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1. 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 nationalisation 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 confirmity 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 nationalising 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 nationalisation 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 nationalised.

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 nationalisation 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 advicer.

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 throughly 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 instalment, 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 recognised 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) favourable to a Customer, (ii) favourable 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 unremunerating accounts.

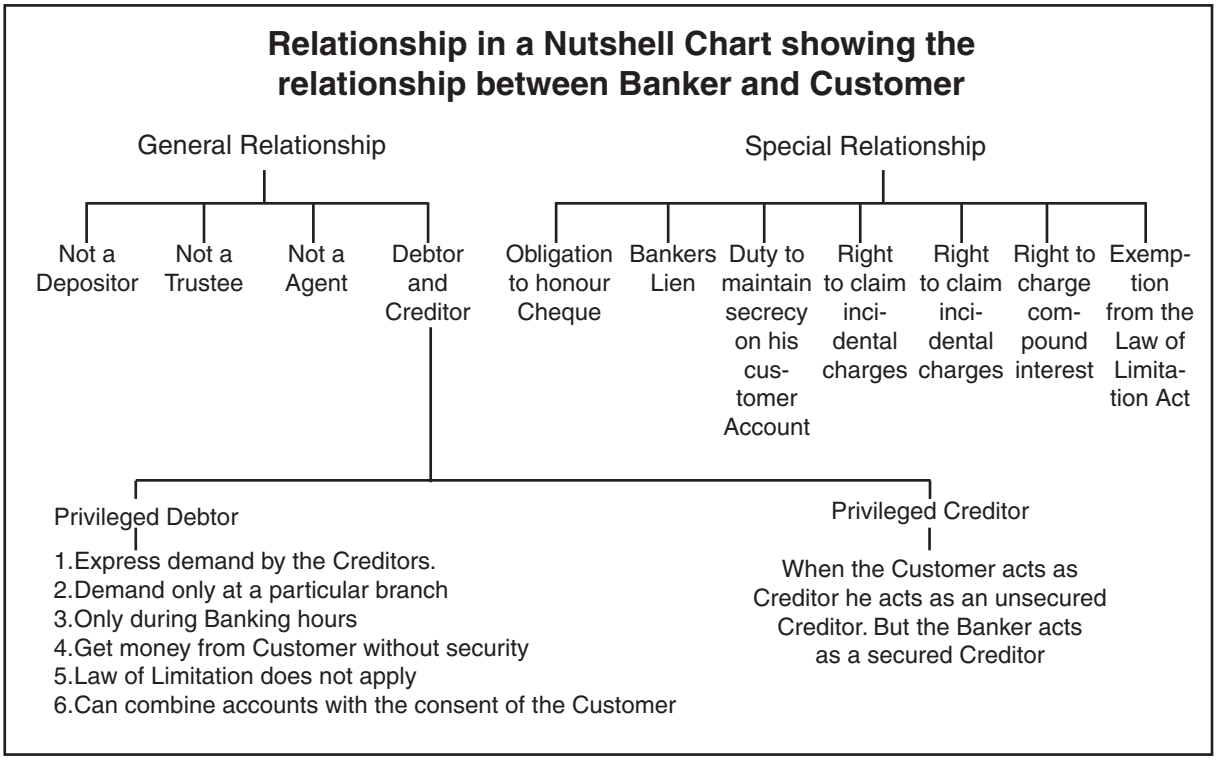
These incidental charges take the form of "Service Charges; Processing Charges; Ledger Folio Charges; Appraisal Charges; Penal Charges; Handling/Collection Charges and so on.

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.

Nomination: 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.

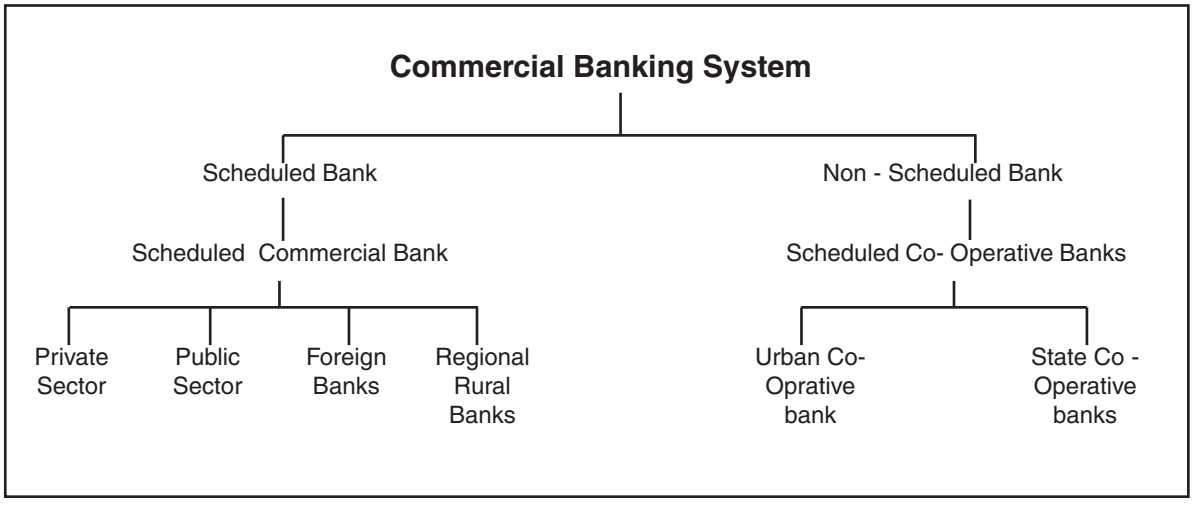
Scheduled Bank: Scheduled Bank is one which is registered in the second schedule of the Reserve Bank of India. The following conditions should be fulfilled by a Bank for inclusion in the schedule:

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 directiors 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.

2. LABOUR LAW - II

UNIT - 1

SOCIAL SECURITY AND WELFARE LEGISLATION

Evolution of Social Security Legislation

Social Security means a guarantee provided by the State through its agencies against certain risks to which members of the society may be exposed. Social Security insures a person against economic distress resulting from various contingencies and assures him a minimum level of living consistent with the nations capacity to pay. The concept of social security is based on the ideals of human dignity and social justice. The underlying idea behind social securing is that a citizen who has contributed or is likely to contribute to his country's welfare should be given protection against certain hazards.

With the growing industrialization, industrial employment involves more risks and hazards such as non-employment, accidents resulting in death, disablement, personal injury, sickness etc., unless the industrial workers are protected against these risks, their contribution to the country's welfare may not be to the optimum level and they may not be efficient also. Therefore securing of employment, security against personal injury, security of health, old age should be provided through adequate legislations.

UNIT - II

THE WORKMEN'S COMPENSATION ACT, 1923

1. Scope, Object and Coverage of the Act

The workmen's compensation Act was framed with a view to provide for compensation to a workman incapacitated by injury from accident. The main object of the Act is to impose legal obligation on this employers to pay compensation to workmen involving accident arising out of and in the course of employment. After the enactment of the ESI Act, 1948, the workmen's compensation Act is not apply to those areas which are covered by the ESI, Act, 1948. The Act applies to workmen employed on monthly wages not exceeding Rs.1 ,600/- and who are employed in factories, mines and plantations, transport, construction work, railways and certain specified hazardous occupations.

2. Employer's Liability' for Compensation Sec. 3

The liability of an employer to pay compensation to the following conditions:

a) Personal injury must have been caused to a workman by an accident

b) The accident must have arisen out of and in the course of employment and

c) The injury must have resulted either in death of the workman or in his total or partial disablement for a period exceeding 3 days.

The terms "Personal Injury", "Accident", "Arising out of an in the course of employment", "National Extension to Employer's Premises" "Occupational disease", "Disablement" etc., are to be studied thoroughly.

Cases:

1. R. B. Moondra and Co. Vs Bhanwari. AIR 1970 Raj.
2. Trustees of Port of Bombay Vs. Yamunabai, AIR 1952 Bom.
3. Smt. Koduri Vs. Potongi Atchamma (1969) LLJ A.P.
4. National Iron and Steel, Co. Ltd., Vs. Manorama. AIR 1953 Cal.
5. Sri Jayaram Motor Service Vs. Pitchammal, 1982 LLJ Mad.
6. Superintending Engineer, Parambikulam Aliar Project, Pollachi Vs, Anandammal, 1983 LLJ. Mad.
7. Salamabegum Vs. Dist. Branch Manager, Maharashtra State Co-Op. Bank 1990. LLJ. Bom.
8. Saurashtra Salt Manufacturing Co. Vs. Baivalu Raja. AIR 1958. SC.
9. Sukhai Vs. Hukum Chand Jute Mills Ltd. AIR 1957 Gal.
10. Ramaswami Vs. Poongavanam. AIR 1954 SC. Mad.
11. T.N. Sitharama Reddiar Vs. A. Ayyaswami Gounder. AIR 1968 Mad.
12. St. Helens Colliery Co. Ltd., Vs. Hewlston 1924. A.C.
13. Rajanna Vs. Union of India. 1995 LLJ, SC.
14. Steel Authority of India Ltd., Vs. Kanchanbala Mohanly, 1994, LLJ, Orissa.
15. T.N.C.S. Corporation Ltd., Vs. S. Poomalai. 1995 LLJ. Mad.

3. Employer Not Liable to Pay Compensation in the following cases - Proviso to Sec. 3(1)

a) The personal injury does not result in total or partial disablement for a period exceeding three days.

b) In respect of any injury, not resulting in death, caused by the accident is directly attributable to.

   (i) The workman was under the influence of drink or drug; or

   (ii) The wilful disobedience on the part of the workman to an order expressly given or to a rule expressly framed for the purpose of securing the safety of the workman; or

   (iii) The wilful removal or disregard by the workman of any safety guards or other device which he knows that they have been provided for the safety of the workman.

4. Calculation of Compensation :- Sec. 4

1. a) Compensation for Death.
   b) Compensation for Permanent total disablement.
   c) Compensation for Permanent Partial disablement.
   d) Compensation for Temporary disablement whether total or partial.
2. Compensation to be paid when due - Sec. 4A.
3. Method of calculating wages for the purpose of computing the amount of compensation - Sec. 5.

4. Review of compensation paid - Sec. 6.
5. Commutation of Payments - Sec. 7.
6. Distribution of Compensation - Sec. 8.
7. Compensation not to be assigned, attached or charged - Sec.9.
8. Principal employer indemnifies against the contractor and against strangers - Sec. 12 and 13.

5. Workmen Compensation Commissioner - Sec. 20 - 27.

His powers, functions and procedures followed.

UNIT - III

THE EMPLOYEE'S STATE INSURANCE ACT, 1948

An Act to provide for certain benefits to employers in cases of sickness, maternity and employment injury.

1. Establishment of ESI Corporation.
   a) Features of the Corporation - Sec. 3.
   b) Constitution of the Corporation - Sec. 3.
   c) Constitution and Powers of Standing Committees - Sec.8 and 18.
   d) Medical Benefit Council - Duties - Sec. 10 and 22.
   e) Principal Officers of the Corporation 8 their duties Sec. 16 and 23.
   f) ESI Fund: Sec. 26, 28, 32 to 35.
2. All employees to be insured - Sec. 38 conditions to be satisfied for an employee to be insured.
3. Contribution Conditions governing contributions. Sec.39, 40 to 45-B.
4. Benefits Provided by the Act.
   a) Sickness Benefit - SecA8 and 49.
   b) Medical Benefit - Sec. 57 and 58.
   c) Maternity Benefit - Sec. 50.
   d) Disablement Benefit - Sec. 51 A to 51 D, 52A, 54 and 54A.
   e) Funeral Benefit - Sec. 46.
   f) Dependent Benefit - Sec. 52.
5. Adjudication of Disputes and Claims.
   a) Constitution of Employee's Insurance Court. - Sec. 74.
   b) Matters to be decided by the Insurance Court - Sec. 75.
   c) Procedure and Powers of the Insurance Court - Sec. 76 - 79.

Cases:

1. Kirloskar Brothers Ltd., Vs. ESI Corporation (1996) 1 LLJ. SC.
2. Royal Talkies Vs. ESI Corporation, A 1 R 1978 SC.
3. E.S.I.C. Vs. Hotel Kalpaga International 1993 LLJ. SC.

UNIT - IV

THE MATERNITY BENEFITS ACT, 1961

1. **Object and Application:**
   This is an Act passed with the object of regulating the of women in certain establishments for certain periods before and after child birth and to provide for maternity benefits. The Act applies to evert establishment being a factory, mine or plantation including any such to Govt. This Act will not be applicable to a factory or establishment covered by the ESI Act, 1948.
2. Prohibition against employment of Pregnant Women - Sec. 4
3. Maternity benefits - Sec.5, 7, 8, 9, 10 and 11.
4. Notice of claim of Maternity benefit - Sec. 6.
5. Powers and duties of Inspector. Sec.15, 16, 17.

UNIT - V

THE EMPLOYEE'S PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

1. **Scope, Coverage and Application of the Act**
   The Act is designed to provide some retirement benefits. The Act envisages the institution of compulsory contributory provident fund in certain establishment mentioned in Schedule I of the Act.
2. Employees' Provident Fund Scheme. Sec.6
3. Employees Pension Scheme

Cases:

1. Delhi Cloth & General Mills Vs. Regional P. F. Commissioner. AI R 1961 All.
2. Mohammed Ali Vs. Union of India (1963) 1 LLJ.
3. Jay Engg. Works Vs. Union of India, AIR 1963 SC.
4. R.P.F. Commissioner Vs. Sri Krishna Metal Mfg. Co. AIR 1962 SC.
5. Ambalavana Chettiar & Co. Vs. R.P.F. Commissioner (19-69) MLJ.
6. Andhra University Vs. RPF Commissioner (1986) LLJ. SC.

UNIT - VI

THE PAYMENT OF BONUS ACT, 1965

1. Meaning and kinds of Bonus.
2. Scope and Application of the Act - Sec.1 .
3. The Scheme of the Act - It is four dimensional.
   1) To impose statutory liability upon an employer of every establishment covered by the Act to pay bonus to employees.
   2) To provide for a formula for payment of bonus;
   3) To provide for payment of minimum and maximum bonus and lining the payment with the scheme of "set off" and "set-on"; and

4) To provide for a machinery for enforcement of the liability for payment of bonus.

4. Payment of Bonus
   a) Eligibility for bonus. Sec. 2(13) and 2(14).
   b) Disqualification of an employee from receiving bonus Sec. 9.
   c) Payment of minimum bonus and amount of bonus. Sec.1 o.
   d) Computation of gross profit - SecA.
   e) Sums deductable from gross profits - Sec.5.
   f) Calculation of direct taxes payable by the Employer - Sec.7.
   g) Calculation of bonus with respect to employees whose salary or wages exceeds Rs.750 p.m. - Sec. 12.
   h) Time for Payment of bonus.
5. Set-on and Set-off of allocable surplus. Sec.15.
6. Adjudication of disputes with respect to bonus payable under the Act. - Sec.22.
7. Mode of recovery of bonus due from an employer - Sec. 21.
8. Inspectors - Appointment - Powers and functions - Sec. 27.

Cases:

1. Mill Owners Association Vs. Rastriya Mill Mazdoor Sangh. (1952) LAC.
2. S. Krishnamurthy Vs. Presiding Officer, Labour Court. (1986) LLJ SC.
3. K.C.P.E. Association, Madras Vs. K.C.P. Ltd., AIR 1978 SC.
4. The workmen of Mis. Binny Ltd., Vs. The Mgt. of Binny Ltd., (1985) LLJ. SC.
5. K.M. Mani Vs. PJ. Antony. AIR 1979 SC:
6. Workmen of Kettlewell Buller & Co. Ltd., Vs. Ketttewell Buller & Co. Ltd. (1995) LLJ. SC.

UNIT - VII

PAYMENT OF GRATUITY ACT, 1972

1. Meaning of Gratuity and application of the Act.
2. Payment of gratuity - Sec A.
3. Determination of gratuity. Sec.7.

Cases:

1. Rashtriya Mill Mazdoor Sangh Vs. National Textile Corporation (1998) 1 LLJ. SC.
2. D. K. Savitramma Vs. Ananpur Dist. Co-operative Central Bank & Another (1991) LLJ AP.

UNIT - VIII

FACTORIES ACT, 1948

1. Definition of Factory Sec. 2(m);
   manufacturing Process Sec. 2(K); and
   Worker 2(1)

Cases:

a) In re K. Chockalingam. AIR 1954 Mad.
b) Hathras Municipality Vs. Union of India. AIR 1 S75 All.
c) Graner and Weil (India) Ltd. , Vs. Collector of Central Excise, Baroda (1995) LLJ SC.
d) Rohtas Industries Vs. Ramlakhan Sing, AIR 1978 SC.
e) Shankar Balaji Vs. State of Maharashtra AIR 1962 SC.

2. Formalities to start a factory. Sec. 6 and 7.
3. Appointment of Inspector - Their powers and functions Sec. 8 and 9.
4. Provisions relating health, welfare and safety Sec.11 to 49.
5. Working Hours Sec. 51 to 65.
6. Employment of young persons and women - Sec. 67 to 75.
7. Annual Leave with wages - Sec. 78 to 84.

UNIT -IX

THE TAMILNADU SHOPS AND ESTABLISHMENTS ACT, 1947

Applicability - Persons covered by the Act, - Opening and closing hours, employment of young persons - working hours public holiday, safety, cleanliness - leave, Annual leave with wages.

3. ENVIRONMENTAL LAW

Including Animal Welfare Laws and Wild Life Protection

BIO - GEOGRAPHICAL ASPECTS OF OUR ENVIRONMENT

Meaning - It means and includes all factors, which directly or indirectly have bearing upon the natural surroundings of human being.

Definition of 'Environment' - section 2 (a) of Environment (Protection) Act, 1986.

The environment as one which 'includes water, air and land and the inter relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro - organisms and property'.

The environment is that which surrounds us - includes air, land, ocean and living things.

Kinds of Natural Environment - Physical and Biological Environment.

Classification of Physical Environment - Solid, Liquid and Gas.

Biosphere - Life bearing layer of Earth.

Ecology - study of how organisms interact with each other and their physical environment.

Components of Ecosystem - Living / Biotic, Non - Living / Abiotic.

Biotic components - Producers and Consumers.

Food Chain, Food Web and Ecological Pyramid.

SOCIO - ECONOMIC DIMENSIONS OF OUR ENVIRONMENT:

Report of the United Nations Conference on Environment and Development -1992 -Agenda 21 - Rio de Janeiro - Dealt with socio and economic dimensions of environmental problems.

Suggestions of the report -

i. Promoting sustainable development through trade liberalization;

ii. Making trade and environment mutually supportive;

iii. Providing adequate financial resources to developing countries and dealing with international debt;

iv. Encouraging macro - economic policies conducive to environment and development.

Environment - 3 kinds.

i. Social environment - environment of other people which encircles man from birth till death.

ii. Cultural environment - environment of rules and tools with which man, inventive animal, always surround himself

iii. Natural environment - planetary stage on which the social drama is enacted.

Note:

Calcutta Youth Front Vs State of West Bengal, 1986 (2) CLJ 26. - In this case, the Calcutta High Court has held that the problem of environmental degradation is a social problem.

People United for better living in Calcutta Vs State of West Bengal, AIR 1993 Cal. 215 at page 217.

"considering the growth it is now a well settled principle of law that socio - economic conditions of the country cannot be ignored by a court of law because the benefit of the society ought to be the prime consideration of law courts."

Economic Growth is concentrated in two major aspects -

i. Affluence - material aspects of per capita consumption of goods and resources and

ii. Globalization - powerful driving force behind today's unprecedented biological implosion.

Socio and Economic effects of Water Pollution -

Damage to property, damage to land, reduction in crop production, loss of plants and animals, navigational interference, reduced drinking water facility, loss of recreational and other amenities, loss to industry, cause illness and death, heavy monetary investments in cleaning rivers, lakes and ponds.

Socio and Economic effects of Air Pollution -

Monetary loss due to illness, increase travel cost and time thereby causes accidental injury, increase cost of artificial illumination, cost of repair of damage to buildings and structures, increased cost of cleaning, investment loss in control of air pollution.

FACTORS RESPONSIBLE FOR ENVIRONMENTAL DEGRADATION

Definition of 'Environmental Pollution' - section 2 (B) of Environment (Protection) Act, 1986.

Kinds of Pollution - Natural Pollution - Droughts, Cyclone, Earth Quake, Fire. Man made Pollution - Air, Land, Water, Noise.

Factors of Environmental Pollution - Air Pollution, Water Pollution, Soil Erosion, Land Degradation, Deforestation, Impact of Human on Biosphere, Noise Pollution, Depletion of Natural Resources, Problems in Urbanization.

ENVIRONMENTAL POLICIES

The Government of India has taken systematic and sustained efforts to tackle major environmental problems of this country. One of the efforts is to formulate comprehensive policy framework to enable the government to have a holistic view of all environmental issues and to formulate an environmental plan for the country.

There have been several policy statements relating to conservation of water, forests, marine resources and for abatement of pollution apart from the environment component of the policy documents relating to sectors like Housing, Land use, Education, Industries and Technology.

Policy statement for abatement of pollution (1992)

Objective - to integrate environmental considerations into decision making at all levels. To achieve this steps have to be taken to :-

i. Prevent pollution at source;
ii. Encourage, develop and apply the best available practicable technical solutions;
iii. Ensure that the polluter pays for the pollution and control arrangements;
iv. Focus protection on heavily polluted areas and river stretches; and
v. Involve the public in decision making.

Critically polluted areas - standards - Fiscal Measures - integration - environmental Audit - Environmental Statistics - Fiscal Measures - Public partnership.

CONSTITUTIONAL OBLIGATION TO PROTECT THE NATURAL ENVIRONMENT

Constitution creates

i. Obligation on the State
ii. Obligation of the Citizens to protect the Natural Environment.

i. Obligation on the State :-

Part IV of the Constitution called the Directive Principles of State Policy has imposed certain fundamental duties on the state to protect the environment.

Article 39 (b) - The Constitution of India provides that the state shall direct its policy to see "that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good."

Article 42 - It has directed the state to endeavour to secure just and humane conditions of work.

Article 47 -" The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

Article 48 - It directs the state to take to organize agriculture and animal husbandry on modern and scientific lines.

Article - 48 A - "The state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

To Refer Cases :-

a) Municipal Council, Ratlam Vs Vardhichand (AIR 1980 SC 1622) - (Article 47)
b) M.C. Mehta Vs Union of India, (2002) 4 SCC 356) - (Article 39(b), 47, 48 - A)

ii. Obligation of the Citizens :-

Part IV A of the Constitution has imposed a fundamental duty on every citizen of India, as per Article 51 A(g) - "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures."

To Refer Case :-

Vijay Singh Puniya Vs State of Rajasthan, AIR 2004 Raj. 1

RIGHT TO LIVE IN HEALTHY ENVIRONMENT

Article 21 - Right to Life -" No person shall be deprived of his life or personal liberty except according to procedure established by law".

Though the Article not expressly mentions the environment, the Apex Court and the various High Courts of our Country have given a wider interpretation to the word 'life' in this Article.

For example: In Subash Kumar Vs State of Bihar, AIR 1991 SC 420 at Page 424, Kar Singh J observed in a more vivid manner: 'Right to live ..... includes the right to enjoyment of pollution free water and air for full enjoyment of life".

Right to life means and includes 'Right to live in a healthy wholesome environment which requires preservation of essential ingredients of life and stable ecological balance.

Right to Life was expanded in Consumer Education and Research Centre Vs Union of India AI R 1995 SC 922 to the right to social security, human conditions of work and leisure of workmen.

DOCTRINES LAID DOWN BY THE JUDICIARY

i. Principle of Absolute Liability :-

The Supreme Court of India formulated this principle for harm caused by hazardous and inherently dangerous industry by interpreting the scope of the power under Article 32 of the Constitution of India to issue directions and orders, , whichever may be appropriate' in 'appropriate proceedings'.

It's a newly formulated doctrine free from the exceptions to the strict liability rule of the common law principle of England.

Cases :

a) Rylands Vs Fletcher
b) M.C. Mehta Vs Union of India (Oleum gas leak case)
c) Indian Council for Enviro - Legal Action Vs Union of India, AIR 1996 SC 1466.

ii. Polluter Pays Principle :-

Rio Declaration - Principle 16 - Polluter should bear the cost of pollution.

This principle was originally considered as an economic and administrative measure to restrain and control the pollution problem has recently been recognized as a powerful legal tool to combat environmental pollution and associated problems.

iii. Precautionary Principle :-

Rio Declaration Principle 15 proclaimed that "in order to protect the environment the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."

Cases:

a) Vellore Citizens Welfare Forum Vs Union of India AIR 1996 SC 2715
b) Jolly George Varghese Vs Bank of Cochin AIR 1980 SC 470
c) Taj Trapezium Case

iv. Public Trust Doctrine:-

"riparum usus publicus est jure genetium sicut ipsius fluminis" - which means that the use of river banks is by the law of nations public, like that of the stream itself.

Cases:

a) K.M. Chinnappa Vs Union of India (1997) 1 SCC 388

b) Mono Lake Case

c) Sachidhananda Pandey Vs State of West Bengal AIR 1997 SC 1109

v. Sustainable Development

Brundtland Report - Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.

Herman Daly suggested three rules for Sustainable Development which are as follows:

1. Harvest renewable resources only at the speed at which they regenerate;
2. Limit wastes to the assimilative capacity of the local eco-system or release those wastes elsewhere where they can be assimilated; and
3. If we use a non-renewable resource, required that part of the profit be put aside for investment in a renewable substitute resource.

Cases:-

a) Doon Valley Case

b) Coastal Zone Protection Case

c) CNG Conversion Case

vi. Doctrine of Inter-Generational Equity

The idea behind this doctrine is that "every generation should leave water, air and soil resources as pure and unpolluted as and when it came to earth." In other words, each generation should leave undiminished all the species of minerals it found existing on earth.

Principle 1 and 2 of Stockholm Declaration on Human Environment (1972) and Principle 3 of Rio Declaration on Environment and Development.

Cases:-

a) State of TamilNadu Vs Hind Stone AIR 1981 SC 711

b) Consumer Education and Research Society Vs Union of India (2002) 2 SC 599 (605)

LAWS PREVENTING ENVIRONMENTAL POLLUTION

THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974

Objects:

- To provide for the prevention and control of water pollution;
- To maintain or restore wholesomeness of water;
- To establish pollution control boards; and
- To confer on pollution control boards powers and functions relating to control and prevention of pollution of water.

Definitions:

Sec 2(a) - Board; Sec 2(b) - Central Board; Sec 2(d) - Occupier; Sec 2(dd) - Outlet; Sec 2(e) - Pollution; Sec 2(g) - Sewage Effluent; Sec 2(gg) - Sewer; Sec 2(j) - Stream; and Sec 2(k) - Trade effluent

Sec 2(e) - Pollution

- Contamination of water or
- Such alteration of the physical, chemical or biological properties of water or
- Discharge of any sewage or trade effluent or any other liquid, gaseous or solid substance into water - directly or indirectly - as may - or is likely to
- Create a nuisance or render such water harmful or injurious to public health or safety or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms.

Sec 2(gg) - Sewage Effluent

Effluent from any sewage system or sewage disposal works includes sullage from open drains

Sec 2(k) - Trade Effluent

Includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation or process or treatment and disposal system, other than domestic sewage.

Constitution of Central Pollution Control Board

Sec 3 empowers the Central Government to constitute a Central Pollution Control Board to exercise such powers and function conferred upon it.

- A full time chairman;
- Not more than 5 officials nominated by the Central Government;
- Not more than 5 persons from amongst the Members of the State Boards, of whom not exceeding 2 shall be from Members representing the Local Authorities;
- Not more than 3 Members to represent the interest of agriculture, fishery or industry or trade or any other interest which in the opinion of the Government, ought to be represented;
- 2 persons to represent the companies or corporations owned, controlled or managed by the Central Government; and
- A full time Member Secretary possessing qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control.

Constitution of State Pollution Control Board

Sec 4 empowers the State Government to constitute a State Pollution Control Board to exercise such powers and function conferred upon it.

- A full time chairman;

- Not more than 5 officials nominated by the State Government;
- Not more than 5 persons from amongst the Members of the Local Authorities functioning within the state;
- Not more than 3 Members to represent the interest of agriculture, fishery or industry or trade or any other interest which in the opinion of the Government, ought to be represented;
- 2 persons to represent the companies or corporations owned, controlled or managed by the State Government; and
- A full time Member Secretary possessing qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control.

To Refer Case:-

State of Manipur Vs Chandham Manihar Singh (1997) 7 SCC 503

Note: Constitution of Joint Pollution Control Boards has been empowered by the provisions under Section 13.

Functions of Central Pollution Control Board and State Pollution Control Boards:

Section 16 of the Water Act has enumerated the functions of CPCB and its main function shall be to promote cleanliness of streams and wells in different areas of the States. Section 17 of the aforesaid Act enumerates the functions of the State Pollution Control Boards.

To Refer Cases:-

a) D.K.Joshi Vs State of U.P. (1991) 9 SCC 578

b) State of M. P. Vs Kedia Leather & Liquor Ltd. (2001) 9 SCC 605

Note:

1. Section 6 of the Act deals with disqualification of a person to be a member of the Board.
2. Section 15 of the Act contains special provisions relating to give directions where Joint Boards have been constituted.
3. Section 28 provides machinery to move for an appeal to the appellate authority as may be constituted by the Concerned Government within the stipulated time.
4. Section 31 requires the concerned person to furnish the Information to State Board and other agencies.

Restriction and Prohibition Under the Act:-

1. Section 24 prohibits any person to knowingly cause or permit any poisonous, or noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter whether directly or indirectly into any stream or well, or sewer or on land.
2. Section 25 makes the following restriction:-

   Without the previous consent of the SPCB no person is authorized to:

   (i) Establish or take any steps to establish any industry, operation or process or any treatment and disposal system or any extension or addition thereto which is likely to discharge sewage or trade effluent into a stream or well or sewer on a land;

(ii) Bring into use any new or altered outlet for discharge of sewage; or

(iii) Begin to make any new discharge of sewage or trade effluent.

Powers Under the Act:

1. Section 19 of the Act empowers the State Government to restrict the application of the Act to only such area or areas as may be declared in the notification published in the Official gazette in this behalf.
2. Section 20 of the Act empowers the State Boards to obtain information
3. Section 21 of the Act empowers the State Boards to take Samples of Effluents
4. Section 22 provides for the analysis of the samples, taken u/s. 21 by the concerned Board analyst and Submission of report of analysis to the concerned Board, in triplicate.
5. Section 23 of the Act provides that any person empowered by the State Board to make entry and to do inspection at any place if he considers it necessary.
6. Section 27 empowers the State Board to grant or refuse to grant its consent incase of non compliance of the conditions if any imposed by it.
7. Section 32 empowers the State Board to take certain emergency measures if it thinks fit to take such measures in any circumstances.
8. Section 33 deals with the power of Board to make application to Courts for restraining apprehended pollution of water in streams or wells.
9. Section 33A empowers the Board to give directions including that of closure of an offending industry.

Special Superseding Power:

Section 61 empowers the Central Government and Section 62 empowers the State Government to supersede the CPCB and JPCB and SPCB respectively under the following circumstances:

i) The board concerned has persistently made default in the performances of the functions imposed on it by or under the Act; or

ii) Circumstances exist which render it necessary in the Public Interest to so supersede the Board.

Penalties under the Act:

Non compliance with Section 20 - punishable with imprisonment upto 3months I fine upto Rs. 10,000 I both. Continuous non-compliance - addl. Fine upto Rs. 5000 per day.

Failure to comply with Sections 32, 33 & 33A - punishable with imprisonment from 18 months to 6 years and with fine of Rs. 10,0001-. Continuous failure - addl. Fine upto Rs. 5,0001 - everyday. Continuous Failure beyond a year after the date of conviction or the person is convicted for the second time - imprisonment which may extend from 2 years and upto 7 years and with fine.

Permitting of poisonous, noxious or polluting matter into any stream, well or land - polluting stream, well or land by discharge of sewage or trade effluent - punishable with imprisonment from 18 months to 6 years and with fine.

Any other violation - punishment of imprisonment which may extend upto 3 years or fine which may extend to Rs.1 ,0001- or both.

Offences by Companies:

Sec 47 provides that-

- every person who at the time of the offence was committed was
- Incharge of, and
- Was responsible to the company
- For the conduct of the business of the company, as well as the company,
- Shall be deemed to be guilty of the offence and shall be liable to be proceeded against and published accordingly

Where an offence has been committed by a Company.

Note:

Offences by Government Department has been dealt under the provisions of Section 48 of the Act which points out the Head of the concerned Department as liable for the offence so committed.

THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981

Objects:-

- To provide for the prevention of and control of air pollution;
- For the establishment of Pollution Control Boards and for the abatement of air pollution; and
- To confer powers and functions on Pollution Control Boards.

Definitions:-

"Air Pollution means the presence in the atmosphere of any air pollutant" as per Sec 2(b); an "Air Pollutant means any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment" as per Sec 2(a); and "emission means any solid or liquid or gaseous substance coming out of any chimney (as defined under Sec 2(h)) duct or flue or any other outlet as per Sec 2(j)".

Pollution Control Boards:-

Central Pollution Control Board and State Pollution Control Boards constituted under the Water (Prevention and Control of Pollution) Act, 1974 will exercise the powers and functions as prescribed under this Act for the Prevention and Control of air Pollution.

Note:

Constitution of State Boards, Terms and Conditions of Service of Members, Disqualification of Members, Meeting of Board and Constitution of Committees under this Act will be the same as Water (Prevention and Control of Pollution) Act, 1974

Section 5 of the Act provides that where, in any State there is no such State Pollution Control Board, the State Government shall constitute a State Board for prevention and control of pollution.

POWERS CONFERRED UNDER THE ACT

Powers of the Central Pollution Control Board:

Under Sec 31A, the board may in the exercise of its powers and performance of its function under this Act, issue any direction in writing which includes the following:

(a) The stoppage or regulation of supply of electricity, water or any other service; or

(b) The closure, prohibition or regulation of any industry, operation or process

- To any person, officer or authority,
- and such person, officer or authority shall be bound to comply with such directions.

Powers of the State Pollution Control Boards:

i) Power to grant, refuse and cancel consent;
ii) Power of entry and inspection;
iii) Power to obtain information;
iv) Power to make application to cope for restraining persons from causing pollution;
v) Power to issue directions; and
vi) Power to take samples of air or emissions etc.

Powers of Central Government:

Under Section 18 the Central Government is vested with the powers to give such directions to the CPCB, those are necessary for the performance of its functions.

Powers of State Government:

Under Section 19 the State Government has the Power to declare air pollution control areas and to prohibit the use of any fuel, appliance or burning of any material in any air pollution control area.

To refer cases:

(i) M.C.Mehta Vs Union of India (2002) 4 SCC 356
(ii) Animal Feeds Dairies and Chemical Ltd Vs Orissa State Pollution Control Board AIR 1995 Ori. 84
(iii) Chaitanya Pulverising Industry Vs Karnataka State Pollution Control Board(1997) 7 SCC 522
(iv) Mahabir Coke Industry Vs Pollution Control Board AIR 1998 Gau. 10

FUNCTIONS ENUMERATED UNDER THE ACT

Functions of Central Pollution Control Board:

The functions as enumerated in the list provided under Section 16 includes

a) To improve the quality of air;
b) To prevent, control or abate air pollution in the country;
c) Lay down standards for the quality of air;
d) Collect and disseminate information in respect of matters relating to air pollution; and
e) Perform such other functions as may be prescribed etc.

Functions of State Pollution Control Board:

The functions as enumerated in the list provided under Section 17 includes

a) To plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;

b) Collect and disseminate information in respect of matters relating to air pollution;

c) To advise the State Government on any matter concerning the prevention, control or abatement of air pollution;

d) To organise mass-education program relating to prevention, control or abatement of air pollution; and

e) To inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process etc.

To refer case:

K. Munuswamy Gowda Vs State of Karnataka AIR 1998 Kant. 281

Penalties:

"Violation of Section 21 or 22 or 31 A - punishable with imprisonment for a term not less than 18 months which may extends upto 6 years with fine - if violation continues additional fine may be levied upto Rs. 5000/- for everyday." - Section 37

If the violation continues beyond a year after the date of conviction or the person is convicted for the second time - imprisonment which may extend from 2 years and upto 7 years and with fine.

THE ENVIRONMENT (PROTECTION) ACT, 1986

Objects:

i) To implement decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972; and

ii) To prevent hazards to living things and property etc.

Definitions:

Sec 2(a) - Environment includes water, air and land and the inter relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro - organisms and property.

Sec 2(b) - Environment Pollutant means any solid, liquid or gaseous substance including noise present in such concentration as may be or tend to be injurious environment.

Sec 2(c) - Environmental pollution means the presence in the environment of any environment pollutant.

Sec 2(e) - Hazardous substance means any substance or preparation which, by reason of its chemical or physio-chemical properties or handling is liable to cause harm to human beings, other living creatures, micro-organism, property or the environment.

POWERS UNDER THE ACT

1. Section 3 - prescribes certain powers which the Central Government shall have to take all such measures as it deems necessary for the purposes of protecting and improving the quality of environment and preventing, controlling and abating environmental pollution.
2. Section 4 - power of the Central Government to appoint officers for the purpose of entrusting on them such of the powers and functions prescribed under this Act.
3. Section 5 confers the power to order closure on the Central Government.
4. Section empowers the Central Government to make rules in relation to:
   a) Standards of quality;
   b) Limiting the concentration of environmental pollution;
   c) Prohibitions/restrictions; and
   d) Prescribing procedures and safeguarding measures.
5. Section 11 empowers the Central Government to take samples.
6. Section 10 confers the power to enter any place and to make search in that place on the Central Government and the persons empowered by it for such purposes.

DUTY IMPOSED BY THE ACT ON THE INDIVIDUALS

- Duty not to discharge excessive environmental pollutants than prescribed by the Central Government - Section 7.
- Duty to comply with the Central Government's prescribed safeguards - Section 8.
- Duty to inform and render assistance for the remedial measures taken to prevent the environmental pollution caused by him - Section 9.

PUNISHMENTS:

Section 15 failure to comply - contravening any of the provisions - imprisonment upto 5years or fine up to Rs. 1,00,001- or both.

Continuous failure or contravention - after the first conviction - addl. Fine upto Rs. 50,001 - for every day.

Continuous failure or contravention - after the date of conviction - beyond one year - imprisonment of may extend upto 7 years.

Note:-

Section 16 and 17 of the Act deals with the offences by companies and government department respectively.

Section 22 of the Act imposes a bar on jurisdiction of civil courts from entertaining any suit or proceedings in respect of anything done, Action taken or order or direction issued by the central government or any other authority or officer in pursuance of any power conferred by the Act.

Section 19 of the Act provides the circumstances in which a court can take cognizance of any offence under this Act.

ENVIRONMENT (PROTECTION) RULES, 1986

Rules made in exercise of the powers conferred under Section 6 and 25 of the Environment (Protection) Act, 1986 on the Central Government.

Scheme of Environment (Protection) Rules, 1986: 14 Rules and 7 Schedules.

Other Important Rules made under the Environment (Protection) Rules, 1986:

1989 - Manufacture, Storage And Import Of Hazardous Chemical Rules;

1993 - Rules For The Manufacture, Use, Import, Export And Storage Of Hazardous Micro-Organisms, Genetically Engineered Organisms Or Cells;

Recognized Laboratories Under Rules For The Manufacture, Use, Import, Export And Storage Of Hazardous Micro-Organisms, Genetically Engineered Organisms Or Cells, 1993;

1998 - Bio-Medical Wastes (Management And Handling) Rules;

1999 - Recycled Plastics (Manufacture And Usage) Rules;

1999 - Environment (Siting For Industrial Projects) Rules;

2000 - The Noise Pollution (Regulation And Control) Rules;

2000 - Ozone Depleting Substances (Regulation And Control) Rules;

2000 - Municipal Solid Wastes (Management And Handling) Rules; And

2001 - Batteries (Management And Handling) Rules.

2011 - E-Waste (Management and Handling) Rules.

Some Important Notifications made under the Environment (Protection) Rules, 1986:

- Eco-labelling Notification;
- Environmental Impact Assessment Notification;
- The Coastal Regulation Zone Notification;
- Public Hearing Notification;
- National Coastal Zone Management Authority Notification;
- TTZ Pollution (Prevention and Control) Authority Notification; and
- Aqua-culture Authority Notification.

LAWS AND POLICIES RELATING TO

NATURAL RESOURCE CONSERVATION FOREST POLICY, 1894

- Use of forest for public benefit;
- Management of forest on commercial lines to produce revenue to the state; and
- Conversion of forest into agricultural land, provided the cultivation is permanent and does not fully extend to the entire forest area.

INDIAN FOREST ACT, 1927

Classification of Forest:

a. Reserve Forest:-

- an area or mass of any land duly notified under the provisions of Section 20 of the Indian Forest Act. 1927 or under the reservation provisions of the Forest Acts of the State Governments.

Procedure for the constitution of Reserve Forest:

- Prescribed in Section 3 to 20 of the Forest Act, 1927;
- Issuance of notification by the State Government which declares certain lands with its particulars to be constituted as Reserve Forest and which appoints an officer of the State Government as Forest Settlement Officer;
- Fixation of period by the Forest Settlement Officer not less than three months for hearing claims and objection by person on the notified lands;
- Then the Forest Settlement Officer may inquire into the claims and after such inquiry, he may reject or accept the same and make settlement thereof; and
- After the aforesaid settlements if any, the land vest with the State government and thereafter the State Government issues notification under Section 20.

Acts prohibited in Reserve Forest (Section 26) which includes:

- Clearing of forest for cultivation or for any other purpose;
- Setting fire to a reserved forest;
- Cattle trespassing;
- Cutting or Quarrying anything in the Reserved Forest; and
- Hunting, Shooting, fishing, poisoning water, killing or catching elephants, etc.

b. Village Forest:

- Assignment of a reserve forest to any village community for the improvement and protection of the forest by that village community.

c. Protected Forest:-

- Section 29 provides that the State Government may by notification in the Official Gazette declare any forestland or wasteland as protected forest.
- The period of Government possession must not exceed 30 years and during such period, the private persons' rights are suspended.

d. Private or Non-Government Forest:-

The State Government may by notification in the official gazette to regulate or to prohibit in any forest or wasteland owned by individuals:

- Breaking up or clearing of land for cultivation;
- Pasturing of cattle; or
- Firing or clearing of the vegetation.

NATIONAL FOREST POLICY, 1952

Announced by the Central Government based on the following National needs:

- Need to evolve a system of balance and complementary land use;
- Need to ameliorate the physical and climatic conditions;
- Need to sustain supply of timber and other forest produce for defence, communication and industries;
- Denudation in mountainous range; and
- Need to realize the maximum actual revenue in perpetuity consistent with the above needs.

THE FOREST (CONSERVATION) ACT,1980

Section 2 directs the State Governments or other authorities not to make any order without the prior approval of the Central Government for the following purposes:

- De-reservation of any reserved forest or any portion thereof;
- Permitting the use of any forest land or any portion thereof for any non-forest purpose;
- Assignment of any forest area to any private person; and
- Clearing off trees naturally grown for the purpose of re afforestation.

Non-forest purpose means the breaking up or cleaning of any forest land or portion thereof for:

- Cultivation of tea, coffee, spices, rubber, palms, oil bearing plants, horticulture crops or medicinal plants; or
- Any purpose other than re afforestation.

NATIONAL FOREST POLICY, 1988

- To maintain, preserve and restore environment stability and ecological balance;
- To encourage effective use of forest produce; and
- To conserve and preserve natural forests, which represent the natural heritage of the country.

Note: The Apex Court and Forest Resource Management - T.N. Godavarman Tirumulkpad Vs. Union of India - AIR 1997 SC 1228.

THE BIOLOGICAL DIVERSITY ACT, 2002

Objects:

- To provide for conservation of biological diversity,
- To provide for sustainable use of its components, and
- For matters connected therewith and incidental thereto.

Definitions (Section 2):

'Biological Diversity' means the variability among living organisms from all sources and the ecological complexes of which they are part, and includes diversity within species or between species of eco-systems.

'Biological Resources' means plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value, but does not include human genetic material.

Authorities under the Act:

NATIONAL BIODIVERSITY AUTHORITY

It is an Authority established under Section 8 of the Act by the Central Government, by Notification in the Official Gazette, it is a body corporate having perpetual succession, common seal, power to acquire, hold and dispose of any property, can sue and be sued and has its Head Office at Chennai.

Members:

- Chief Executive Officer - a Chair Person;
- Ten Ex-officio Members; and
- Five other non-official members.

Powers and Functions of National Biodiversity Authority:

Section 18 enumerates the Powers and Functions of the National Biodiversity Authority as follows:

- To regulate and may grant any approval, any activities referred to in Sections 3, 4 and 6; and
- Advise central government and the state government to ensure that the objects of this Act has not been left out, as the case may be, etc

STATE BIODIVERSITY AUTHORITY

It is an Authority established under Section 22 of the Act by the State Government, by Notification in the Official Gazette and it is a body corporate having perpetual succession, common seal, power to acquire, hold and dispose of any property, can sue and be sued.

Members:

- A chairperson,
- Not more than five ex-officio members, and
- Not more than five non-official members.

Functions:

Section 23 enumerates the Functions of the State Biodiversity Authority as follows:

- Advise the state government to ensure that the objects of this Act has not been left out; and
- To do such other function as it may deem fit for the purpose of the Act.

Notes:-

1. Section 13 - constitution of committee to deal with agro- biodiversity by the National Biodiversity Authority.

2. Agro - biodiversity means biological diversity of agriculture and related species and their wild relatives.
3. Section 19 - approval by National Biodiversity Authority for undertaking certain activities.
4. Section 27 - constitution of National Biodiversity Fund.
5. Section 32 - constitution of State Biodiversity Fund.
6. Section 36 - duty of the Central Government to develop National Strategies Plan for Conservation. Etc., of Biological Diversity.

ANIMAL WELFARE LAWS

WILDLIFE (PROTECTION) ACT 1972

Wildlife means to include "any animal, bees, butterflies, crustacean, fish and moths; and aqua ire or land vegetation, which form part of any habitat."

Authorities under the Act:

Central Government may, for the purpose of the Act, appoint:-

- A Director of wildlife preservation;
- Assistant Directors of wildlife preservation and
- Such other officers and employees as may be necessary. State Government may for the purpose of the Act, appoint:-
- A chief wildlife warden;
- Wildlife wardens;
- One honorary wildlife warden in each district; and
- Such other officers and employees as may be necessary.

Wildlife Advisory Board - constituted by State Government/ Administrator of Union Territory:-

Members:-

1. Minister in charge of Forests if any ,or the Chief Secretary shall the chairman;
2. Two members of the legislature;
3. Secretary (in charge of forests) to the Government;
4. Forest Officer in charge of the State Forest Department;
5. An officer nominated by the Director of Wildlife Preservation;
6. Chief Wildlife Warden;
7. Officers of State Government not exceeding five; and
8. Such other persons, not exceeding ten, who in the opinion of the State Government, are interested in the protection of wildlife, including the representatives of tribal not exceeding three.

To refer case:

Center for Environmental Law, WWF Vs Union of India - (1998)9 SCC 623

Duties:

Advise the State Government

- in the selection of areas to be declared as sanctuaries, national parks and closed areas and the administration thereof.
- in formulation of the policy for protection and conversation of wildlife and specified plants.
- in any other matter connected with the protection of wildlife.

HUNTING OF WILD ANIMALS-PROHIBITED

Sec.9 prohibits hunting of any wild animal specified in schedules I, II, III, and IV. Any person, who contravenes section 9 shall be punishable with imprisonment for a term which may extend 3 years or with fine which may extend to Rs.25,000/- or both.

To refer case:

Chief Forest Conservator vs Nisar Khan- AIR 2003 SCW 1333.

SANCTUARIES AND NATIONAL PARKS

Sanctuaries:

1. Section 18 provides that a State Government may by notification, declare its intention to constitute any area other than an area comprised within any reserved forest or the territorial waters as sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propogating or developing wildlife or its environment.
2. Section 27 -restriction on entry in sanctuary and permits the entry of the following persons in the sanctuary:-
    - A public servant on duty;
    - A person permitted to reside within the limits of the sanctuary by the appropriate authority;
    - A person having any right over immovable property within the limits of sanctuary;
    - A person passing through the sanctuary along a public highway; and
    - The dependents of the person referred to above

To refer cases:

i) The Sariska Case -AI R 1992 SC 514

ii) M/S Chandmari Tea Co. and Anr. Vs State of Assam and Ors. AIR 2000 Gau. 13.

NATIONAL PARKS

1. Section 35 provides that the state government for the purpose of protecting, propogating or developing wildlife may by a notification declare that an area by reason of its ecological, faunal, floral, geo morphological or zoological association or importance, needed to be constituted as a National Park.

2. Activities prohibited in a National Park
    - Destroying, exploiting or removing any wildlife.
    - Destroying, damaging or depriving any wild animal of its habitat.
    - Grazing of any livestock.

To refer cases:-

i) Animal and Environmental Legal Defence Fund Vs Union of India - AIR 2000 Del.449.

ii) Forest Friendly Camps Pvt. Ltd Vs State of Rajasthan - AIR 2002 Raj.214

PREVENTION OF CRUELTY TO ANIMALS ACT, 1960

Object:-

- To prevent cruelty to animals and
- To prevent infliction of unnecessary pain or suffering on animals.

Phooka or doom dev:-

It includes any process of introducing air on any substance into to the female of a milch animal with the object of drawing off from the animal any secretion of milk.

Activities that would amount to cruelty to animals are enumerated under section 11 which if would have done by any person, he shall be punishable

- In the case of a first offence, with fine which shall not be less than Rs. 10/- but which may extend to Rs. 50/- and
- In the case of a second or subsequent offence; with fine between Rs. 25/- and Rs. 100/- or with imprisonment upto 3 months or with both.

ANIMAL WELFARE BOARD OF INDIA

Established by the Government of India mainly for two purpose (section 4):-

- For the promotion of animal welfare generally and
- For protecting animals from being subjected to unnecessary pain or suffering.

Main functions:-

i) To implement provisions of the Act;

ii) To recognize societies for the prevention of cruelty to animals (SPCAs) and Animal Welfare Organization; and

iii) To impart education to the human treatment of animals, etc.,

Note:-

Section 14 permits experimentation on animals (including experiments involving operations) if such experimentation will be useful or saving or for prolonging life or alleviating suffering or for combating any disease, whether of human beings, animals or plants.

RESTRICTION ON EXHIBITION AND TRAINING OF PERFORMING ANIMALS:-

1. Section 15 prohibits exhibition and/or training of any animal which is notified by the central government.
2. Subject to conditions prescribed by the authority, any person registered with such “Prescribed Authority” for the purpose of exhibiting or training any performing animal may exhibit or train such performing animal.

LEGAL REMEDIES FOR ENVIRONMENTAL PROBLEMS

1. CONSTITUTIONAL LAW REMEDIES
2. TORT LAW REMEDIES
3. CRIMINAL LAW REMEDIES
4. OTHER STATUTORY REMEDIES
   - i) Public Liability Insurance Act, 1991.
   - ii) National Environmental Tribunal Act, 1995.
   - iii) National Environmental Tribunal Appellate Authority Act, 1997.
   - iv) National Green Tribunal Act, 2010.

CONSTITUTIONAL LAW REMEDIES

Right to live in a clean and healthy environment is a fundamental right guaranteed under Art 21 of the Constitution. Hence for the enforcement of the fundamental right, any person can move to the court i.e.

- The Supreme Court under Article 32; and
- The High Court Under Article 226

Case:-

Narmada Bachao Andolan Vs Union of India (1998) 5 SCC 586.

CONSTITUTION OF THE GREEN BENCH

After hearing Vellore Citizens Welfare Forum Case, Bittu Seghal Case and Calcutta Tanneries case, the Supreme Court requested the Chief Justices of the respective High Courts to Constitute a 'Green Bench' for the purpose of adjudicating pubic interest environmental cases.

TORT LAW REMEDIES

Availability of Tortuous Liability for Environmental Pollution:-

1. Negligence;
2. Nuisance; and
3. Trespass.

" Negligence is the Breach of Legal Duty to take care which results in Damage, undesired by the Defendant to the Plaintiff" - According to Winfiled.

KINDS OF LIABILITY:-

1. Strict Liability - Rylands Vs Fletcher (Exceptions are there)
2. Absolute Liability - Oleum Gas Leak Case (No Exceptions)

" Nuisance is Something that Worketh Hurt, Inconvenience or Damage" -According to Blackstone.

KINDS:-

- i) Public/Common Nuisance
- ii) Private Nuisance

NOTE:-

Mass Tort Action For Environmental Hazardous - Bhopal Gas Leak Tragedy.

CRIMINAL LAW REMEDIES

INDIAN PENAL CODE:-

Section 268 to 294 A deals with the Offences affecting Public Health, Injury, Convenience, Decency and Morals.

TABULATION OF OFFENCES UNDER IPC, 1860 AFFECTING PUBLIC HEALTH, SAFETY AND CONVENIENCE, DECENCY AND MORALS

Section	Offences	Punishment
268	Public Nuisance (causing annoyance).	Fine - Rs. 200/- under section 290.
269	Negligent act likely to spread infection of disease dangerous to life.	Imprisonment of either description upto 6 months or fine or both.
270	Malignant act likely to spread infection of disease dangerous to life.	Imprisonment of either description upto 2 years of fine or both.
277	Fouling water of public spring or reservoir.	Imprisonment of either description upto 3 months or fine upto Rs. 500/- or both.
278	Making Atmosphere noxious to health.	Fine up to Rs. 500/-.
283	Danger or Obstruction in public way	Fine up to Rs. 200/-.
284	Negligent conduct with respect to poisonous substances.	Imprisonment of either description upto 6 months or fine upto Rs. 1000/- or both.
285	Negligent conduct with respect to fire of combustible matter.	Imprisonment of either description upto 6 months or fine upto Rs. 1000/- or both.
289	Negligent conduct with respect to explosive substances.	Imprisonment of either description upto 6 months or fine upto Rs. 1000/- or both.
287	Negligent conduct with respect to Machinery.	Imprisonment of either description upto 6 months or fine upto Rs. 1000/- or both.
291	Continuance of nuisance after injunction to discontinue.	Imprisonment of either description upto 6 months or fine or both.

(SOURCE: Pg. 329, Shanthakumar's Introduction to Environmental Law, 2nd Edition, 2005).

CRIMINAL PROCEDURE CODE, 1973 - RELEVANT PROVISIONS:-

Section 133 to 144 which deals with the Prevention and Control of Public Nuisance, Causing Air, Water and Noise Pollution.

To Refer Case:

Ratlam Municipal Council Vs Vardichand AIR 1980 SC 1622.

STATUTORY REMEDIES

PUBLIC LIABILITY INSURANCE ACT, 1991

Object:

To provide immediate relief to the persons affected by accidents occurring while handling hazardous substance and for other incidental and connected matters.

Definitions:

Section 2(a) defines that term 'accident as to mean an accident involving a fortuitous or sudden or unintentional occurrence while handling any hazardous substance resulting in continuous, intermittent or repeated exposure to death of, or injury to, any person or damage to any property but does not include an accident by reason only of war or radio-activity.

Hazardous substance has been under Section 2(d) and include any substance or preparation which is defined as hazardous substance under the Environment Protection Act, 1986 and exceeding such quantity as may be specified, by notification, by a central government.

Requirements under the act :-

Section 3 - incorporates of principle of liability without fault and imposes on the owner liability to give relief in case of death or injury to any person or any damage to any property, resulting from accident occurring while handling any hazardous substance.

Section 4 - requires the owner to take out one or more insurance policies compulsorily, before starting the handling of hazardous substance.

Section 5 - requires the collector to verify and make publicity about the occurrence of the accident for inviting applications for claim for relief as provided under Section 6.

Section 7 - requires the collector, on receipt of application for claim for relief, to hold an inquiry into the claim or each of the claims, after giving notice of application to owner and after giving the parties an opportunity of being heard and make an award determining the amount of relief payable to person(s).

Powers under the act:-

Section 7 A - empowers the central government to establish environment relief fund. Sections 9,10 and 11 - deals with certain powers for calling for information, entry and inspection and search and seizure.

Section 12 - empowers the central government to issue directions in writing as it may deem fit to any owner or any person, officer, authority or agencies.

Penalties under the act:-

Failure to comply with any direction issued under the act - contravention of any of the provisions of the act - imprisonment for a period of 18 months which may extend to 6 years or with fine not less than Rs. 1,00,000/- or both.

For second and subsequent of above failure or contravention - imprisonment for a 2 years which may extend to 7 years and with fine not less than Rs. 1,00,000/-

Non-compliance of sections 9 and 11 - imprisonment upto 3months or with fine upto Rs. 10,000/- or with both.

NATIONAL GREEN TRIBUNAL ACT, 2010

(Repealed the NATIONAL ENVIRONMENT TRIBUNAL ACT, 1995 and the NATIONAL ENVIRONMENT APPELLATE AUTHORITY ACT, 1997).

The Act intended to provide for the establishment of National Green Tribunal (hereinafter referred as NGT) for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of an legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith and incidental thereto.

NGT shall not be bound by the procedure laid down in the code of civil procedure, 1908 but shall be guided by the principles of natural justice.

NGT has been empowered to regulate its own procedure and also not bound by the rules of evidence contained in the Indian evidence Act, 1872.

ESTABLISHMENT:-

Section 3 empowers the Central Government, by issues of Notification, to establish, a tribunal, to be known as the National Green Tribunal.

COMPOSITION :-

- A full time Chair Person.
- Not less than ten but subject to maximum of twenty full time Judicial Members.
- Not less than ten but subject to maximum of twenty full time Expert Members.

SUBSTANTIAL QUESTION RELATING TO ENVIRONMENT:-

According to Clause (m) of Section 2 the Term -" shall include an instance, where.-

(i) There is a direct violation of a specific statutory environmental obligation by a person by which, -
   (a) The community at large other than an individual or group of individuals is affected or likely to be affected or is likely to be affected by the environmental consequences; or
   (b) The gravity of damage to the environment or property is substantial; or
   (c) The damage to public health is broadly measures;

(ii) The environment consequences relate to a specific activity or a point source or pollution.

JURISDICTION:-

Tribunal to settle disputes where a substantial question relating to environment arising out of the implementation of the enactments specified in Schedule I to the Act.

SCHEDULE I specifies following enactments:-

(1) The Water (Prevention and Control of Pollution) Act, 1974;
(2) The Water (Prevention and Control of Pollution) Act, 1977;
(3) The Forest (Conservation) Act, 1980;
(4) The Air (Prevention and Control of Pollution) Act, 1981 ;
(5) The Environmental (Protection) Act, 1986;
(6) The Public Liability Insurance Act, 1981
(7) The Biological Diversity Act, 2002.

SOCIAL MOVEMENTS / VOLUNTARY ORGANIZATIONS

Classification of Social Movements:-

1. Relief and Welfare Agencies;
2. Technical Innovation Organizations;
3. Public Service Contractors;
4. Popular Development Agencies;
5. Grass roots Development Organizations; and
6. Advocacy Groups and Networks.

SOME SOCIAL MOVEMENTS FOR ENVIRONMENTAL MANAGEMENT IN INDIA

1. Kalpavriksh (KV):- main functions of the kalpavriksh are to inculcate understanding and concern on environmental issues especially among the youth; to conduct research in environmental problems; to campaign on environmental issues; to evolve a holistic environmental perspective.
2. Kerala Sastra Sahitya Paeishad:- activities to encompass eco-development, creating and awareness on water and energy conservation, encouraging the use of non-conventional sources.
3. World Wide Fund for Nature - India:- to promote harmony between humankind and nature for almost three decades.
4. Bombay Natural History Society:- contributed significantly to increasing knowledge of our mammals, birds, reptiles and other fauna and flora.
5. Chipko Movement:- an ecological movement concerned with preservation of forest and thereby maintenance of the traditional eco-balance in the sub-Himalayan region where hill people have enjoyed a very long symbolic relationship with forest.

INTERNATIONAL CONVENTIONS AND AGREEMENTS

INTERNATIONAL ENVIRONMENTAL LAW

The environmental pollution is a global problem which doesn't know any geographical areas and political barriers. It affects the entire environment.

International Declarations

1. Stockholm Declaration
2. Rio Declaration

1. Stockholm Declaration of the United Nations Conference on Human Environment 1972.

   The United Nations conference on the Human environment held at Stockholm from 5th to 16th June, 1972 considered the need for enhancing and preservation of human environment.

   This declaration laid down 26 principles to be followed by states for the development of human environment.

   As a result, United Nations Environment Programme (UNEP) was established. It plays important role in evolution of conventions and instruments in the areas of environmental protection. It is responsible for the development of number of International Instruments like Vienna Conventions, Montreal Protocol and the convention of bio diversity.

2. Rio Declaration of the United Nations Conference on Environment and Development. 1992.

   This conference is also called as 'Earth Summit' and representatives of 150 countries met in Rio de Janeiro, Brazil, establish a important concept of 'sustainable development' .

It proclaimed 27 principles and the main objects is

1. To establish a new and equitable global partnership through the creation of new levels of co operation among states, key sectors of societies and people;
2. To work towards international agreements to respect the interest of all and protect the integrity of the global environment and developmental system and
3. To recognise the integral and interdependent nature of our earth.

JOHANNESBURG DECLARATION, 2002

The Johannesburg Declaration on Sustainable Development was adopted at the World Summit on Sustainable Development (WSSD), sometimes referred to as Earth Summit 2002, at which the Plan of Implementation of the World Summit on Sustainable Development was also agreed upon.

The Johannesburg Declaration builds on earlier declarations made at the United Nations Conference on the Human Environment at Stockholm in 1972, and the Earth Summit in Rio de Janeiro in 1992. While committing the nations of multi lateralism as the path forward.

In terms of the political commitment of parties, the Declaration is a more general statement than the Rio Declaration. It is an agreement to focus particularly on "the worldwide conditions that pose severe threats to the sustainable development of our people, which include: chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorisms; intolerance and incitement to racial, ethnic, religious and other hatreds; zenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis" Johannesburg Declaration.

ENVIRONMENTAL PROBLEMS IN TAMIL NADU

Over the past few years, the State of Tamil Nadu is facing so many serious kinds of environmental problems resulted due to rapid increasing population growth, industrialization, urbanization, vehicle population, usage of coastal areas, etc.

WATER POLLUTION:-

- due to sewage discharges;
- due to industrial discharger; and
- pollution from hazardous industries.

AIR POLLUTION:-

Air Quality monitoring is under taken by the Tamil Nadu Pollution Control Board (TNPCB) to improve the quality of air and to prevent, control and abate air pollution in the State.

4. ADMINISTRATIVE LAW

Origin and development of Administrative Law

Administrative Law is described as the outstanding legal development of the twentieth century.

The role and the functions of the state have transformed a lot from that of a mere police state to welfare state. With the increase in number of disputes between government and individual, the state struggled to tackle the problem of just balance between individual liberty and public welfare. Subsequently, most of the cases required the judicial review of the administrative decisions. Thus all these developments have amplified the scope and influence of the administrative law.

Definition of Administrative Law

Administrative Law simply deals with the following aspects namely 1. Powers and composition of the administrative authorities 2. Fixing the limits of powers 3.The procedure which is to be followed by these authorities while they are exercising those powers and finally the judicial and other means to control these authorities.

Ivory Jennings:- "Administrative Law is the law relating to the administration. It determines the organisation, powers and duties of the administrative authorities."

K.C.Davis:- "Administrative Law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action."

Garner:- "Those rules which are recognized by the courts as law and which relate to and regulate the administration of government."

Powers and functions of Administrative Law:-

To ensure that the exercise of any category of administrative power is in accordance with the constitution, the law and rights and liberties of the citizens.

Distinction between the Constitutional Law and the Administrative Law:-

According to Hood Phillips "Constitutional Law is concerned with the organization and functions of government at rest whilst administrative law is concerned with that organization and those functions in motion.

Droit Administratif:-

French Administrative Law is known as Droit Administrative. It means a body of rules, which determine the organization, powers and duties of Public Administration and regulate the relation of the administration with the citizens of the country. Main features of Droit Administrative are as follows:-

1. Dual System of courts - separate administrative courts,
2. Counseil d'Etat,
3. Tribunal des conflicts and
4. Application of special rules.

Conseil d'Etat

In France, the Council of State (Conseil d'Etat) is a body of the French national government that provides the executive branch with legal advice and acts as the administrative court of last resort. The Council is primarily made up of high-ranking legal officers.

A General Session of the Council of State is presided over by the Prime Minister or, in his absence, the Minister of Justice. However, since the real presidency of the Council is held by the Vice-President, he usually presides all but the most ceremonial assemblies. This is also done for obvious reasons pertaining to the separation of powers. The Council's Vice-Chairman is ceremonially considered to be France's top functionary.

BASIC CONSTITUTIONAL PRINCIPLES

Doctrine of Rule of Law

One of the basic principles of English constitution is Rule of Law which is derived from the French phrase "Ia principle de legalite" which means a government based on the principles of law. The administrative law is purely based on the doctrine of rule of law which was originated by Sir Edward Coke, the then C J of James I reign. Dicey developed this doctrine in his book called "The Law of Constitution". In the above mentioned book he advocated the following three meaning to the doctrine namely 1. Supremacy of Law, 2. Equality before law, 3. Predominance of legal spirit.

U.S.A.

All government officers of the United States, including the President, the Justices of the Supreme Court, and all members of Congress, pledge first and foremost to uphold the Constitution. These oaths affirm that the rule of law is superior to the rule of any human leader. I At the same time, the federal government has considerable discretion: the legislative branch is free to decide what statutes it will write, as long as it stays within its enumerated powers and respects the constitutionally protected rights of individuals. Likewise, the judicial branch has a degree of judicial discretion, and the executive branch also has various discretionary powers including prosecutorial discretion.

Scholars continue to debate whether the U.S. Constitution adopted a particular interpretation of the "rule of law," and if so, which one. For example, Law Professor John Harrison asserts that the word "law" in the Constitution is simply defined as that which is legally binding, rather than being "defined by formal or substantive criteria," and therefore judges do not have discretion to decide that laws fail to satisfy such unwritten and vague criteria. Law Professor Frederick Mark Gedicks disagrees, writing that Cicero, Augustine, Thomas Aquinas, and the framers of the U.S. Constitution believed that an unjust law was not really a law at all.

James Wilson said during the Philadelphia Convention in 1787 that, “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.” George Mason agreed that judges “could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as judges to give it a free course.” Chief Justice John Marshall (joined by Justice Joseph Story) took a similar position in 1827: “When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law.”

India

Dicey’s rule of law has been adopted and incorporated in the Indian Constitution. The aforesaid principles are enriched in Part III of the Indian Constitution. India has a written constitution; a body of laws, subordinate to the constitution, dealing with various subjects; rules and regulations, executive instructions & Conventions. All these may be broadly termed as ‘law’ and their operation to subject population is the ‘Rule of Law.’ India is, in many senses, a typical example of a modern nation state. It contains within itself most of that which commends a state to the universal body politic. It has managed to stay within the definition of democratic. It has an elaborate, written constitution clearly delineating the three pillars of the modern nation state viz. the legislature, the executive and the judiciary, and demarcating their respective roles.

The fundamental rights embodied in the Indian constitution in terms virtually identical term to the universal declaration of human rights act as guarantee that all Indian citizens can and will lead their lives in peace as long as they obey the law. These civil liberties take precedence over any other law of the land. They include individual rights common to most liberal democracies, such as equality before the law, freedom of speech and expression, freedom of association and peaceful assembly, freedom of religion, and right to constitutional remedies, such as Habeas Corpus, for the protection of civil rights. These rights are fundamental rights because they are certain basic human rights which every human being has the right to enjoy for a balanced and harmonious growth of his or her personality. These rights are guaranteed in the constitution of India and help in the growth and development of responsible citizens. The constitution provides for safeguards against any violation of these rights. These safeguards can be enforced in a court of law, hence they are justiciable rights. They check the government from making laws that go against fundamental rights. Furthermore, they act as bulkwark against various forms of exploitation which take place against women, children and minority communities.

Doctrine of Separation of Powers

There are three distinct activities in every government through which the will of the people are expressed. These are the legislative, executive and judicial functions of the government. Corresponding to these three activities are three organs of the government, namely the legislature, the executive and the judiciary. The legislative organ of the state makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs.

It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The principle of separation of powers deals with the mutual

relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government.

Montesquieu, a French scholar, found that concentration of power in one person or a group of persons results in tyranny. And therefore for decentralization of power to check arbitrariness, he felt the need for vesting the governmental power in three different organs, the legislature, the executive, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other.

Montesquieu in the following words stated the Doctrine of Separation of Powers

There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Through his doctrine Montesquieu tried to explain that the union of the executive and the legislative power would lead to the despotism of the executive, for it could get whatever laws it wanted to have, whenever it wanted them. Similarly the union of the legislative power and the judiciary would provide no defence for the individual against the state. The importance of the doctrine lies in the fact that it seeks to preserve the human liberty by avoiding concentration of powers in one person or body of persons.

Separation Of Powers Under Different Constitutions:-

Despite the safeguards it gives against tyranny, the modern day societies find it very difficult to apply it rigidly. In principle they go for separation of powers and dilution of powers simultaneously.

U.S.A.

The doctrine of separation finds its home in U.S. It forms the basis of the American constitutional structure. Art. I vests the legislative power in the Congress; Art. II vests executive power in the President and Art. III vests judicial power in the Supreme Court. The framers of the American constitution believed that the principle of separation of powers would help to prevent the rise of tyrannical government by making it impossible for a single group of persons to exercise too much power. Accordingly they intended that the balance of power should be attained by checks and balances between separate organs of the government. This alternative system existing with the separation doctrine prevents any organ to become supreme.

Despite of the express mention of this doctrine in the Constitution, U.S. incorporates certain exceptions to the principle of separation with a view to introduce system of checks and balances. For example, a bill passed by the Congress may be vetoed by the President in the exercise of his legislative power. Also treaty making power is with the President but it's not effective till approved by the Senate. It was the exercise of executive power of the senate due to which U.S. couldn't become a member to League of Nations. The Supreme Court has the power to declare the acts passed by the congress as unconstitutional. There are other functions of an organ also which are exercised by the other. India, too, followed U.S. in adoption of the checks and balances which make sure that the individual organs doesn't behold the powers absolutely.

This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the power. Therefore the constitution which gives a good mention of the doctrine in its provisions also does not follow it in its rigidity and hence has opted for dilution of powers just like India.

U.K.

Before we go to India, it's important to know the constitutional setup of the country to which India was a colony and ultimately owes the existence of the form of government it has. U.K. follows a parliamentary form of government where the Crown is the nominal head and the real legislative functions are performed by the Parliament. The existence of a cabinet system refutes the doctrine of separation of powers completely. It is the Cabinet which is the real head of the executive, instead of the Crown. It initiates legislations, controls the legislature, it even holds the power to dissolve the assembly. The resting of two powers in a single body, therefore denies the fact that there is any kind of separation of powers in England.

India

Though, just like American constitution, in Indian constitution also, there is express mention that the executive power of the Union and of a State is vested by the constitution in the President and the Governor, respectively, by Articles 53(1) and 154(1), but there is no corresponding provision vesting the legislative and judicial powers in any particular organ. It has accordingly been held that there is no rigid separation of powers.

Although prima facie it appears that our constitution has based itself upon doctrine of separation of powers. Judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or the legislature. Constitution restricts the discussion of the conduct of any judge in the Parliament. The High Courts and the Supreme Court has been given the power of judicial review and they can declare any law passed by parliament as unconstitutional. The judges of the S.C. are appointed by the President in consultation with the CJI and judges of the S.C. The S.C. has power to make Rules for efficient conduction of business

It is noteworthy that A. 50 of the constitution puts an obligation over state to take steps to separate the judiciary from the executive. But, since it is a DPSP, therefore it's unenforceable.

In a similar fashion certain constitutional provisions also provide for Powers, Privileges and Immunities to the MPs , Immunity from judicial scrutiny into the proceedings of the house, etc. Such provisions are thereby making legislature independent, in a way. The Constitution provides for conferment of executive power on the President. His powers and functions are enumerated in the constitution itself. The President and the Governor enjoy immunity from civil and criminal liabilities.

But, if studied carefully, it is clear that doctrine of separation of powers has not been accepted in India in its strict sense. The executive is a part of the legislature. It is responsible to the legislature for its actions and also it derives its authority from legislature. India, since it is a parliamentary form of government, therefore it is based upon intimate contact and close co-ordination among the legislative and executive wings. However, the executive power vests in the President but, in reality he is only a formal head and that, the Real head is the Prime minister along with his Council of Ministers. The reading of Art. 74(1) makes it clear that the executive head has to act in accordance with the aid and advice given by the cabinet.

Generally the legislature is the repository of the legislative power but, under some specified circumstances President is also empowered to exercise legislative functions. Like while issuing an ordinance, framing rules and regulations relating to Public service matters, formulating law while proclamation of emergency is in force. These were some instances of the executive head becoming the repository of legislative functioning. President performs judicial functions also.

On the other side, in certain matters Parliament exercises judicial functions too. It can decide the question of breach of its privilege, and in case of impeaching the President; both the houses take active participation and decide the charges

Judiciary, in India, too can be seen exercising administrative functions when it supervises all the subordinate courts below. It has legislative power also which is reflected in formulation of rules regulating their own procedure for the conduct and disposal of cases

So, it's quite evident from the constitutional provisions themselves that India, being a parliamentary democracy, does not follow an absolute separation and is, rather based upon fusion of powers, where a close co-ordination amongst the principal organs is unavoidable and the constitutional scheme itself mentions it. The doctrine has, thus, not been awarded a Constitutional status. Thus, every organ of the government is required to perform all the three types of functions. Also, each organ is, in some form or the other, dependant on the other organ which checks and balances it. The reason for the interdependence can be accorded to the parliamentary form of governance followed in our country. But, this doesn't mean that this doctrine is not followed in India at all.

Except where the constitution has vested power in a body, the principle that one organ should not perform functions which essentially belong to others is followed. This observation was made by the Supreme Court in the Re: Delhi Laws Act case, wherein, it was held by a majority of 5:2, that, the theory of separation of powers is not part and parcel of our Constitution. But, it was also held that except for exceptional circumstances like in Art. 123, Art. 357, it is evident that constitution intends that the powers of legislation shall be exercised exclusively by the Legislature. As Kania, C. J., observed- "Although in the constitution of India there is no express separation of powers, it is clear that a legislature is created by the constitution and detailed provisions are made for making that legislature pass laws. Does it not imply that unless it can be gathered from other provisions of the constitution, other bodies-executive or judicial-are not intended to discharge legislative functions?"

In essence they imported the modern doctrine of separation of powers. While dealing with the application of this doctrine, it is quintessential to mention the relevant cases which clarify the situation further.

Natural Justice - Rule Of Fair Hearing

In India, there is no particular statute, laying down the minimum standard, which the administrative bodies must follow while exercising their decision making powers. There is, therefore, a confusing variety of administrative procedure. In some cases, the administrative procedure is controlled by the statute under which they exercise their powers. But in some cases, the administrative agencies are left free to device their own procedure. But the courts have several times reiterated that the administrative agencies must follow a minimum of fair procedure, while exercising their powers. This fair procedure is called the principles of natural justice.

The principles of natural justice have been developed by the courts, in order to secure fairness in the exercise of the powers by the administrative agencies. The principles of natural justice are the Common Law counterpart of the 'due process of law' in the Constitution of the United States. However wide the powers of the state and however extensive discretion they confer, the administrative agencies are always under the obligation to follow a manner that is procedurally fair.

The doctrine of natural justice seeks not only to secure justice but also to prevent miscarriage of justice. The norms of natural justice are based on two ideas:

1. *audi alteram partem*,- no man can be condemned unheard
2. *nema judex in Causa sua patest* - no man can judge in his own cause

However the applicability of the principles of natural justice depends upon the facts and circumstances of each case

In India, the Supreme Court has reiterated that the principles of natural justice are neither rigid nor they can be put in a straight jacket but are flexible. In the case of R. S. Dass v. Union of India, the Supreme Court observed that:

> "It is well established that rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and background of statutory provisions, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case".

The reason for the flexibility of natural justice is that the concept is applied to a wide spectrum of the decision-making bodies.

The project focuses on the rule of fair hearing, which is one of the essential rules of the Natural Justice.

Position in India: Article 14, 19, 21 of the Indian Constitution lay down the cornerstone of natural justice in India. In the case of E P Royappa v. State of Tamilnadu, the apex court held that a properly expressed and authenticated order can be challenged on the ground that condition precedent to the making of order has not been fulfilled or the principles of natural justice have not been observed. In another landmark case of Maneka Gandhi v. Union of India, the apex court held that law which allows any administrative authority to take a decision affecting the rights of the people, without assigning the reason for such action, cannot be accepted as a procedure, which is just, fair and reasonable, hence violative of Articles 14 and 21.

Rule against bias:- The term bias literally means "deciding a case otherwise than on the principles of evidence. This principle is based on the following three principles; the maxim nemo judex in Causa sua potest which means no man can judge in his own cause, justice should not only be done, but manifestly and undoubtedly be seen to be done, judges, like Caesar's wife should be above suspicion.

Types of Bias:- Bias can be classified under the following heads

1. **Pecuniary Bias:-** When the judge has some monetary interest in the subject matter of dispute, it gives rise to pecuniary bias.
   a) Dimes Vs Grant Junction Canal (1852) 3 HL 759 : 17 Jur 79,
   b) Jeejeeboy Vs Asstt. Collector of Thana AI R 1965 SC 1096,
   c) J. Mahapatra& Co. Vs State of Orissa AIR 1984 SC 1572 (1576).

2. **Personal Bias:-** A judge may be a relative, friend or business associate of a party. He may have personal grudge, enmity against such party. In such circumstances there is every likelihood that the judge may be biased towards one party and prejudicial towards the other.
   a) Manaklal Vs Premchand AIR 1957 SC 425,
   b) A.K.Kraipauk Vs Union of India (1969) 2 SCC 262; AIR 1970 SC 150,
   c) State of UP Vs Mohd.Nooh AIR 1958 SC 86,
   d) Pratap Singh Vs State of Punjab AIR 1964 SC 72.
3. **Official Bias/Bias as to Subject matter/Policy/Departmental Bias:-** This may arise when the judge has a general interest in the subject-matter.
   a) Gullampally Nageswara Rao Vs A.P.S.R.T.C. AIR 1959 SC 308,
   b) Krishna Bus Service (P) Ltd Vs State of Haryana AIR 1985 SC 1651,
   c) K.Chelliah Vs Chairman, Industrial Finance Corporation, AIR 1973 Mad. 122.

Judicial Obstinacy:- Apart from the above three types of bias there may also be a judicial bias. Judicial bias arises on account of judicial inflexibility.

a) State of W.B Vs Shivananda Pathak AIR 1995 SC 2050.

Test of Real likelihood of bias

A pecuniary interest, however small it may be, disqualifies a person from acting as a judge. Other interests, however, do not stand on the same footing. Here the test is whether there is a real likelihood of bias in the judge. In India the same principle is accepted in Manaklal Vs Premchand (AIR 1957 SC 425).

RULE OF FAIR HEARING

The maxim audi alteram partem brings out the rule of fair hearing. It lays down that no one should be condemned unheard. It is the first principle of the civilised jurisprudence that a person facing the charges must be given an opportunity to be heard, before any decision is taken against him. Hearing means 'fair hearing'.

The norms of reasonableness of opportunity of hearing vary from body to body and even case to case relating to the same body. The courts, in order to look into the reasonableness of the opportunity, must keep in mind the nature of the functions imposed by the statute in context of the right affected. The civil courts, in India, are governed in the matter of proceedings, through the Civil Procedure Code and the criminal courts, by the Criminal Procedure Code as well as the Evidence Act. But the adjudicatory bodies functioning outside the purview of the regular court hierarchy are not subject to a uniform statute governing their proceedings.

The components of fair hearing are not fixed but are variable and flexible. Their scope and applicability differ from case to case and situation to situation. In Mineral Development v. State of Bihar, the apex court observed that the concept of fair hearing is elastic and not susceptible of a precise and easy definition. The hearing procedures vary from the tribunal, authority to authority and situation to situation. It is not necessary that the procedures of hearing must be like that of the proceedings followed by the regular courts.

The objective of the giving the accused an opportunity of fair hearing is that an illegal action or decision may not take place. Any wrong order may adversely affect a person. The maxim implies that the person must be given an opportunity to defend himself. LORD HEWART rightly observed that" it is merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done". In this regard the Dr. Bentley case needs to be elaborately discussed. In this case the Court of King's Bench condemned the decision of the Cambridge University, of canceling the degree of the scholar, without giving him the opportunity to be reasonably heard.

In another landmark case of Olga Tellis v. Bombay Municipal Corpn. , the court held that even if the legislature authorises the administrative action, without any hearing, the law would be violative of the principles of fair hearing and thus violative of Articles 14 and 21 of the Indian Constitution. In Cooper v. Wandsworth Board of Works, BYLES J. observed that the laws of God and man both give the party an opportunity to defend himself. Even God did not pass a sentence upon Adam before he was called upon to make his defence.

Law envisages that in the cases classified as 'quasi-judicial', the duty to follow completely the principles of natural law exists. But the cases which are classified as the 'administrative', the duty on the administrative authority is to act justly and fairly and not arbitrarily. In the 1970 case of A. K. Kraipak v. Union of India, the Supreme Court made a statement that the fine distinction between the quasi-judicial and administrative function needs to be discarded for giving a hearing to the affected party. Before the Kraipak's case, the court applied the natural justice to the quasi-judicial functions only. But after the case, the natural justice could be applied to the administrative functions as well.

COMPONENTS OF RIGHT TO FAIR HEARING

Right to notice:-

The term 'Notice' originated from the Latin word 'Notitia' which means 'being known'. Thus it connotes the sense of information, intelligence or knowledge. Notice embodies the rule of fairness and must precede an adverse order. It should be clear enough to give the party enough information of the case he has to meet. There should be adequate time for the party, so that he can prepare for his defence. It is the sine qua non of the right of hearing. If the notice is a statutory requirement, then it must be given in a manner provided by law. Thus notice is the starting point in the hearing. Unless a person knows about the subjects and issues involved in the case, he cannot be in the position to defend himself.

The notice must be adequate also. Its adequacy depends upon the case. But generally, a notice, in order to be adequate must contain following elements:

- Time, place and nature of hearing.
- Legal authority under which hearing is to be held.
- Statements of specific charges which the person has to meet.

The test of the adequacy of the notice will be whether it gives the sufficient information and material so as to enable the person concerned to prepare for his defense. There should also be sufficient time to comply with the requirements of a notice. Where a notice contains only one charge, the person cannot be punished for the charges which were not mentioned in the notice

The requirement of notice can be dispensed with, where the party concerned clearly knows the case against it and thus avails the opportunity of his defence. Thus in the case of Keshav mills Co. Ltd. v. Union of India, the court upheld the government order of taking over the mill for a period of 5 years. It quashed the argument of the appellants that they were not issued notice before this action was taken, as there was the opportunity of full-scale hearing and the appellant did not want to know anything more.

Right to know the evidence against him:-

Every person before an administrative authority, exercising adjudicatory powers has right to know the evidence to be used against him. The court in case of Dhakeshwari Cotton Mills Ltd. v. CIT, held that the assessee was not given a fair hearing as the Appellate Income Tax tribunal did not disclose the information supplied to it by the department. A person may be allowed to inspect the file and take notes.

Right to present case and evidence:-

The adjudicatory authority must provide the party a reasonable opportunity to present his case. This can be done either orally or in written. The requirement of natural justice is not met if the party is not given the opportunity to represent in view of the proposed action.

Courts have unanimously held that the oral hearing is not an integral part of the fair hearing, unless the circumstances call for the oral hearing. In Union of India vs. J P Mitter, the court refused to quash the order of the President of India in respect of the dispute relating to the age of a High Court judge. It was held that where the written submission is allowed, there is no violation of natural justice, if the oral hearing is not granted.

Right to cross-examination:-

The right to rebut adverse evidence presupposes that the person has been informed about the evidence against him. Rebuttal can be done either orally or in written, provided that the statute does not provide otherwise. Cross examination is a very important weapon to bring out the truth. Section 33 of the Indian Evidence Act, 1972, provides for the rights of the parties to cross-examine. The cross-examination of the witnesses is not regarded as an obligatory part of natural justice. Whether the opportunity of cross examination is to be give or not depends upon the circumstances of the case and statute under which hearing is held. State of Jammu and Kashmir v. Bakshii Ghulam Mohd., the Government of Jammu and Kashmir appointed a Commissioner of Inquiry to inquire into the charges of corruption and maladministration against the ex-Chief Minister of the state. He claimed the right to cross-examine the witnesses on the ground of natural justice. The Court interpreted the statute and held that only those witnesses who deposed orally against the Chief Minister can be cross-examined and not of those who merely filed affidavits.

Similarly, in Hiranath mishra v. Rajendra Medical College, Ranchi, some male students of medical college entered the girls hostel and misbehaved with the girls. An enquiry committee was set up against whom the complaints were made. The complainants were examined but not in presence of the boys. On the report of the committee, four students were expelled from the college. They challenged the decision of the committee on the ground of violation of the natural justice. The court rejected the plea and held that in presence of the boys, the girls cannot be cross-examined that that may expose them to the harassment.

Right to counsel:-

For some time the thinking had been that the lawyers should be kept away from the administrative adjudication, as it saves time and expense. But the right to be heard would be of little avail if the counsel were not allowed to appear, as everyone is not articulate enough to present his case. In India few statutes like the Industrial Disputes Act, 1947, specifically bar the legal practitioners from appearing before the administrative bodies. Till recently the view was that the right to counsel was not inevitable part of the natural justice.

Reasons must be given for the decisions:-

Union of India Vs M. L. Capoor (AIR 1974 SC 87) The Apex held that in case of an administrative order also even in the absence of any statutory provisions imposing a duty to give reasons, "a minimal requirement of just and fair treatment" required that the person affected ought to be informed of the reasons for the action.

Judicial review of Administrative adjudication

General Grounds

1. Doctrine of Ultra vires.
2. Jurisdictional Grounds.

a) Lack of absence of jurisdiction due to nature of subject matter. J. K. Chowdhry Vs Dutta Gupta (AIR 1958 SC 722) News Papers Ltd. Vs Industrial Tribunal (AIR 1957 SC 532), United Commercial Bank Vs Workmen AIR 1951 SC 230.

b) Declining Jurisdiction or refusal to exercise jurisdiction.

   i. Rajagopala Naidu Vs State Transport Appellate Tribunal (AIR 1964 SC1573),

   ii. Union of India Vs Goel (AIR 1964 SC 364),

   iii. State of Madras Vs Sundaram (AIR 1965 SC 1103),

   iv. Syed Yakoob Vs K.S. Radhakrishna (AIR 1964 SC 417),

   v. Sumithra Devi Vs Sheo Shankar Yadav (1973 SCJ 334),

   vi. Premchand Vs State of Punjab (AIR 1971 P & H 50).

3. Error of law apparent on the face of the record Harikrishna Kamath Vs Syed Ahmed (AI R 1955 SC 233), Shanmugam Vs S.R.V.S. (AIR 1963 SC 1636)
4. Violation of Principles of natural Justice,
5. Violation of the constitution.

DELEGATED LEGISLATION

Delegated legislation is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority.

In England

In the United Kingdom, delegated legislation is legislation or law that is passed otherwise than in an Act of Parliament (or an Act of the Scottish Parliament, Northern Ireland Assembly or National Assembly for Wales). Instead, an enabling Act (also known as the parent Act or empowering Act) confers a power to make delegated legislation on a Government Minister or another person or body. Several thousand pieces of delegated legislation are made each year, compared with only a few dozen Acts of Parliament. Delegated legislation can be used for a wide variety of purposes, ranging from relatively narrow, technical matters (such as fixing the date on which an Act of Parliament will come into force, or setting the level of fees payable for a public service, e.g. the issue of a passport), to filling in the detail of how an Act setting out broad principles will be implemented in practice.

Different forms of Delegated Legislation:

1. Central Act to Central Government:

Central Act empowered Central Government to come with delegated legislation. Basically this legislation based on particular Parent Act. For Example, S.3 of Defence Act, S.3 of All India Service Act.

2. Central Act to State Government:

Central Legislature to empower to state executive to comes with delegated legislation. For Example, S.8 of Opium Act, S.2 of Muslim Wakf Act.

3. Central Act to Central as well as state Government:

Parent Act empowered to central as well as state executive to come with delegated legislation. For Example, Administrative Tribunal Act, S.35 empower central Government and S.36 empower to state government come with delegated legislation.

4. Central Act to Statutory bodies:

Central Legislature empower to statutory bodies come with delegated legislation. For Example, Advocate Act 1961, S.49 empower to bar council of India to make a rule means Central Act through the statutory body to make a rule.

5. State Act to State Government:

State Legislature empower to State Executive come with delegated legislation. For Example, Municipality Act, Panchayat Act.

6. State Act to Statutory bodies:

For Example, GNLU Act, S.46, State Act empower to Statutory Body to make a law.

Classification of Delegated Legislation

Delegated legislation may take several forms. They may be normal or of exceptional type, they may be usual or unusual, positive or negative, skeleton or Henry VIII clause.

1. **Title based classification**

Rules: For the definition see the General Clauses Act 1897

Regulation: An instrument by which decisions, orders and acts of government are made known to the public.

Order: in general order refers to Administrative Rule making.

Bye-laws: Rules made by semi-governmental authorities established under the Acts of Legislature

Directions: Expression of Administrative Rule making under the authority of law

Scheme: It is the situation where the law authorizes the administrative agency to lay down a framework.

In Sukhdev Singh v. Bhagatram Supreme Court held delegated legislation means rules, regulation, bye-laws.

2. **Purpose based delegated legislation Power to bring an act into force**

Power to extended life of the Act

Power to extend laws from one area to another Power to include

Power to exempt

Power to adopt

Power to fill in detail

Power to prescribed punishment

Power to make modification

Power to remove difficulty

Judicial Control of delegated legislation

Delegation of powers means those powers, which are given by the higher authorities to the lower authorities to make certain laws, i.e., powers given by the legislature to administration to enact laws to perform administration functions.

A. General grounds

a) Delhi Laws Act Case (AIR 1951 SC 332),

The question of validity of delegated legislative powers under the Constitution came before the Supreme Court in the form of a Presidential reference under Article 143 in what is known as in Re: Delhi laws Act case, in this case president referred advisory opinion to three question. The question whether the above section, or any of its provision, and in what particulars, or to what extent, was ultra vires Parliament. The Apex court held that Delegation of Legislative Powers is valid but essential legislative functions should not be delegate. Furthermore general principles regarding delegation of legislative powers were discussed elaborately. The following principles were observed by the apex court:-

1. Basic Policy should be laid down in the Parent Act.
2. Essential Legislative function should not be delegated.

3. Executive can only implement the policy laid down in the enabling act.
4. Some standard guidelines or principles should be laid down in the parent act. Otherwise, such power is considered as arbitrary or excessive.

b) **Raj Narain Vs Chairman, Patna Admn. Committee** (AIR 1954 SC 569), an attempt was made to define essential function

c) **Harishankar Bagla Vs State of M.P.** (AIR 1954 SC 465),

d) **Hamdard Dawakhana Vs Union of India** (AIR 1960 SC 554),

e) **State of Maharashtra Vs George** (AIR 1963 SC 722), Publication of delegated legislation is necessary even when the parent act is silent.

f) **V.Nagappa Vs Iron Ore Mines Cess Commr.** (AIR 1973 SC 1374).

B. Ground of Ultra Vires

1. Delegated legislation is void if it is ultra vires the parent Act.
   a) King Emperor Vs Sibnath Bannerji (AIR 1945 P.C. 156),
   b) Mohd Hussain Vs State of Bombay (AI R 1962 SC 97),
   c) Gadde Venkateswara Rao Vs State of A.P. (AIR 1966 Sc 828),
   d) Yasin Vs Town Area Committee (AIR 1952 SCR 572),
   e) M.L.Bagga Vs Murhan Rao (AIR 1956 Hyd 35),
   f) Harish Chandra Vs State of M. P. (AI R 1965 SC 932).
2. Delegated legislation ultra vires the constitution is void even though the parent Act is Intra vires.
   a) Narendra Kumar Vs Union of India (AIR 1960 SC 430),
   b) Dwaraka Prasad Vs State of U.P. (AIR 1954 SC 224),
   c) Kharak Singh Vs State of U.P. (AIR 1963 SC 1295),
   d) Bar Council Delhi Vs Swijcet Singh
3. Delegated Legislation is void if the parent Act itself is Ultra Vires the Constitution.
   a) Chintaman Rao Vs State of M.P. (AIR 1954 SC 118)
4. Delegated legislation ultra vires the general law,
5. Unreasonableness,
6. Mala fide,
7. Sub - Delegation and
8. Excessive Delegation.

Sub - Delegation

When a statute confers some legislative powers on an executive authority and latter further delegates those powers to another subordinate authority or agency, it is called Sub - Delegation. In other words, in sub-delegation, a delegate further delegates. The enabling act is called as

Parent Act and the delegated and sub-delegated legislations are called Children act.

Ganpati Vs State of Ajmer (AIR 1955 SC 188),

Jackson Vs Butterworth (1948) 2 All ER 558,

Central Talkies Vs Dwaraka Prasad (AIR 1961 SC 606.

Conditional Legislation

A statute that provides controls but specifies that they are to go into effect only when a given administrative authority fulfils the existence or conditions defined in the statute. It is also called as Conditional Legislation.

Field Vs Clark (1892) 143 US 649,

Emperor Vs Benoari Lal (AI R 1945 PC 43),

State of Bombay Vs Narottamdas (AIR 1951 SC 69),

Inder Singh Vs State of Rajasthan (AIR 1957 SC 510).

ADMINISTRATIVE TRIBUNALS

The word tribunal literally means" seat or bench upon which a judge or judges sit in a court or court of justice. A tribunal is a body with judicial/quasi - judicial powers/functions set up by the statute outside the usual judicial hierarchy of SC and HC's.

Kinds of Tribunals

1. Statutory or Administrative Tribunals and
2. Domestic Tribunals.

Statutory or Administrative Tribunals

Administrative Tribunal is body constituted under a statute to perform adjudicatory functions of the management of affairs of an organisation or executive branch of a Government. They are not courts, but they are set up to perform quasi - judicial functions.

Kinds of Administrative Tribunals in India

1. Income Tax Appellate Tribunals,
2. Industrial Tribunal,
3. Railway Rates Tribunal,
4. Administrative Tribunals under Administrative Tribunals Act, 1985. (CAT),
5. Consumer Commission.

The central government set up a "Central Administrative Tribunal from November I, 1985, under the Administrative Tribunals Act. which came into force on February 27, 1985. The main aims and objects of the Tribunal were to provide speedier justice to public servants regarding their service complaints or disputes. The Tribunals would also ease the burden of the judiciary. The Jurisdiction of all Courts dealing with the service matters was taken away from November" 1985 except the Jurisdiction of the Supreme Court under Article 136 of the constitution . Pending cases were transferred to the concerned bench of the Central Administrative Tribunal except

appeals pending in High Courts which were to be dealt with by the respective High Courts. Besides the principal bench at Delhi, the benches of the tribunal were to be established at seven additional places, at Allahabad, Calcutta, Gauhati, Madras, Bombay, Nagpur and Bangalore.

Domestic Tribunals

Domestic Tribunals refers to an agency created to regulate the internal discipline among the members by exercising the adjudicatory and investing powers. These Tribunals are further sub - divided into following two types:-

i. Statutory Domestic Tribunals and

ii. Non - Statutory/Contractual Domestic Tribunals.

Statutory Domestic Tribunals

It refers to the domestic Tribunals created by or under a Law. Such Tribunals regulates professions and lay down standards and provide adjudicative machinery to enforce the same. Example:- Bar Council, Universities, Medical Council, ICA etc.

Non-Statutory/Contractual Domestic Tribunals

These types of tribunals are created under an agreement or contract among the parties. Example:- Clubs, Chamber of Commerce, Trade Unions, Private Arbitrators, etc.

PURELY ADMINISTRATIVE FUNCTIONS

DISCRETIONARY FUNCTIONS AND MINISTERIAL FUNCTIONS

Discretion in layman's language means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. But the term 'discretion' when qualified by the word 'administrative' has somewhat different overtones. 'Discretion' in this sense means choosing from amongst the various available alternatives but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular.

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. It is necessary not only for the individualization of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventually in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Therefore, there has been a constant conflict between the claims of the administration to an absolute discretion and the claims of subjects to a reasonable exercise of it. Discretionary power by itself is not pure evil but gives much room for misuse. Therefore, remedy lies in tightening the procedure and not in abolishing the power itself.

Judicial behaviour and administrative discretion in India:-

Though courts in India have developed a few effective parameters for the proper exercise of discretion, the conspectus of judicial behaviour still remains halting, variegated and residual, and lacks the activism of the American courts. Judicial control mechanism of administrative discretion is exercised at two stages:

(1) Control at the stage of delegation of discretion;

(2) Control at the stage of the exercise of discretion.

(1) Control at the stage of delegation of discretion.-

The court exercises control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian Constitution. Therefore, if the law confers vague and wide discretionary power on any administrative authority, it may be declared ultra vires Article 14, Article 19 and other provisions of the Constitution. In case of delegated legislation, courts have after been satisfied with vague or broad statements of policy, but usually it has not been so in cases of application of fundamental rights to statutes conferring administrative discretion. The reason is that delegated legislation being a power to make an order of general applicability presents less chance of administrative arbitrariness than administrative discretion which applies from case to case.

(2) Control at the stage of the exercise of discretion.-

In India, unlike the USA, there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review arises from the constitutional configuration of courts. Courts in India have always held the view that judge-proof discretion is a negation of the rule of law. Therefore, they have developed various formulations to control the exercise of administrative discretion. These formulations may be conveniently grouped into two broad generalizations:

(a) That the authority is deemed not to have exercised its discretion at all or failure to exercise discretion- “non application of mind” ;

(b) That the authority has not exercised its discretion properly or excess or “abuse of discretion”

JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION

GENERAL GROUNDS

I. Abuse of Discretion.

(1) Mala fides:-

Mala fides or bad faith means dishonest intention or corrupt motive.

In **Jaichand v. State of West Bengal**, the Supreme Court observed that mala fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. In this sense, mala fides is equated with any ultra vires exercise of administrative power. The term “mala fides” has not been used in the broad sense, but in the narrow sense of exercise of power with dishonest intent or corrupt motive. Mala fides, in this narrow sense, would include those cases where the motive force behind an administrative action is personal animosity, spite, vengeance, personal benefit to the authority itself or its relations or friends. Mala fide exercise of discretionary power is bad as it amounts to abuse of power.

In **Pratap Singh v. State of Punjab,** (AIR 1964 SC 972) the Supreme Court used the phrase "mala fides" for initiating administrative action against an individual "for satisfying a private or personal grudge of the authority.

In **Rowjee v. Andhra Pradesh,** (Al R 1964 SC 962) under the schemes prepared by the State Road Transport Corporation, certain transport routes were proposed to be nationalized. The schemes owed their origin to the directions by the Chief Minister. It was alleged that the Chief Minister had acted mala fide in giving the directions. The charge against him was that the particular routes had been selected because he sought to take vengeance on the private operators on those routes, as they were his political opponents. From the course of events, and the absence of an affidavit from the Chief Minister denying the charge against him, the court concluded that mala fide on the part of the Chief Minister was established.

In **State of Punjab v. Gurdial Singh,** the court struck down the land acquisition proceedings for acquiring the land of the petitioners for a mandi on account of mala fides.

In **G. Sadanandan v. State of Kerala,** the petitioner, a businessman, dealing in wholesale kerosene oil was detained under Rule 30(1)(b) of the Defence of India Rules, 1962 with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community. The petitioner challenged the validity of the impugned order of detention mainly on the ground that it is mala fide and has been passed as a result of malicious and false reports, prepared at the instance of Deputy Superintendent of Police. The whole object of Deputy Superintendent in securing the preparation of these false reports was to eliminate the petitioner from the field of wholesale business in kerosene oil in Trivandrum so that his relatives may benefit and obtain the dealership. The Deputy Superintendent did not file the affidavit to controvert the allegations made against him and the affidavits filed by the Home Secretary were very defective in many respects. After considering all the materials the Supreme Court declared the order of detention to be clearly and plainly mala fide.

In **P.B. Samant v. State of Maharashtra,** the court held the distribution of cement against the law and the circulars or guidelines issued by the Government on that behalf as bad. The distribution of cement was in favour of certain builders in return for the donations given by them to certain foundations of which the Chief Minister was a trustee. It was a clear case of mala fide exercise of power. The power to control the distribution of an essential commodity like cement is given to the Government with a view to ensuring its equitable distribution. When this power is used for obtaining donations for a trust, it is a clear case of abuse of power.

In **Express Newspapers (Pvt.) Ltd v. Union of India,** a notice of re-entry upon the failure of lease of lease granted by the central government and of threatened demolition of the Appellant's officer buildings was held to be mala fide and politically motivated by the party in power against the Express Group of Newspapers in general.

In **State of Punjab v. V.K Khanna,** the Court held that the expression 'mala fide' has a definite significance and there must be existing definite evidence of bias. The action would not be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the Act.

The Supreme Court in **E.P. Royappa v. Tamil Nadu**, brought out difficulties inherent in proving mala fides. The factors which are important in proof of mala fides: (i) Direct evidence (e.g. documents, tape recordings etc.), (ii) Course of events, (iii) Public utterance of the authority, (iv) Deliberate ignoring of facts by the authority and (v) Failure to file affidavits denying the allegations of mala fides. However, if the allegations are of wild nature, there is no need of controverting allegations. Mala fides may also be inferred from the authority ignoring apparent facts either deliberately or sheer avoidance.

(2) Improper purpose:-

If a statute confers power for one purpose, its use for a different purpose will not be regarded as a valid exercise of the powers and the same may be quashed. The cases of exercise of discretionary power from improper purposes have increased in modern times because conferment of broad discretionary power has become usual tendency. The orders based on improper purpose were quashed first in the cases concerning the exercise of powers of compulsory acquisition in England. "Improper purpose" is broader than mala fides, for whereas the latter denotes a personal spite or malice, the former may have no such element.

In a few cases on preventive detention the Supreme Court has held that the power of preventive detention cannot be used as a convenient substitute for prosecuting a person in a Criminal Court. In **Srilal Shav v. State of West Bengal**, a preventive detention order was issued against a person mainly on the ground that he had stolen railway property. He had documents in his possession to prove his bona fide and to prove that he had purchased the goods in the open market. A criminal case filed against him was dropped and the mentioned preventive detention was passed in its place. The order was held to be bad by the court.

In **L.K. Dass v. State of West Bengal,** the court held that the power of detention could not be used on simple solitary incident of theft of railway property and the proper course to prosecute the person was in a criminal court.

(3) Irrelevant considerations:-

A discretionary power must be exercised on relevant and not on irrelevant or extraneous considerations. It means that power must be exercised taking into account the considerations mentioned in the statute. If the statute mentions no such considerations, then the power is to be exercised on considerations relevant to the purpose for which it is conferred.

In **Ram Manohar Lohia v. Bihar,** (AIR 1966 SC 740) the petitioner was detained under the Defence of India Rules, 1962 to prevent him from acting in a manner prejudicial to the maintenance of "law and order", whereas the rules permitted detention to prevent subversion of "public order". The court struck down the order as, in its opinion, the two concepts were not the same, "law and order" being wider than "public order".

In Barium Chemicals Ltd. vs. Company Law Board, (AI R 1967 SC 95) this case shows a definite orientation in the judicial behaviour for an effective control of administrative discretion in India. In this case Company Law Board exercising its power under Section 237 of the Companies Act 1956 ordered an investigation into the affairs of Barium Chemicals Ltd. The basis of the exercise of discretion for ordering investigation was that due to faulty

planning the company incurred a loss, as a result of which the value of the shares had fallen and many eminent persons had resigned from the Board of Directors. The court quashed the order of the Board on ground that the basis of the exercise of discretion is extraneous to the factors mentioned in Section 237.

(4) Mixed considerations:-

Sometimes, it so happens that the order is not wholly based on irrelevant or extraneous considerations. It is founded partly on relevant and existent considerations and partly on irrelevant or non-existent considerations. The judicial pronouncements do not depict a uniform approach on this point.

In **Shibbanlal v. State of U.P.,** (AIR 1954 SC 179)the petitioner was detained on two grounds: first, that his activities were prejudicial to the maintenance of supplies essential to the community, and second, that his activities were injurious to the maintenance of public order. Later the government revoked his detention on the first ground as either it was unsubstantial or non-existent but continued it on the second. The court quashed the original detention order.

In **Dwarka Das v. State of J & K,** (AIR 1957 SC 164) the Supreme Court has observed that if the power is conferred on a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, the exercise of the power will be bad if some of the grounds are found to be non-existent or irrelevant.

(5) Leaving out relevant considerations:-

If in exercising its discretionary power, an administrative authority ignores relevant considerations, its action will be invalid. An authority must take into account the considerations which a statute prescribes expressly or impliedly. In case the statute does not prescribe any considerations but confers power in a general way, the court may still imply some relevant considerations for the exercise of the power and quash an order because the concerned authority did not take these into account.

In **Shanmugam v. S.K. V. S. (P) Ltd.,** (AIR 1963 SC 1626) a regional transport authority called for applications for the grant of stage of carriage permit for a certain route. Under the statute, the authority had broad powers to grant the permits in public interest, but the government attempted to control the discretion of the authority by prescribing a marking system under which marks were allotted to different applicants on the basis of viable unit, workshop, residence (branch office) on the route, experience and special circumstances. In the instant case, the branch office on the route, which the petitioner had, was ignored on the ground that he had branches elsewhere. It was held that the authority had ignored a relevant consideration. It was an untenable position to take that even if the applicant had a well-equipped branch on the route concerned; it would be ignored if the applicant "has some other branch somewhere unconnected with that route".

In **Rampur Distillery Co. Ltd. v. Company Law Board,** (AIR 1970 SC 1789) the Company Law Board exercising wide discretionary power under Section 326 of the Companies Act, 1956 in the matter of renewal of a managing agency refused approval for the renewal to the managing agents of the Rampur Distillery. The reason given by the Board for its action

related to the past conduct of the managing agent. The Vivian Bose Enquiry Commission had found these managing agents guilty of gross misconduct during the year 1946-47 in relation to other companies. The Supreme Court, though it did not find any fault in taking into consideration the past conduct, held the order bad, because the Board did not take into consideration the present acts which were very relevant factors in judging suitability.

(6) Colourable exercise of power:-

At times, the courts use the idiom "colourable exercise of power" to denounce an abuse of discretion. Colourable exercise means that under the "colour" or "guise" of power conferred for one purpose, the authority is seeking to achieve something else which it is not authorized to do under the law in question then the action of the authority shall be invalid and illegal. Viewed in this light, "colourable exercise of power" would not appear to be a distinct ground of judicial review of administrative action but would be covered by the grounds already noticed, improper purpose or irrelevant considerations. The same appears to be the conclusion when reference is made to cases where the ground of "colourable exercise of power" has been invoked.

In the Somawanti v. State of Punjab, (AIR 1963 SC 151) the Supreme Court stated as the follows with reference to acquisition of land under the Land Acquisition Act: "Now whether in a particular case the purpose for which land is needed is a public purpose or not is for the State Government to be satisfied about subject to one exception. The exception is that if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party. If it appears that what the Government is satisfied about is not a public but a private purpose or no purpose at all action on the Government would be colourable as not being relatable to the power conferred upon it by the Act and its declaration will be a nullity."

(7) Judicial discretion :-

At times, the courts have used a vague phrase "judicial discretion" to restrict the exercise of discretionary power by an authority.

(8) Unreasonableness:-

At times the statute may require the authority to act reasonably. The courts have also stated that the authority should consider the question fairly and reasonably before taking action. The term "unreasonable" means more than one thing. It may embody a host of grounds mentioned already, as that the authority has acted on irrelevant or extraneous consideration or for an improper purpose, or mala fide, etc. Viewed thus, unreasonableness does not furnish an independent ground of judicial control of administrative powers apart from the grounds already mentioned. The term may include even those cases where the authority has acted according to law but in wrong manner and where it has acted according to law and in a right manner but on wrong grounds. Sometimes statutes itself provides for reasonable exercise of the discretionary power. Under such conditions the authority concerned had to act reasonably. And, the court will interfere with the order where it has not been passed under reasonable belief.

In **Sheonath v. Appellate Assistant Commissioner**, (AIR 1971 SC 245) the Supreme Court has remarked that the words "reason to believe" (for initiating reassessment proceedings) used in the Income-tax Act suggest that "the belief must be that of an honest and reasonable person based upon reasonable grounds but not on mere suspicion."

There may be cases where the administrative authority might have exercised his power without any reason. In such cases the court would quash the order.

The Supreme Court observed in **K.L. Trading Co. Ltd. v. State of Meghalaya,** that to attract judicial review of administration action, the applicant must show that the administrative action suffers from vice of arbitrariness, unreasonableness and unfairness. Merely because the Court may feel that the administrative action is not justified on merit, can be no ground for interference. The Court can only interfere when the process of making such decision is wrong or suffers from the vice of arbitrariness, unfairness and unreasonableness.

It may be mentioned here that in France the reasonableness of the administrative acts or decisions is examined on a much broader scale than in common law countries. In France any act can be brought to the test of reason. Every administrative act or decision is thought to be proper and lawful only if it is reasonable.

(9) Non - Application of mind by Authority:-

State of Punjab Vs Suraj Prakash (AIR 1963 SC 507), Purtabpove Company Ltd Vs Cane Commr (AIR 1963 SC 507), Mahadayal Premchandra Vs C.T.O.

(10) Acting mechanically and without due care - Negligent Action :-

Barium Chemicals Vs Rana (AIR 1972 SC 591),

Sadanandan Vs State of Kerala (AI R 1966 SC 1926).

II. Violation of Fundamental Rights

An Administrative authority must exercise its discretionary powers in consonance with those rights which are enriched under Part III of the Indian Constitution. West Bengal Vs Anwar Ali, (AIR 1952 SC 75), Satwant Singh VsAsst. Passport Officer (AIR 1967 SC 1836).

III. Ultra Vires

The term "Ultra Vires" means beyond powers. If the administrative authority while exercising the discretionary power exceeds the limit, such act is said to be ultra Vires. Liversidge Vs Anderson (1042 AC 206), Ridge Vs Baldwin (1964 AC 40), Gurbachan Vs Bombay (AIR 1952 SC 221), Ram Manohar Lohia Vs State of Bihar (AIR 1966 SC 749).

ADMINISTRATIVE FINALITY

Exclusion of or Preclusion of Judicial Review

"OUSTER CLAUSES"

Nature, Scope or extent of "finality" or "Ouster" clauses in the relevant statute is determined by the court only after considering the following factors:-

a) Terms of Scheme of the statute concerned,

b) Object or Purpose of such clauses,

c) Adequacy of remedies provided under the statute for redressal of grievances of the aggrieved party and

d) Nature of the administrative action challenged.

Generally speaking ouster clauses do not prohibit challenge of any category of action which is Ultra Vires, Unconstitutional, illegal and mollified.

TYPICAL EXAMPLES OF "OUSTER" CLAUSES

a) Administrative action shall be final.

b) Any order or decision under the Act "shall not be questioned in any legal proceedings whatsoever" ,

c) "no suit shall lie for anything done or purported to be done in good faith under this statute".

Basappa Vs Govt of Madras (AI R 1964 SC)

Srinivasa Vs State of AP (AI R 1971 SC 71)

Barlow Vs Collins (1970) US 159

Statutory Inquiries

Jagannath Vs State of Orissa (AIR 1969 SC 215),

Krishna Ballabh Vs Commn of Inquiry (AIR 1969 SC 258),

State of J&K Vs Ghulam Mohammed (AIR 1967 SC 122),

Ramakrishna Dalmia Vs Tendolkar (AIR 1958 SC 538).

OMBUDSMAN

Ombudsman is a person who acts as a trusted intermediary between either the state (or elements of it) or an organization, and some internal or external constituency, while representing not only but mostly the broad scope of constituent interests. The Government of India has designated several ombudsmen (sometimes called Chief Vigilance Officer or CVO) for the redress of grievances and complaints from individuals in the banking, insurance and other sectors being serviced by both private and public bodies and corporations. The CVC (Central Vigilance Commission) was set up on the recommendation of the Santhanam Committee (1962-64).

In India, the Ombudsman is known as the Lokpal or Lokayukta. An Administrative Reforms Commission (ARC) was set up on 5 January 1966 under the Chairmanship of Shri Morarji Desai. It recommended a two-tier machinery: Lokpal at the Centre (parliamentary commissioner, as in New Zealand) and one Lokayukta each at the State level for redress of people's grievances. However, the jurisdiction of the Lokpal did not extend to the judiciary (as in New Zealand). The central Government introduced the first Lokpal Bill, Lokpal and Lokayuktas Bill in 1968, and further legislation was introduced in 2005, but has so far not been enacted.

The state-level Lokayukta institution has developed gradually. Orissa was the first state to present a bill on establishment of Lokayukta in 1970, but Maharashtra was the first to establish the institution, in 1972. Other states followed: Bihar (1974), Uttar Pradesh (1977), Madhya Pradesh (1981), Andhra Pradesh (1983), Himachal Pradesh (1983), Karnataka (1984), Assam (1986), Gujarat (1988), Delhi (1995), Punjab (1996), Kerala (1998), Chhattishgarh (2002), Uttaranchal (2002), West Bengal (2003) and Haryana (2004). The structure of the Lokayukta is not uniform across all the states. Some states have Up-Lokayukta under the Lokayukta and in some states, the Lokayukta does not have suo moto powers of instigating an enquiry.

Kerala State has an Ombudsman for Local Self Government institutions like Panchayats, Municipalities and Corporations. He or she can enquire/investigate into allegations of action, inaction, corruption and maladministration. A retired Judge of the High Court is appointed by the Governor for a term of three years, under the Kerala Panchayat Raj Act.

In the State of Rajasthan, the Lokayukta institution was established in 1973 after the Rajasthan Lokayukta and Up- Lokayuktas Act, 1973 was passed by the State Legislature.

REDRESSAL OF GRIEVANCES

REMEDIES AVAILABLE TO AN AGGRIEVED PARTY

Constitutional Remedies :- Arts. 32,226,227,136" 132, 133, 134

Remedies under Ordinary or General Law :- Suit, appeal, review, injunction, declaration.

Remedies under the relevant provisions of the concerned statute:- Appeal, reference, review, statement of case.

Scope and extent of a remedy depends upon the following factors:-

1. Action of the state in question,
2. Provisions of the relevant statute,
3. Provisions of ordinary or general law,
4. Provisions of constitutional law,
5. Inherent limitations of each remedy,
6. Self - imposed limitations by the judiciary.

Case Laws:- Art. 136

1. Kriloskar Electric Company Vs Workman (AIR 1973 SC 2119)
2. M.S.I.Hussain Vs State of Maharashtra (AIR 1976 SC 1992)

Art 226

1. S.Narayanan Vs Union of India (AIR 1976 SC 1986) Hebeas

Corpus:-

1. K. Sanyal Vs. Ot. Magistrate (AIR 1973 SC 2684)
2. Addl. Ot. Magistrate Vs S.Shukla (AIR 1976 SC 1207)

Mandamus

1. Umakant Saran Vs state of Bihar (AI R 1973 SC 965

Certiorari

1. C.Raza Textiles Vs I.TO. Rampur (AIR 1973 SC 1362)

Writ of Prohibition and

Writ of Quo Warranto.

Locus Standi and Public Interest Litigation. S.P.Gupta Vs Union of India

LIABLITY OF THE STATE OR GOVERNMENT

Articles 299 and 300 of the constitution deals with the state liability which are as follows:-

1. Tortious Liability of the state (Art 300) and

2. Contractual Liability of the state (Art 299).

Tortious Liability of the state (Art 300):-

It refers to the liability of the state/government for torts committed by its servants. It is based on the following two maxims namely **Qui facit per alium facit per se** and **Respondent Superior.**

Sovereign Immunity:-

It means exception from liability on the ground of being sovereign provided the following two conditions are satisfied:-

1. Tort committed in discharge of duty imposed on him by law

2. It must be in delegation of sovereign power.

Contractual Liability of the state (Art 299):-

A state when enters into variety of contracts with the parties, the government as a party to the contract is subject to the same contractual obligations, rights and liabilities.