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STUDY MATERIAL

**EXECUTIVE PROGRAMME**

**ECONOMIC, BUSINESS  
AND COMMERCIAL LAWS**

**MODULE 2**

**PAPER 7**



**THE INSTITUTE OF  
Company Secretaries of India**

**भारतीय कम्पनी सचिव संस्थान**

**IN PURSUIT OF PROFESSIONAL EXCELLENCE**

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## **EXECUTIVE PROGRAMME**

### **ECONOMIC, BUSINESS AND COMMERCIAL LAWS**

India redrafted its economic policy to usher in a new era of deregulation, liberalisation and global integration. Since then significant policy initiatives have been introduced, to provide stimulus for accelerated growth, industrial efficiency and international competitiveness. As part of reform process, the Government has also initiated legislative reforms in the area of Economic, Business and Commercial laws. The Government enacted Foreign Exchange Management Act, The Competition Act, 2002, Real Estate (Regulation and Development) Act, 2016 and amended Benami Transaction Prohibitions Act. Further, the Prevention of Money Laundering Act to deal with new categories of economic offences, has also been enacted. Similarly, in the area of consumer protection and business laws, the process of reforms is going on.

In the light of above developments, this study material has been prepared to provide an understanding of certain Economic, Business and Commercial legislations which have direct bearing on the functioning of companies. The study material has been divided into three parts consisting of twenty four study lessons. Part I dealing with Foreign Exchange Management & NBFCs consists of Study Lessons I to XI, whereas Part II dealing with Competition Laws consists of Study Lesson XII and Part III dealing with Business & Commercial Laws consists of Study Lessons XIII to XXIV.

This study material has been published to aid the students in preparing for the Economic, Business and Commercial Laws paper of the CS Executive Programme. It has been prepared to provide basic understanding of some of the Economic, Business and Commercial laws thereunder, which have a bearing on the conduct of corporate affairs. It is part of the educational kit and takes the students step by step through each phase of preparation stressing key concepts, principle, pointers and procedures. Company Secretaryship being a professional course, the examination standards are set very high, with emphasis on knowledge of concepts, applications, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The material may, therefore, be regarded as the basic material and must be read alongwith the original Bare Acts, Rules, Regulations, Case Law, Chartered Secretary Journal published by the Institute every month .

The subject of Economic, Business and Commercial Laws is inherently complicated and is subjected to constant refinement through new primary legislations, rules and regulations made thereunder and court decisions on specific legal issues. It, therefore becomes necessary for every student to constantly update himself with the various legislative changes made as well as judicial pronouncements rendered from time to time by referring to the Institute's journal 'Chartered Secretary' and e-bulletin as well as other law/professional journals.

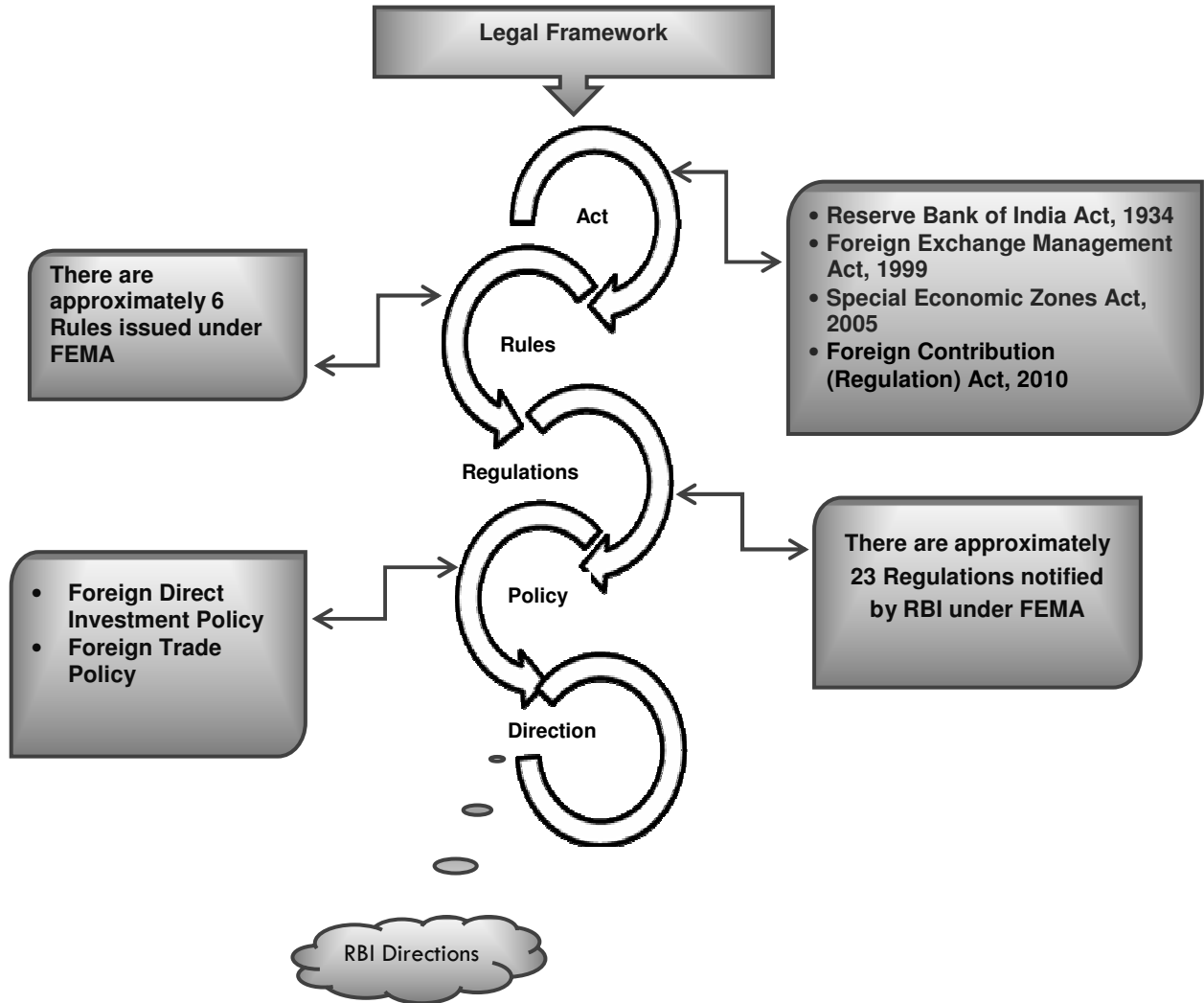
In the event of any doubt, students may write to the Directorate of Professional Development, Perspective Planning & Studies of the Institute for clarification at academics@icsi.edu.

Although care has been taken in publishing this study material yet the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.

Should there be any discrepancy, error or omission noted in the study material, the Institute shall be obliged if the same is brought to its notice for issue of corrigendum in the e-bulletin.

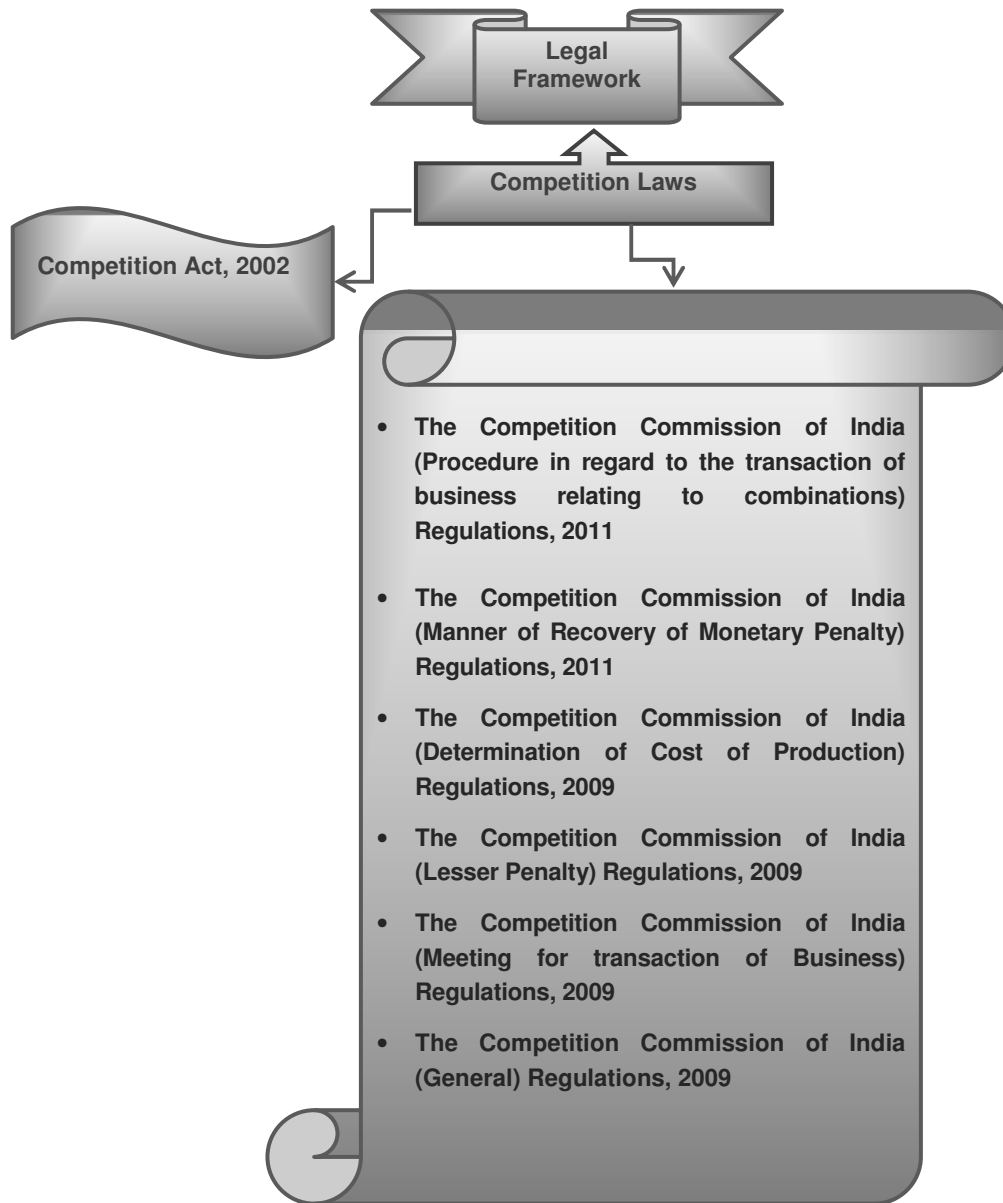
## Part I

### Foreign Exchange Management & NBFCs

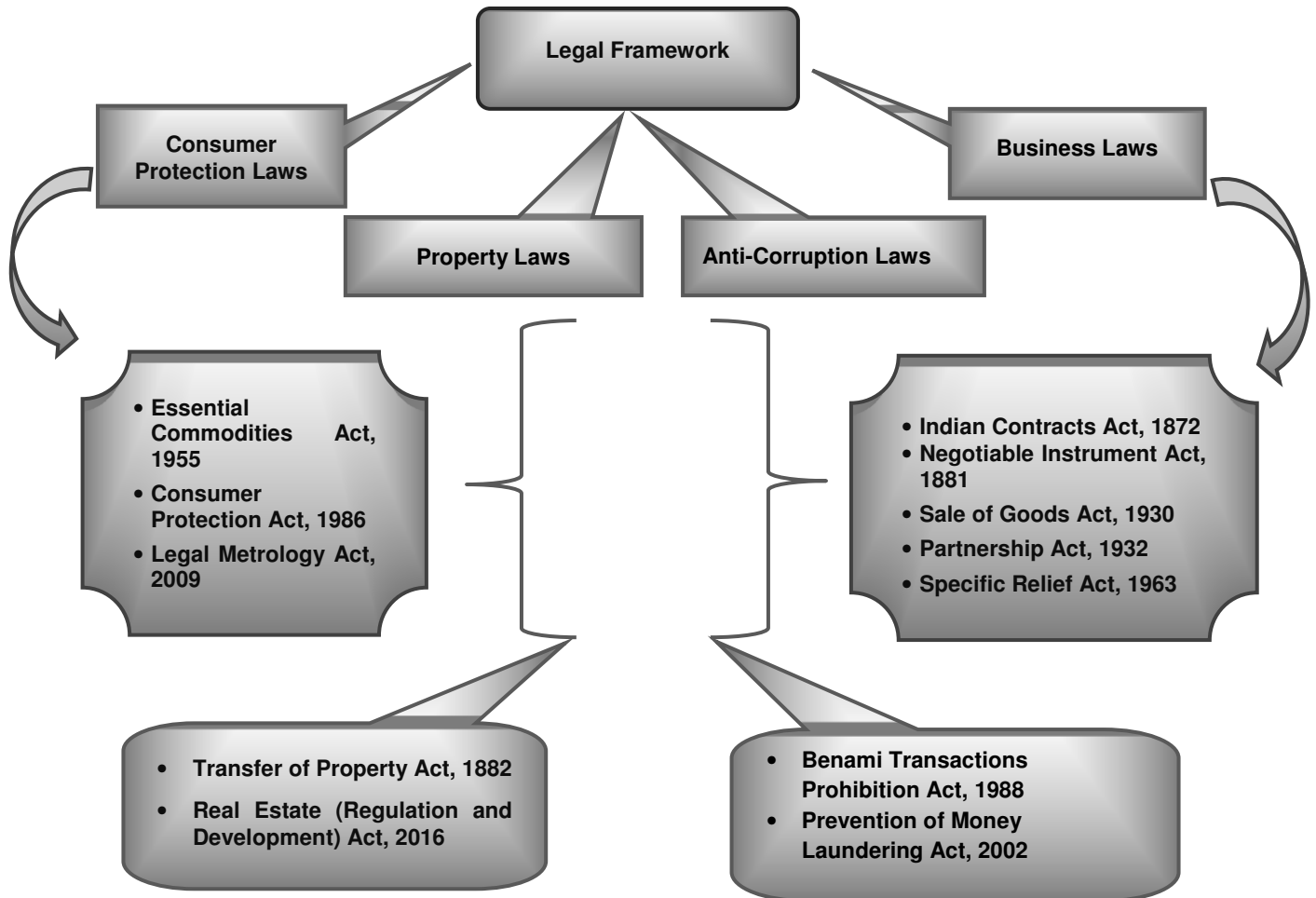




## Part II Competition Act



## Part III Business & Commercial Laws



## EXECUTIVE PROGRAMME

### Module 2

### Paper 7

## Economic, Business and Commercial Laws (Max Marks 100)

## SYLLABUS

### Objectives

- Part I : To provide expert knowledge in Foreign Exchange Management and NBFCs.  
Part II : To provide expert knowledge in Competition Law.  
Part III : To provide working knowledge in Business and Commercial Laws.

### Part I: Foreign Exchange Management &NBFCs (40 Marks)

#### Detailed Contents

- 1. Reserve Bank of India Act, 1934:** Central Banking functions; Monetary policy; Penalties.
- 2. Foreign Exchange Management Act, 1999 :** Introduction
- 3. Foreign Exchange Transactions & Compliances:** Current and Capital Account Transactions; Acquisition & Transfer of Immovable Property in India and Abroad; Realization and Repatriation of Foreign Exchange; Brief information of other FEMA Regulations.
- 4. Foreign Contribution (Regulation) Act, 2010:** Introduction and Object, Eligible Contributor, Eligible Receiver, Registration, Offences and Penalties.
- 5. Foreign Direct Investments – Regulations & FDI Policy:** Automatic and Approval Route of FDI; Setting up of Subsidiary/Joint Venture/Liaison Office/ Branch Office by Non-residents; Foreign Portfolio Investments.
- 6. Overseas Direct Investment:** ODI Policy, foreign currency remittances, Setting up of Subsidiary/Joint Venture/Branch Office.
- 7. Liberalized Remittance Scheme:** Investment Outside India by Indian Residents.
- 8. External Commercial Borrowings (ECB):** An Overview.
- 9. Foreign Trade Policy & Procedure:** Merchandise Exports from India Scheme (MEIS); Service Exports from India Scheme (SEIS); Duty exemption / remission schemes; Export oriented units (EOUS); Electronics Hardware Technology Parks (EHTPS); Software Technology Parks (STPS); Bio-Technology Parks (BTPS). Imports and related policies.
- 10. Non-Banking Finance Companies (NBFCs):** Definition; Types; Requirement of Registration as NBFC and exemptions from registration as NBFC; Micro Finance Institutions, Activities of NBFCs;

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Compliances by the NBFCs and requirements of approvals of RBI; Deposit Accepting and Non-deposit Accepting NBFCs; Deemed NBFC; Core Investment Company and Systemically Important Core Investment Companies; Peer to Peer Lending; Defaults, Adjudication, prosecutions and penalties.

11. **Special Economic Zones Act, 2005:** Establishment of Special Economic Zones; Approval and Authorization to Operate SEZ; Setting up of Unit; Special Economic Zone Authority.

#### **Case Laws, Case Studies & Practical Aspects**

##### **Part II: Competition Law (25 Marks)**

12. **Competition Act, 2002:** Competition Policy ; Anti-Competitive Agreements; Abuse of Dominant Position; Overview of Combination and Regulation of Combinations; Competition Advocacy; Competition Commission of India; Appellate Tribunal.

#### **Case Laws, Case Studies & Practical Aspects**

##### **Part III: Business & Commercial Laws (35 Marks)**

#### **Consumer Protection**

13. **Consumer Protection Act, 1986:** Consumer Protection in India; Rights of Consumers; Consumer Dispute Redressal Forums; Nature and Scope of Remedies.
14. **Essential Commodities Act, 1955:** Essential Commodities; Powers of Central Government; Authorities responsible to administer the Act; Delegation of powers; Nature of Order passed under the Act; Seizure and Confiscation of Essential Commodities; Offences by Companies.
15. **Legal Metrology Act, 2009:** Standard weights and measures; Power of inspection, seizure; Declarations on pre-packaged commodities; Offences and penalties.

#### **Property Law**

16. **Transfer of Property Act, 1882:** Types of Properties; Properties which cannot be Transferred; Rule Against Perpetuities; Lis Pendens; Provisions Relating to Sale; Mortgage, Charge, Lease, Gift and Actionable Claim; Specific Performance.
17. **Real Estate (Regulation and Development) Act, 2016:** Registration of Real Estate Project; Real Estate Agents; Real Estate Regulatory Authority; Central Advisory Council; The Real Estate Appellate Tribunal; Offences, Penalties and Adjudication. Specimen Agreement for Sale between the Promoter and the Allottee; Due Diligence Reporting.

#### **Anti-Corruption Laws**

18. **Benami Transaction Prohibitions (Act):** Benami Property; Benami Transaction, Prohibition of Benami Transaction; Authority, Adjudication of Benami property.
19. **Prevention of Money Laundering:** Problem and adverse effect of money laundering; Methods of money laundering; Offence of money laundering; Attachment, adjudication and confiscation.

#### **Business Laws**

20. **Indian Contracts Act, 1872:** Essential elements of a Valid Contract; Indemnity and Guarantee; Bailment and Pledge; Law of Agency; E-Contract; Landmark judgments.

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21. **Specific Relief Act, 1963:** Specific reliefs and defense; specific performance and defense; unenforceable contracts; Rescission of Contracts; Cancellation of Instruments; Declaratory Decrees; Preventive Reliefs.
22. **Sale of Goods Act, 1930:** Essentials of a Contract of Sale; Sale Distinguished from Agreement to Sell, Bailment, Contract for Work and Labour and Hire-Purchase; Conditions and Warranties; Doctrine of Caveat Emptor; Performance of the Contract of Sale; Landmark judgments.
23. **Partnership Act, 1932:** Rights and Liabilities of Partners; Registration of Firms; Dissolution of Firms and Partnership; Landmark judgments
24. **Negotiable Instrument Act, 1881:** Negotiable Instruments and Parties; Material Alteration; Crossing and bouncing of Cheques; Dishonour of Cheques & its Remedies; Presumption of Law as to Negotiable Instruments; Landmark judgments.

#### **Case Laws, Case Studies & Practical Aspects**



## LESSON WISE SUMMARY

### Economic, Business and Commercial Laws

#### Part I - Foreign Exchange Management & NBFCs

##### Lesson 1 - Reserve Bank of India Act, 1934

The Reserve Bank of India was established on April 1, 1935 in accordance with the provisions of the Reserve Bank of India Act, 1934. The purposes for which the Reserve Bank of India was established as India's central bank have been spelt out in the preamble to the Reserve Bank of India Act, which states as follows:

(i) to regulate the issue of banknotes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage; and

(ii) that it is essential to have a modern monetary policy framework to meet the challenge of an increasingly complex economy ; the primary objective of the monetary policy is to maintain price stability while keeping in mind the objective of growth and the monetary policy framework in India shall be operated by the Reserve Bank of India.

The objective of the lesson is to introduce the students regarding:

- Origins of the Reserve Bank of India;
- Banking Functions;
- Issue bank notes;
- Monetary Policy Functions;
- Public Debt Functions;
- Foreign Exchange Management;
- Banking Regulation & Supervision;
- Regulation and Supervision of NBFCs;
- Regulation & Supervision of Co-operative banks;
- Regulation of Derivatives and Money Market Instruments;
- Payment and Settlement Functions;
- Consumer Protection Functions;
- Financial Inclusion and Development Functions;

##### Lesson 2 - Foreign Exchange Management Act, 1999 – Introduction

The Foreign Exchange Management Act, 1999 (FEMA) is an Act of the Parliament of India to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in

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India. The Act extends to the whole of India and it also applies to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.

It is expected that, at the end of this lesson, students will, *inter alia*, be in a position to:

- Understand the Concept of FEMA;
- Structure and Overall Schemes of FEMA;
- Rules and Regulations framed by RBI under FEMA;

### **Lesson 3 - Foreign Exchange Transactions & Compliances**

The management of foreign exchange is very important in the present day business. FEMA is a regulatory mechanism that enables the Reserve Bank of India to pass regulations and the Central Government to pass rules relating to foreign exchange in tune with the Foreign Trade policy of India. The Act is more transparent in its application as it lays down the areas requiring specific permissions of the Reserve Bank/Government of India on acquisition/holding of foreign exchange. It stipulate the strict compliances in case of import, export, debt funding, equity capital infusion, transfer of shares etc.

The objective of the lesson is to facilitate the students to acquaint with:

- Concept of Current Account Transactions and Capital Account Transactions;
- Compliances of acquisition and transfer of immovable property in India and outside India;
- Provisions of Realisation, Repatriation and Surrender of Foreign Currency;
- Limits for possession or retention of foreign currency or foreign coins; and
- Procedure for Adjudication, Appeal and Compounding.

### **Lesson 4 - Foreign Contribution (Regulation) Act, 2010**

Foreign Contribution (Regulation) Act, 2010 regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. The Act mandates that every bank or authorized person in foreign exchange shall report to specified authority, the prescribed amount of foreign remittance, source and manner in which foreign remittance was received and other particulars.

It is expected that, at the end of this lesson, students will, *inter alia*, be in a position to:

- Regulation of foreign contribution, foreign Source and foreign hospitality;
- Accounts, Intimation, Audit and Disposal of Assets; and
- Inspection, Search and Seizure.

### **Lesson 5 - Foreign Direct Investment – Regulation & Policy**

Foreign Direct Investment (FDI) is a major source of non-debt financial resource for the economic development of India. Foreign companies invest in India to take advantage of relatively lower wages, special investment privileges such as tax exemptions, etc. To promote Foreign Direct Investment (FDI), the Government has put in place an investor friendly policy, wherein except for a small negative list, most sectors are open for 100% FDI under the Automatic route.

The objective of the lesson is to familiarize the students with:

- Eligible Investors under FDI;
- Entry Routes for Investment i.e. Automatic Route, Government Route, Competent authority etc;
- Instruments for Investments i.e. equity shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares etc;
- Prohibited and Permitted Sectors;
- Conditions of FDI in major sector i.e. E-commerce activity, Insurance etc.;
- Conversion of ECB/lump sum fee/royalty etc. into Equity;
- Provisions of FDI with respect to Issue of Rights/Bonus Shares& Employees Stock Option Scheme (ESOPS)/Sweat Equity;
- Acquisition of Shares under Scheme of Merger/Demerger/Amalgamation;
- Modes of Payment allowed for receiving FDI in an Indian Company;
- Reporting of FDI i.e. Reporting of Inflow/Issue of shares/Transfer of shares etc; and
- Conditions and procedure for establishment of branch office (BO)/ liaison office (LO)/ project Office (PO) in India.

### **Lesson 6 - Overseas Direct Investments (ODI)**

Overseas Direct Investments (ODI) refers to the investments made in the overseas entities by way of contribution to their capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but it does not include portfolio investment.

Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues for promoting global business by Indian entrepreneurs.

The purpose of the lesson is to familiarize the students with:

- Two way approach to the approval of direct investment, i.e. Automatic Route and Approval Route;
- Proposal for making ODI under approval route and Prior RBI approval;
- Financial Commitment;
- Eligibility to make ODI under the Automatic Route;
- Permissible Sources for Funding Overseas Direct Investment;
- Acquisition/Sale of Foreign Securities by Resident Individual in India; and
- Obligations of Indian party which has made direct investment outside India etc.

### **Lesson 7 - Liberalized Remittance Scheme (LRS)**

Liberalised Remittance Scheme was introduced on February 4, 2004 as a liberalization measure to facilitate resident individuals to remit funds abroad for permitted current or capital account transactions or



combination of both. The Scheme is available to all resident individuals including minors and not available to corporates, partnership firms, HUF and trusts.

This lesson is designed to familiarize the students with:

- Overview of Liberalised Remittance Scheme;
- Permissible Capital Account Transactions and Current Account Transactions by an individual under LRS; and
- Remittance facilities to Persons other than Individuals.

### **Lesson 8 - External Commercial Borrowings (ECB)**

External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. Transactions on account of External Commercial Borrowings (ECB) are governed by clause (d) of sub-section 3 of section 6 of the Foreign Exchange Management Act, 1999 (FEMA). However, ECB framework is not applicable in respect of investment in Non-convertible Debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPs).

The objective of the lesson is to familiarize the students with:

- Overview of ECB, Tracks of ECB i.e. Track I, Track II & Track III and kinds of ECB;
- Routes available for raising ECB;
- Provisions of Conversion of ECB into equity;
- Procedure for raising ECB; and
- Reporting Requirements i.e. In case of Changes in terms and conditions of ECB, Conversion of ECB into equity etc.

### **Lesson 9 - Foreign Trade Policy and Procedure**

The Foreign Trade Policy, 2015-20, is notified by Central Government seeks to provide a stable and sustainable policy environment for foreign trade in merchandise and services. India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports.

The objective of the lesson is to facilitate the students to acquaint with:

- Provisions regarding Imports and Exports;
- Importer-Exporter Code (IEC) Number/E-IEC;
- Required Documents for Export/Import of Goods From/into India;
- Merchandise Exports from India Scheme (MEIS);
- Service Exports from India Scheme (SEIS);
- Duty exemption / remission schemes;
- Export oriented units (EOUS);

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- Electronics Hardware Technology Parks (EHTPS);
- Software Technology Parks (STPS);
- Bio-Technology Parks (BTPS); and
- Imports and related policies.

## **Lesson 10 - Non-Banking Finance Companies (NBFCs)**

India has financial institutions which are not banks but which accept deposits and extend credit like banks. These are called Non-Banking Financial Companies (NBFCs) in India. The regulation and supervision of non-banking financial companies is one of the critical functions that the Reserve Bank of India (RBI) has been entrusted with. Reserve Bank of India (RBI) Act mandates every non-banking financial company to obtain a certificate of registration from RBI and to maintain net owned fund as may be specified by RBI in the Official Gazette, before commencing such non-banking financial business. Further, as part of regulation and supervision of non-banking financial companies, RBI has been conferred with the statutory powers to regulate or prohibit issue of prospectus or advertisements soliciting deposits of money by non-banking financial companies, power to determine policy and issue directions to non-banking financial companies.

The objective of the lesson is to introduce the students regarding:

- Types of NBFC;
- Activities of NBFCs;
- Compliances by the NBFCs;
- Deposit Accepting and Non-deposit Accepting NBFCs;
- Core Investment Company;
- Systemically Important Core Investment Companies; and
- Peer to Peer Lending.

## **Lesson 11 - Special Economic Zones Act, 2005**

Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs. Goods and services going into the SEZ area from Domestic Tariff Area treated as exports and goods coming from the SEZ area into DTA treated as if these are being imported.

Special Economic Zone Act, 2005 to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. SEZ Rules, 2006 authorises company secretaries to appear before Board of Approval constituted under Section 8 of the Act.

The purpose of this lesson is to provide the students with:

- Establishment of Special Economic Zones;
- Approval and Authorization to Operate SEZ;
- Setting up of Unit; and
- Special Economic Zone Authority.

**Part II- Competition Law****Lesson 12-Competition Act, 2002**

Economic theory suggests that prices and quantities in a competitive market equilibrate to levels that generate efficient outcomes at a given point of time. Competition is therefore, beneficial as it provides to consumers wider choice and provides sellers with stronger incentives to minimize costs, so eliminating waste. Competition Act, 2002 to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto. Competition Act, 2002, authorizes a company secretary holding a certificate of practice to appear before Competition Commission of India.

The objective of the lesson is to introduce the students regarding:

- Competition Policy;
- Anti-Competitive Agreements;
- Abuse of Dominant Position;
- Overview of Combination and Regulation of Combinations;
- Competition Advocacy;
- Competition Commission of India; and
- Right to legal representation.

**Part III - Business & Commercial Laws****CONSUMER PROTECTION****Lesson 13- Consumer Protection Act, 1986**

The Consumer Protection Act, 1986 was enacted to provide for better protection of the interests of consumers and for the purpose of making provision for establishment of consumer protection councils and other authorities for the settlement of consumer disputes, etc. Consumer markets for goods and services have undergone drastic transformation since the enactment of the Consumer Protection Act in 1986.

The objective of the lesson is to introduce the students regarding:

- Consumer Protection in India;
- Rights of Consumers;
- Consumer Dispute Redressal Forums; and
- Nature and Scope of Remedies.

**Lesson 14 - Essential Commodities Act, 1955**

The Preamble to the Act says that it is an Act to provide in the interest of the general public for the control of the production, supply and distribution of, and trade and commerce in, certain

commodities. The dominant object and intendment of the Act is to secure equitable distribution and availability at fair prices of essential commodities in the interest of the general public. The interest of the general public necessarily connotes the interest of the consuming public and not the interest of the dealer.

Necessary powers have been given to the Central Government under the Act to administer the provisions of the Act by issuing orders/directions notified in the official gazette and by delegating the authority to State Governments and administrators of Union Territories. The Central Government at its apex level is responsible for achieving the objectives enshrined by the Parliament under this Act for the welfare and general well-being of all the citizens.

The purpose of this lesson is to provide the students with:

- Essential Commodities;
- Powers of Central Government;
- Authorities responsible to administer the Act;
- Seizure and Confiscation of Essential Commodities; and
- Offences by Companies.

### **Lesson 15 - Legal Metrology Act, 2009**

The branch of knowledge concerning weights and measures is technically known as legal metrology. In basic form, metrology is the science of measurement. Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.

The objective of the lesson is to introduce the students regarding:

- Standard weights and measures;
- Power of inspection, seizure;
- Declarations on pre-packaged commodities; and
- Offences and penalties.

### **PROPERTY LAW**

### **Lesson 16 - Transfer of Property Act, 1882**

Property has, always, been on the fundamental elements of socio economic life of an individual. Transfer of Property means an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself and one or more other living persons and "to transfer property" is to perform such an act. Consequently, the law relating to transfer of property is not only an important branch of civil law but also one that demands proper elucidation due to its complexity.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to:

- Understand types of Properties;
- Know Rules relating to Transfer of Property;

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- Properties which cannot be transferred;
- Lis Pendens; and
- Understand Provisions Relating to Sale; Mortgage, Charge, Lease.

### **Lesson 17 - Real Estate (Regulation and Development) Act, 2016**

Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.

As per Section 56 of the Act, the applicant or appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

The objective of the lesson is to introduce the students regarding:

- Registration of Real Estate Project;
- Real Estate Agents;
- Real Estate Regulatory Authority;
- The Real Estate Appellate Tribunal; and
- Specimen Agreement for Sale between the Promoter and the Allottee; Due Diligence Reporting.

### **ANTI-CORRUPTION LAWS**

#### **Lesson 18 - Benami Transaction Prohibitions (Act)**

Benami Transactions (Prohibition) Act, 1988 defines benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami. The legislation is also intended to effectively prohibit benami transactions and consequently prevent circumvention of law through unfair practices. It empowers the Government to confiscate benami property by following due procedure. It therefore promotes equity across all citizens.

The purpose of this lesson is to provide the students with:

- Benami Property;
- Benami Transaction;
- Prohibition of Benami Transaction; and
- Adjudication of Benami property.

#### **Lesson 19 - Prevention of Money Laundering**

The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. The economic

and political influence of criminal organisations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society. In countries transitioning to democratic systems, this criminal influence can undermine the transition. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.

The Prevention of Money-laundering Act, 2002 enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.

The objective of the lesson is to introduce the students regarding:

- Problem and adverse effect of money laundering;
- Methods of money laundering;
- Offence of money laundering; and
- Attachment, adjudication and confiscation.

## **BUSINESS LAWS**

### **Lesson 20 - Indian Contracts Act, 1872**

The Law of Contract constitutes the most important branch of Mercantile or Commercial Law. It affects everybody, more so, trade, commerce and industry. It may be said that the contract is the foundation of the modern world. The Indian Contract Act, 1872 regulates all the transactions of a company.

- It lays down the general principles relating to the formation and enforceability of contracts; rules governing the provisions of an agreement and offer;
- Various types of contracts including those of indemnity and guarantee, bailment and pledge and agency; and
- It also contains provisions pertaining to breach of a contract.

### **Lesson 21 - Specific Relief Act, 1963**

The Specific Relief Act, 1963 was enacted to define and amend the law relating to certain kinds of specific relief. It contains provisions, *inter alia*, specific performance of contracts, contracts not specifically enforceable, parties who may obtain and against whom specific performance may be obtained, etc. It also confers wide discretionary powers upon the courts to decree specific performance and to refuse injunction, etc.

It is expected that, at the end of this lesson, students will, *inter alia*, be in a position to:

- Understand specific reliefs and defense;
- Specific performance and defense;
- Unenforceable contracts; and
- Know Decrees and Preventive Reliefs.

### **Lesson 22-Sale of Goods Act, 1930**

The law relating to sale of goods is contained in the Sale of Goods Act, 1930. In a sale, the property in

the goods sold passes to the buyer at the time of contract so that he becomes the owner of the goods. In an agreement to sell, the ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfillment of some conditions subject to which the property in the goods is to be transferred.

The purpose of this lesson is to provide the students with:

- Essentials of a Contract of Sale;
- Sale Distinguished from Agreement to Sell;
- Bailment;
- Conditions and Warranties; and
- Doctrine of Caveat Emptor.

### **Lesson 23 - Partnership Act, 1932**

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually, "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm-name". In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to:

- Understand Rights and Liabilities of Partners;
- Registration of Firms;
- Admission of new partners; and
- Dissolution of Firms and Partnership.

### **Lesson 24 - Negotiable Instrument Act, 1881**

A negotiable instrument may be defined as an instrument, the property in which is acquired by anyone who takes it bona fide, and for value, notwithstanding any defect of title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of instrument.

The objective of the lesson is to introduce the students regarding:

- Negotiable Instruments and Parties;
- Effect of Negotiability;
- Crossing and bouncing of Cheques;
- Dishonour of Cheques & its Remedies; and
- Presumption of Law as to Negotiable Instruments.

## LIST OF RECOMMENDED BOOKS

### Paper 7: ECONOMIC, BUSINESS AND COMMERCIAL LAWS

1. Snow White: Foreign Exchange Management Manual.
2. Statutory Manual
3. Statutory Guide for NBFCs with Law Relating to Securitisation and Reconstruction of Financial Assets- Taxmann (2017)
4. Law & Practice Relating to Special Economic Zones- Taxmann Publications Private Limited
5. T. Ramappa: Competition Law in India – Policies, Issues, and Developments; Oxford University Press, New Delhi.
6. Guide to Competition Law- Containing Commentary on the Competition Act, 2002; MRTP Act, 1969 & the Consumer Protection Act, 1986 (Set of 2 Volumes)- S.M.Dugar, revised by Arijit Pasayat, Sudhansu Kumar (2016)
7. S M Dugar's Guide to Competition Act, 2002- Author : S.M.Dugar, revised by Sudhansu Kumar with a foreword by Dhanendra Kumar (2018)
8. Consumer Protection Law and Practice- Dr. V.K. Aggarwal
9. Commentary on Consumer Protection Act, 1986- Y.V.Rao, with a Foreword by Justice I. Venkatanarayana (2017)
10. Essential Commodities Act, 1955 (Act No. 10 of 1955) (Lawmann's) (2017)- Lawmann
11. The Legal Metrology Act, 2009- Virag Gupta & Gaurav Pathak (2018)
12. The Transfer of Property Act, 1882 with Exhaustive Case Law- Universal's Concise Commentary (2017)
13. Real Estate (Regulation and Development) Act 2016 - Taxmann (2017)
14. Prohibition of Benami Property Transactions Act 1988 (Bare Act) (August 2016 Edition)- Taxmann
15. Law on Prevention of Money Laundering in India (2017)- M C Mehanathan
16. The Indian Contract & Specific Relief Acts (Set of 2 Volumes) (2017)- Pollock and Sir Dinshaw Fardunji Mulla
17. Sale of Goods Act, 1930 (Lawmann's)(2017)- Lawmann
18. Indian Partnership Act, 1932 (Lawmann's) (2017)- Lawmann
19. The Negotiable Instruments Act (2016)- Universal Law Series



**Journals:**

1. e-Bulletin 'Student Company Secretary' : The ICSI, New Delhi-110 003.
2. Chartered Secretary (Monthly) : The ICSI, New Delhi-110 003.
3. All India Reporter : All India Reporter Ltd., Congress Nagar, Nagpur.

**Note:**

1. Students are advised to read the above journals for updating the knowledge.
2. Students are advised to read/refer the latest editions of the recommended books.



## ARRANGEMENT OF STUDY LESSONS

Module-2 Paper-7

### ECONOMIC, BUSINESS AND COMMERCIAL LAWS

**Sr. No.**

**Lesson Title**

#### Part I: Foreign Exchange Management and NBFCs

1. Reserve Bank of India Act, 1934
2. Foreign Exchange Management Act, 1999
3. Foreign Exchange Transactions & Compliances
4. Foreign Contribution (Regulation) Act, 2010
5. Foreign Direct Investments – Regulations & FDI Policy
6. Overseas Direct Investment
7. Liberalized Remittance Scheme
8. External Commercial Borrowings (ECB)
9. Foreign Trade Policy & Procedure
10. Non-Banking Finance Companies (NBFCs)
11. Special Economic Zones Act, 2005

#### Case Laws, Case Studies & Practical Aspects

#### Part II : Competition Law

12. Competition Act, 2002

#### Part III : Business & Commercial Laws

#### Consumer Protection

13. Consumer Protection Act, 1986:
14. Essential Commodities Act, 1955
15. Legal Metrology Act, 2009

#### Property Law

16. Transfer of Property Act, 1882
17. Real Estate (Regulation and Development) Act, 2016

**Anti-Corruption Laws**

18. Benami Transaction Prohibitions (Act)
19. Prevention of Money Laundering

**Business Laws**

20. Indian Contracts Act, 1872
  21. Specific Relief Act, 1963
  22. Sale of Goods Act, 1930
  23. Partnership Act, 1932
  24. Negotiable Instrument Act, 1881
-

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# Lesson 1

## Reserve Bank of India Act, 1934

### LESSON OUTLINE

- Learning objectives
- Introduction
- Origins of the Reserve Bank of India
- Organisational Structure & Management
- Reserve Bank as Banker to Banks
- Foreign Exchange Reserves Management
- Monetary policy
- Instruments of Monetary Policy
- Inflation target
- Monetary Policy Report
- Penalty
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

The Reserve Bank designs and implements the regulatory policy framework for banking and non-banking financial institutions with the aim of providing people access to the banking system, protecting depositors' interest, and maintaining the overall health of the financial system.

The rapid pace of growth achieved by financial system in the deregulated regime necessitated a deepening and widening of access to banking services. The new millennium has seen the Reserve Bank play an active role in balancing the relationship between banks and customers; focusing on financial inclusion; setting up administrative machinery to handle customer grievances; pursuing clean note policy and ensuring development and oversight of secure and robust payment and settlement systems.

The object of the study is to familiarize the students with the Central Banking functions and Monetary Policy of the Reserve Bank of India.

*The Preamble to the Reserve Bank of India Act, 1934 specifies its objective as "to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage".*

## INTRODUCTION

The origin of the Reserve Bank of India can be traced back to 1926, when the Royal Commission on Indian Currency and Finance – also known as the Hilton-Young Commission – recommended the creation of a central bank for India to separate the control of currency and credit from the Government and to augment banking facilities throughout the country. The Reserve Bank of India Act, 1934 established the Reserve Bank and set in motion a series of actions culminating in the start of operations in 1935. Since then, the Reserve Bank's role and functions have undergone numerous changes, as the nature of Indian economy and financial sector changed.

Starting as a private shareholders' bank, the Reserve Bank was nationalized in 1949. It then assumed the responsibility to meet the aspirations of a newly independent country and its people. The Reserve Bank's nationalisation aimed at achieving coordination between the policies of the government and those of central bank.

The Preamble to the Reserve Bank of India Act, 1934 (the Act), under which it was constituted, specifies its objective as “to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage”.

The objectives outlined in the Preamble hold good. As evident from the multifaceted functions that the Reserve Bank performs today, its role and priorities have, changed in tandem with national priorities and global developments. Essentially, the Reserve Bank has demonstrated dynamism and flexibility to meet the requirements of an evolving economy.

A core function of the Reserve Bank in the past years has been the formulation and implementation of monetary policy with the objective of maintaining price stability and ensuring adequate flow of credit to productive sectors of the economy. To these was added, in more recent times, the goal of maintaining financial stability. The objective of maintaining financial stability has spanned its role from external account management to oversight of banks and non-banking financial institutions as also of money, government securities and foreign exchange markets.

The Reserve Bank designs and implements the regulatory policy framework for banking and non-banking financial institutions with the aim of providing people access to the banking system, protecting depositors' interest, and maintaining overall health of the financial system. Its function of regulating the commercial banking sector, which emerged with the enactment of Banking Regulation Act, 1949, has over the time, expanded to cover other entities. Thus, amendments to Banking Regulation Act, 1949 brought cooperative banks and regional rural banks under the Reserve Bank's jurisdiction, while amendments to the Reserve Bank of India Act saw development finance institutions, non-banking financial companies and primary dealers coming under its regulation, as these entities became important players in the financial system and markets.

Similarly, the global economic uncertainties during and after the Second World War warranted conservation of scarce foreign exchange reserves by sovereign intervention and allocation. Initially, the Reserve Bank carried out regulation of foreign exchange transactions under the Defence of India Rules, 1939 and later, under the Foreign Exchange Regulation Act of 1947. Over the years, as the economy matured, the role shifted from foreign exchange regulation to foreign exchange management.

Post-independence, as the emerging nation tried to meet the aspirations of a large and diversified populace, the Reserve Bank, with its experience and expertise, was entrusted with a variety of developmental roles, particularly in the field of credit delivery. With the onset of economic planning in 1950-51, the Reserve Bank undertook a variety of developmental functions to encourage savings and capital formation and widen and deepen the agricultural and industrial credit set-up. Institution building was a significant aspect of its role in the sixties and the seventies. The strategy for nearly four decades placed emphasis on the state-induced or state-supported developmental efforts. Subsequently, the role of financial sector and financial markets was



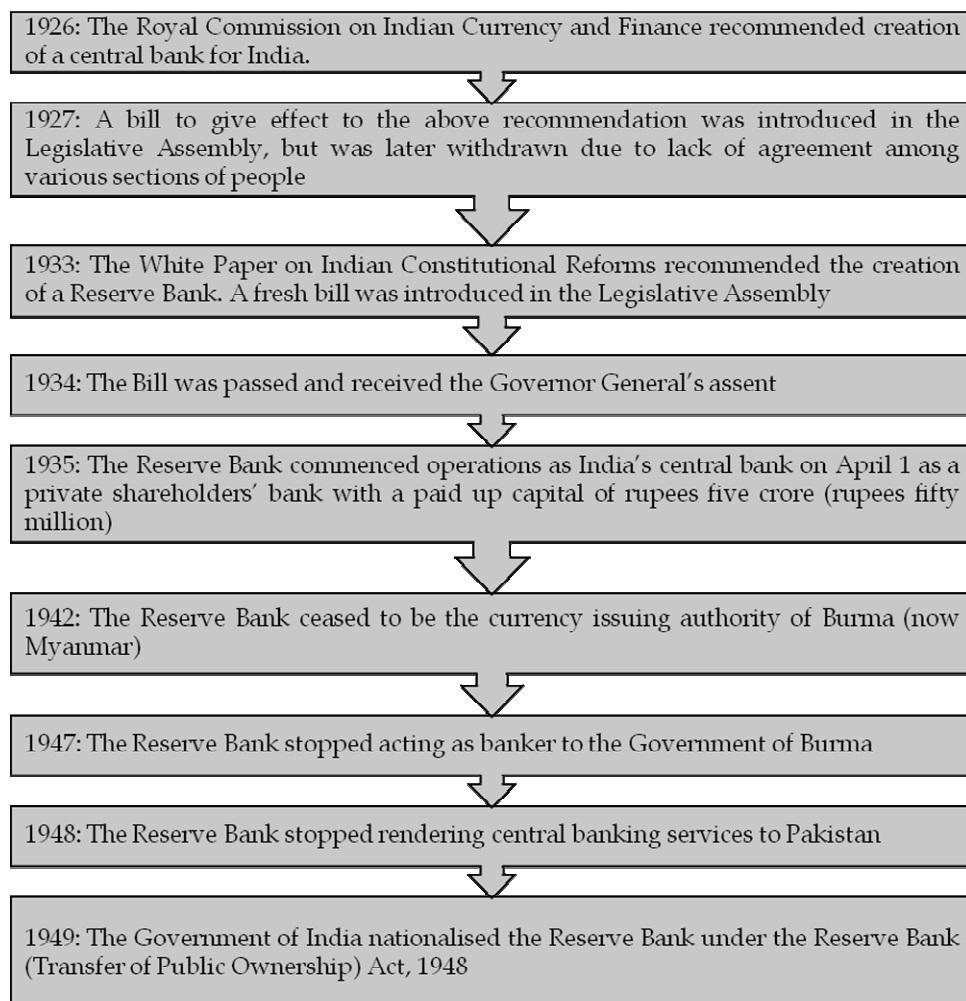
also given an explicit recognition in the development strategy.

The aftermath of 1991 balance of payments and foreign exchange crisis saw a paradigm shift in India's economic and financial policies. The approach under the reform era included a thrust towards liberalisation, privatisation, globalisation and concerted efforts at strengthening the existing and emerging institutions and market participants. The Reserve Bank adopted international best practices in areas, such as, prudential regulation, banking technology, variety of monetary policy instruments, external sector management and currency management to make the new policy framework effective.

The rapid pace of growth achieved by the financial system in deregulated regime necessitated a deepening and widening of access to banking services. The new millennium has seen the Reserve Bank play an active role in balancing the relationship between banks and customers; focusing on financial inclusion; setting up administrative machinery to handle customer grievances; pursuing clean note policy and ensuring development and oversight of secure and robust payment and settlement systems.

The last two-and-a-half decades have also seen growing integration of national economy and financial system with the globalising world. While rising global integration has its advantages in terms of expanding the scope and scale of growth of the Indian economy, it also exposes India to global shocks. Hence, maintaining financial stability became an important mandate for the Reserve Bank. This, in turn, has brought forth the need for effective coordination and consultation with other regulators within the country and abroad.

### Origin of the Reserve Bank of India at a glance



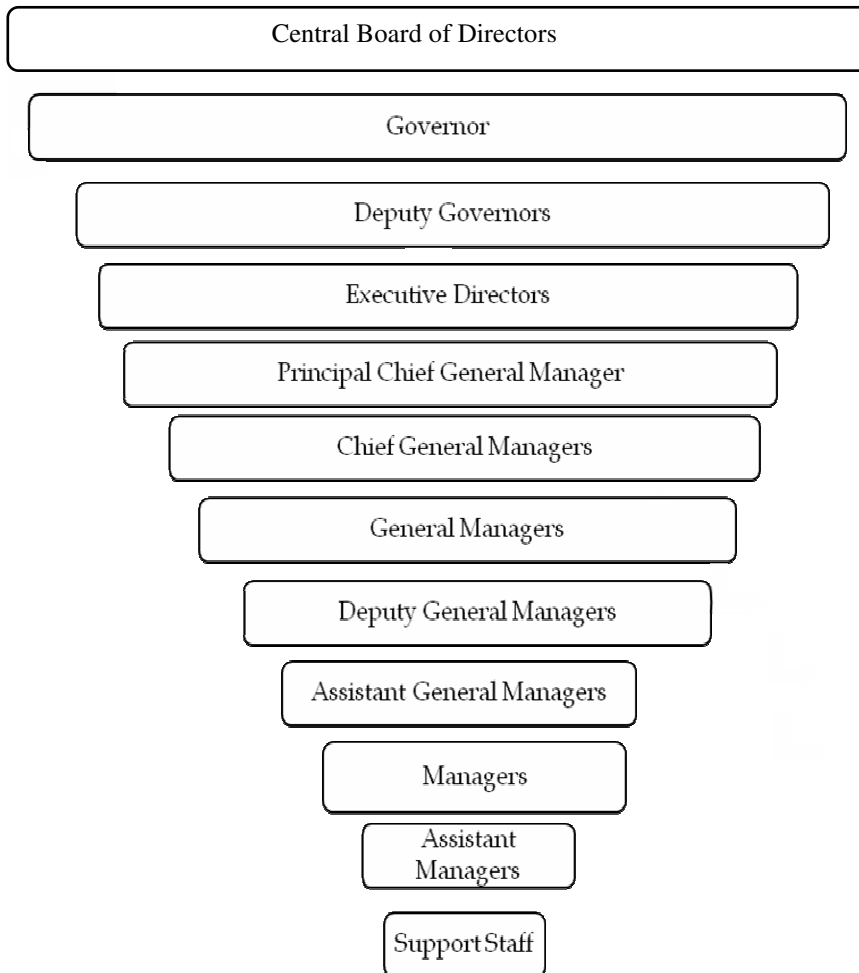
## ESTABLISHMENT AND INCORPORATION OF RESERVE BANK

Section 3 of the RBI Act states that a bank to be called the Reserve Bank of India shall be constituted for the purposes of taking over the management of the currency from the Central Government and of carrying on the business of banking in accordance with the provisions of the Act.

Sub section (2) of this section provides that the Bank shall be a body corporate by the name of Reserve Bank of India, having perpetual succession and a common seal, and shall by the said name sue and be sued.

## ORGANISATIONAL STRUCTURE & MANAGEMENT

The organizational structure of RBI can be classified under the following designations:



## CENTRAL BOARD OF DIRECTORS

The Central Board of Directors is at the top of the Reserve Bank's organisational structure. Appointed by the Government under the provisions of Reserve Bank of India Act, 1934, the Central Board has the primary authority and responsibility for the oversight of Reserve Bank. It delegates specific functions to the Local Boards and various committees. The Governor is the Reserve Bank's chief executive.

The Governor supervises and directs the affairs and business of RBI. The management team also includes Deputy Governors and Executive Directors.

The Central Government nominates fourteen Directors on the Central Board, including one Director each from the four Local Boards. The other ten Directors represent different sectors of the economy, such as, agriculture, industry, trade, and professions. All these appointments are made for a period of four years. The Government also nominates one Government official as a Director representing the Government, who is usually the Finance Secretary to the Government of India and remains on the Board 'during the pleasure of the Central Government'.

The Governor and Deputy Governors devote their whole time to the affairs of the Bank, and receive such salaries and allowances as may be determined by the Central Board, with the approval of the Central Government [Section 8(2)]

The Deputy Governor and the Director nominated may attend any meeting of the Central Board and take part in its deliberations but shall not be entitled to vote. However when the Governor is, for any reason, unable to attend any such meeting, a Deputy Governor authorized by him in this behalf in writing may vote for him at that meeting. [Section 8(3)]

The Governor and a Deputy Governor hold the office for such term not exceeding five years as the Central Government may fix when appointing them, and they are eligible for re-appointment. A Director nominated holds the office for a period of four years and thereafter until his successor is nominated. [Section 8(4)]

No act or proceeding of the Board can be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution, of the board. [Section 8(5)]

A retiring director shall be eligible for re-nomination. [Section 8(7)]

## Local Boards

The Reserve Bank Governor and a maximum of four Deputy Governors are also ex officio Directors on the Central Board. The Reserve Bank also has four Local Boards, constituted by the Central Government under the RBI Act, one each for the Western, Eastern, Northern and Southern areas of the country, which are located in Mumbai, Kolkata, New Delhi and Chennai. Each of these Boards has five members appointed by the Central Government for a term of four years and thereafter until his successor is appointed. They are eligible for re-appointment [Section 9(3)]. The members of the Local Board shall elect from amongst themselves one person to be the Chairman of the Board. [Section 9(2)]. These Boards represent territorial and economic interests of their respective areas, and advise the Central Board on matters, such as, issues relating to local cooperative and indigenous banks. They also perform other functions that the Central Board may delegate to them. [Section 9(1)]

## Offices and Branches

The Reserve Bank has a network of offices and branches through which it discharges its responsibilities. The units operating in the four metros — Mumbai, Kolkata, Delhi and Chennai — are known as offices, while the units located at other cities and towns are called branches. Currently, the Reserve Bank has its offices, including branches, at 27 locations in India. The offices and larger branches are headed by a senior officer of the rank of Chief General Manager, designated as Regional Director while smaller branches are headed by a senior officer of the rank of General Manager.

## FUNCTIONS OF THE RESERVE BANK

The statutes governing the establishment and mandates of central banks play a crucial role in determining their functions across the world. The RBI has been constituted under the Reserve Bank of India (RBI Act, 1934). The legal backing for the functions of the RBI is not only confined to the provisions of the RBI Act, but also spread over a number of statutes, such as the Banking Regulation Act, 1949, Foreign Exchange Management Act, 1999, Government Securities Act, 2006, Payment and Settlement Systems Act, 2007, etc.

The purposes for which the Reserve Bank of India established as India's central bank have been spelt out in the preamble to the RBI Act, which states as follows:

- (i) to regulate the issue of banknotes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage; and
- (ii) that it is essential to have a modern monetary policy framework to meet the challenge of an increasingly complex economy: the primary objective of the monetary policy is to maintain price stability while keeping in mind the objective of growth and the monetary policy framework in India shall be operated by the Reserve Bank of India .

***The functions of the Reserve Bank of India can be summarized as under:***

- Banking Functions
- Issue bank notes
- Monetary Policy Functions
- Public Debt Functions
- Foreign Exchange Management
- Banking Regulation & Supervision
- Regulation and Supervision of NBFCs
- Regulation & Supervision of Co-operative banks
- Regulation of Derivatives and Money Market Instruments
- Payment and Settlement Functions
- Consumer Protection Functions
- Financial Inclusion and Development Functions

### Banking Functions

The general superintendence and direction of the affairs and business of RBI is entrusted to Central Board having nominees from the Central Government and Directors appointed under Section 8 of the RBI Act. The Board of RBI is headed by the Governor and assisted by not more than four Deputy Governors.

The Board exercises all powers and does all acts and things which may be exercised by the RBI. Section 17 of the RBI Act enables RBI to do banking business, such as accepting deposits, without interest, from any person. The other businesses, which the RBI may transact, are also mentioned in the said

provision. It states that RBI may transact various businesses such as acceptance of deposits without interest from Central Government and State Governments, purchase, sale and rediscount of Bills of Exchange, short term Loans and Advances to banks, annual Contributions to National Rural Credit Funds, dealing in Derivatives, purchase and sale of Government Securities, purchase and sale of shares of State Bank of India, National Housing Bank, Deposit Insurance and Credit Guarantee Corporation, etc., keeping of deposits with SBI for specific purposes, making and issue of Banknotes, etc.

Similarly, Section 18 facilitates the RBI to act as a 'Lender of Last Resort'; whereas Section 19 states the list of businesses which the RBI may not transact. This apart, the provisions of RBI Act enables the RBI to act as banker to Central Government and State Governments. Under Sections 20 and 21 the RBI shall have an obligation and right respectively to accept monies for account of Central Government and to make payments up to the amount standing to the credit of its account, and to carry out its exchange, remittance and other banking operations, including the management of public debt of the Union. In the case of State Governments, the said banking functions may be undertaken by way of an agreement between RBI and the State Government concerned as provided in Section 21-A of RBI Act. These agreements made between the RBI and the State Governments are statutory as they are required to be laid before the Parliament as soon as they are made.

### Issue Functions

Right to issue bank notes is one of the key central banking functions of the RBI. Section 22 of RBI Act confers RBI with sole right to issue bank notes in India. The issue function of bank notes is performed by the Issue Department, which is separated and kept wholly distinct from Banking Department. The RBI Act enables the RBI to recommend to Central Government the denomination of bank notes, i.e. two rupees, five rupees, ten rupees, twenty rupees, fifty rupees, one hundred rupees, five hundred rupees, one thousand rupees, two thousand rupees, five thousand rupees and ten thousand rupees or other denominations not exceeding ten thousand rupees.

The design, form and material of bank notes is approved by Central Government on the recommendations of Central Board of the RBI. Every bank note is a legal tender at any place in India, however, on recommendation of the Central Board, the Central Government may declare any series of bank notes of any denomination as not to be a legal tender. Another important function is exchange of mutilated or torn notes, which under the RBI Act is not a matter of right, but a matter of grace. The bank notes that are being issued by RBI are exempt from payment of stamp duty .

### Monetary Policy Function

Chapter III-F of the RBI Act provides a statutory basis for Monetary Policy Framework and the Monetary Policy Committee (MPC). The Central Government, in consultation with the RBI shall determine the inflation target in terms of the Consumer Price Index, once in every five years, which needs to be notified in the Official Gazette. Similarly, it is the Central Government that should constitute a Monetary Policy Committee by notification in the Official Gazette.

The Monetary Policy Committee consists of

- (a) the Governor of the RBI;
- (b) Deputy Governor of the RBI in charge of Monetary Policy;
- (c) one officer of the RBI to be nominated by the Central Board; and
- (d) three persons to be appointed by the Central Government .

The Monetary Policy Committee has been entrusted with the statutory duty to determine the Policy Rate required to achieve the inflation target. The decision of the Monetary Policy Committee is binding on RBI and the RBI is required publish a document explaining the steps to be taken to implement the decisions of the Monetary Policy Committee. The meetings of the MPC are required to be held at least 4 times a year and its decisions to be published after each meeting.

### **Public Debt Functions**

The Parliament of India enacted the Government Securities Act, 2006 ('GS Act') with an objective to consolidate and amend the law relating to Government securities and its management by the Reserve Bank of India. The GS Act applies to Government securities created and issued by the Central Government or a State Government. The GS Act prescribes the procedure and modalities to be followed by RBI in the management of public debt and also confers various powers on RBI including the power to determine the title to a Government security if there exists any doubt in the opinion of RBI. Further, Section 18 of the GS Act provides that no order made by RBI under this Act shall be called in question by any Court for the reasons stated therein. Prior to the enactment of GS Act, the said public debt functions of the RBI have been governed under the provisions of Public Debt Act, 1944. However, the enactment of the GS Act has not fully repealed the Public Debt Act, 1944. This is evident from Section 31 of the GS Act which states that the Public Debt Act, 1944, shall cease to apply to the Government securities to which this Act (GS Act) applies.

### **Foreign Exchange Management**

The powers and responsibilities with respect to external trades and payments, development and maintenance of foreign exchange market in India have been conferred on RBI under the provisions of Foreign Exchange Management Act, 1999 ('FEMA'). Section 10 of the FEMA empowers the RBI to authorize any person to be known as authorized person to deal in foreign exchange or in foreign securities, as an authorized dealer, money changer or off-shore banking unit or in any other manner as it deems fit. Similarly, FEMA empowers the RBI to revoke an authorization issued to an authorized dealer in public interest, or if the authorized person has failed to comply with the conditions subject to which the authorization was granted or has contravened any of the provisions of the FEMA or any rule, regulation, notification, direction or order issued by the RBI. However, the revocation of an authorization may be done by the RBI after following the prescribed procedure in FEMA or the Regulations made thereunder. Section 13 of the FEMA details out the contraventions and penalties, and the RBI has been empowered with the power to compound such contraventions under Section 15 of the FEMA.

### **Banking Regulation & Supervision**

The power to regulate and supervise banks has been provided to RBI under the provisions of Banking Regulation Act, 1949 (BR Act, 1949). Although, the preamble to the BR Act, 1949, states that it is an Act to consolidate and amend the law relating to banking, the powers of RBI to formulate banking policy, regulate banking business, protect the interests of banking companies, supervision of banking companies, etc., are spread across the provisions of BR Act, 1949.

Firstly, Section 5(ca) of the BR Act, 1949, states that banking policy means any policy, which is specified from time to time by the RBI, in the interest of banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, the volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources.

Secondly, as a part of RBI's regulatory power, Section 10BB of the BR Act, 1949 empowers RBI to appoint a

Chairman or Managing Director of a banking company for the reasons stated therein. Similarly, as a part of control over management, Section 36-AB of BR Act, 1949, provides for power to appoint additional directors on the boards of banking companies. Not only the powers to appoint managerial persons but also the power to remove them are vested with the RBI under Section 36-AA of the BR Act, 1949. Moreover, the RBI has been empowered, to supersede the board of banking companies.

Though the business of banking is within the domain of a banking company, the power to control advances by banking companies is also provided to RBI under Section 21 of the BR Act, 1949. Similarly, Section 22 of the BR Act, 1949 confers on RBI the power to issue license and also to cancel licenses of banking companies. Another important regulatory power that has been vested with the RBI is to issue directions to banking companies. Under Section 35-A of BR Act, 1949, RBI has the power to issue directions to banking companies in the public interest or in the interest of banking policy or to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of banking company or to secure the proper management of any banking company.

In this regard, it may be worthwhile to note the observations of the Hon'ble Supreme Court of India in the case of *Joseph Kuruvilla v. Reserve Bank of India* {AIR 1962 SC 1373} that in view of history of establishment of the Reserve Bank, as a Central Bank for India, its position as a banker's bank, its control over the banking companies and banking in India, its position as an issuing bank, its power to license the banking companies and cancel their licence and the numerous other powers, it is unanswerable that between the Court and the Reserve Bank, the momentous decision to wind up a tottering or unsafe banking company in the interest of the depositors, may reasonably be left to the Reserve Bank.

The provisions of the Banking Regulation (Amendment) Act, 2017, provides for dealing with cases relating to stressed assets. Stressed assets are loans where the borrower has defaulted in repayment or where the loan has been restructured, etc. In terms of Sections 35-AA and 35-AB of the BR Act, 1949, the RBI has been specifically authorized to issue directions to banking companies for resolution of stressed assets. As a part of the supervisory power, the RBI has been empowered to inspect banking companies on its own or at the instance of Central Government under the provisions of the BR Act, 1949. In so far as the regulatory and supervisory powers of the RBI over the public sector banks including the State Bank of India and the Regional Rural Banks are concerned, in addition to the provisions available in the respective Special Acts, the provisions as stated in Section 51 of the BR Act shall also be applicable. Thus an overall responsibility to find out the well-being of a banking company, in improving monetary stability and economic growth as well as keeping in view the interests of depositors, has been left with the Reserve Bank of India.

### **Regulation and Supervision of NBFCs**

The regulation and supervision of non-banking financial companies is one of the critical functions that the RBI has been entrusted with. Section 45-IA of RBI Act mandates every non-banking financial company to obtain a certificate of registration from the RBI and to maintain net owned fund as may be specified by the RBI in the Official Gazette, before commencing such non-banking financial business. Further, as part of regulation and supervision of non-banking financial companies, the RBI has been conferred with the statutory powers to regulate or prohibit issue of prospectus or advertisements soliciting deposits of money by non-banking financial companies, power to determine policy and issue directions to non-banking financial companies, etc. Further, the RBI has been empowered under Section 45-L of the RBI Act to call for information and issue directions to non-banking financial companies for the reasons stated therein. As a part of the supervisory control over the non-banking financial companies, the RBI has powers to inspect them under Section 45-N of RBI Act, 1934. The RBI shall exercise all these powers in the public interest

or to regulate the financial system of the country to its advantage or to prevent the affairs of any non-banking financial company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the non-banking financial company. This makes it clear that the power of RBI to regulate and supervise banking companies emanates from the provisions of BR Act whereas the powers to regulate and supervise non-banking financial companies has the source from RBI Act.

### **Regulation & Supervision of Co-operative banks**

Regulation and supervision of urban co-operative banks is another area the RBI has been entrusted with. In terms of Article 246 of the Constitution of India, the exercise of legislative powers of the Union and the State are given in the Union List and the State List, i.e. List I and II respectively of the VII Schedule to the Constitution. The entry relating to Cooperative Societies fall in State List whereas the entry relating to banking falls in the Union List. These results in the duality of jurisdiction over cooperative banks both by the Reserve Bank of India, in terms of Banking Regulation Act, 1949, and the Registrar of Cooperative Societies, in terms of the respective State Cooperative Societies Act, of the State concerned. Section 56 of the BR Act, 1949, makes it applicable to co-operative societies involved in the business of banking. As a part of the regulatory and supervisory regime over co-operative banks, the RBI has been entrusted with the powers to issue licenses and cancel licenses of co-operative banks, supersede their boards, inspect them and also issue directions to them in the public interest, interest of banking policy, control over loans and advances, etc.

In *Janata Sahakari Bank Ltd. v. State of Maharashtra* (AIR 1993 Bombay 252) Hon'ble Bombay High Court has held that though the control over management of Co-operative Society where it is Cooperative Banking Society or otherwise is vested in the Registrar of Co-operative Societies, but insofar as banking is concerned, by virtue of S.56 of the Banking Regulation Act, 1949, read with S.35A of the Banking Regulation Act, 1949, it will be a subject with which the Reserve Bank of India has full power.

### **Regulation of Derivatives and Money Market Instruments**

Chapter III-D was inserted in the RBI Act with effect from 9th January 2007 by way of an amendment to the RBI Act, 1934. In the said chapter, the Parliament of India thought it appropriate to introduce provisions relating to regulation of transactions relating to derivatives, money market instruments, securities, etc. by the RBI. Sub-section (a) of Section 45U of RBI Act defines derivative as an instrument to be settled at a future date, whose value is derived from change in interest rate, foreign exchange rate, credit rating or credit index, price of securities (also called 'underlying'), or a combination of more than one of them and includes interest rate swaps, forward rate agreements, foreign currency swaps, foreign currency-rupee swaps, foreign currency options, foreign currency rupee options or such other instruments as may be specified by the RBI from time to time. Similarly, money market instruments have been defined to include call or notice money, term money, repo, reverse repo, certificate of deposit, commercial paper and such other debt instrument of original or initial maturity up to one year as the RBI may specify from time to time. The powers of RBI to regulate money market instruments have been provided under Section 45W of the RBI Act, which states that the RBI may specify from time to time, in public interest or to regulate the financial system of the country to its advantage, determine the policy relating to interest rates or interest rate products and give directions in that behalf to all agencies or any of them, dealing in securities, money market instruments, foreign exchange, derivatives, or other instruments of like nature.

### **Payment and Settlement Functions**

The Parliament of India enacted the Payment and Settlement Systems Act, 2007 ('PSS Act, 2007') with an objective to provide for the regulation and supervision of payment systems in India and to designate



Reserve Bank of India as the authority for that purpose and for matters connected therewith or incidental thereto. Under Section 4 of the PSS Act, 2007, no person shall commence or operate a payment system except with an authorization issued by the RBI.

Similarly, under Section 8 of the PSS Act, 2007, RBI has the powers to revoke the authorization granted to any person if it contravenes any of the provisions of PSS Act or does not comply with the regulations or fails to comply with the orders or directions issued by the RBI or operates the payment system contrary to the conditions subject to which the authorization was issued. The regulation and supervision of payment systems has been conferred on the RBI by virtue of provisions of Chapter IV of PSS Act, 2007. The regulatory and supervisory controls include the power to determine standards for the functioning of payment systems, power to call for returns, documents or other information, power to enter and inspect payment systems, power to carry out audit and inspections, power to issue directions, etc.

### **Consumer Protection Functions**

In India, although the provisions of the BR Act, 1949, requires the RBI to bear in mind the vital issue of protection of depositors' interests while granting a banking license or cancellation thereof, giving directions on advances or on any banking matter, applying for suspension, winding up, or amalgamation of banks, approving appointment of CEOs or additional directors, removal of CEOs, etc., there is no specific provision under the BR Act, 1949, or any of the other statutes for forming a formal mechanism for redressal of grievances of depositors. In the absence of a specific provision for the purpose, RBI has resorted to its powers under Section 35-A of the BR Act, 1949, to formulate the Banking Ombudsman Scheme for the redressal of grievances of depositors.

### **Financial Inclusion and Development Functions**

The mushrooming of unauthorized and unregulated money lenders in the financial system of the country necessitated the RBI to do something more than what has been provided in the Rule books. Financial literacy or financial inclusion, though, not explicitly expressed in the RBI Act, 1934, or the BR Act, 1949, sub-section (16) of Section 17 of the RBI Act, 1934, enables RBI to do all such matters and things as may be incidental to or consequential to the exercise of its powers or the discharge of its duties under the Act. Further, India being a country with significant illiteracy, there remains an obligation on the part of the 'State' to educate the people and also to include them into the organised financial system of the country to get the benefits of professional banking system of the country. The amendment to the BR Act, 1949, inserting Section 26-A is a step towards achieving this objective, which makes it amply clear that the statute casts a responsibility on the RBI to focus towards achieving financial literacy in the country. Not only the BR Act, 1949, even the RBI Act, 1934, mandates the RBI to maintain expert staff to study various aspects of rural credit and development, which emphasizes the premier role to be played by RBI in promoting financial literacy and financial inclusion among the citizens living even in the remote areas of the country.

### **Right to Issue Bank Notes**

Management of currency is one of the core central banking functions of the Reserve Bank for which it derives the necessary statutory powers from Section 22 of the RBI Act, 1934. Along with the Government of India, the Reserve Bank is responsible for the design, production and overall management of the nation's currency, with the goal of ensuring an adequate supply of clean and genuine notes. In consultation with the Government, the Reserve Bank routinely addresses security issues and targets ways to enhance security features to reduce the risk of counterfeiting or forgery of currency notes.

The Paper Currency Act of 1861 conferred upon the Government of India the monopoly of issuing note, thus ending the practice of private and presidency banks issuing currency. Between 1861 and 1935, the Government of India managed the issue of paper currency. In 1935, when the Reserve Bank began operations, it took over the function of note issue from the Office of the Controller of Currency, Government of India.

### Denominations of Notes

The Indian Currency is called the *Indian Rupee (abbreviated as Re. in singular and Rs. in plural)*, and its sub-denomination the *Paisa (plural Paise)*. At present, notes in India are issued in the denomination of ₹5, ₹10, ₹20, ₹50, ₹100, ₹200, ₹500 and ₹2,000. The printing of ₹1 and ₹2 denominations has been discontinued. However, notes in these denominations issued earlier are still valid and in circulation. The Reserve Bank is also authorised to issue notes in the denominations of five thousand rupees and ten thousand rupees or any other denomination, but not exceeding ten thousand rupees that the Central Government may specify. Thus, in terms of Section 24 of RBI Act 1934, notes in denominations higher than ten thousand rupees cannot be issued. The Central Government may, on the recommendation of the Central Board, direct the non-issue or the discontinuance of issue of bank notes of such denominational values as it may specify in this behalf. The Government of India announced the demonetisation of ₹500 and ₹1000 bank notes with effect from midnight of November 8, 2016, making these notes invalid. A newly redesigned series of ₹500 banknote, in addition to a new denomination of ₹2000 banknote is in circulation since 10 November 2016.

### Form of Bank Notes

The Department of Currency Management makes recommendations on design of bank notes to the Central Government, forecasts the demand for notes, and ensures smooth distribution of notes and coins throughout the country [Section 25]. It arranges to withdraw unfit notes, administers the provisions of the RBI (Note Refund) Rules, 2009 (these rules deal with the payment of value of the soiled or mutilated notes) and reviews/rationalises the work systems and procedures at the issue offices on an ongoing basis.

### Legal tender character of notes

Section 24 sub-section (1) of the Act states that subject to the provisions of sub-section (2), every bank note shall be legal tender at any place in India in payment or on account for the amount expressed therein, and shall be guaranteed by the Central Government.

Sub-section 2 empowers the Central Government, on recommendation of the Central Board, by notification in the Gazette of India to declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination to cease to be legal tender save at such office or agency of the Bank and to such extent as may be specified in the notification.

### Currency Distribution

The Government of India on the advice of the Reserve Bank decides on the various denominations of the notes to be printed. The Reserve Bank coordinates with the Government in designing the banknotes, including their security features.

The printed notes received from Printing Press set up by Government and RBI are issued for circulation both through remittances to banks as also the Reserve Bank counters.

### **Coin Distribution**

The Indian Coinage Act, 1906 governs the minting of rupee coins, including small coins of the value of less than one rupee. Coins are legal tender in India for unlimited amounts. Fifty paise coins are legal tender for any sum not exceeding ten rupees and smaller coins for any sum not exceeding one rupee. The Reserve Bank acts as an agent of the Central Government for distribution, issue and handling of the coins and for withdrawing and remitting them back to Government as may be necessary.

### **Combating Counterfeiting**

The Reserve Bank, in consultation with the Government of India, periodically reviews and upgrades the security features of the bank notes to deter counterfeiting. It also shares information with various law enforcement agencies to address the issue of counterfeiting. It has also issued detailed guidelines to banks and government treasury offices on how to detect and impound counterfeit notes.

### **Bank exempt from stamp duty on bank notes**

The Bank is not liable to the payment of any stamp duty under the Indian Stamp Act, 1899, in respect of bank notes issued by it [section 29].

### **Powers of Central Government to supersede Central Board**

Section 30 Sub section (1) of the states that if in the opinion of Central Government the Bank fails to carry out any of the obligations imposed on it by or under the Act, by notification in the Gazette of India, declare the Central Board to be superseded, and thereafter the general superintendence and direction of the affairs of the Bank shall be entrusted to such agency at the Central Government may determine, and such agency may exercise the powers and do all acts and things which may be exercised or done by the Central Board under the Act.

As per sub section 2 of this section when action is taken under this section the Central Government shall cause a full report of the circumstances leading to such action and of the action taken to be laid before Parliament at the earliest possible opportunity and in any case within three months from the issue of the notification superseding the Board.

### **Issue of demand bills and notes**

Section 31 Sub section (1) of the states that no person in India other than the Bank, or, as expressly authorized by the Act the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person: However cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.

As per sub section 2 of this section notwithstanding anything contained in the Negotiable Instrument Act, 1881, no person in India other than the Bank or, as expressly authorized by the Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument.

### **Banker to the Central Government & State Governments**

Reserve Bank acts as banker to all the State Governments in India, except Jammu & Kashmir and Sikkim. It has limited agreements for the management of the public debt of these two State Governments. As a banker

to the Government, the Reserve Bank receives and pays money on behalf of the various Government departments.

The Reserve Bank also undertakes to float loans and manage them on behalf of the Governments. It also provides Ways and Means Advances – a short-term interest bearing advance – to the Governments, to meet the temporary mismatches in their receipts and payments. Besides, it arranges for investments of surplus cash balances of the Governments as a portfolio manager. The Reserve Bank also acts as adviser to Government, whenever called upon to do so, on monetary and banking related matters.

The banking functions for the governments are carried out by the Public Accounts Departments at the offices /branches of the Reserve Bank, while management of public debt including floatation of new loans is done at Public Debt Office at offices/branches of the Reserve Bank and by the Internal Debt Management Department at the Central Office.

### **Management of Public Debt**

The Reserve Bank manages the public debt and issues new loans on behalf of the Central and State Governments. It involves issue and retirement of rupee loans, interest payment on the loan and operational matters about debt certificates and their registration.

The union budget decides the annual borrowing needs of the Central Government. Parameters, such as, interest rate, timing and manner of raising of loans are influenced by the state of liquidity and the expectations of the market. The Reserve Bank's debt management policy aims at minimising the cost of borrowing, reducing the roll-over risk, smoothening the maturity structure of debt, and improving depth and liquidity of Government securities markets by developing an active secondary market.

### **Reserve Bank as Banker to Banks**

The Reserve Bank to fulfill this function, opens current accounts of banks with itself, enabling these banks to maintain cash reserves as well as to carry out inter-bank transactions through these accounts. Inter-bank accounts can also be settled by transfer of money through electronic fund transfer system, such as, the Real Time Gross Settlement System (RTGS).

In addition, the Reserve Bank has also introduced the Centralised Funds Management System (CFMS) to facilitate centralised funds enquiry and transfer of funds across Deposit Accounts Department (DADs). This helps banks in their fund management as they can access information on their balances maintained across different DADs from a single location.

As Banker to Banks, the Reserve Bank provides short-term loans and advances to select banks, when necessary, to facilitate lending to specific sectors and for specific purposes. These loans are provided against promissory notes and other collateral given by the banks.

The Reserve Bank also acts as the 'lender of last resort'. It can come to the rescue of a bank that is solvent but faces temporary liquidity problems by supplying it with much needed liquidity when no one else is willing to extend credit to that bank. The Reserve Bank extends this facility to protect the interest of the depositors of the bank and to prevent possible failure of a bank, which in turn may also affect other banks and institutions and can have an adverse impact on financial stability and thus on the economy.

### **Financial Regulation and Supervision**

The Reserve Bank's regulatory and supervisory domain extends not only to the Indian banking system but

also to the development financial institutions (DFIs), non-banking financial companies (NBFCs), primary dealers, credit information companies and select segments of the financial markets.

As the regulator and the supervisor of the banking system, the Reserve Bank has a critical role to play in ensuring the system's safety and soundness on an ongoing basis. The objective of this function is to protect the interest of depositors through an effective prudential regulatory framework for orderly development and conduct of banking operations, and to maintain overall financial stability through various policy measures.

### **Prudential Norms for Banks**

In order to strengthen the balance sheets of banks, the Reserve Bank has been prescribing appropriate prudential norms for them in regard to income recognition, asset classification and provisioning, capital adequacy, investments portfolio and capital market exposures, to name a few. A brief description of these norms is furnished below:

**Capital Adequacy:** The Reserve Bank has instructed banks to maintain adequate capital on a continuous basis. The adequacy of capital is measured in terms of Capital to Risk-Weighted Assets Ratio (CRAR). Under the recently revised framework, banks are required to maintain adequate capital for credit risk, market risk, operational risk and other risks. Basel II standardised approach is applicable with road map drawn up for advanced approaches.

**Loans and Advances:** In order to maintain the quality of their loans and advances, the Reserve Bank requires banks to classify their loan assets as performing and non-performing assets (NPA), primarily based on the record of recovery from the borrowers. NPAs are further categorised into Sub-standard, Doubtful and Loss Assets depending upon age of the NPAs and value of available securities. Banks are also required to make appropriate provisions against each category of NPAs. Banks are also required to have exposure limits in place to prevent credit concentration risk and limit exposures to sensitive sectors, such as, capital markets and real estate.

**Investments:** The Reserve Bank requires banks to classify their investment portfolios into three categories for the purpose of valuation: Held to Maturity (HTM), Available for Sale (AFS) and Held for Trading (HFT). The securities held under HFT and AFS categories have to be marked-to-market periodically and depreciation, if any, needs appropriate provisions by banks. Securities under HTM category must be carried at acquisition / amortised cost, subject to certain conditions.

### **Foreign Exchange Reserves Management**

The Reserve Bank, as the custodian of the country's foreign exchange reserves, is vested with the responsibility of managing their investment. The legal provisions governing management of foreign exchange reserves are laid down in the Reserve Bank of India Act, 1934.

The Reserve Bank's reserves management function has in recent years grown both in terms of importance and sophistication for two main reasons. First, the share of foreign currency assets in the balance sheet of the Reserve Bank has substantially increased. Second, with the increased volatility in exchange and interest rates in the global market, the task of preserving the value of reserves and obtaining a reasonable return on them has become challenging. The basic parameters of the Reserve Bank's policies for foreign exchange reserves management are safety, liquidity and returns.

Within this framework, the Reserve Bank focuses on:

- (a) Maintaining market's confidence in monetary and exchange rate policies.

- (b) Enhancing the Reserve Bank's intervention capacity to stabilise foreign exchange markets.
- (c) Limiting external vulnerability by maintaining foreign currency liquidity to absorb shocks during times of crisis, including national disasters or emergencies.
- (d) Providing confidence to the markets that external obligations can always be met, thus reducing the costs at which foreign exchange resources are available to market participants.
- (e) Adding to the comfort of market participants by demonstrating the backing of domestic currency by external assets.

While safety and liquidity continue to be the twin-pillars of reserves management, return optimisation has become an embedded strategy within this framework. The Reserve Bank has framed policy guidelines stipulating stringent eligibility criteria for issuers, counterparties, and investments to be made with them to enhance the safety and liquidity of reserves. The Reserve Bank, in consultation with the Government, continuously reviews the reserves management strategies.

### **Transactions in foreign exchange**

Section 40 of the Act says that the Bank shall sell to or buy from any authorized person who makes a demand in that behalf at its office in Bombay, Calcutta, Delhi or Madras or at such of its branches as the Central Government may, by order, determine, foreign exchange at such rates of exchange and on such conditions as the Central Government may from time to time by general or special order determine, having regard so far as rates of exchange are concerned to its obligations to the International Monetary Fund:

In this section "authorized person" means a person who is entitled by or under the Foreign Exchange Regulation Act, to buy, or as the case may be, sell, the foreign exchange to which his demand relates.

### **Market Operations**

The Reserve Bank operationalises its monetary policy through its operations in government securities, foreign exchange and money markets.

**Open Market Operations:** Open Market Operations in the form of outright purchase/sale of Government securities are an important tool of the Reserve Bank's monetary management. The Bank carries out such operations in the secondary market on the electronic Negotiated Dealing System – Order Matching (NDS-OM) platform by placing bids and/or taking the offers for securities.

**Liquidity Adjustment Facility Auctions:** The liquidity management operations are aimed at modulating liquidity conditions such that the overnight rates in the money market remains within the informal corridor set by the repo and reverse repo rates for the liquidity adjustment facility (LAF) operations. In a repo transaction, the Reserve Bank infuses liquidity into the system by taking securities as collateral, while in a reverse repo transaction it absorbs liquidity from the system with the Reserve Bank providing securities to the counter parties.

**Market Stabilisation Scheme:** The Market Stabilisation Scheme (MSS) was introduced in April 2004 under which Government of India dated securities/treasury bills could be issued to absorb surplus structural/durable liquidity created by the Reserve Bank's foreign exchange operations. MSS operations are a sterilisation tool used for offsetting the liquidity impact created by intervention in the foreign exchange markets.

## Payment and Settlement Systems

The regulation and supervision of payment systems is being increasingly recognised as a core responsibility of central banks. Safe and efficient functioning of these systems is an important pre-requisite for proper functioning of financial system and the efficient transmission of monetary policy.

The Payment and Settlement Systems Act, 2007 provides for regulation and supervision of payment systems in India and designates the Reserve Bank as the authority for the purpose. As per the Act, only payment systems authorised by the Reserve Bank can be operated in the country. The Act also provides for the settlement effected under the rules and procedures of the system provider to be treated as final and irrevocable.

The Reserve Bank has put in place an institutional framework and structure for oversight of the payment systems. In 2005, it created a Board for Regulation and Supervision of Payment and Settlement Systems (BPSS) as a Committee of the Central Board. A new department called the Department of Payment and Settlement Systems (DPSS) was constituted to assist the BPSS in performing its functions.

The Reserve Bank has adopted a three-pronged strategy of consolidation, development and integration to establish a modern and robust payment and settlement system which is also efficient and secure. The consolidation revolves around expanding the reach of the existing products by introducing clearing process in new locations.

The Reserve Bank has also taken steps towards integrating the payment system with the settlement systems for government securities and foreign exchange. To facilitate settlement of Government securities transactions, it created the Negotiated Dealing System, a screen-based trading platform.

For settlement of trade in foreign exchange, Government securities and other debt instrument, it has set up the Clearing Corporation of India Limited (CCIL). This plays the role of a central counter party to transactions and guarantees settlement of trade, thus managing the counter party risk.

## Monetary Policy Management

One of the most important functions of central banks is formulation and execution of monetary policy. In the Indian context, the basic functions of the Reserve Bank of India as enunciated in the Preamble to the RBI Act, 1934 are: “to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage.” Thus, the Reserve Bank’s mandate for monetary policy flows from its monetary stability objective. Essentially, monetary policy deals with the use of various policy instruments for influencing the cost and availability of money in the economy. As macroeconomic conditions change, a central bank may change the choice of instruments in its monetary policy. The overall goal is to promote economic growth and ensure price stability.

## Monetary Policy

Monetary policy refers to the policy of the central bank with regard to the use of monetary instruments under its control to achieve the goals specified in the Act. The Reserve Bank of India (RBI) is vested with the responsibility of adopting and implementing monetary policy. This responsibility is explicitly mandated under the Reserve Bank of India Act, 1934. The primary objective of monetary policy is to maintain price stability while keeping in mind the objective of growth. Price stability is a necessary precondition to sustainable growth.

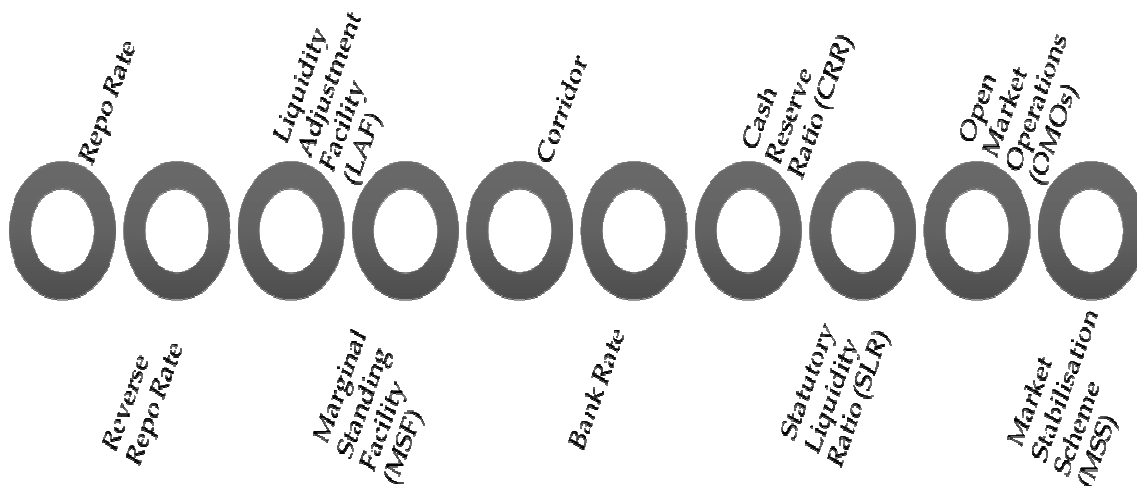
## Monetary Policy Framework

The RBI Act explicitly provides empowers the Reserve Bank to operate the monetary policy framework of the country.

- The framework aims at setting the policy (repo) rate based on an assessment of the current and evolving macroeconomic situation; and modulation of liquidity conditions to anchor money market rates at or around the repo rate. Repo rate changes transmit through the money market to the entire the financial system, which, in turn, influences aggregate demand – a key determinant of inflation and growth.
- Once the repo rate is announced, the operating framework designed by the Reserve Bank envisages liquidity management on a day-to-day basis through appropriate actions, which aim at anchoring the operating target– the Weighted Average Call Rate (WACR) – around the repo rate.
- The operating framework is fine-tuned and revised depending on the evolving financial market and monetary conditions, while ensuring consistency with the monetary policy stance.

## Instruments of Monetary Policy

There are several direct and indirect instruments that are used for implementing monetary policy.



- **Repo Rate:** The (fixed) interest rate at which the Reserve Bank provides overnight liquidity to banks against the collateral of government and other approved securities under the Liquidity Adjustment Facility (LAF).
- **Reverse Repo Rate:** The (fixed) interest rate at which the Reserve Bank absorbs liquidity, on an overnight basis, from banks against the collateral of eligible government securities under the LAF.
- **Liquidity Adjustment Facility (LAF):** The LAF consists of overnight as well as term repo auctions. Progressively, the Reserve Bank has increased the proportion of liquidity injected under fine-tuning variable rate repo auctions of range of tenors. The aim of term repo is to help develop the inter-bank term money market, which in turn can set market based benchmarks for pricing of loans and deposits, and hence improve transmission of monetary policy. The Reserve Bank also conducts variable interest rate reverse repo auctions, as necessitated under the market conditions.



- **Marginal Standing Facility (MSF):** A facility under which scheduled commercial banks can borrow additional amount of overnight money from the Reserve Bank by dipping into their Statutory Liquidity Ratio (SLR) portfolio up to a limit at a penal rate of interest. This provides a safety valve against unanticipated liquidity shocks to the banking system.
- **Corridor:** The MSF rate and reverse repo rate determine the corridor for the daily movement in the weighted average call money rate.
- **Bank Rate:** It is the rate at which the Reserve Bank is ready to buy or rediscount bills of exchange or other commercial papers. The Bank Rate is published under Section 49 of the Reserve Bank of India Act, 1934. This rate has been aligned to the MSF rate and, therefore, changes automatically as and when the MSF rate changes alongside policy repo rate changes.
- **Cash Reserve Ratio (CRR):** The average daily balance that a bank is required to maintain with the Reserve Bank as a share of such per cent of its Net demand and time liabilities (NDTL) that the Reserve Bank may notify from time to time in the Gazette of India.
- **Statutory Liquidity Ratio (SLR):** The share of NDTL that a bank is required to maintain in safe and liquid assets, such as, unencumbered government securities, cash and gold. Changes in SLR often influence the availability of resources in the banking system for lending to the private sector.
- **Open Market Operations (OMOs):** These include both, outright purchase and sale of government securities, for injection and absorption of durable liquidity, respectively.
- **Market Stabilisation Scheme (MSS):** This instrument for monetary management was introduced in 2004. Surplus liquidity of a more enduring nature arising from large capital inflows is absorbed through sale of short-dated government securities and treasury bills. The cash so mobilised is held in a separate government account with the Reserve Bank.

### Constitution of Monetary Policy Committee

Section 45ZB of the Act states that:-

- (1) The Central Government may, by notification in the Official Gazette, constitute a Committee to be called the Monetary Policy Committee of the Bank.
- (2) The Monetary Policy Committee shall consist of the following Members, namely:—
  - (a) the Governor of the Bank—Chairperson, ex officio;
  - (b) Deputy Governor of the Bank, in charge of Monetary Policy—Member, ex officio;
  - (c) one officer of the Bank to be nominated by the Central Board—Member, ex officio; and
  - (d) three persons to be appointed by the Central Government—Members.
- (3) The Monetary Policy Committee shall determine the Policy Rate required to achieve the inflation target.
- (4) The decision of the Monetary Policy Committee shall be binding on the Bank.

### Meetings of Monetary Policy Committee

Section 45ZI of the Act states that:-

- (1) The Bank shall organise at least four meetings of the Monetary Policy Committee in a year.

- (2) The meeting schedule of the Monetary Policy Committee for a year shall be published by the Bank at least one week before the first meeting in that year.
- (3) The meeting schedule may be changed only—
  - (a) by way of a decision taken at a prior meeting of the Monetary Policy Committee; or
  - (b) if, in the opinion of the Governor, an additional meeting is required or a meeting is required to be rescheduled due to administrative exigencies.
- (4) Any change in meeting schedule shall be published by the Bank as soon as practicable.
- (5) The quorum for a meeting of the Monetary Policy Committee shall be four Members, at least one of whom shall be the Governor and in his absence, the Deputy Governor who is the Member of the Monetary Policy Committee.
- (6) The meetings of the Monetary Policy Committee shall be presided over by the Governor, and in his absence by the Deputy Governor who is a Member of the Monetary Policy Committee.
- (7) Each Member of the Monetary Policy Committee shall have one vote.
- (8) All questions which come up before any meeting of the Monetary Policy Committee shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Governor shall have a second or casting vote.
- (9) The Central Government may, if it considers necessary, convey its views in writing to the Monetary Policy Committee from time to time.
- (10) The vote of each Member of the Monetary Policy Committee for a proposed resolution shall be recorded against such Member.
- (11) Each Member of the Monetary Policy Committee shall write a statement specifying the reasons for voting in favour of, or against the proposed resolution.
- (12) The procedure, conduct, code of confidentiality and any other incidental matter for the functioning of the Monetary Policy Committee shall be such as may be specified by the regulations made by the Central Board.
- (13) The proceeding of the Monetary Policy Committee shall be confidential.

### **Monetary Policy Report**

Section 45ZM sub section 1 of the Act provides that the Bank shall, once in every six months, publish a document to be called the Monetary Policy Report, explaining—

- (a) the sources of inflation; and
- (b) the forecasts of inflation for the period between six to eighteen months from the date of publication of the document.

As per sub section 2 of this section the form and contents of the Monetary Policy Report shall be such as may be specified by the regulations made by the Central Board.

### **Power to make rules**

Section 45ZO sub section (1) of the Act provides that the Central Government may, by notification in the

Official Gazette, make rules for the purpose of carrying out the provisions of this Chapter.

Sub section 2 of this section states that in particular and without prejudice to the generality of the foregoing power, such rules may provide for—

- (a) the procedure of functioning of the Search-cum-Selection Committee under sub-section (3) of section 45ZC;
- (b) the terms and conditions of appointment, (other than the remuneration and other allowances), of Members of the Monetary Policy Committee under sub-section (2) of section 45ZD; and
- (c) any other matter which is to be, or may be, prescribed by the Central Government by rules.

## **PENALTIES**

(1) Whoever in any application, declaration, return, statement, information or particulars made, required or furnished by or under or for the purposes of any provisions of this Act, or any order, regulation or direction made or given thereunder or in any prospectus or advertisement issued for or in connection with the invitation by any person, of deposits of money from the public wilfully makes a statement which is false in any material particular knowing it to be false or wilfully omits to make a material statement shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

(2) If any person fails to produce any book, account or other document or to furnish any statement, information or particulars which, under this Act or any order, regulation or direction made or given thereunder, it is his duty to produce or furnish or to answer any question put to him in pursuance of the provisions of this Act or of any order, regulation or direction made or given thereunder, he shall be punishable with fine which may extend to two thousand rupees in respect of each offence and if he persists in such failure or refusal, with further fine which may extend to one hundred rupees for every day, after the first during which the offence continues.

(3) If any person contravenes the provisions of section 31, he shall be punishable with fine, which may extend to the amount of the bill of exchange, hundi, promissory note or engagement for payment of money in respect whereof the offence is committed.

(4) If any person discloses any credit information, the disclosure of which is prohibited under section 45E, he shall be punishable with imprisonment for a term, which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

(4A) If any person contravenes the provisions of sub-section (1) of section 45-IA, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

(4AA) If any auditor fails to comply with any direction given or order made by the Bank under section 45MA, he shall be punishable with fine, which may extend to five thousand rupees.

(4AAA) Whoever fails to comply with any order made by the Company Law Board under sub-section (2) of section 45QA, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to a fine of not less than rupees fifty for every day during which such noncompliance continues.

(5) If any person, other than an auditor-

- (a) receives any deposit in contravention of any direction given or order made under Chapter IIIB; or

(aa) fails to comply with any direction given or order made by the Bank under any of the provisions of Chapter IIIB; or

(b) issues any prospectus or advertisement otherwise than in accordance with section 45NA or any order made under section 45J, as the case may be, he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which may extend, –

(i) in the case of a contravention falling under clause (a), to twice the amount of the deposit received; and

(ii) in the case of a contravention falling under clause (b), to twice the amount of the deposit called for by the prospectus or advertisement.

(5A) If any person contravenes any provision of section 45S, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of deposit received by such person in contravention of that section, or two thousand rupees, whichever is more, or with both:

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgement of the court, the imprisonment shall not be less than one year and the fine shall not be less than one thousand rupees.

(5B) notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973, it shall be lawful for a Metropolitan Magistrate or a Judicial Magistrate of the first class to impose a sentence of fine in excess of the limit specified in that section on any person convicted under sub-section (5A).

(6) If any other provision of this Act is contravened or if any default is made in complying with any other requirement of this Act or of any order, regulation or direction made or given or condition imposed thereunder, any person guilty of such contravention or default shall be punishable with fine which may extend to two thousand rupees and where a contravention or default is a continuing one, with further fine which may extend to one hundred rupees for every day after the first, during which the contravention or default continues. (Section 58B)

## LESSON ROUND-UP

- The Preamble to the Reserve Bank of India Act, 1934 under which it was constituted, specifies its objective as to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage.
- The Central Board of Directors is at the top of the Reserve Bank's organizational structure. Appointed by the Government under the provisions of the Reserve Bank of India Act, 1934, the Central Board has the primary authority and responsibility for the oversight of the Reserve Bank. It delegates specific functions to the Local Boards and various committees. The Governor is the Reserve Bank's chief executive.
- The Government of India on the advice of the Reserve Bank decides on the various denominations of the notes to be printed. The Reserve Bank coordinates with the Government in designing the banknotes, including their security features.
- Monetary policy refers to the policy of the central bank with regard to the use of monetary instruments under its Control to achieve the goals specified in the Act.
- The Reserve Bank of India (RBI) is vested with the responsibility of conducting monetary policy. This responsibility is explicitly mandated under the Reserve Bank of India Act, 1934.
- The primary objective of monetary policy is to maintain price stability while keeping in mind the objective of growth. Price stability is a necessary precondition to sustainable growth.





# Lesson 2

## Foreign Exchange Management Act, 1999-Introduction

### LESSON OUTLINE

- Learning objectives
- Historical background
- Overview of Foreign Exchange Management Act
- Overall scheme of Foreign Exchange Management Act
- Structure of the Foreign Exchange Management Act
- Rules framed under the Foreign Exchange Management Act
- Regulations issued by Reserve Bank issued under the Foreign Exchange Management Act
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

As per Article 246 of Constitution of India, the Parliament has exclusive power to make laws with respect to any of the matters enumerated in the Union List in the Seventh Schedule. The Foreign Exchange Management Act, 1999 can be traced to various entries in the Union List. Entry 16 of the Union List deals with Foreign jurisdiction. Entry 36 of the Union List deals with Currency, coinage and legal tender; foreign exchange. Entry 37 of the Union List deals with Foreign loans and Entry 41 of the Union List deals with Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

The legal framework for administration of foreign exchange transactions in India is provided by the Foreign Exchange Management Act, 1999. Under the Foreign Exchange Management Act, 1999 (FEMA), which came into force with effect from June 1, 2000, all transactions involving foreign exchange have been classified either as capital account transactions or current account transactions.

The object of the study is to familiarize the students with the overview of regulatory structure under Foreign Exchange Management Act, 1999.

*“Foreign Exchange Management Act, 1999 is an Act to facilitate external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.”*

*Preamble*

## HISTORICAL BACKGROUND

A system of exchange control was first time introduced through a series of rules under the Defence of India Act, 1939 on temporary basis. As the foreign exchange crisis persisted for a long time Foreign Exchange Regulation Act, 1947 was enacted initially for a period of ten years. However, 10 years of economic development did not ease the foreign exchange constraint, FERA permanently entered the statue book in 1957.

Subsequently, this Act was replaced by the Foreign Exchange Regulation Act, 1973 (FERA, 1973), which came into force with effect from January 1, 1974. In 1974, FERA was completely overhauled with all offences being considered as criminal offences with *mens rea*. The Enforcement Directorate was empowered to arrest any person without even arrest warrant.

In the 1990s, consistent with the general philosophy of economic reforms a sea change relating to the broad approach to reform in the external sector took place. In 1991 government of India initiated the policy of economic liberalization. Foreign investments in many sectors were permitted. This resulted in increased flow of foreign exchange in India and foreign exchange reserves increased substantially.

In 1997, the Tarapore Committee on Capital Account Convertibility (CAC), constituted by the Reserve Bank, had indicated the preconditions for Capital Account Convertibility. The three crucial preconditions were fiscal consolidation, a mandated inflation target and, strengthening of the financial system. The Tarapore Committee had also recommended change in the legislative framework governing foreign exchange transactions.

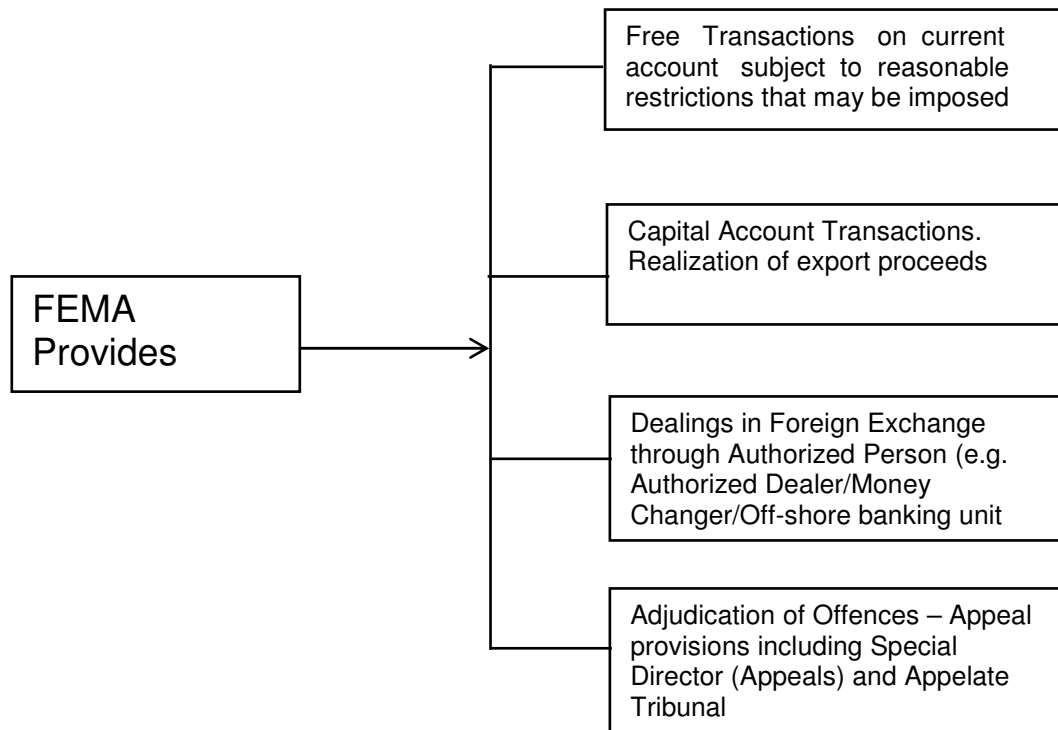
A Bill introduced in the Lok Sabha on 4 August, 1998 was referred to the Standing Committee on Finance which submitted it's report to the House on 23 December '98 with suggestion and modifications. As the 12th Lok Sabha was dissolved before any decision could be taken on the Bill, the Bill lapsed consequently. The Bill was again introduced in the 13th Lok Sabha on 25th October 1999 and was passed in the winter session of Parliament in 1999. The President Assent was received on 29th December, 1999.

Finally FEMA came into force w.e.f. 1st June 2000. Accordingly, the Foreign Exchange Regulation Act (FERA) was repealed and replaced by the new Foreign Exchange Management Act (FEMA) with effect from June 2000. The philosophical approach was shifted from that of conservation of foreign exchange to one of facilitating trade and payments as well as developing orderly foreign exchange market.

## Overview of FEMA

The Foreign Exchange Management Act, 1999 was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. In fact it is the central legislation that deals with inbound investments into India and outbound investments from India and trade and business between India and the other countries.





### Applicability

Foreign Exchange Management Act, 1999 extends to the whole of India. The Act also applies to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.

FEMA has considerably liberalised provisions in respect of foreign exchange. However, in extraordinary situations may arise. The Central Government has been empowered to suspend operation of any or all provisions of FEMA in public interest, by issuing a notification. The Central Government has also been empowered to relax suspension by issuing a notification.

### Overall Scheme of FEMA

FEMA makes provisions for dealings in foreign exchange. Broadly, all Current Account Transactions are free. However, Central Government can impose reasonable restrictions by issuing rules (Section 3 FEMA). Capital Account Transactions are permitted to the extent specified by RBI by issuing Regulations. (Section 6 of FEMA)

FEMA envisages that RBI shall have a controlling role in management of foreign exchange. Since RBI cannot directly handle foreign exchange transactions, it authorizes “Authorised Persons” to deal in foreign exchange. RBI has been empowered to issue directions to such “Authorised Persons” under Section 11.

FEMA also makes provisions for enforcement, penalties, adjudication and appeal. The FEMA 1999 contains

only basic legal framework. The practical aspects are covered in Rules made by Central Government and Regulations made by RBI.

FDI Policy announced by Department of Industrial Policy & Promotion, Ministry of Industries and Commerce directly relevant to understanding the provisions of FEMA. Instructions/Guidelines etc. of Ministry of Finance and Securities and Exchange Board of India (SEBI) become relevant when (ECB) /ADR/GDR and capital market is involved.

## **FEMA Structure**

The legislations, rules and regulations, governing Foreign Exchange Management are as under:

- ✓ FEMA contains 7 Chapters divided into 49 sections of which 12 sections cover operational part and the rest deals with contravention, penalties, adjudication, appeals, enforcement directorate, etc.

CHAPTER I – Preliminary (Section 1&2)

CHAPTER II- Regulation and Management of Foreign Exchange (Section 3 –9)

CHAPTER III – Authorised Person (Section 10 –12)

CHAPTER IV – Contravention and Penalties (Section 13-15)

CHAPTER V – Adjudication and Appeal (Section 16- 35)

CHAPTER VI – Directorate of Enforcement (Section 36-38)

CHAPTER VII- Miscellaneous (Section 39 – 49)

- ✓ Rules made by Ministry of Finance under section 46 of FEMA (Subordinate or delegated Legislations)
- ✓ Regulations made by RBI under section 47 of FEMA (Subordinate or delegated Legislations)
- ✓ Master Direction issued by RBI on every year
- ✓ Foreign Direct Investment policy issued by Department of Industrial Policy and Promotion.
- ✓ Notifications and Circulars issued by Reserve Bank of India.

Besides the FEMA, there are Set of Rules, Regulations and Master Directions under the Act to ensure effective implementation of the Act.

### ***The Rules made under FEMA are as follows:***

1. FEM (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000
2. FEM (Authentication of Documents) Rules, 2000

3. FEM (Current Account Transaction) Rules, 2000
4. FEM (Adjudication Proceedings and Appeal) Rules, 2000
5. FEM (Compounding Proceedings) Rules, 2000
6. The Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000.

***The Regulations made under FEMA are as follows:***

1. FEM (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015
2. FEM (Borrowing and Lending in Rupees) Regulations, 2000
3. FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000
4. FEM (Deposit) Regulations, 2016
5. FEM (Export and Import of Currency) Regulations, 2015
6. FEM (Guarantees) Regulations, 2000
7. FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2000
8. FEM (Establishment in India of Branch office or a Project office or any other Place of Business) Regulations, 2016
9. FEM (Export of Goods and Services) Regulations, 2015
10. FEM (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015
11. FEM (Insurance) Regulations, 2015
12. FEM (Investment in Firm or Proprietary Concern in India) Regulations, 2000
13. FEM (Manner of Receipt and Payment) Regulations, 2016
14. FEM (Permissible Capital Account Transactions) Regulations, 2000
15. FEM (Possession and Retention of Foreign Currency) Regulations, 2015
16. FEM (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015
17. FEM (Remittance of Assets) Regulations, 2016
18. FEM (Transfer or Issue of Security by a person Resident outside India) Regulations, 2017
19. FEM (Foreign Exchange Derivative Contracts) Regulations, 2000
20. FEM (Transfer or Issue of any Foreign Security) Regulations, 2004
21. FEM (Crystallization of inoperative Foreign Currency Deposits) Regulations, 2014
22. F.E.M (Transfer or Issue of any foreign Security) Regulations, 2004
23. FEM (International Financial Services Centre) Regulations, 2015
24. FEM (Regularization of Assets Held Abroad by a Person Resident in India) Regulations, 2015



# Lesson 3

## Foreign Exchange Transactions & Compliances

### LESSON OUTLINE

- Learning objectives
- Foreign Exchange
- Foreign Securities
- Current Account Transactions
- Capital Account Transactions
- Acquisition & Transfer of immovable property in India
- Acquisition & Transfer of immovable property outside India
- Realisation & Repatriation of Foreign Exchange
- Adjudication
- Compounding of contraventions
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

When a business enterprise imports goods from other countries, exports its products to them or makes investments abroad, it deals in foreign exchange.

Foreign exchange means 'foreign currency' and includes deposits, credits and balances payable in any foreign currency; drafts, travellers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency; and drafts, travellers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency. The management of foreign exchange is very important in the present day business. This lesson deals with how FEMA facilitates external trade and payments and promotes the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the Reserve Bank of India (RBI) in the administration of FEMA. The rules, regulations and norms pertaining to several sections of the Act are laid down by the Reserve Bank of India, in consultation with the Central Government.

The object of the study is to familiarize the students with the Foreign Exchange Transactions and compliances thereto.

*The Foreign Exchange Management Act, 1999 was enacted by the Parliament, taking into consideration the developments such as substantial increase in foreign exchanges reserves, growth in foreign trade, rationalization of tariffs, current account convertibility etc.,*

## INTRODUCTION

The Foreign Exchange Regulation Act, 1973, which was enacted to consolidate and amend the law in several respects encompassing the experience gained over few decades of implementation of the earlier enactment of 1947, had outlived its purpose in the light of the liberalization policies introduced in 1991.

The Foreign Exchange Regulation Act, since then had been reviewed and amendments were made as part of ongoing process of economic liberalization relating to foreign investment and foreign trade for closer interaction with the world economy. During the subsequent period, the Central Government decided further review of the Foreign Exchange Regulation Act in the light of developments and experience in relation to foreign trade and investment. It was at that time felt, that a better course would be to repeal the Foreign Exchange Regulation Act and enact a new legislation.

Accordingly, taking into consideration the developments such as substantial increase in foreign exchanges reserves, growth in foreign trade, rationalization of tariffs, current account convertibility etc., the Foreign Exchange Management Bill, to repeal and replace the Foreign Exchange Regulation Act was introduced in the Lok Sabha. But before the Bill came up for discussion and approval, the Lok Sabha was dissolved. Subsequently, certain modifications were made to the original Bill and a modified Bill was presented and passed by both the Houses of Parliament. The Foreign Exchange Management Act received the assent of the President on 9th December, 1999 and brought into force with effect from 1<sup>st</sup> June, 2000. Foreign Exchange Management Act, 1999 is an Act to facilitate external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.

## IMPORTANT DEFINITIONS

Section 2 of the Foreign Exchange Management Act defines various terms used in the Act, and certain important definitions are given below:

### **Adjudicating Authority [Section 2(a)]**

According to clause (a) of Section 2 'Adjudicating Authority' means an officer authorised under Sub-section (1) of Section 16 for the purposes of adjudication in respect of penalties under Section 13. Section 16 empowers the Central Government, to appoint, by an order published in the Official Gazette, as many officers as it may think fit as the adjudicating authorities for holding an enquiry in the manner prescribed after giving the person alleged to have committed any contravention, an opportunity of being heard.

### **Appellate Tribunal [Section 2(b)]**

'Appellate Tribunal' means Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the adjudicating authorities and Special Directors (Appeals) under the Act.

### **Authorised Person [Section 2(c)]**

The term authorised person is defined to include an authorised dealer, money changer, offshore banking unit or any other person for the time being authorised to deal in foreign exchange or foreign securities.

### **Capital Account Transaction [Section 2(e)]**

'Capital account transaction' has been defined to mean any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.

**Currency Notes [Section 2(i)]**

'Currency Notes' means and includes cash in the form of coins and bank notes. In fact, it means money and such bank notes or other paper money as are authorised by law and circulate from hand to hand as a medium of exchange.

**Current Account Transaction [Section 2(j)]**

The term current account transaction has been defined to mean a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Under the Act freedom has been granted for selling and drawing of foreign exchange to or from an authorized person for undertaking current account transactions. However, the Central Government has been vested with powers in consultation with Reserve Bank to impose reasonable restrictions on current account transactions. The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000 dealing with various aspects of current account transactions.

**Foreign Exchange [Section 2(n)]**

The term 'foreign exchange has been defined to mean foreign currency and includes deposits, credits, balance payable in foreign currency, drafts, travelers cheques, letters of credit, bills of exchange expressed or drawn in Indian currency but payable in any foreign currency. Any draft, travelers cheque, letters of credit or bills of exchange drawn by banks, institutions or persons outside India but payable in Indian currency has also been included in the definition of foreign exchange.

**Foreign Security [Section 2(o)]**

The term Foreign Security has been defined to mean any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency but where redemption or any form of return such as interest or dividend is payable in Indian currency.

Transfer or issue of a foreign security is a capital account transaction within the meaning of Section 6(3)(a) of the Act. The Reserve Bank of India has made Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2000 for regulation, acquisition and transfer of a foreign security by a person resident in India i.e. investment by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

**Person [Section 2(u)]**

The definition of the term 'person includes, an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals whether incorporated or not; any agency, office or branch owned or controlled by such persons. Even every artificial juridical person not falling within the above definition has been treated as person as per clause (u) of Section 2.

**Person Resident in India [Section 2(v)]**

The expression 'Person resident in India has been defined to mean a person residing in India for more than 182 days during the course of the preceding financial year. However, two categories of persons are excluded from the purview of definition.

The first category includes any person who has gone out of India or who stays outside India for or on taking up employment outside India, or for carrying on outside India a business or vocation. The definition also includes person who stays outside India for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period. The second category of persons which have been excluded from the definition of person resident in India include:

A person who has come to stay or stays in India, in either case otherwise than—

- (i) for or taking up employment in India; or
- (ii) for carrying on in India a business or vocation in India; or
- (iii) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

## **REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE**

Chapter II of the Act containing Sections 3-9 deals with Regulation and Management of Foreign Exchange. Section 3 prohibits any person other than an authorised person from dealing in or transferring any foreign exchange or foreign security to any person or making any payment to or for the credit of any person resident outside India in any manner or receiving otherwise through an authorised person any payment by order or on behalf of any person resident outside India in any manner except as provided in the Act, rules or regulations made thereunder or with the general or special permission of the Reserve Bank of India.

Section 3(d) prohibits a person to enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person, except as otherwise provided in the Act and rules or regulations made thereunder. For this purpose, financial transaction has been defined to mean making any payment to or for the credit of any person or receiving any payment for, by order or on behalf of any person. Financial transaction also includes drawing, issuing or negotiating any bill of exchange or promissory note or transferring any security or acknowledging any debt.

## **CURRENT ACCOUNT TRANSACTIONS**

Section 5 of the Act allows any person to sell or draw foreign exchange to or from an authorised person if such sale or drawl is a current account transaction as defined under Section 2(j) of the Act. However, the Central Government may, in the public interest and in consultation with the Reserve Bank impose reasonable restrictions for current account transactions.

Foreign Exchange Management (Current Account Transactions) Rules, 2000 defines the term 'Drawal as to mean drawal of foreign exchange from an authorised person and includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM Card or any other thing by whatever name called which has the effect of creating foreign exchange liability.

## **Prohibition on drawal of foreign exchange for certain transactions**

Rule 3 prohibits the drawal of foreign exchange for the purposes of transactions specified in the Schedule I or a travel to Nepal and/or Bhutan or a transaction with a person resident in Nepal or Bhutan. However, in the case of transaction with a person resident in Nepal and Bhutan, the prohibition may be exempted by RBI subject to such terms and conditions as it may consider necessary. Schedule I to the Rules enumerate the situations in which the drawal of foreign exchange is prohibited. These are as follows:



Remittance out of lottery winnings
Remittance of income from racing/riding etc. or any other hobby
Remittance for purchase of lottery tickets, banned/prescribed magazine, football pools, sweep stakes etc
Payment of commission on exports made towards equity investment in joint ventures/wholly owned subsidiaries abroad of Indian Companies
Payment of Commission on exports under Rupee State Credit Route, except commission upto 10% of invoice value of exports of tea and tobacco
Payment related to 'call back service' of telephone
Remittance of interest income on funds held in Non-resident Special Rupee Scheme Account.

### Prior approval of Government of India for certain transactions

Rule 4 requires prior approval of the Government of India for the transactions as specified in Schedule II. However, this does not apply to the cases where the payment is made out of funds held in Resident Foreign Currency Account (RFC) of the remitter.

### Prior approval of Reserve Bank for certain transaction

Rule 5 of the Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015, governs every drawal of foreign exchange for transactions included in Schedule III. However, Rule 5 does not apply in those where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

### Transactions included in Schedule III

#### 1. Facilities for individuals—

Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess thereof requires prior approval of the Reserve Bank of India.

- (i) Private visits to any country (except Nepal and Bhutan)
- (ii) Gift or donation.
- (iii) Going abroad for employment
- (iv) Emigration
- (v) Maintenance of close relatives abroad
- (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for

meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.

- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies abroad
- (ix) Any other current account transaction

However, the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Further more a person who is resident but not permanently resident in India and

- (a) is a citizen of a foreign State other than Pakistan; or
- (b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

*Explanation:* For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

It is to be noted that a person other than an individual may also avail of foreign exchange facility, *mutatis mutandis*, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

## 2. Facilities for persons other than individual

The following remittances by persons other than individuals require prior approval of the Reserve Bank of India.

- (i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-
  - (a) creation of Chairs in reputed educational institutes,
  - (b) contribution to funds (not being an investment fund) promoted by educational institutes; and
  - (c) contribution to a technical institution or body or association in the field of activity of the donor Company.
- (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
- (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.
- (iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses."

## CAPITAL ACCOUNT TRANSACTION

Section 6 of the FEMA allows capital account transactions subject however to certain conditions. This section empowers the Reserve Bank of India to specify, in consultation with the Central Government, any class or classes of capital account transactions permissible and the limit up to which foreign exchange shall be admissible for such transactions. However, Reserve Bank shall not impose any restrictions on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business.

The Reserve Bank of India may, by regulations, prohibit, restrict or regulate the transfer or issue of any foreign security by a person resident in India or by a person resident outside India. Reserve Bank of India may also regulate, prohibit or restrict transfer or issue of any security or foreign security through any branch office, or agency in India of a person resident outside India. Any borrowing or lending in foreign exchange in whatever form or by whatever name called may also be regulated or prohibited by the Reserve Bank. Similarly, RBI may also prohibit or restrict any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India. Deposits between person's resident in India and person's resident outside India may be regulated or prohibited by the Reserve Bank of India. RBI may also regulate the export, import or holding of currency or currency notes.

Acquisition or transfer of immovable property other than on lease not exceeding five years in India by person resident in India or a person resident outside India may be prohibited or regulated by the Reserve Bank of India. RBI has also been empowered to prohibit or regulate giving of guarantee or surety in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India or by a person resident outside India.

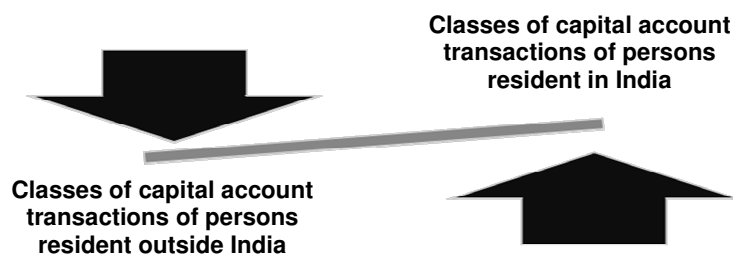
Sub-section (4) allows a person resident in India to hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India, if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. Similarly, a person resident outside India is permitted to hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Reserve Bank of India under sub-section (6) has been empowered to regulate, prohibit, restrict establishment in India of a branch, office or other place of business by a person resident outside India for carrying on any activity relating to such branch, office or other place of business.

### Permissible Capital Account Transactions

Schedule I & II to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 classifies the capital account transactions of a person under the following two heads viz.

#### Classes of Capital Account Transactions



## Classes of Capital Account Transactions by Persons Resident in India

Investment by a person resident in India in foreign securities

Foreign currency loans raised in India and abroad by a person resident in India

Transfer of immovable property outside India by person resident in India

Guarantees issued by a person resident in India in favour of a person resident outside India

Export, import and holding of currency/currency notes

Loans and overdrafts by a person resident in India from a person resident outside India

Maintenance of foreign currency accounts in India and outside India by a person resident in India

Taking out of insurance policy by a person resident in India from an insurance company outside India

Loans and overdrafts by a person resident in India to a person resident outside India

Remittance outside India of capital assets of a person resident in India

Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India

### Classes of Capital Account Transactions by Persons Resident Outside India

Investment in India by a person resident outside India, that is to say:

- (a) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
- (b) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.

Acquisition and transfer of immovable property in India by a person resident outside India

Guarantee by a person resident outside India in favour of, or on behalf of a person resident in India

Import and export of currency/currency notes into/from India by a person resident outside India.

Deposits between a person resident in India and a person resident outside India

Foreign Currency accounts in India of a person resident outside India

Remittance outside India of capital assets in India of a person resident outside India.

Subject to the provisions of the Act, or rules, or regulations or directions or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for the above mentioned capital account transactions provided the transactions are within the limit, if any, specified in the Regulations relevant to the transaction. However, no person is allowed to undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction except as provided in the Act, Rules or regulations made thereunder.

Similarly, except as otherwise provided in the Act, no person resident outside India is entitled to make investment in India, in any form, in any company or partnership firm or proprietary concern or any entity whether incorporated or not, which is engaged or proposed to engage in the business of chit funds, or Nidhi company, or in agricultural or plantation activities, or real estate business, or construction of farm houses, or trading in Transferable Development Rights (TDRs). For this purpose real estate business includes development of townships, construction of residential/commercial premises, roads or bridges.

The payment for investment are required to be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India in accordance with the regulation made by the Reserve Bank of India. Every person selling or drawing foreign

exchange to or from an authorised person for a capital account transaction is required to furnish to Reserve Bank a declaration within the time specified in the regulations relevant to the transactions.

**ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OUTSIDE INDIA BY A PERSON RESIDENT IN INDIA**

**Modes of acquiring property outside India by a resident**

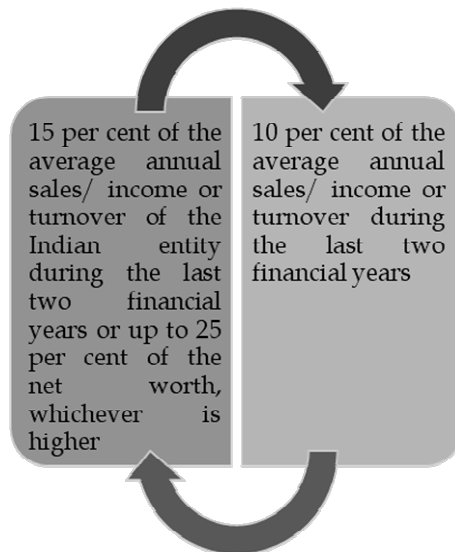
According to section 6(4) of the FEMA read with Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015, a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by him/ her when he/ she was resident outside India or inherited from a person resident outside India.

1. A resident can acquire immovable property outside India by way of gift or inheritance from:
  - (a) a person referred to at 3.1 above; or
  - (b) a person resident in India who had acquired such property on or before July 8, 1947 and continued to be held by him with the permission of the Reserve Bank.
  - (c) a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
2. A resident can purchase immovable property outside India out of foreign exchange held in his/ her Resident Foreign Currency (RFC) account.
3. A resident can acquire immovable property outside India jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.

**Acquisition under the Liberalised Remittance Scheme (LRS)**

A resident individual can send remittances under the Liberalised Remittance Scheme for purchasing immovable property outside India.

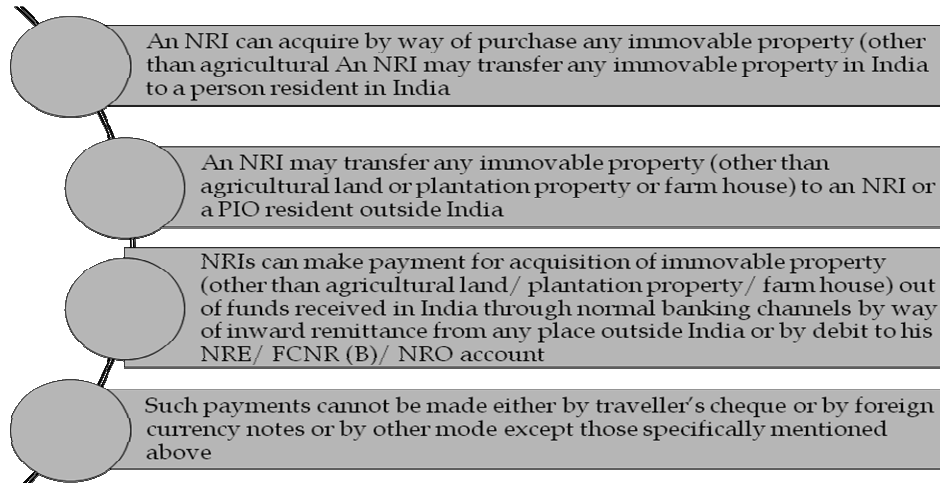
**Companies having overseas offices**



## ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA

As per section 6(5) of FEMA read with Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000, a person resident outside India can hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by him/ her when he/ she was resident in India or inherited from a person resident in India.

### Acquisition/ transfer of immovable property by a Non- Resident Indian (NRI)



It may be noted that:

1. 'Non-Resident Indian' (NRI) is a citizen of India resident outside India.
2. 'Transfer' includes sale, purchase, mortgage, exchange, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

### Acquisition/ transfer by a Person of Indian Origin (PIO)

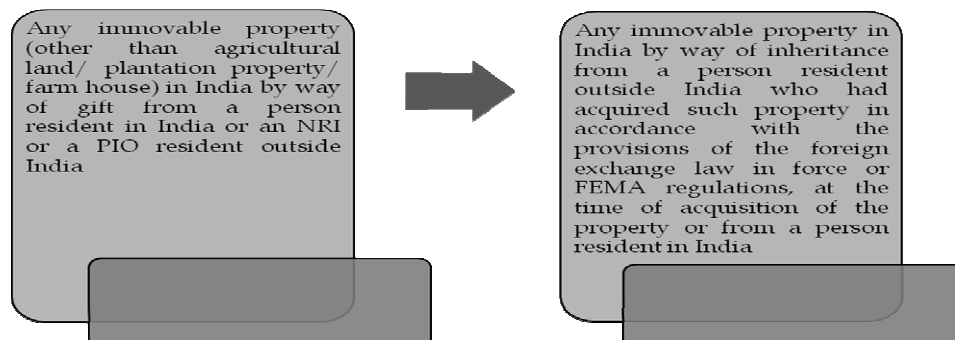
'Person of Indian Origin' means an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan) who at any time, held an Indian Passport or who or either of whose father or mother or whose grandfather or grandmother was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955.

#### **Purchase of immovable property**

A PIO resident outside India can acquire by way of purchase any immovable property (other than agricultural land/ plantation property / farm house) in India.

#### **Gift/ Inheritance of immovable property**

A PIO resident outside India may acquire



***Transfer of immovable property***

A PIO resident outside India can transfer

- by way of sale, any immovable property in India (other than agricultural land/ farm house/ plantation property), to a person resident in India
- by way of gift or sale, agricultural land/ farm house/ plantation property in India, to a person resident in India who is a citizen of India
- by way of gift, residential or commercial property in India, to a person resident in India or to an NRI or to a PIO resident outside India

***Payment for Acquisition of Immovable Property in India***

A PIO resident outside India can make payment for acquisition of immovable property in India (other than agricultural land/ farm house/ plantation property) by way of purchase out of funds received by inward remittance through normal banking channels or by debit to his NRE/ FCNR (B) / NRO account;

Such payments cannot be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically mentioned above.

**Acquisition of immovable Property by Foreign Embassies/ Diplomats/ Consulate Generals**

Foreign Embassy/ Diplomat/ Consulate General, may purchase/ sell immovable property (other than agricultural land/ plantation property/ farm house) in India provided –

- (a) Clearance from the Government of India, Ministry of External Affairs is obtained for such purchase/sale, and
- (b) The consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through the normal banking channels.

**REALISATION, REPATRIATION AND SURRENDER OF FOREIGN CURRENCY**

Section 8 of the Act requires the person resident in India to make all reasonable efforts to realise and repatriate the foreign exchange due or accrued as per the directions of the Reserve Bank.

In exercise of the powers conferred by Section 8, sub-section (6) of Section 10, clause (c) of sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999, the Reserve Bank issued Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender.

**Duty of persons to realise foreign exchange due**

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to



India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

- (a) that the receipt by him of the whole or part of that foreign exchange is delayed; or
- (b) that the foreign exchange ceases in whole or in part to be receivable by him.

**It may be noted that 'Foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange.**

### **Manner of Repatriation**

On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

- (a) sell it to an authorised person in India in exchange for rupees; or
- (b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
- (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

### **Period for surrender of realised foreign exchange**

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person, within the period specified below :-

- (i) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
- (ii) in all other cases within a period of ninety days from the date of its receipt.

### **Period for surrender in certain cases**

Any person not being an individual resident in India who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the FEMA does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.

Where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person—

- (i) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and

- (ii) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellerscheques.

### **Period for surrender of received/realised/unspent/unused foreign exchange by Resident individuals**

A person being an individual resident in India shall surrender the received/ realised/ unspent/ unused foreign exchange whether in the form of currency notes, coins and travelers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/ realisation/ purchase/ acquisition or date of his return to India, as the case may be.

### **Exemption**

**The Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 does not apply to foreign exchange in the form of currency of Nepal or Bhutan.**

### **REMITTANCE OF ASSETS**

In exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, the Reserve Bank issued the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 in respect of remittance outside India by a person whether resident in India or not, of assets in India.

### **Remittances by individuals not being NRIs/ PIOs**

'Remittance of assets' means remittance outside India of funds in a deposit with a bank/ firm/ company, provident fund balance or superannuation benefits, amount of claim or maturity proceeds of insurance policy, sale proceeds of shares, securities, immovable property or any other asset held in India in accordance with the provisions of the Foreign Exchange Management Act, 1999 (FEMA) or rules/ regulations made there under.

ADs may allow remittance of assets by a foreign national where:

- (i) the person has retired from employment in India;
- (ii) the person has inherited from a person referred to in section 6(5) of the Act;
- (iii) the person is a non-resident widow/widower and has inherited assets from her/his deceased spouse who was an Indian national resident in India.

The remittance should not exceed USD one million per financial year. This limit, however, will not cover sale proceeds of assets held on repatriation basis. In case the remittance is made in more than one instalment, the remittance of all instalments should be made through the same AD on submission of documentary evidence.

- (v) the remittance is in respect of balances held in a bank account by a foreign student who has completed his/ her studies, provided such balance represents proceeds of remittances received from abroad through normal banking channels or rupee proceeds of foreign exchange brought by such person and sold to an authorised dealer or out of stipend/ scholarship received from the Government or any organisation in India.

These facilities are not available for citizens of Nepal or Bhutan or a PIO.

### Remittances by NRIs/ PIOs

'**Non-Resident Indian**' (**NRI**) means a person resident outside India who is a citizen of India.

A '**Person of Indian Origin (PIO)**' is a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or

- (i) Who belonged to a territory that became part of India after the 15th day of August, 1947; or
- (ii) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or
- (iii) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c).

*Explanation:* PIO will include an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

**ADs may allow NRIs/ PIOs, on submission of documentary evidence, to remit up to USD one million, per financial year:**

- (i) out of balances in their non-resident (ordinary) (NRO) accounts/ sale proceeds of assets/ assets acquired in India by way of inheritance/ legacy;
- (ii) in respect of assets acquired under a deed of settlement made by either of his/ her parents or a relative as defined in Companies Act, 2013. The settlement should take effect on the death of the settler;
- (iii) in case settlement is done without retaining any life interest in the property i.e. during the lifetime of the owner/ parent, it would tantamount to regular transfer by way of gift and the remittance of sale proceeds of such property would be guided by the extant instructions on remittance of balance in the NRO account;

In case the remittance is made in more than one instalment, the remittance of all instalments should be made through the same AD. Where the remittance is to be made from the balances held in the NRO account, the Authorised Dealer should obtain an undertaking from the account holder stating that the said remittance is sought to be made out of the remitter's balances held in the account arising from his/ her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account and if such is found to be the case, the account holder will render himself/ herself liable for penal action under FEMA.

### Remittances by companies/ entities

ADs may allow remittances by Indian companies under liquidation on directions issued by a Court in India/ orders issued by official liquidator in case of voluntary winding up on submission of:

- (i) Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.
- (ii) Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act, 1956.
- (iii) In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no

legal proceedings pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

ADs may also allow Indian entities to remit their contribution towards the provident fund/ superannuation/ pension fund in respect of their expatriate staff resident but “not permanently resident” in India.

### **Remittances/ winding up proceeds of branch/ office**

ADs may permit remittance of assets on closure or remittance of winding up proceeds of branch office/ liaison office (other than project office) on submission of the following documents:

- (i) A copy of the Reserve Bank's permission for establishing the branch/ office in India.
- (ii) Auditor's certificate:
  - a. indicating the manner in which the remittable amount has been arrived and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;
  - b. confirming that all liabilities in India including arrears of gratuity and other benefits to the employees etc., of the branch/ office have been either fully met or adequately provided for;
  - c. confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India;
  - d. confirming that the branch/office has complied with all regulatory requirements stipulated by the Reserve Bank of India from time to time regarding functioning of such offices in India;
- (iii) a confirmation from the applicant that no legal proceedings are pending in any Court in India and there is no legal impediment to the remittance; and
- (iv) a report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the office in India.

### **Remittance of assets requiring RBI approval**

Prior approval of the Reserve Bank is necessary for remittance of assets where:

- (a) Remittance is in excess of USD 1,000,000 (US Dollar One million only) per financial year
  - (i) on account of legacy, bequest or inheritance to a citizen of foreign state, resident outside India;
  - (ii) by NRIs/ PIOs out of the balances held in NRO accounts/ sale proceeds of assets/ the assets acquired by way of inheritance/ legacy.
- (b) Hardship will be caused to a person if remittance from India is not made to such a person.

Remittance of funds from the sale of assets in India held by a person, whether resident in or outside India, not covered under the directions stipulated above will require approval of the Reserve Bank.

### **Income-tax clearance**

The remittances are subject to payment of applicable taxes in India. Reserve Bank of India does not issue any instructions under FEMA clarifying tax issues. It is mandatory on the part of Authorised Dealers to comply with the requirement of tax laws, as applicable.

### **Exemption from Realisation or Repatriation**

Section 9 of the Act contains exemptions from the application of provisions relating to holding of foreign

currency and realisation and repatriation in certain circumstances, as provided under Sections 4 and 8 of the Act respectively. Accordingly, possession of foreign currency or coins by any person or class of persons, as the Reserve Bank may specify is not prohibited. A person or class of persons may hold and operate foreign currency account within the prescribed limits as may be specified by the Reserve Bank. Foreign exchange acquired or received before 8th July, 1947, or any income arising or accruing thereon which is held outside India, in pursuance of a general or special permission of RBI, is also exempted.

Provisions relating to holding of foreign exchange, realisation and repatriation of foreign exchange are not applicable to person resident in India upto such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from certain persons mentioned above and any income arising there from. Reserve Bank may also specify the exemption limit upto which the foreign exchange earned by a person from employment, business, trade, vocation services, honorarium, gifts, inheritance or other legitimate means may be possessed. Reserve Bank may also exempt such other receipts as it thinks fit.

### **POSSESSION AND RETENTION OF FOREIGN CURRENCY OR FOREIGN COINS**

Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 deals with limits on possession and retention of foreign currency or foreign coins. Under Regulation 3 the Reserve Bank has specified following limits for possession or retention of foreign currency or foreign coins, namely:

- (i) possession without limit of foreign currency and coins by an authorised person within the scope of his authority;
- (ii) possession without limit of foreign coins by any person;
- (iii) retention by a person resident in India of foreign currency notes, bank notes and foreign currency travelers cheques not exceeding US \$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travelers cheques acquired during a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or from any person not resident in India and also who is on a visit to India, or as honorarium or gift or for services rendered or in settlement of any lawful obligation; or as a honorarium or gift while on a visit to any place outside India; or represents unspent amount of foreign exchange acquired from an authorised person for travel abroad.

Regulation 4 deals with possession of foreign exchange by a person resident in India but not permanently resident therein and provides that a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travelers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the law for the time being in force. Explanation to regulation 4 defines the term 'not permanently resident as to mean a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

### **AUTHORISED PERSON**

Chapter III of the Act containing Sections 10-12 deals with the provisions relating to authorised person. Section 10 deals with the procedure of appointing authorised person by the Reserve Bank, Section 11 specifies the powers of the RBI to issue directions to authorised person and Section 12 prescribes the power of the RBI to inspect authorised person. An Authorised Dealer is any person specifically authorized by the Reserve Bank under Section 10(1) of FEMA, 1999, to deal in foreign exchange or foreign securities.

Under Section 10, any person who has made an application to the RBI may be authorised by it to act as an

authorised person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or offshore banking unit or in any other manner as the RBI deem fit. This authorisation is in writing and subject to the conditions laid down by the RBI.

Normally, nationalised banks, leading non nationalized banks and foreign banks are appointed as authorized persons.

Authorised persons are required to comply with the directions of the Reserve Bank with regard to his dealing in foreign exchange or foreign security receipt with the previous permission of the Reserve Bank. However authorised person are required not to engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation.

Reserve Bank of India has been empowered to revoke the authorisation granted to any person at any time in the public interest. It may also revoke the authorisation after giving an opportunity, if the authorised person failed to comply with the conditions subject to which the authorisation was granted or contravened any of the provisions of the Act, rules, notifications or directions.

An authorised person, before undertaking any transaction on behalf of any person shall, require that person to make such declaration and give such information as will reasonably satisfy the authorised person that the transaction will not involve or is not intended to violate or contravene any provisions of the Act, rules, notification or directions. In case, the person refuses to comply with such requirements or makes only unsatisfactory compliances, the authorised person is duty bound to refuse in writing to act on behalf of such person in such transaction and report the matter to Reserve Bank.

Any person, other than an authorised person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to the authorised person does not use it for such purpose, or does not surrender it to authorised person within the specified period, or uses the foreign exchange for any other purpose, which is not permitted under the provisions of the Act, such person shall be deemed to have committed contravention of the provisions of the Act.

### **Power of the Reserve Bank to issue directions to authorised person**

Section 11 of the Act empowers the RBI to issue directions to the authorised person in regard to making of payment or doing or desist from doing any act relating to foreign exchange or foreign security. Reserve Bank has also been empowered to issue directions to the authorised persons to furnish such information in such manner as it deems fit. If any authorised person contravenes any direction given by the RBI or fails to file the return as directed by RBI, he may be liable to a fine not exceeding ₹10,000/- and in the case of continuing contravention, with an additional penalty which may extend to ₹2,000 for every day during which such contravention continues. Power of Reserve Bank to Inspect authorised person

Section 12 of the Act empowers RBI to inspect the business of any authorised person for the purpose of verifying the correctness of any statement/information or particulars furnished. In case authorised person fails to furnish the information sought, the RBI can initiate inspection of the authorised person for obtaining such information. RBI may also inspect the business of an authorised person for securing compliance with the provisions of the Foreign Exchange Management Act or any of the Rules, Regulations or directions. The Reserve Bank may make an order in writing authorising any of its officer for this purpose.

When an inspection is initiated by the Reserve Bank, it shall be the duty of every authorised person (where the authorised person is a company or firm, every director partner or officer of such a company or firm), to produce before the inspecting officer, such books, accounts and other documents in his custody and to

furnish any statement or information relating to the affairs of such authorised person within the time limit and the manner in which such inspecting officer may direct.

## ADJUDICATION AND APPEAL

Chapter V containing Sections 16-35 deals with the adjudication and appeal.

### Appointment of Adjudicating Authority

Section 16 empowers the Central Government to appoint by notification in the Official Gazette as many Adjudicating Authorities as it may think fit for holding enquiries under Section 13. The Central Government is, however under obligation to specify the jurisdiction of the Adjudicating Authority. The Adjudicating Authority has been empowered to hold any enquiry on a complaint made in writing by an officer authorised by a general or special order by the Central Government.

In case, a complaint has been made in respect of a person alleged to have committed the contravention, such person shall be given a reasonable opportunity of being heard before imposing any penalty under Section 13. The Adjudicating Authority has discretion to demand from the persons against whom a complaint is made a bond or guarantee for any such amount as he thinks fit, if he is of the opinion that such persons likely to abscond or evade the payment of penalty, if imposed.

### Appeal to Special Director (Appeals)

Section 17 of the Act provides for appointment of one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities. In this context, the Central Government has been empowered to appoint by notification Special Directors (Appeals) specifying their jurisdiction over matters and places.

An appeal to the Special Director (Appeals) may be made against the orders of the Assistant Director or Deputy Director of enforcement, acting as Adjudicating Authority. The appeal against the order of Adjudicating Authority shall be made in the prescribed form along with requisite fee, within forty five days from the date of the receipt of the order by aggrieved person. The Special Director (Appeals) has however, been empowered to entertain appeal after the expiry of the said period of forty five days.

### Establishment of Appellate Tribunal

Under Section 18, the Central Government is empowered to establish an Appellate Tribunal, by a notification in the Official Gazette, to hear appeals against the orders of Adjudication Authorities and Special Director (Appeals). The Central Government or any person aggrieved by the orders of Adjudicating Authority or Special Director (Appeals) may prefer an appeal to the Appellate Tribunal under Section 19 of the Act.

Section 20 of the Act empowers the Central Government to appoint a Chairperson and as many members as it may deem fit to the Appellate Tribunal. The jurisdiction of the Appellate Tribunal may be exercised by benches. A bench may be constituted by the Chairperson with one or more member as the Chairperson deem fit. The Chairperson can also transfer member of one bench to another bench. The Appellate Tribunal shall sit ordinarily at New Delhi for hearing. The Central Government however may, in consultation with the Chairperson, notify the sitting of the Tribunal elsewhere as it may deem fit.

A person who is or has been or is qualified to be a judge of a High Court shall be eligible for the appointment as chairperson of Appellate Tribunal. A person who is or has been or is eligible to be a district judge shall be

eligible for appointment as a member of Appellate Tribunal. A member of the Indian Legal Service and holding the post in Grade I of that Services or the member of Indian Revenue Service and holding the post equivalent to a Joint Secretary to the Government of India, shall be eligible to be appointed as Special Director (Appeals).

The Chairperson and Members will hold office for a period of 5 years from the date of assuming office. However, no chairperson or member shall hold office on attaining the age of 65 years and 62 years respectively.

### **Appeal to High Court**

A right to appeal to High Court lies with the appellant who is aggrieved by the decision of the Tribunal. Such appeal must be filed within 60 days from the date of communication of the decision or order of the Tribunal. The appeal to the High Court can be made on any question of law arising out of such order. A relaxation for a maximum period of sixty days for making an appeal may be granted by the High Court, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the specified period.

### **Directorate of Enforcement**

Section 36 of the Act empowers the Central Government to establish a Directorate of Enforcement with a Director and other officers or class of Officers, for the purposes of the enforcement of the Act. The Central Government has also been empowered to authorise Director, Additional Director, Special Director or Deputy Director to appoint officers of enforcement below the rank of Assistant Director of Enforcement to exercise the powers and discharge the duties conferred or imposed on him under the Act.

The Central Government, may, by order and with prescribed conditions and limitations, authorise any officers of customs or Central Excise or any police officer or officers of Central or State Government to exercise such powers and discharge such duties of the Director of Enforcement or any other officer of the Enforcement as stated in the order.

### **Investigation**

Section 37 of the Act empowers the Director of Enforcement and other officers below the rank of an Assistant Director to take up for investigation the contravention referred to in Section 13 of the Act. In addition, the Central Government may also authorise any officer or class of officers in the Central Government, State Government, Reserve Bank of India, not below the rank of Under Secretary to Government of India, to investigate any contravention under Section 13 of the Act. The officers so appointed shall exercise the like powers which are conferred on income tax authorities under the Income Tax Act, 1961, subject to such conditions and limitations as laid down under that Act.

### **Contravention by Companies**

Section 42 of the Act deals with contravention of the provisions of the Act by the Companies and provides that where the person committing the contravention of the Act or Rules happened to be a company, every person who at the time the contravention was committed, was in charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly. However, no such persons shall be deemed to be guilty of committing any offence if he proves that such contravention took place without his knowledge or that he exercised adequate steps to prevent such contravention.



In case the contravention is committed by a company and it is proved that such contravention is committed with the knowledge, consent and connivance or is attributed to the neglect on the part of any director, manager or secretary or other officer of the company, they will also be deemed to be guilty of contravention and liable to be proceeded against and punished accordingly.

### COMPOUNDING OF CONTRAVENTIONS

Contravention is a breach of the provisions of the Foreign Exchange Management Act (FEMA), 1999 and rules/regulations/notification/orders/directions/circulars issued there under. Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal. The Reserve Bank is empowered to compound any contraventions as defined under section 13 of FEMA, 1999 except the contravention under section 3(a), for a specified sum after offering an opportunity of personal hearing to the contravener. It is a voluntary process in which an individual or a corporate seeks compounding of an admitted contravention. It provides comfort to any person who contravenes any provisions of FEMA, 1999 [except section 3(a) of the Act] by minimizing transaction costs. Willful, malafide and fraudulent transactions are, however, viewed seriously, which will not be compounded by the Reserve Bank.

Any person who contravenes any provision of the FEMA, 1999 [except section 3(a)] or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act or contravenes any condition subject to which an authorization is issued by the Reserve Bank, can apply for compounding to the Reserve Bank. Applications seeking compounding of contraventions under section 3(a) of FEMA, 1999 may be submitted to the Directorate of Enforcement.

#### Power to compound by Reserve Bank

AMOUNT	COMPOUNDING AUTHORITY
In case where the sum involved in such contravention is ten lakhs rupees or below	Assistant General Manager of the Reserve Bank of India
In case where the sum involved in such contravention is more than rupees ten lakhs but less than rupees forty lakhs,	Deputy General Manager of Reserve Bank of India
In case where the sum involved in the contravention is rupees forty lakhs or more but less than rupees hundred lakhs	General Manager of Reserve Bank of India
In case the sum involved in such contravention is rupees one hundred lakhs or more	Chief General Manager of the Reserve Bank of India

#### Delegation of Powers to Regional Offices

As a measure of customer service and in order to facilitate the operational convenience, compounding powers have been delegated to the Regional Offices of the Reserve Bank of India to compound the following contraventions of FEMA, 1999.

<b>Brief Description of Contravention</b>	<b>Compounding Authority</b>
Delay in reporting inward remittance received for issue of shares.	Regional Offices of the Reserve Bank of India
Delay in filing form FC(GPR) after issue of shares.	Regional Offices of the Reserve Bank of India
Delay in filing the Annual Return on Foreign Liabilities and Assets (FLA Return), by all Indian companies which have received Foreign Direct Investment in the previous year(s) including the current year	Regional Offices of the Reserve Bank of India
Delay in issue of shares/refund of share application money beyond 180 days, mode of receipt of funds, etc.	Regional Offices of the Reserve Bank of India
Violation of pricing guidelines for issue of shares.	Regional Offices of the Reserve Bank of India
Issue of ineligible instruments such as non-convertible debentures, partly paid shares, shares with optionality clause, etc.	Regional Offices of the Reserve Bank of India
Issue of shares without approval of RBI or FIPB respectively, wherever required.	Regional Offices of the Reserve Bank of India
Delay in submission of form FC-TRS on transfer of shares from Resident to Non-Resident.	Regional Offices of the Reserve Bank of India
Delay in submission of form FC-TRS on transfer of shares from Non-Resident to Resident.	Regional Offices of the Reserve Bank of India
Taking on record transfer of shares by investee company, in the absence of certified form FC-TRS.	Regional Offices of the Reserve Bank of India

<b>Brief Description of Contravention</b>	<b>Compounding Authority</b>
Contraventions relating to acquisition and transfer of immovable property outside India	FED, CO Cell, New Delhi
Contraventions relating to acquisition and transfer of immovable property in India	FED, CO Cell, New Delhi

Contraventions relating to establishment in India of Branch office, Liaison Office or Project office	FED, CO Cell, New Delhi
Contraventions falling under Foreign Exchange Management (Deposit) Regulations, 2000	FED, CO Cell, New Delhi

### Application for Compounding

- All applications for compounding may be submitted together with the prescribed fee of Rs.5000/- by way of a demand draft drawn in favour of “Reserve Bank of India” and payable at the concerned Regional Office and by way of a demand draft drawn in favour of “Reserve Bank of India” and payable at Mumbai for cases submitted to the Compounding Authority, [Cell for Effective implementation of FEMA (CEFA)], Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai.
- Along with the application in the prescribed format, the applicant may also furnish the details relating to Foreign Direct Investment, External Commercial Borrowings, Overseas Direct Investment and Branch Office / Liaison Office, as applicable, a copy of the Memorandum of Association and latest audited balance sheet along with an undertaking that they are not under investigation of any agency such as DOE, CBI, etc. in order to complete the compounding process within the time frame.
- In case the application has to be returned where required approvals are not obtained from the authorities concerned or in case of incomplete application for any other reason, the application fees of Rs.5000/- received along with the application will be returned by crediting the same to the applicant’s account through NEFT as per the ECS mandate and details of their bank account as furnished along with the application. The application will be treated as incomplete without these details.
- The applicants are also advised to bring to the notice of the compounding authority change, if any, in the address/ contact details of the applicant during the pendency of the compounding application with Reserve Bank.

### Pre-requisite for Compounding Process

- In respect of a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under the Compounding Rules, such contraventions would not be compounded and relevant provisions of the FEMA, 1999 shall apply. Any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention.
- Contraventions relating to any transaction where proper approvals or permission from the Government or any statutory authority concerned, as the case may be, have not been obtained such contraventions would not be compounded unless the required approvals are obtained from the concerned authorities.
- Cases of contravention such as those having a money laundering angle, national security concerns and/or involving serious infringements of the regulatory framework or where the contravener fails to pay the sum for which contravention was compounded within the specified period in terms of the compounding order, shall be referred to the Directorate of Enforcement for further investigation and

necessary action under FEMA, 1999 or to the authority instituted for implementation of the Prevention of Money Laundering Act 2002, or to any other agencies, for necessary action as deemed fit.

- In this connection, it is clarified that whenever a contravention is identified by the Reserve Bank or brought to its notice by the entity involved in contravention by way of a reference other than through the prescribed application for compounding, the Bank will continue to decide
  - whether a contravention is technical and/or minor in nature and, as such, can be dealt with by way of an administrative/ cautionary advice;
  - whether it is material and, hence, is required to be compounded for which the necessary compounding procedure has to be followed or
  - whether the issues involved are sensitive / serious in nature and, therefore, need to be referred to the Directorate of Enforcement (DOE). However, once a compounding application is filed by the concerned entity suo moto, admitting the contravention, the same will not be considered as 'technical' or 'minor' in nature and the compounding process shall be initiated in terms of section 15 (1) of Foreign Exchange Management Act, 1999 read with Rule 9 of Foreign Exchange (Compounding Proceedings) Rules, 2000.

### **Scope and Procedure for Compounding**

- On receipt of the application for compounding, the Reserve Bank shall examine the application based on the documents and submissions made in the application and assess whether contravention is quantifiable and, if so, the amount of contravention.
- The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings. In case the contravener fails to submit the additional information/documents called for within the specified period, the application for compounding will be liable for rejection.
- The following factors, which are only indicative, may be taken into consideration for the purpose of passing compounding order and adjudging the quantum of sum on payment of which contravention shall be compounded:
  - the amount of gain of unfair advantage, wherever quantifiable, made as a result of the contravention;
  - the amount of loss caused to any authority/ agency/ exchequer as a result of the contravention;
  - economic benefits accruing to the contravener from delayed compliance or compliance avoided;
  - the repetitive nature of the contravention, the track record and/or history of non-compliance of the contravener;
  - contravener's conduct in undertaking the transaction and in disclosure of full facts in the application and submissions made during the personal hearing; and any other factor as considered relevant and appropriate.

### **Issue of the Compounding Order**

- The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerned as expeditiously as possible as and not later than 180 days from the date of application on the basis of the averments made in the application as well as other documents and submissions made in this context by the contravener during the personal hearings.

- The time limit for this purpose would be reckoned from the date of receipt of the completed application for compounding by the Reserve Bank.
- If the applicant opts for appearing for the personal hearing, the Reserve Bank would encourage the applicant to appear directly for it rather than being represented / accompanied by legal experts / consultants, as compounding is only for admitted contraventions. Appearing for or opting out of personal hearing does not have any bearing whatsoever on the amount imposed in the compounding order. If the authorized representative of the applicant is unavailable for the personal hearing, the Compounding Authority may pass the order based on available information/ documents.
- The Compounding Order shall specify the provisions of the FEMA, 1999 or any rule, regulation, notification, direction or order issued in exercise of the powers under FEMA, 1999 in respect of which contravention has taken place along with details of the contravention.
- One copy of the compounding order issued under sub rule (2) of Rule 8 of Foreign Exchange (Compounding Proceedings) Rules, 2000 shall be supplied to the applicant (the contravener) and also to the Adjudicating Authority, where the compounding of any contravention is made after making of a complaint under sub-section (3) of section 16 of the FEMA, as the case may be.
- To ensure more transparency and greater disclosure, it has been decided to host the compounding orders passed on the Reserve Bank's website ([www.rbi.org.in](http://www.rbi.org.in)).

### LESSON ROUND-UP

- Foreign exchange means 'foreign currency' and includes:- (i) deposits, credits and balances payable in any foreign currency; (ii) drafts, travellers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency; and (iii) drafts, travellers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.
- Capital Account transactions means any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.
- Current Account Transaction means a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.
- In exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, the Reserve Bank issued the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 in respect of remittance outside India by a person whether resident in India or not, of assets in India.
- Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal. The Reserve Bank is empowered to compound any contraventions as defined under section 13 of FEMA, 1999 except the contravention under section 3(a) for a specified sum after offering an opportunity of personal hearing to the contravener. It is a voluntary process in which an individual or a corporate seeks compounding of an admitted contravention. It provides comfort to any person who contravenes any provisions of FEMA, 1999 [except section 3(a) of the Act] by minimizing transaction costs.



# Lesson 4

## Foreign Contribution (Regulation) Act, 2010

### LESSON OUTLINE

- Learning objectives
- Foreign contribution
- Foreign Source
- Foreign hospitality
- Regulation of foreign contribution and foreign hospitality
- Certificate of Registration
- Application for Renewal
- Renewal of Certificate
- Cancellation of Certificate
- Management of Foreign Contribution
- Intimation to Government
- Obligation of Banks under FCRA
- Inspection
- Audit
- Confiscation
- Adjudication
- Offences and penalties
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Foreign Contribution (Regulation) Act, 2010 is internal security legislation and regulated by Ministry of Home Affairs which prohibits certain classes of persons from receiving 'foreign contribution'. It also restricts certain classes of persons from accepting foreign hospitality while visiting any country or territory outside India, without the prior permission of the Central Government.

The Act provides that persons having definite cultural, economic, educational, religious and social programmes should get themselves registered with the Government of India before accepting any 'foreign contribution'. "Foreign contribution" means the donation, delivery or transfer made by any foreign source of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf; of any currency, whether Indian or foreign; any security as defined under Securities Contracts (Regulation) Act, 1956 and the Foreign Exchange Management Act, 1999.

The Act mandates that every bank or authorized person in foreign exchange shall report to specified authority, the prescribed amount of foreign remittance, source and manner in which foreign remittance was received and other particulars in such form and manner as may be prescribed. The object of the study is to familiarize the students with the legal requirements stipulated under the FCRA, 2010.

*The object of the Foreign Contribution (Regulation) Act, 2010 is to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.*

## INTRODUCTION

The Foreign Contribution (Regulation) Act, 1976 was enacted to regulate the acceptance and utilization of foreign contribution or hospitality with a view to ensuring that the Parliamentary institutions, political associations, academic and other voluntary organizations as well as individuals working in important areas of national life may function in a manner consistent with the values of sovereign democratic republic. The Act was amended in 1984 to extend its provisions to cover second and subsequent recipients of foreign contribution and to the members of higher judiciary, besides introducing the system of grant of registration to the association receiving foreign contribution.

Significant developments have taken place since 1984 such as change in internal security scenario, an increased influence of voluntary organizations, spread of use of communication and information technology, quantum jump in the amount of foreign contribution being received, and large scale growth in the number of registered organizations. This has necessitated large scale changes in the Act of 1976 and therefore, it was thought appropriate to replace the FCRA, 1976 by a new legislation to regulate the acceptance and utilization of foreign contribution and foreign hospitality by a person or association.

The Foreign Contribution (Regulation) Act, 2010 has come into effect from May 1, 2011. The Ministry of Home Affairs has issued the necessary Gazette Notification vide S.O. 999 (E) dated the 29th April, 2011 in this regard. The Ministry of Home Affairs has also issued a Gazette Notification vide G.S.R. 349 (E) dated the 29th April, 2011 notifying the Foreign Contribution (Regulation) Rules, 2011 made under section 48 of FCRA, 2010. The FCR Rules, 2011 have come into force simultaneously with FCRA, 2010.

## DEFINITIONS

The definitions of the following terms used in the statute are relevant for understanding the operative provisions of the Foreign Contribution (Regulation) Act, 2010.

**“Association”** means an association of individuals, whether incorporated or not, having an office in India and includes a society, whether registered under the Societies Registration Act, 1860, or not, and any other organisation, by whatever name called [Section 2(1)(a)]

**“Authorised person in foreign exchange”** means an authorised person referred to in clause (c) of section 2 of the Foreign Exchange Management Act, 1999 [Section 2(1)(b)]

**“Bank”** means a banking company as referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 [Section 2(1)(c)]

**“Candidate for election”** means a person who has been duly nominated as a candidate for election to any Legislature [Section 2(1)(d)]

**“Certificate”** means certificate of registration granted under sub-section (3) of section 12 [Section 2(1)(e)]

**“Company”** shall have the meaning assigned to it under clause (17) of section 2 of the Income-tax Act, 1961 Section 2(1)(f);

**“Foreign company”** means any company or association or body of individuals incorporated outside India and includes—

- (i) a foreign company within the meaning of section 591 of the Companies Act, 1956 (1 of 1956);
- (ii) a company which is a subsidiary of a foreign company;
- (iii) the registered office or principal place of business of a foreign company referred to in sub clause (i)



or company referred to in sub-clause (ii);

(iv) a multi-national corporation.

*Explanation.*— For the purposes of this sub-clause, a corporation incorporated in a foreign country or territory shall be deemed to be a multi-national corporation if such corporation, —

(a) has a subsidiary or a branch or a place of business in two or more countries or territories; or

(b) carries on business, or otherwise operates, in two or more countries or territories; [Section 2(1)(g)]

**“Foreign contribution”** means the donation, delivery or transfer made by any foreign source,—

(i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;

(ii) of any currency, whether Indian or foreign;

(iii) of any security as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined in clause (o) of section 2 of the Foreign Exchange Management Act, 1999.

*Explanation 1.*— A donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.

*Explanation 2.*— The interest accrued on the foreign contribution deposited in any bank referred to in sub-section (1) of section 17 or any other income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution within the meaning of this clause.

*Explanation 3.*— Any amount received, by any person from any foreign source in India, by way of fee (including fees charged by an educational institution in India from foreign student) or towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India or any contribution received from an agent of a foreign source towards such fee or cost shall be excluded from the definition of foreign contribution within the meaning of this clause [Section 2(1)(h)].

**“Foreign hospitality”** means any offer, not being a purely casual one, made in cash or kind by a foreign source for providing a person with the costs of travel to any foreign country or territory or with free boarding, lodging, transport or medical treatment [Section 2(1)(i)].

**“Foreign source”** includes, —

(i) the Government of any foreign country or territory and any agency of such Government;

(ii) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf;

(iii) a foreign company;

(iv) a corporation, not being a foreign company, incorporated in a foreign country or territory;

(v) a multi-national corporation referred to in sub-clause (iv) of clause (g);

- (vi) a company within the meaning of the Companies Act, 1956 and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:—
  - (A) the Government of a foreign country or territory;
  - (B) the citizens of a foreign country or territory;
  - (C) corporations incorporated in a foreign country or territory;
  - (D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;
  - (E) foreign company;
- (vii) a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;
- (viii) a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;
- (ix) a society, club or other association of individuals formed or registered outside India;
- (x) a citizen of a foreign country [Section 2(1)(j)]

**“Legislature”** means —

- (A) either House of Parliament;
- (B) the Legislative Assembly of a State, or in the case of a State having a Legislative Council, either House of the Legislature of that State;
- (C) Legislative Assembly of a Union territory constituted under the Government of Union Territories Act, 1963;
- (D) Legislative Assembly for the National Capital Territory of Delhi referred to in the Government of National Capital Territory of Delhi Act, 1991;
- (E) Municipality as defined in clause (e) of article 243P of the Constitution;
- (F) District Councils and Regional Councils in the States of Assam, Meghalaya, Tripura and Mizoram as provided in the Sixth Schedule to the Constitution [Section 2(1)(k)]

**“Person”** includes—

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) an association;
- (iv) a company registered under section 25 of the Companies Act, 1956 [Section 2(1)(m)]

**“Political party”** means—

- (i) an association or body of individual citizens of India—
  - (A) to be registered with the Election Commission of India as a political party under section 29A of the Representation of the People Act, 1951; or
  - (B) which has set up candidates for election to any Legislature, but is not so registered or deemed to be registered under the Election Symbols (Reservation and Allotment) Order, 1968;

- (ii) a political party mentioned in column 2 of Table 1 and Table 2 to the notification of the Election Commission of India No.56/J&K/02, dated the 8th August, 2002, as in force for the time being [Section 2(1)(n)]

It may be noted that words and expressions used herein and not defined in this Act but defined in the Representation of the People Act, 1950 or the Representation of the People Act, 1951 or the Foreign Exchange Management Act, 1999 shall have the meanings respectively assigned to them in those Acts.

## **REGULATION OF FOREIGN CONTRIBUTION AND FOREIGN HOSPITALITY**

### **Prohibition to accept foreign contribution**

Section 3(1) of the Act, imposes restriction on acceptance of foreign contribution by candidate for election; correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper; Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government; member of any Legislature; political party or office-bearer thereof; organisation of a political nature as may be specified by the Central Government; association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 or any other mode of mass communication; correspondent or columnist, cartoonist, editor, owner of the association or company. A "corporation" for the above purpose means a corporation owned or controlled by the Government and includes a Government company as defined in section 617 of the Companies Act, 1956.

Sub-section (2)(a) of Section 3 provides that no person, resident in India, and no citizen of India resident outside India, shall accept any foreign contribution, or acquire or agree to acquire any currency from a foreign source, on behalf of any political party, or any person, prohibited from accepting any foreign contribution.

Sub-section (2) (b) mandates that no person, resident in India, shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any person if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or any person, prohibited from accepting any foreign contribution.

Section 3(2)(c) provides that no citizen of India resident outside India shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any political party or any person specified in sub-section (1) of section 3, or both or any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person specified in sub-section (1) of section 3, or both.

Section 3(3) provides that no person receiving any currency, whether Indian or foreign, from a foreign source on behalf of any person or class of persons, referred to in section 9, shall deliver such currency to any person other than a person for which it was received, or to any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a person other than the person for which such currency was received.

### **Person to whom section 3 does not apply**

Section 4 provides that nothing contained in section 3 shall apply to the acceptance, by any person specified

in that section, of any foreign contribution where such contribution is accepted by him, subject to the provisions of section 10,—

- (a) by way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source; or
- (b) by way of payment, in the course of international trade or commerce, or in the ordinary course of business transacted by him outside India; or
- (c) as an agent of a foreign source in relation to any transaction made by such foreign source with the Central Government or State Government; or
- (d) by way of a gift or presentation made to him as a member of any Indian delegation, provided that such gift or present was accepted in accordance with the rules made by the Central Government with regard to the acceptance or retention of such gift or presentation; or
- (e) from his relative; or
- (f) by way of remittance received, in the ordinary course of business through any official channel, post office, or any authorised person in foreign exchange under the Foreign Exchange Management Act, 1999; or
- (g) by way of any scholarship, stipend or any payment of like nature:

Further in case any foreign contribution received by any person specified under section 3, for any of the purposes other than those specified under this section, such contribution shall be deemed to have been accepted in contravention of the provisions of section 3.

### **Procedure to notify an organization of a political nature**

Section 5(1) provides that the Central Government may, having regard to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organisations with the activities of any political party, by an order published in the Official Gazette, specify such organisation as an organisation of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3. Further, the Central Government may, frame the guidelines specifying the ground or grounds on which an organisation shall be specified as an organisation of a political nature.

### **Restriction on acceptance of foreign hospitality**

Section 6 prohibits acceptance of foreign hospitality by certain persons except with the prior permission of Central Government. Accordingly no member of a Legislature or office-bearer of a political party or Judge or Government servant or employee of any corporation or any other body owned or controlled by the Government shall, while visiting any country or territory outside India, accept, except with the prior permission of the Central Government, any foreign hospitality.

However, it shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India, but, where such foreign hospitality has been received, the person receiving such hospitality shall give, within one month from the date of receipt of such hospitality an intimation to the Central Government as to the receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received by him.

### **Prohibition to transfer foreign contribution to other person**

Section 7 prohibits the transfer of foreign contribution to other person. Accordingly, no person who is

registered and granted a certificate or has obtained prior permission under the Act; and receives any foreign contribution, shall transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior permission under the Act.

However, such person may transfer, with the prior approval of the Central Government, a part of such foreign contribution to any other person who has not been granted a certificate or obtained permission under the Act in accordance with the rules made by the Central Government.

**Which are the organisations/individuals specifically debarred from receiving foreign contribution?**

*The following are the persons prohibited from accepting foreign contribution:*

- (a) Candidate for election;
- (b) Correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
- (c) Judge, government servant or employee of any entity controlled or owned by the Government;
- (d) Member of any Legislature;
- (e) Political party or office bearers thereof;
- (f) Organisations of a political nature as may be specified;
- (g) Associations or companies engaged in the production or broadcast of audio news or audiovisual news or current affairs programmes through any electronic mode or form or any other mode of mass communication;
- (h) Correspondent or columnist, cartoonist, editor, owner of the association or company referred to in (g) above.



**Utilization of foreign contribution**

Section 8 (1)(a) provides that every person, who is registered and granted a certificate or given prior permission under the Act and receives any foreign contribution, shall utilise such contribution for the purposes for which the contribution has been received. Further any foreign contribution or any income arising out of it shall not be used for speculative business and that the Central Government shall, by rules, specify the activities or business which shall be construed as speculative business for the purpose of this section.

Section 8 (1) (b) provides that every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall not defray as far as possible such sum, not exceeding fifty per cent of such contribution, received in a financial year, to meet administrative expenses. Further administrative expenses exceeding fifty per cent of such contribution may be defrayed with prior approval of the Central Government.

The Central Government prescribes the elements which shall be included in the administrative expenses and the manner in which the administrative expenses shall be calculated.

**Power of Central Government to prohibit receipt of foreign contribution**

Section 9 deals with power of Central Government to prohibit receipt of foreign contribution, etc., in certain cases. Accordingly, the Central Government has been empowered to -

- (a) prohibit any person or organisation not specified in section 3, from accepting any foreign contribution;

- (b) require any person or class of persons, not specified in section 6, to obtain prior permission of the Central Government before accepting any foreign hospitality;
- (c) require any person or class of persons not specified in section 11, to furnish intimation within such time and in such manner as may be prescribed as to the amount of any foreign contribution received by such person or class of persons as the case may be, and the source from which and the manner in which such contribution was received and the purpose for which and the manner in which such foreign contribution was utilised;
- (d) without prejudice to the provisions of sub-section (1) of section 11, require any person or class of persons specified in that sub-section to obtain prior permission of the Central Government before accepting any foreign contribution;
- (e) require any person or class of persons, not specified in section 6, to furnish intimation, within such time and in such manner as may be prescribed, as to the receipt of any foreign hospitality, the source from which and the manner in which such hospitality was received.

However, no such prohibition or requirement shall be made unless the Central Government is satisfied that the acceptance of foreign contribution by such person or class of persons, as the case may be, or the acceptance of foreign hospitality by such person, is likely to affect prejudicially the sovereignty and integrity of India; or public interest; or freedom or fairness of election to any Legislature; or friendly relations with any foreign State; or harmony between religious, racial, social, linguistic or regional groups, castes or communities.

#### **Power to prohibit payment of currency received in contravention of the Act**

Section 10 provides that where the Central Government is satisfied, after making such inquiry as it may deem fit, that any person has in his custody or control any article or currency or security, whether Indian or foreign, which has been accepted by such person in contravention of any of the provisions of this Act, it may, by order in writing, prohibit such person from paying, delivering, transferring or otherwise dealing with, in any manner whatsoever, such article or currency or security save in accordance with the written orders of the Central Government and a copy of such order shall be served upon the person so prohibited in the prescribed manner.

#### ***Who can receive foreign contribution?***

*An association having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution unless such person obtains a certificate of registration / prior permission from the Central Government.*

#### **Registration of certain persons with Central Government**

Section 11(1) requires that person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution if such person obtains a certificate of registration from the Central Government.

It may be noted that any association registered with the Central Government under section 6 or granted prior permission under that section of the Foreign Contribution (Regulation) Act, 1976, as it stood immediately before the commencement of this Act, shall be deemed to have been registered or granted prior permission, as the case may be, under this Act and such registration shall be valid for a period of five years from the date on which this section comes into force.

Sub-section (2) of Section 11 provides that every person referred to in sub-section (1) may, if it is not registered with the Central Government under that sub-section, accept any foreign contribution only after obtaining the prior permission of the Central Government and such prior permission shall be valid for the specific purpose for which it is obtained and from the specific source. Further if the person referred to in sub-sections (1) and (2) has been found guilty of violation of any of the provisions of this Act or the Foreign Contribution (Regulation) Act, 1976, the unutilised or unreceived amount of foreign contribution shall not be utilised or received, as the case may be, without the prior approval of the Central Government.

Sub-section (3) of Section 11 provides that the Central Government may, by notification in the Official Gazette, specify the person or class of persons who shall obtain its prior permission before accepting the foreign contribution; or the area or areas in which the foreign contribution shall be accepted and utilised with the prior permission of the Central Government; or the purpose or purposes for which the foreign contribution shall be utilised with the prior permission of the Central Government; or the source or sources from which the foreign contribution shall be accepted with the prior permission of the Central Government.

### **Grant of certificate of registration**

Section 12(1) provides that an application by a person for grant of certificate or giving prior permission, shall be made to the Central Government in such form and manner and alongwith such fee, as may be prescribed. On receipt of an application, the Central Government shall, by an order, if the application is not in the prescribed form or does not contain any of the particulars specified in that form, reject the application. If on receipt of an application for grant of certificate or giving prior permission and after making such inquiry as the Central Government deems fit, it is of the opinion that the conditions specified in sub-section (4) are satisfied, it may, ordinarily within ninety days from the date of receipt of application, register such person and grant him a certificate or give him prior permission, as the case may be, subject to such terms and conditions as may be prescribed. In case the Central Government does not grant, within the said period of ninety days, a certificate or give prior permission, it shall communicate the reasons therefor to the applicant and that a person shall not be eligible for grant of certificate or giving prior permission, if his certificate has been suspended and such suspension of certificate continues on the date of making application.

Sub-section (4) of Section 12 provides following conditions for granting certificate of registration :—

- (a) the person making an application for registration or grant of prior permission under sub-section (1),—
  - (i) is not fictitious or benami;
  - (ii) has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;
  - (iii) has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;
  - (iv) has not been found guilty of diversion or mis-utilisation of its funds;
  - (v) is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;
  - (vi) is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;
  - (vii) has not contravened any of the provisions of this Act;
  - (viii) has not been prohibited from accepting foreign contribution;

- (b) the person making an application for registration under sub-section (1) has undertaken reasonable activity in its chosen field for the benefit of the society for which the foreign contribution is proposed to be utilised;
- (c) the person making an application for giving prior permission under sub-section (1) has prepared a reasonable project for the benefit of the society for which the foreign contribution is proposed to be utilised;
- (d) in case the person being an individual, such individual has neither been convicted under any law for the time being in force nor any prosecution for any offence pending against him;
- (e) in case the person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him;
- (f) the acceptance of foreign contribution by the person referred to in sub-section (1) is not likely to affect prejudicially—
  - (i) the sovereignty and integrity of India; or
  - (ii) the security, strategic, scientific or economic interest of the State; or
  - (iii) the public interest; or
  - (iv) freedom or fairness of election to any Legislature; or
  - (v) friendly relation with any foreign State; or
  - (vi) harmony between religious, racial, social, linguistic, regional groups, castes or communities;
- (g) the acceptance of foreign contribution referred to in sub-section (1),—
  - (i) shall not lead to incitement of an offence;
  - (ii) shall not endanger the life or physical safety of any person.

Where the Central Government refuses the grant of certificate or does not give prior permission, it shall record in its order the reasons therefore and furnish a copy thereof to the applicant. The Central Government may not communicate the reasons for refusal for grant of certificate or for not giving prior permission to the applicant under this section in cases where there is no obligation to give any information or documents or records or papers under the Right to Information Act, 2005.

*It may be noted that the certificate granted shall be valid for a period of five years and the prior permission shall be valid for the specific purpose or specific amount of foreign contribution proposed to be received, as the case may be.*

### **Suspension of certificate**

Section 13 (1) provides that where the Central Government, for reasons to be recorded in writing, is satisfied that pending consideration of the question of cancelling the certificate on any of the grounds mentioned in sub-section (1) of section 14, it is necessary so to do, it may, by order in writing, suspend the certificate for such period not exceeding one hundred and eighty days as may be specified in the order.


Further every person whose certificate has been suspended shall not receive any foreign contribution during the period of suspension of certificate. However, the Central Government, on an application made by such person, if it considers appropriate, allow receipt of any foreign contribution by such person on such terms and conditions as it may specify.



Every person whose certificate has been suspended shall utilise, in the prescribed manner, the foreign contribution in his custody with the prior approval of the Central Government.

**Cancellation of certificate**

Section 14 empowers the Central Government to cancel the certificate. Accordingly, the Central Government may, if it is satisfied after making such inquiry as it may deem fit, by an order, cancel the certificate if —



The holder of the certificate has made a statement in, or in relation to, the application for the grant of registration or renewal thereof, which is incorrect or false; or
The holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or
In the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or
The holder of certificate has violated any of the provisions of this Act or rules or order made thereunder; or
If the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.

Before passing an order of cancellation of certificate, the person concerned would be given a reasonable opportunity of being heard. Any person, whose certificate has been cancelled, shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

**Management of foreign contribution of person whose certificate has been cancelled**

Section 15 provides that the foreign contribution and assets created out of the foreign contribution in the custody of every person whose certificate has been cancelled under section 14 shall vest in such authority as may be prescribed.

The authority may, if it considers necessary and in public interest, manage the activities of the person referred to in that sub-section for such period and in such manner, as the Central Government may direct. Such authority may utilise the foreign contribution or dispose of the assets created out of it in case adequate funds are not available for running such activity. The authority shall return the foreign contribution and the assets vested upon it to the person, if such person is subsequently registered under this Act.

**Renewal of certificate**

*Every person who has been granted a certificate under section 12 shall have such certificate renewed within six months before the expiry of the period of the certificate [Section 16].*

**Application for Renewal**

The application for renewal of the certificate shall be made to the Central Government in such form and

manner and accompanied by such fee as may be prescribed. The Central Government shall renew the certificate, ordinarily within ninety days from the date of receipt of application for renewal of certificate subject to such terms and conditions as it may deem fit and grant a certificate of renewal for a period of five years. In case the Central Government does not renew the certificate within the said period of ninety days, it shall communicate the reasons therefor to the applicant. The Central Government may refuse to renew the certificate in case where a person has violated any of the provisions of this Act or rules made thereunder.

## **ACCOUNTS, INTIMATION, AUDIT AND DISPOSAL OF ASSETS**

### ***Foreign contribution through scheduled bank***

Section 17 provides that every person who has been granted a certificate or given prior permission shall receive foreign contribution in a single account only through such one of the branches of a bank as he may specify in his application for grant of certificate.

However, such person may open one or more accounts in one or more banks for utilising the foreign contribution received by him. Further no funds other than foreign contribution shall be received or deposited in such account or accounts.

Every bank or authorised person in foreign exchange shall report to such authority as may be specified amount of foreign remittance; the source and manner in which the foreign remittance was received; and other particulars, in such form and manner as may be prescribed.

### ***Intimation***

Section 18 requires every person who has been granted a certificate or given prior approval to provide within such time and in such manner as may be prescribed, an intimation to the Central Government, and such other authority as may be specified by the Central Government, as to the amount of each foreign contribution received by it, the source from which and the manner in which such foreign contribution was received, and the purposes for which, and the manner in which such foreign contribution was utilised by him.

Every person receiving foreign contribution is required to submit a copy of a statement indicating therein the particulars of foreign contribution received duly certified by officer of the bank or authorised person in foreign exchange and furnish the same to the Central Government along with the intimation.

### ***Maintenance of accounts***

Section 19 requires every person who has been granted a certificate or given prior approval to maintain, in such form and manner as may be prescribed, an account of any foreign contribution received by him; and a record as to the manner in which such contribution has been utilised by him.

### ***Order for Audit of accounts***

Section 20 provides that where any person who has been granted a certificate or given prior permission, fails to furnish any intimation within the time specified therefore or the intimation so furnished is not in accordance with law or if, after inspection of such intimation, the Central Government has any reasonable cause to believe that any provision of Act has been, or is being, contravened, the Central Government may, by general or special order, authorise such gazetted officer, holding a Group A post under the Central Government or any other officer or authority or organisation, as it may think fit, to audit any books of account kept or maintained by such person and thereupon every such officer shall have the right to enter in or upon any premises at any reasonable hour, before sunset and after sunrise, for the purpose of auditing the said books of account and any information obtained from such audit shall be kept confidential and shall not be disclosed except for the purposes of the Act.

***Intimation by candidate for election***

Section 21 requires every candidate for election, who had received any foreign contribution, at any time within one hundred and eighty days immediately preceding the date on which he is duly nominated as such candidate, shall give, within such time and in such manner as may be prescribed, an intimation to the Central Government or prescribed authority or both as to the amount of foreign contribution received by him, the source from which, and the manner in which, such foreign contribution was received and the purposes for which and the manner in which such foreign contribution was utilised by him.

***Disposal of assets created out of foreign contribution***

Section 22 provides that where any person who was permitted to accept foreign contribution under this Act, ceases to exist or has become defunct, all the assets of such person shall be disposed of in accordance with the provisions contained in any law for the time being in force under which the person was registered or incorporated. In the absence of any such law, the Central Government may, having regard to the nature of assets created out of foreign contribution received under this Act, by notification, specify that all such assets shall be disposed off by such authority, as it may specify, in such manner and procedure as may be prescribed.

**INSPECTION, SEARCH AND SEIZURE**

Section 23 provides that if the Central Government has, for any reason, to be recorded in writing, any ground to suspect that any provision of this Act has been or is being, contravened by any political party; or any person; or any organisation; or any association, it may, by general or special order, authorise such gazetted officer, holding a Group A post under the Central Government or such other officer or authority or organisation, as it may think fit, to inspect any account or record maintained by such political party, person, organisation or association, as the case may be, and thereupon every such inspecting officer shall have the right to enter in or upon any premises at any reasonable hour, before sunset and after sunrise, for the purpose of inspecting the said account or record.

***Seizure of accounts or records***

Section 24 provides that if, after inspection of an account or record, the inspecting officer has any reasonable cause to believe that any provision of the Act or of any other law relating to foreign exchange has been, or is being, contravened, he may seize such account or record and produce the same before the court, authority or tribunal in which any proceeding is brought for such contravention. Further, the authorised officer shall return such account or record to the person from whom it was seized if no proceeding is brought within six months from the date of such seizure for the contravention disclosed by such account or record.

***Adjudication of confiscation***

Section 29 dealing with adjudication of confiscation, provides that any confiscation of article or currency or security, which is seized, may be adjudged without limit, by the Court of Session within the local limits of whose jurisdiction the seizure was made; and subject to such limits as may be prescribed, by such officer, not below the rank of an Assistant Sessions Judge, as the Central Government may, by notification in the Official Gazette.

Section 30 provides that no order of adjudication of confiscation shall be made unless a reasonable opportunity of making a representation against such confiscation has been given to the person from whom any article or currency or security has been seized.

***Appeal***

Section 31 deals with appeals and provides that any person aggrieved by any order made under section 29

may prefer an appeal, where the order has been made by the Court of Session, to the High Court to which such Court is subordinate; or where the order has been made by any officer specified, to the Court of Session within the local limits of whose jurisdiction such order of adjudication of confiscation was made, within one month from the date of communication to such person of the order.

Further the appellate court may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of one month, allow such appeal to be preferred within a further period of one month, but not thereafter.

Every appeal preferred under this section shall be deemed to be an appeal from an original decree and the provisions of Order XLI of the First Schedule to the Code of Civil Procedure, 1908, shall, as far as may be, apply thereto as they apply to an appeal from an original decree.

### ***Penalty and Punishment***

Section 34 prescribes for penalty on any person, on whom any prohibitory order has been served under section 10, pays, delivers, transfers or otherwise deals with, in any manner whatsoever, any article or currency or security, whether Indian or foreign, in contravention of such prohibitory order, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

The court trying such contravention may also impose on the person convicted an additional fine equivalent to the market value of the article or the amount of the currency or security in respect of which the prohibitory order has been contravened by him or such part thereof as the court may deem fit.

Section 35 provides for punishment with imprisonment for a term which may extend to five years, or with fine, or with both for accepting, or assisting any person, political party or organisation in accepting, any foreign contribution or any currency or security from a foreign source, in contravention of any provision of this Act or any rule or order made thereunder.

### **Offences by companies**

Section 39 deals with offences by companies and provides that where an offence has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However, such person shall not be liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Further in the case an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

### **Composition of certain offences**

Section 41 (1) provides that any offence punishable under this Act (whether committed by an individual or association or any officer or employee thereof), not being an offence punishable with imprisonment only, may, before the institution of any prosecution, be compounded by such officers or authorities and for such sums as the Central Government may, by notification in the Official Gazette, specify in this behalf.

Section 41(2) provides that any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence.

Every officer or authority shall exercise the powers to compound an offence, subject to the direction, control and supervision of the Central Government. Every application for the compounding of an offence shall be made to the officer or authority referred to in sub-section (1) in such form and manner alongwith such fee as may be prescribed. Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, against the offender in relation to whom the offence is so compounded.

Every officer or authority while dealing with an application for the compounding of an offence for a default in compliance with any provision of this Act which requires by an individual or association or its officer or other employee to obtain permission or file or register with, or deliver or send to, the Central Government or any prescribed authority any return, account or other document, may, direct, by order, if he or it thinks fit to do so, any individual or association or its officer or other employee to file or register with, such return, account or other document within such time as may be specified in the order.

### LESSON ROUND-UP

- FCRA, 2010 regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.
- The Act provides that persons having definite cultural, economic, educational, religious and social programmes should get themselves registered with the Government of India before accepting any 'foreign contribution'. In case a person falling in the above category is not registered with the Central Government, it can accept foreign contribution only after obtaining prior permission of the Central Government.
- Central Government is empowered to prohibit any person or organisation not specified in the Act from accepting any foreign contribution and to require any person or class of persons, not specified in it to obtain prior permission of the Central Government before accepting any foreign hospitality.
- Associations which were granted certificates of registration, such registration shall be valid for a period of five years.
- Any offence punishable under this act (whether committed by an individual or association or any officer or employee thereof), not being an offence punishable with imprisonment only, may, before the institution of any prosecution, be compounded by such officers or authorities and for such sums as the central government may, by notification in the official gazette, specify in this behalf.

### SELF-TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. How does the FCRA, 2010 seeks to regulate the receipt of foreign contribution and foreign hospitality?
2. Define 'foreign contribution' and 'foreign source'.
3. Discuss the provisions of FCRA relevant to exemptions from acceptance of foreign contribution.
4. Explain the concept of 'organisation of a political nature' under the Foreign Contribution (Regulation) Act, 2010.
5. Discuss the powers of Central Government under FCRA to prohibit receipt of foreign contribution.



# Lesson 5

## Foreign Direct Investment – Regulation & Policy

### LESSON OUTLINE

- Learning objectives
- Foreign Direct Investment
- Foreign Direct Investment Route
- Permitted Sectors/Activities
- Prohibited sectors /Activities
- Foreign Direct Investment in major sectors
- Reporting requirements
- Penalty
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Foreign Direct Investment (FDI) provides a situation where in both the host and the home nations derive some benefit. The home countries want to take the advantage of the vast markets opened by industrial growth. Whereas the host countries get to acquire resources ranging from financial, capital, entrepreneurship, technological know-how and managerial skills which assist it in supplementing its domestic savings and foreign exchange.

India's Foreign Direct Investment (FDI) is an endorsement of its status as a preferred investment destination amongst global investors. India's steady economic liberalization and its embrace of the global economy have been key factors in attracting FDI. To promote Foreign Direct Investment (FDI), the Government has put in place an investor-friendly policy, wherein except for a small negative list, most sectors are open for 100% FDI under the Automatic route.

The object of the study is to familiarize the students with the legal requirements stipulated under the Foreign Direct Investment (FDI) Policy.

*The Government has put in place a policy framework on Foreign Direct Investment, which is transparent, predictable and easily comprehensible. This framework is embodied in the Circular on Consolidated FDI Policy.*

## INTRODUCTION

To promote Foreign Direct Investment (FDI), the Government has put in place an investor-friendly policy, wherein except for a small negative list, most sectors are open for 100% FDI under the Automatic route. Further, the policy on FDI is reviewed on an ongoing basis, to ensure that India remains attractive & investor friendly destination. Changes are made in the policy after having intensive consultations with stakeholders including apex industry chambers, associations, representatives of industries/groups and other organizations taking into consideration their views/comments. The FDI policy is applicable across the sectors/ industries and equally applies to SME sector.

## UNDERSTANDING OF SOME KEY TERMS

**'AD Category-I Bank'** means a bank(Scheduled Commercial, State or Urban Cooperative) which is authorized under Section 10(1) of FEMA to undertake all current and capital account transactions according to the directions issued by the RBI from time to time.

**'Authorized Bank'** means a bank including a co-operative bank (other than an authorized dealer) authorized by the Reserve Bank to maintain an account of a person resident outside India.

**'Authorized Dealer'** means a person authorized as an authorized dealer under sub-section (1) of section 10 of FEMA.

**'Authorized Person'** means an authorized dealer, money changer, offshore banking unit or any other person for the time being authorized under sub-section (a) of section 10 of FEMA to deal in foreign exchange or foreign securities.

**'Capital'** means equity shares; fully, compulsorily & mandatorily convertible preference shares; fully, compulsorily & mandatorily convertible debentures and warrants.

The equity shares issued in accordance with the provisions of the Companies Act, as applicable, shall include equity shares that have been partly paid. Preference shares and convertible debentures shall be required to be fully paid, and should be mandatorily and fully convertible. Further, 'warrant' includes Share Warrant issued by an Indian Company in accordance to provisions of the Companies Act, as applicable.

**'Capital account transaction'** means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6 of FEMA.

**'Competent Authority'** means the concerned Administrative Ministry/Department empowered to grant government approval for foreign investment under the extant FDI Policy and FEMA Regulations.

**'Control'** shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements. For the purposes of Limited Liability Partnership, 'control' will mean right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of the LLP.

**'Convertible Note'** means an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.



**‘Depository Receipt’** (DR) means a negotiable security issued outside India by a Depository bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as deposit by a Custodian bank in India. DRs are traded on Stock Exchanges in the US, Singapore, Luxembourg, etc. DRs listed and traded in the US markets are known as American Depository Receipts (ADRs) and those listed and traded anywhere/elsewhere are known as Global Depository Receipts (GDRs). DRs are governed by Notification No. FEMA 330/ 2014-RB, issued by Reserve Bank of India.

**“Employees’ Stock Option”** means the option given to the directors, officers or employees of a company or of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.

**‘Erstwhile Overseas Corporate Body’**(OCB) means a company, partnership firm, society and other corporate body owned directly or indirectly to the extent of at least sixty percent by non-resident Indians and includes overseas trust in which not less than sixty percent beneficial interest is held by non-resident Indians directly or indirectly but irrevocably and which was in existence on the date of commencement of the Foreign Exchange Management (Withdrawal of General Permission to Overseas Corporate Bodies (OCBs) ) Regulations, 2003 (the Regulations) and immediately prior to such commencement was eligible to undertake transactions pursuant to the general permission granted under the Regulations.

**‘Foreign Currency Convertible Bond’** (FCCB) means a bond issued by an Indian company expressed in foreign currency, the principal and interest of which is payable in foreign currency. FCCBs are issued in accordance with the Foreign Currency Convertible Bonds and ordinary shares (through depository receipt mechanism) Scheme, 1993 and subscribed by a non-resident entity in foreign currency and convertible into Ordinary Shares of the issuing company in any manner, either in whole, or in part.

**‘FDI’** means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations.

**‘FDI linked performance conditions’** means the sector specific conditions for companies receiving foreign investment.

**‘FEMA’** means the Foreign Exchange Management Act, 1999 (42 of 1999).

**‘Foreign Institutional Investor’**(FII) means an entity established or incorporated outside India which proposes to make investment in India and which is registered as a FII in accordance with the Securities and Exchange Board of India (SEBI) (Foreign Institutional Investor) Regulations 1995.

**‘Foreign Portfolio Investor’**(FPI) means a person registered in accordance with the provisions of Securities and Exchange Board of India (SEBI) (Foreign Portfolio Investors) Regulations, 2014, as amended from time to time.

**‘Foreign Venture Capital Investor’** (FVCI) means an investor incorporated and established outside India, which is registered under the Securities and Exchange Board of India (Foreign Venture Capital Investor) Regulations, 2000 {SEBI(FVCI) Regulations} and proposes to make investment in accordance with the regulations.

**‘Government route’** means that investment in the capital of resident entities by non-resident entities can be made only with the prior approval of Government (Competent Ministry/Department for grant of approval).

**‘Group Company’** means two or more enterprises which, directly or indirectly, are in a position to:

- (i) exercise twenty-six percent or more of voting rights in other enterprise; or

- (ii) appoint more than fifty percent of members of board of directors in the other enterprise.

**'Holding Company'** would have the same meaning as defined in Companies Act, as applicable.

**'Indian Company'** means a company incorporated in India under the Companies Act, as applicable.

**'Indian Venture Capital Undertaking'** (IVCU) means an Indian company:

- (i) whose shares are not listed in a recognised stock exchange in India;
- (ii) which is engaged in the business of providing services, production or manufacture of articles or things, but does not include such activities or sectors which are specified in the negative list by the SEBI, with approval of Central Government, by notification in the Official Gazette in this behalf.

**'Investment Vehicle'** shall mean an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (Invlts) governed by the SEBI (Invlts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012.

**'Investing Company'** means an Indian Company holding only investments in other Indian company/(ies), directly or indirectly, other than for trading of such holdings/securities.

**'Investment on repatriable basis'** means investment, the sale proceeds of which, net of taxes, are eligible to be repatriated out of India and the expression 'investment on non-repatriable basis' shall be construed accordingly.

**'Joint Venture'** (JV) means an Indian entity incorporated in accordance with the laws and regulations in India in whose capital a non-resident entity makes an investment.

**'Limited Liability Partnership'** means a Limited Liability Partnership firm, formed and registered under the Limited Liability Partnership Act, 2008.

**'Manufacture'**, with its grammatical variations, means a change in a non-living physical object or article or thing- (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

**'Non-resident entity'** means a 'person resident outside India' as defined under FEMA.

**'Non-Resident Indian'** (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955. 'Persons of Indian Origin' cardholders registered as such under Notification No. 26011/4/98 F.I. dated 19.8.2002 issued by the Central Government are deemed to be 'Overseas Citizen of India' cardholders'

A company is considered as **'Owned'** by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and / or Indian companies, which are ultimately owned and controlled by resident Indian citizens. A Limited Liability Partnership will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/or entities which are ultimately 'owned and controlled by resident Indian citizens' and such resident Indian citizens and entities have majority of the profit share.

**'Person'** includes-

- (i) an individual,
- (ii) a Hindu undivided family,
- (iii) a company,
- (iv) a firm,
- (v) an association of persons or a body of individuals whether incorporated or not,
- (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and
- (v) any agency, office, or branch owned or controlled by such person.

**'Person of Indian Origin'** (PIO) means a citizen of any country other than Bangladesh or Pakistan, if

- (i) he at any time held Indian Passport; or
- (ii) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
- (iii) the person is a spouse of an Indian citizen or a person referred to in sub-clause (i) or (ii).

**'Person resident in India'** means-

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include-

A. A person who has gone out of India or who stays outside India, in either case-

- (a) for or on taking up employment outside India, or
- (b) for carrying on outside India a business or vocation outside India, or
- (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

B. A person who has come to or stays in India, in either case, otherwise than-

- a. for or on taking up employment in India; or
- b. for carrying on in India a business or vocation in India, or
- c. for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) any person or body corporate registered or incorporated in India,

(iii) an office, branch or agency in India owned or controlled by a person resident outside India,

(iv) an office, branch or agency outside India owned or controlled by a person resident in India.

**'Person resident outside India'** means a person who is not a Person resident in India.

**'Portfolio Investment Scheme'** means the Portfolio Investment Scheme referred to in Schedules 2, 2A & 3 of FEMA (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000.

**'RBI'** means the Reserve Bank of India established under the Reserve Bank of India Act, 1934.

**'Resident Entity'** means 'Person resident in India' excluding an individual.

**'Resident Indian Citizen'** shall be interpreted in line with the definition of 'person resident in India' as per FEMA, 1999, read in conjunction with the Indian Citizenship Act, 1955.

**'SEBI'** means the Securities and Exchange Board of India established under the Securities and Exchange Board of India Act, 1992.

**'SEZ'** means a Special Economic Zone as defined in Special Economic Zone Act, 2005.

**'SIA'** means Secretariat of Industrial Assistance in DIPP, Ministry of Commerce & Industry, and Government of India.

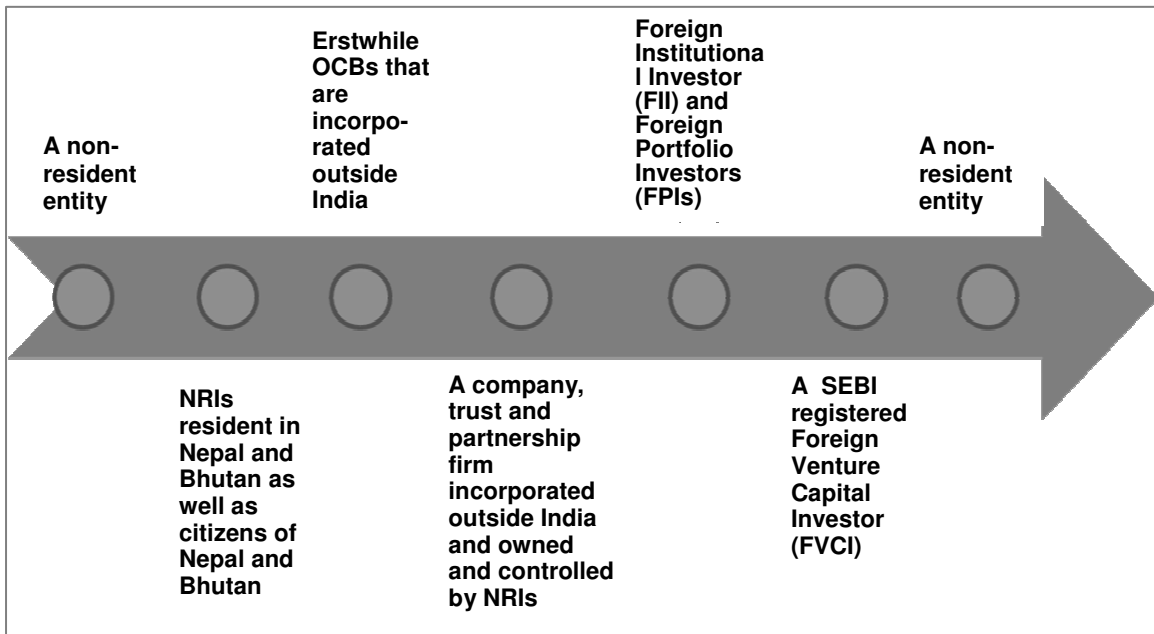
**'Sweat Equity Shares'** means such equity shares as issued by a company to its directors or employees at a discount or for consideration other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

**'Transferable Development Rights'** (TDR) means certificates issued in respect of category of land acquired for public purposes either by the Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole.

**'Unit'** shall mean beneficial interest of an investor in the Investment Vehicle and shall include shares or partnership interests.

**'Venture Capital Fund'** (VCF) means a Fund registered as a 'venture capital fund' under SEBI (Venture Capital Funds) Regulations, 1996.

**ELIGIBLE INVESTORS UNDER FDI**



**A non-resident entity** can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, a citizen of Bangladesh or an entity incorporated in Bangladesh can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

**NRIs resident in Nepal and Bhutan** as well as citizens of Nepal and Bhutan are permitted to invest in the capital of Indian companies on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels.

**OCBs have been derecognized as a class of investors in India** with effect from September 16, 2003. Erstwhile OCBs which are incorporated outside India and are not under the adverse notice of RBI can make fresh investments under FDI Policy as incorporated non-resident entities, with the prior approval of Government of India if the investment is through Government route; and with the prior approval of RBI if the investment is through Automatic route.

**A company, trust and partnership firm incorporated outside India** and owned and controlled by NRIs can invest in India with the special dispensation as available to NRIs under the FDI Policy.

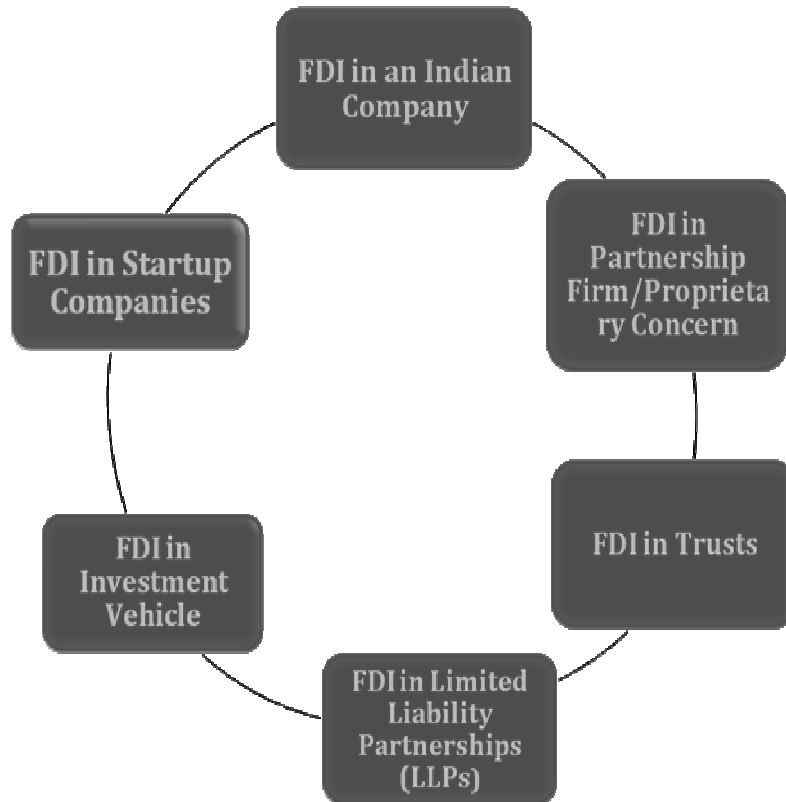
**Foreign Institutional Investor (FII) and Foreign Portfolio Investors (FPI)** may in terms of Schedule 2 and 2A of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations, as the case may be, respectively, invest in the capital of an Indian company under the Portfolio Investment Scheme which limits the individual holding of an FII/FPI below 10% of the capital of the company and the aggregate limit for FII/FPI investment to 24% of the capital of the company. This aggregate limit of 24% can be increased to the sectoral cap/statutory ceiling, as applicable, by the Indian company concerned through a resolution by its Board of Directors followed by a special resolution to that effect by its General Body and subject to prior intimation to RBI. The aggregate FII/FPI investment, individually or in conjunction with other kinds of foreign investment, will not exceed sectoral/statutory cap.

Only registered FIIs/FPIs and NRIs as per Schedules 2,2A and 3 respectively of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, can invest/trade through a registered broker in the capital of Indian Companies on recognised Indian Stock Exchanges.

**A SEBI registered Foreign Venture Capital Investor (FVCI)** may contribute up to 100% of the capital of an Indian company engaged in any activity mentioned in Schedule 6 of Notification No. FEMA 20/2000, including startups irrespective of the sector in which it is engaged, under the automatic route. A SEBI registered FVCI can invest in a domestic venture capital fund registered under the SEBI (Venture Capital Fund) Regulations, 1996 or a Category- I Alternative Investment Fund registered under the SEBI (Alternative Investment Fund) Regulations, 2012. Such investments shall also be subject to the extant FEMA regulations and extant FDI policy including sectoral caps, etc. The investment can be made in equities or equity linked instruments or debt instruments issued by the company (including start-ups and if a startup is organised as a partnership firm or an LLP, the investment can be made in the capital or through any profit-sharing arrangement) or units issued by a VCF or by a Category-I AIF either through purchase by private arrangement either from the issuer of the security or from any other person holding the security or on a recognised stock exchange. It may also set up a domestic asset management company to manage its investments. SEBI registered FVCIs are also allowed to invest under the FDI Scheme, as non-resident

entities, in other companies, subject to FDI Policy and FEMA regulations.

**A Non- Resident Indian** may subscribe to National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such subscriptions are made through normal banking channels and the person is eligible to invest as per the provisions of the PFRDA Act. The annuity/ accumulated saving will be repatriable.



## ELIGIBLE INVESTEE ENTITIES

### FDI in an Indian Company

Indian companies can issue capital against FDI.

### FDI in Partnership Firm/Proprietary Concern

- (i) A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) resident outside India can invest in the capital of a firm or a proprietary concern in India on non-repatriation basis provided;
  - Amount is invested by inward remittance or out of NRE/FCNR(B)/NRO account maintained with Authorized Dealers/Authorized banks.
  - The firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector.
  - Amount invested shall not be eligible for repatriation outside India.
- (ii) Investments with repatriation option: NRIs/PIO may seek prior permission of Reserve Bank for

investment in sole proprietorship concerns/partnership firms with repatriation option. The application will be decided in consultation with the Government of India.

- (iii) Investment by non-residents other than NRIs/PIO: A person resident outside India other than NRIs/PIO may make an application and seek prior approval of Reserve Bank for making investment in the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India.
- (iv) Restrictions: An NRI or PIO is not allowed to invest in a firm or proprietorship concern engaged in any agricultural/plantation activity or real estate business or print media.

### **FDI in Trusts**

FDI is not permitted in Trusts other than in Venture Capital Fund (VCF) registered and regulated by SEBI and 'Investment vehicle'.

### **FDI in Limited Liability Partnerships (LLPs)**

- (i) FDI in LLPs is permitted subject to the following conditions:
- (ii) FDI is permitted under the automatic route in Limited Liability Partnership (LLPs) operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions.
- (iii) An Indian company or an LLP having foreign investment, is also permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions.

Conversion of an LLP having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions into a company is permitted under automatic route. Similarly, conversion of a company having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into an LLP is permitted under automatic route. FDI in LLP is subject to the compliance of the conditions of LLP Act, 2008.

### **FDI in Investment Vehicle**

An entity being 'investment vehicle' registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose including Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (Invlts) governed by the SEBI (Invlts) Regulations, 2014, Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012 and notified under Schedule 11 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 is permitted to receive foreign investment from a person resident outside India (other than an individual who is citizen of or any other entity which is registered / incorporated in Pakistan or Bangladesh), including a Registered Foreign Portfolio Investor (RFPI) or a non-resident Indian (NRI).

### **FDI in Startup Companies**

Start-ups can issue equity or equity linked instruments or debt instruments to FVCI against receipt of foreign remittance, as per the FEMA Regulation. In addition, start-ups can issue convertible notes to person resident outside India subject to the following conditions:

1. A person resident outside India (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered/incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian startup company for an amount of twenty five lakh rupees or more in a single tranche.

‘Startup Company’ means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, and as amended from time to time.

2. A startup company engaged in a sector where foreign investment requires Government approval may issue convertible notes to a non-resident only with approval of the Government.
3. A startup company issuing convertible notes to a person resident outside India shall receive the amount of consideration by inward remittance through banking channels or by debit to the NRE / FCNR (B) / Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time to time.

However an escrow account for the above purpose shall be closed immediately after the requirements are completed or within a period of six months, whichever is earlier. However, in no case continuance of such escrow account shall be permitted beyond a period of six months.

4. NRIs may acquire convertible notes on non-repatriation basis in accordance with Schedule 4 of the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000.
5. A person resident outside India may acquire or transfer, by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance with the pricing guidelines as prescribed by RBI. Prior approval from the Government shall be obtained for such transfers in case the startup company is engaged in a sector which requires Government approval.
6. The startup company issuing convertible notes shall be required to furnish reports as prescribed by Reserve Bank of India.

## ENTRY ROUTES FOR INVESTMENT



An Indian company may receive Foreign Direct Investment under the two routes as given under:

### ***Automatic Route***

FDI is allowed under the automatic route without prior approval either of the Government or the Reserve Bank of India in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time.



**Government Route**

FDI in activities not covered under the automatic route requires prior approval of the Government. Proposals for foreign investment under Government route, are considered by respective Administrative Ministry/Department.

Foreign investment in sectors/activities under government approval route will be subject to government approval where:

- (i) An Indian company is being established with foreign investment and is not owned by a resident entity or
- (ii) An Indian company is being established with foreign investment and is not controlled by a resident entity or
- (iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition etc. or
- (iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition etc.
- (v) It is clarified that Foreign investment shall include all types of foreign investments, direct and indirect, regardless of whether the said investments have been made under Schedule 1 (FDI), 2 (FII), 2A (FPI), 3 (NRI), 6 (FVCI), 9 (LLPs), 10 (DRs) and 11(Investment Vehicles) of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations. FCCBs and DRs having underlying of instruments which can be issued under Schedule 5, being in the nature of debt, shall not be treated as foreign investment. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment.
- (vi) Investment by NRIs under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations will be deemed to be domestic investment at par with the investment made by residents.
- (vii) A company, trust and partnership firm incorporated outside India and owned and controlled by non-resident Indians will be eligible for investments under Schedule 4 of FEMA (Transfer or issue of Security by Persons Resident Outside India) Regulations and such investment will also be deemed domestic investment at par with the investment made by residents.

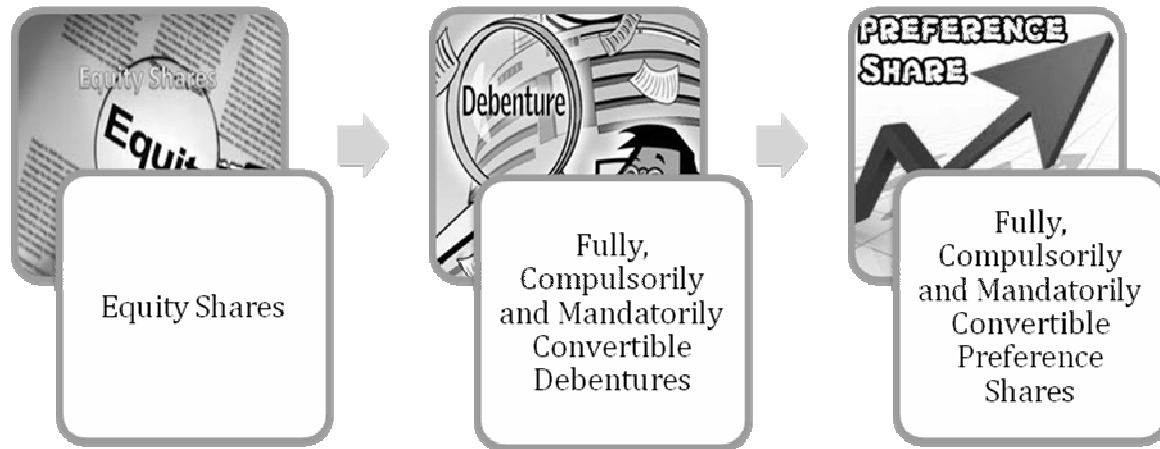
**Competent Authority**

Following are the Competent Authorities for grant of approval for foreign investment for sectors/activities requiring Government approval:

<b>S. No.</b>	<b>Activity/ sector</b>	<b>Administrative Ministry/ Department</b>
(i)	Mining	Ministry of Mines

(ii)	Defence	
	a) Items requiring Industrial Licence under the Industries (Development & Regulation) Act, 1951, and/or Arms Act, 1959 for which the powers have been delegated by Ministry of Home Affairs to DIPP	Department of Defence Production, Ministry of Defence
	b) Manufacturing of Small Arms and Ammunitions covered under Arms Act 1959	Ministry of Home Affairs
(iii)	Broadcasting	Ministry of Information & Broadcasting
(iv)	Print Media	
(v)	Civil Aviation	Ministry of Civil Aviation
(vi)	Satellites	Department of Space
(vii)	Telecommunication	Department of Telecommunications
(viii)	Private Security Agencies	Ministry of Home Affairs
(ix)	Applications involving investments from <i>Countries of Concern</i> which presently include Pakistan and Bangladesh, requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, amended from time to time	
(x)	Trading (Single brand, Multi brand and Food Product retail trading)	Department of Industrial Policy & Promotion
(xi)	FDI proposals by Non-Resident Indians (NRIs)/ Export Oriented Units requiring approval of the Government	
(xii)	Applications relating to issue of equity shares under the FDI policy under the Government route for import of capital goods/machinery/equipment (excluding second-hand machinery)	
(xiii)	Applications relating to issue of equity shares for pre-operative/pre-incorporation expenses (including payments of rent etc.)	
(xiv)	Financial services activity which are not regulated by any Financial Sector Regulator or where only part of the financial services activity is regulated or where there is doubt regarding the regulatory oversight	
(xv)	Applications for foreign investment into a Core Investment Company or an Indian company engaged only in the activity of investing in the capital of other India Company/ies	
(xvi)	Banking (Public and Private)	Department of Financial Services
(xvii)	Pharmaceuticals	Department of Pharmaceuticals

## Instruments for Investments



Investments can be made by non-residents in the equity shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares of an Indian company, through the Automatic Route or the Government Route.

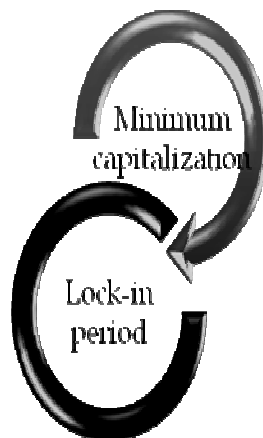
The Indian company having received FDI either under the Automatic route or the Government route is required to comply with provisions of the FDI policy including reporting the FDI to the Reserve Bank

## Caps on Investments

Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy.

## Entry Conditions on Investment

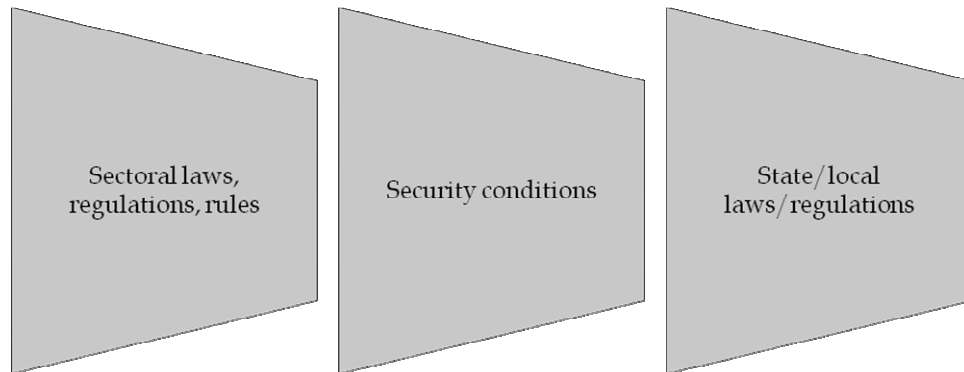
Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for:



## Other Conditions on Investment besides Entry Conditions

Besides the entry conditions on foreign investment, the investment/investors are required to comply with all

relevant:



**PROHIBITED SECTORS**

FDI is prohibited in:

- Lottery Business including Government/private lottery, online lotteries etc.
- Gambling and Betting including casinos etc.
- Chit Funds
- Nidhi Company
- Trading in Transferable Development Rights (TDRs)
- Real Estate Business\* or Construction of Farm Houses
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Activities/sectors not open to private sector investment e.g.(I) Atomic Energy and (II) Railway operations(other than permitted activities).
- Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities.

Note\*:- 'Real estate business' shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

**PERMITTED SECTORS**

FDI Permitted in:

<b>Sector/Activity</b>	<b>% of Equity/FDI Cap</b>	<b>Entry Route</b>
Floriculture, Horticulture, and Cultivation of Vegetables & Mushrooms under controlled conditions;	100%	Automatic
Development and Production of seeds and planting material;	100%	Automatic
Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, Apiculture;	100%	Automatic
Services related to agro and allied sectors  Note: Besides the above, FDI is not allowed in any other agricultural sector/activity	100%	Automatic
Tea sector including tea plantations	100%	Automatic
Coffee plantations	100%	Automatic
Rubber plantations	100%	Automatic
Cardamom plantations	100%	Automatic
Palm oil tree plantations	100%	Automatic
Olive oil tree plantations  Note: Besides the above, FDI is not allowed in any other plantation sector/activity.	100%	Automatic
Mining and Exploration of metal and non-metal ores including diamond, gold, silver and precious ores but excluding titanium bearing minerals and its ores; subject to the Mines and Minerals (Development & Regulation) Act, 1957.	100%	Automatic

<p>Coal &amp; Lignite mining for captive consumption by power projects, iron &amp; steel and cement units and other eligible activities permitted under and subject to the provisions of Coal Mines (Nationalization) Act, 1973.</p>	100%	Automatic
<p>Setting up coal processing plants like washeries subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.</p>	100%	Automatic
<p>Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities</p> <p>Mining and mineral separation of titanium bearing minerals &amp; ores, its value addition and integrated activities subject to sectoral regulations and the Mines and Minerals (Development and Regulation Act 1957).</p>	100%	Government
<p>Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector, subject to the existing sectoral policy and regulatory</p>	100%	Automatic

framework in the oil marketing sector and the policy of the Government on private participation in exploration of oil and the discovered fields of national oil companies.		
Petroleum refining by the Public Sector Undertakings (PSU), without any disinvestment or dilution of domestic equity in the existing PSUs.	49%	Automatic
Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951; and  Manufacturing of small arms and ammunition under the Arms Act, 1959	100%	Automatic up to 49%  Government route beyond 49% wherever it is likely to result in access to modern technology or for other reasons to be recorded
Teleports(setting up of up-linking HUBs/Teleports);	100%	Automatic
Direct to Home (DTH);	100%	Automatic
Cable Networks (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability);	100%	Automatic
Mobile TV;	100%	Automatic
Headend-in-the Sky Broadcasting Service(HITS)	100%	Automatic
Cable Networks(Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs))	100%	Automatic
Terrestrial Broadcasting FM(FM Radio), subject to such terms and conditions, as specified from time to time, by Ministry of Information & Broadcasting, for grant of	49%	Government

permission for setting up of FM Radio stations		
Up-linking of 'News & Current Affairs' TV Channels	49%	Government
Up-linking of Non-'News & Current Affairs' TV Channels/ Down-linking of TV Channels	100%	Automatic
Publishing of newspaper and periodicals dealing with news and current affairs	26%	Government
Publication of Indian editions of foreign magazines dealing with news and current affairs	26%	Government
Publishing/printing of scientific and technical magazines/specialty journals/periodicals, subject to compliance with the legal framework as applicable and guidelines issued in this regard from time to time by Ministry of Information and Broadcasting.	100%	Government
Publication of facsimile edition of foreign newspapers	100%	Government
Airport (Greenfield projects)	100%	Automatic
Airport (Existing projects)	100%	Automatic
Scheduled Air Transport Service/ Domestic Scheduled Passenger Airline	100%	Automatic up to 49% (Automatic up to 100% for NRIs) Government route beyond 49%
Regional Air Transport Service	100%	Automatic up to 49% (Automatic up to 100% for NRIs) Government route beyond 49%
Non-Scheduled Air Transport Services	100%	Automatic
Helicopter services/seaplane services requiring DGCA approval	100%	Automatic

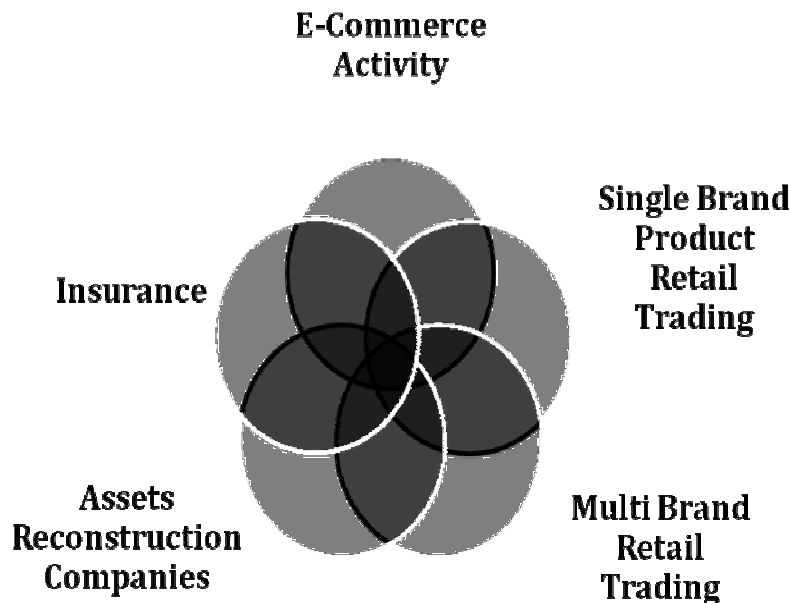


Ground Handling Services subject to sectoral regulations and security clearance.	100%	Automatic
Maintenance and Repair organizations; flying training institutes; and technical training institutions.	100%	Automatic
Construction-development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)	100%	Automatic
Industrial Parks -new and existing	100%	Automatic
Satellites- establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO	100%	Government
Private Security Agencies	74%	Automatic up to 49% Government route beyond 49% and up to 74%
Telecom Services (including Telecom Infrastructure Providers Category-I)  All telecom services including Telecom Infrastructure Providers Category-I, viz. Basic, Cellular, Unified Access Services, Unified License (Access Services), Unified License, National/ International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), All types of ISP licenses, Voice Mail/ Audiotex/UMS, Resale of IPLC,	100%	Automatic up to 49% Government route beyond 49%

Mobile Number Portability Services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower) except Other Service Providers.		
Cash & Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs)	100%	Automatic
E-commerce activities	100%	Automatic
Single Brand product retail trading	100%	Automatic up to 49% Government route beyond 49%
Multi Brand Retail Trading	51%	Government
Duty Free Shops	100%	Automatic
Railway Infrastructure Construction, operation and maintenance of the following: (i) Suburban corridor projects through PPP, (ii) High speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signaling systems, (vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivities to main railway line and (x) Mass Rapid Transport Systems.	100%	Automatic
Asset Reconstruction Company	100%	Automatic
Banking- Private Sector	74%	Automatic up to 49% Government route beyond 49% and up to 74%.
Banking- Public Sector subject to Banking Companies (Acquisition & Transfer of Undertakings) Acts	20%	Government

1970/80. This ceiling (20%) is also applicable to the State Bank of India and its associate Banks.		
Credit Information Companies	100%	Automatic
Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations, in compliance with SEBI Regulations	49%	Automatic
Insurance Company	49%	Automatic
Insurance Brokers	49%	Automatic
Third Party Administrators	49%	Automatic
Surveyors and Loss Assessors	49%	Automatic
Other Insurance Intermediaries appointed under the provisions of Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)	49%	Automatic
Pension Sector	49%	Automatic
Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010.	49%	Automatic
White Label ATM Operations	100%	Automatic
Financial Services activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India.	100%	Automatic
Pharmaceutical (Greenfield)	100%	Automatic
Pharmaceutical(Brownfield )	100%	Automatic up to 74% Government route beyond 74%

## CONDITIONS OF FDI IN MAJOR SECTOR



### FDI in E-Commerce Activities

Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.

E-commerce means buying and selling of goods and services including digital products over digital & electronic network.

E-commerce entity means a company incorporated under the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2 of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2(v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

### Other Conditions of Investment

- 100% FDI under automatic route is permitted in marketplace model of e-commerce.
- FDI is not permitted in inventory based model of e-commerce.
- Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.

- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.
- E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.
- An e-commerce entity will not permit more than 25% of the sales value on financial year basis affected through its marketplace from one vendor or their group companies.
- In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- In marketplace model, any warrantee/ guarantee of goods and services sold will be responsibility of the seller.
- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.
- Guidelines on cash and carry wholesale trading of FDI Policy will apply on B2B e-commerce.
- Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalities, sale of services through e-commerce will be under automatic route.

### **FDI in Single Brand Product Retail Trading**

In Single Brand product retail trading, 49% FDI is allowed under Automatic route and beyond 49% under Government route.

- (1) Foreign Investment in Single Brand product retail trading is aimed at attracting investments in production and marketing, improving the availability of such goods for the consumer, encouraging increased sourcing of goods from India, and enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.
- (2) FDI in Single Brand product retail trading would be subject to the following conditions:
  - (a) Products to be sold should be of a 'Single Brand' only.
  - (b) Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.
  - (c) 'Single Brand' product-retail trading would cover only products which are branded during manufacturing.
  - (d) A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking single brand product retail trading. The onus for ensuring compliance with this condition will rest with the Indian entity carrying out single-brand product retail trading in India. The investing entity shall provide evidence to this effect at the time of seeking approval, including a copy of the licensing/franchise/sub-licence agreement, specifically indicating compliance with the above

condition. The requisite evidence should be filed with the RBI for the automatic route and to competent authority for cases involving approval.

- (e) In respect of proposals involving foreign investment beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of five years' total value of the goods purchased, beginning 1st April of the year of the commencement of the business i.e. opening of the first store. Thereafter, it would have to be met on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single-brand product retail trading.
  - (f) Subject to the conditions, a single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce.
- (3) Application seeking permission of the Government for FDI exceeding 49% in a company which proposes to undertake single brand retail trading in India would be made to the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion. The applications would specifically indicate the product/product categories which are proposed to be sold under a 'Single Brand'. Any addition to the product/product categories to be sold under 'Single Brand' would require a fresh approval of the Government. In case of FDI up to 49%, the list of products/product categories proposed to be sold except food products would be provided to the RBI.

### **FDI in Multi Brand Retail Trading**

In Multi Brand Retail Trading, 51% FDI allowed under Government route.

- (1) FDI in multi brand retail trading, in all products, will be permitted, subject to the following conditions:
- (i) Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded.
  - (ii) Minimum amount to be brought in, as FDI, by the foreign investor, would be US \$ 100 million.
  - (iii) At least 50% of total FDI brought in the first tranche of US \$ 100 million, shall be invested in 'back-end infrastructure' within three years, where 'back-end infrastructure' will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure. Subsequent investment in backend infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements.
  - (iv) At least 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian micro, small and medium industries, which have a total investment in plant & machinery not exceeding US \$ 2.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. The 'small industry' status would be reckoned only at the time of first engagement with the retailer, and such industry shall continue to qualify as a 'small industry' for this purpose, even if it outgrows the said investment of US \$ 2.00 million during the course of its relationship with the said retailer. Sourcing from agricultural co-operatives and farmers

co-operatives would also be considered in this category. The procurement requirement would have to be met, in the first instance, as an average of five years' total value of the manufactured/processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.

- (v) Self-certification by the company, to ensure compliance of the conditions at serial nos. (ii), (iii) and (iv) above, which could be cross-checked, as and when required. Accordingly, the investors shall maintain accounts, duly certified by statutory auditors.
- (vi) Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms around the municipal/urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.
- (vii) Government will have the first right to procurement of agricultural products.
- (viii) The above policy is an enabling policy only and the State Governments/Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT under this policy. The list of States/Union Territories which have conveyed their agreement is at (2) below. Such agreement, in future, to permit establishment of retail outlets under this policy, would be conveyed to the Government of India through the Department of Industrial Policy & Promotion and additions would be made to the list at (2) below accordingly. The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/ regulations, such as the Shops and Establishments Act etc.
- (ix) Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading.

(2) List of States/Union Territories is:

1. Andhra Pradesh
2. Assam
3. Delhi
4. Haryana
5. Himachal Pradesh
6. Jammu & Kashmir
7. Karnataka
8. Maharashtra
9. Manipur
10. Rajasthan
11. Uttarakhand
12. Daman & Diu and Dadra and Nagar Haveli (Union Territories)

### **FDI in Asset Reconstruction Companies**

100 % FDI allowed in 'Asset Reconstruction Company' (ARC). 'Asset Reconstruction Company' (ARC) means

a company registered with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).

#### **Conditions for Investment in ARC:**

Persons resident outside India can invest in the capital of Asset Reconstruction Companies (ARCs) registered with Reserve Bank of India, up to 100% on the automatic route.

Investment limit of a sponsor in the shareholding of an ARC will be governed by the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as amended from time to time. Similarly, investment by institutional / non-institutional investors will also be governed by the said Act, as amended from time to time.

The total shareholding of an individual FII/FPI shall be below 10% of the total paid-up capital.

FIIs/FPIs can invest in the Security Receipts (SRs) issued by ARCs. FIIs/FPIs may be allowed to invest up to 100 per cent of each tranche in SRs issued by ARCs, subject to directions/guidelines of Reserve Bank of India. Such investment should be within the relevant regulatory cap as applicable.

All investments would be subject to provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as amended from time to time.

#### **FDI in Insurance**

49% FDI is allowed in (i) Insurance Company (ii) Insurance Brokers (iii) Third Party Administrators (iv) Surveyors and Loss Assessors (v) Other Insurance Intermediaries appointed under the provisions of Insurance Regulatory and Development authority Act, 1999 (41 of 1999) under Automatic route .

#### **Conditions of Investment**

- (a) No Indian Insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed forty-nine percent of the paid up equity capital of such Indian Insurance company.
- (b) The foreign investment up to forty-nine percent of the total paid-up equity of the Indian Insurance Company shall be allowed on the automatic route subject to approval/verification by the Insurance Regulatory and Development Authority of India.
- (c) Foreign investment in this sector shall be subject to compliance with the provisions of the Insurance Act, 1938 and the condition that Companies receiving FDI shall obtain necessary license /approval from the Insurance Regulatory & Development Authority of India for undertaking insurance and related activities.
- (d) An Indian Insurance company shall ensure that its ownership and control remains at all times in the hands of resident Indian entities as determined by Department of Financial Services/ Insurance Regulatory and Development Authority of India as per the rules/regulations issued by them from time to time.
- (e) Foreign portfolio investment in an Indian Insurance company shall be governed by the provisions contained in sub-regulations (2), (2A), (3) and (8) of Regulation 5 of FEMA Regulations, 2000 and provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.
- (f) Any increase in foreign investment in an Indian Insurance company shall be in accordance with the pricing guidelines specified by Reserve Bank of India under the FEMA Regulations.



- (g) The foreign equity investment cap of 49 percent shall apply on the same terms as above to Insurance Brokers, Third Party Administrators, Surveyors and Loss Assessors and Other Insurance Intermediaries appointed under the provisions of the Insurance Regulatory and Development Authority Act, 1999
- (h) Provided that where an entity like a bank, whose primary business is outside the insurance area, is allowed by the Insurance Regulatory and Development Authority of India to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from their primary (i.e., non-insurance related) business must remain above 50 percent of their total revenues in any financial year.
- (i) The certain provisions relating to 'Banking-PrivateSector', shall be applicable in respect of bank promoted insurance companies.

### **TYPES OF INSTRUMENTS THAT CAN BE USED UNDER FDI**

1. Indian companies can issue equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares subject to pricing guidelines/valuation norms prescribed under FEMA Regulations. The price/conversion formula of convertible capital instruments should be determined upfront at the time of issue of the instruments. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant FEMA regulations [as per any internationally accepted pricing methodology on arm's length basis for the unlisted companies and valuation in terms of SEBI (ICDR) Regulations, for the listed companies].

Optionality clauses are allowed in equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares under FDI scheme, subject to the following conditions:

- (a) There is a minimum lock-in period of one year which shall be effective from the date of allotment of such capital instruments.
- (b) After the lock-in period and subject to FDI Policy provisions, if any, the non-resident investor exercising option/right shall be eligible to exit without any assured return, as per pricing/valuation guidelines issued by RBI from time to time.

2. Other types of Preference shares/Debentures i.e. non-convertible, optionally convertible or partially convertible for issue of which funds have been received on or after May 1, 2007 are considered as debt. Accordingly all norms applicable for ECBs relating to eligible borrowers, recognized lenders, amount and maturity, end-use stipulations, etc. shall apply. Since these instruments would be denominated in rupees, the rupee interest rate will be based on the swap equivalent of London Interbank Offered Rate (LIBOR) plus the spread as permissible for ECBs of corresponding maturity.

3. The inward remittance received by the Indian company vide issuance of DRs and FCCBs are treated as FDI and counted towards FDI.

4. Acquisition of Warrants and Partly Paid Shares - An Indian Company may issue warrants and partly paid shares to a person resident outside India subject to terms and conditions as stipulated by the Reserve Bank of India in this behalf, from time to time.

5. Issue of Foreign Currency Convertible Bonds (FCCBs) and Depository Receipts (DRs)

- (a) FCCBs/DRs may be issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and DR Scheme 2014 respectively, as per the guidelines issued by the Government of India there under from time to time.
- (b) DRs are foreign currency denominated instruments issued by a foreign depository in a permissible jurisdiction against a pool of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian.
- (c) A person will be eligible to issue or transfer eligible securities to a foreign depository for the purpose of converting the securities so purchased into depository receipts in terms of Depository Receipts Scheme, 2014 and guidelines issued by the Government of India there under from time to time.
- (d) A person can issue DRs, if it is eligible to issue eligible instruments to person resident outside India under Schedules 1, 2, 2A, 3, 5 and 8 of the FEM (Transfer or Issue of Security by a person Resident outside India) Regulations, 2000, as amended from time to time.
- (e) The aggregate of eligible securities which may be issued or transferred to foreign depositories, along with eligible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such eligible securities under the relevant regulations framed under FEMA, 1999.
- (f) The pricing of eligible securities to be issued or transferred to a foreign depository for the purpose of issuing depository receipts should not be at a price less than the price applicable to a corresponding mode of issue or transfer of such securities to domestic investors under the relevant regulations framed under FEMA, 1999.
- (g) The issue of depository receipts as per DR Scheme 2014 shall be reported to the Reserve Bank by the domestic custodian as per the reporting guidelines for DR Scheme 2014.

6. (i) Two-way Fungibility Scheme: A limited two-way Fungibility scheme has been put in place by the Government of India for ADRs/GDRs. Under this Scheme, a stock broker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs/GDRs based on instructions received from overseas investors. Re-issuance of ADRs/GDRs would be permitted to the extent of ADRs/GDRs which have been redeemed into underlying shares and sold in the Indian market.

(ii) Sponsored ADR/GDR issue: An Indian Company can also sponsor an issue of ADR/GDR. Under this mechanism, the company offers its resident shareholders a choice to submit their shares back to the company so that on the basis of such shares, ADRs/GDRs can be issued abroad. The proceeds of the ADR/GDR issue are remitted back to India and distributed among the resident investors who had offered their Rupee denominated shares for conversion. These proceeds can be kept in Resident Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for conversion into ADRs/GDRs.

## **ISSUE/TRANSFER OF SHARES**

- The capital instruments should be issued within 180 days from the date of receipt of the inward remittance received through normal banking channels including escrow account opened and maintained for the purpose or by debit to the NRE/FCNR (B) account of the non-resident investor.
- In case, the capital instruments are not issued within 180 days from the date of receipt of the inward remittance or date of debit to the NRE/FCNR (B) account, the amount of consideration so received should be refunded immediately to the non-resident investor by outward remittance through normal

banking channels or by credit to the NRE/FCNR (B) account, as the case may be.

- Non-compliance with the above provision would be reckoned as a contravention under FEMA and would attract penal provisions. In exceptional cases, refund of the amount of consideration outstanding beyond a period of 180 days from the date of receipt may be considered by the RBI, on the merits of the case.

### **Issue price of shares**

Price of shares issued to persons resident outside India under the FDI Policy, shall not be less than –

- a. the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company are listed on any recognised stock exchange in India;
- b. the fair valuation of shares done by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis, where the shares of the company are not listed on any recognised stock exchange in India; and
- c. the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

However, where non-residents (including NRIs) are making investments in an Indian company in compliance with the provisions of the Companies Act, as applicable, by way of subscription to its Memorandum of Association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

### **Foreign Currency Account**

Indian companies which are eligible to issue shares to person's resident outside India under the FDI Policy may be allowed to retain the share subscription amount in a Foreign Currency Account, with the prior approval of RBI.

### **Transfer of shares and convertible debentures**

Subject to FDI sectoral policy (relating to sectoral caps and entry routes), applicable laws and other conditionality including security conditions, non-resident investors can also invest in Indian companies by purchasing/acquiring existing shares from Indian shareholders or from other non-resident shareholders. General permission has been granted to non-residents/NRIs for acquisition of shares by way of transfer subject to the following:

- (a) A person resident outside India (other than NRI and erstwhile OCB) may transfer by way of sale or gift, the shares or convertible debentures to any person resident outside India (including NRIs). Government approval is not required for transfer of shares in the investee company from one non-resident to another non-resident in sectors which are under automatic route. In addition, approval of Government will be required for transfer of stake from one non-resident to another non-resident in sectors which are under Government approval route.
- (b) NRIs may transfer by way of sale or gift the shares or convertible debentures held by them to another NRI.
- (c) A person resident outside India can transfer any security to a person resident in India by way of gift.
- (d) A person resident outside India can sell the shares and convertible debentures of an Indian company on a recognized Stock Exchange in India through a stock broker registered with stock exchange or a merchant banker registered with SEBI.

- (e) A person resident in India can transfer by way of sale, shares/ convertible debentures (including transfer of subscriber's shares), of an Indian company under private arrangement to a person resident outside India, subject to the guidelines.
- (f) General permission is also available for transfer of shares/convertible debentures, by way of sale under private arrangement by a person resident outside India to a person resident in India, subject to the guidelines.
- (g) The above general permission also covers transfer by a resident to a non-resident of shares/convertible debentures of an Indian company, engaged in an activity earlier covered under the Government Route but now falling under Automatic Route, as well as transfer of shares by a non-resident to an Indian company under buyback and/or capital reduction scheme of the company.
- (h) The Form FC-TRS should be submitted to the AD Category-I Bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee resident in India. However, in cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the investee company would have to file form FC-TRS with the AD Category-I bank.

The sale consideration in respect of equity instruments purchased by a person resident outside India, remitted into India through normal banking channels, shall be subjected to a Know Your Customer (KYC) check by the remittance receiving AD Category-I bank at the time of receipt of funds. In case, the remittance receiving AD Category-I bank is different from the AD Category-I bank handling the transfer transaction, the KYC check should be carried out by the remittance receiving bank and the KYC report be submitted by the customer to the AD Category-I bank carrying out the transaction along with the Form FC-TRS.

A person resident outside India including a Non-Resident Indian investor who has already acquired and continues to hold the control in accordance with the SEBI (Substantial Acquisition of Shares and Takeover) Regulations can acquire shares of a listed Indian company on the stock exchange through a registered broker under FDI scheme provided that the original and resultant investments are in line with the extant FDI policy and FEMA regulations in respect of sectoral cap, entry route, mode of payment, reporting requirement, documentation, etc.

*Escrow:* AD Category-I banks have been given general permission to open escrow account and special account of non-resident corporate for open offers/exit offers and delisting of shares. The relevant SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST) Regulations or any other applicable SEBI Regulations/provisions of the Companies Act, as applicable will be applicable. AD Category-I banks have also been permitted to open and maintain, without prior approval of RBI, non-interest bearing escrow accounts in Indian Rupees in India on behalf of residents and/or non-residents, towards payment of share purchase consideration and/or provide Escrow facilities for keeping securities to facilitate FDI transactions subject to the terms and conditions specified by RBI. SEBI authorised Depository Participants have also been permitted to open and maintain, without prior approval of RBI, escrow accounts for securities subject to the terms and conditions as specified by RBI. In both cases, the escrow agent shall necessarily be an AD Category-I bank or SEBI authorised Depository Participant (in case of securities accounts). These facilities will be applicable for both issue of fresh shares to the non-residents as well as transfer of shares from/to the non-residents.

In case of transfer of shares between a resident buyer and a non-resident seller or vice-versa, not more than twenty five per cent of the total consideration can be paid by the buyer on a deferred basis within a period not exceeding eighteen months from the date of the transfer agreement. For this purpose, if so agreed between the

buyer and the seller, an escrow arrangement may be made between the buyer and the seller for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the transfer agreement or if the total consideration is paid by the buyer to the seller, the seller may furnish an indemnity for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the payment of the full consideration.

However the total consideration finally paid for the shares must be compliant with the applicable pricing guidelines.

### **Prior Permission of RBI in Certain Cases for Transfer of Capital Instruments**

In the following cases, prior approval of RBI is required:

- Transfer of capital instruments from resident to non-residents by way of sale
- Transfer of any capital instrument by way of gift by a person resident in India to a person resident outside India. While forwarding applications to Reserve bank for approval for transfer of capital instruments by way of gift, the documents should be enclosed
- Transfer of shares from NRI to Non-resident

(i) Transfer of capital instruments from resident to non-residents by way of sale where:

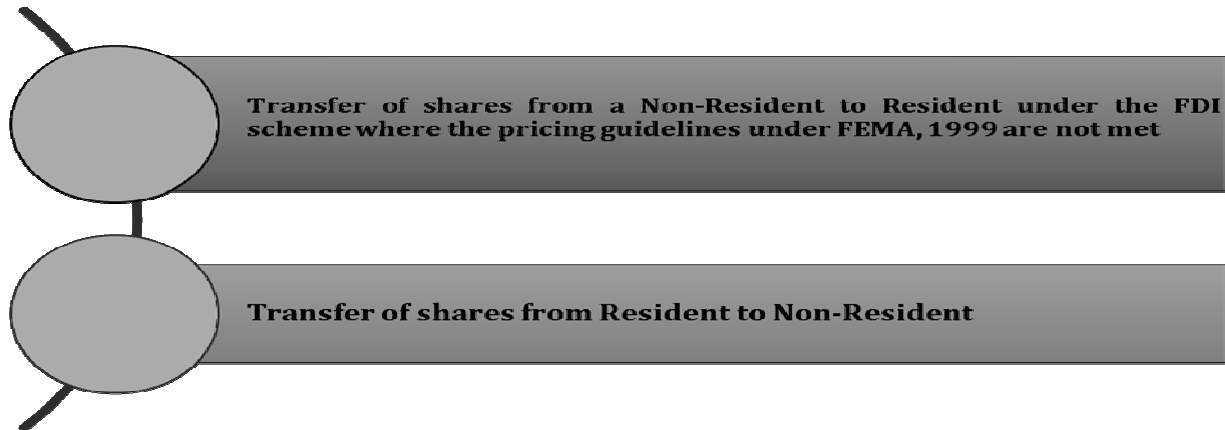
- (a) Transfer is at a price which falls outside the pricing guidelines specified by the Reserve Bank from time to time.
- (b) Transfer of capital instruments by the non-resident acquirer involving deferment of payment of the amount of consideration. Further, in case approval is granted for a transaction, the same should be reported in Form FC-TRS, to an AD Category-I bank for necessary due diligence, within 60 days from the date of receipt of the full and final amount of consideration.

(ii) Transfer of any capital instrument, by way of gift by a person resident in India to a person resident outside India. While forwarding applications to Reserve Bank for approval for transfer of capital instruments by way of gift, the documents should be enclosed. Reserve Bank considers the following factors while processing such applications:

- (a) The proposed transferee (donee) is eligible to hold such capital instruments under Schedules 1, 4 and 5 of Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.
- (b) The gift does not exceed 5 per cent of the paid-up capital of the Indian company/each series of debentures/each mutual fund scheme.
- (c) The applicable sectoral cap limit in the Indian company is not breached.
- (d) The transferor (donor) and the proposed transferee (donee) are close relatives as defined in Section 2 (77) of Companies Act, 2013, as amended from time to time.
- (e) The value of capital instruments to be transferred together with any capital instruments already transferred by the transferor, as gift, to any person residing outside India does not exceed the rupee equivalent of USD 50,000 during the financial year.
- (f) Such other conditions as stipulated by Reserve Bank in public interest from time to time.

(iii) Transfer of shares from NRI to non-resident.

**In the Following Cases, Approval of RBI Is Not Required**



***A. Transfer of shares from a Non-Resident to Resident under the FDI scheme where the pricing guidelines under FEMA, 1999 are not met provided that:***

- i. The original and resultant investment are in line with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation, etc.;
- ii. The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST, buy back); and
- iii. Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

***B. Transfer of shares from Resident to Non-Resident:***

- (i) where the transfer of shares requires the prior approval of the Government as per the extant FDI policy provided that:
  - (a) the requisite approval of the Government has been obtained; and
  - (b) the transfer of shares adheres with the pricing guidelines and documentation requirements as specified by the Reserve Bank of India from time to time.
- (ii) where the transfer of shares attract SEBI (SAST) Regulations subject to the adherence with the pricing guidelines and documentation requirements as specified by Reserve Bank of India from time to time.
- (iii) where the transfer of shares does not meet the pricing guidelines under the FEMA, 1999 provided that:
  - (a) The resultant FDI is in compliance with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc.;
  - (b) The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open

offer/substantial acquisition/SEBI SAST); and

- (c) Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.
- (iv) where the investee company is in the financial sector provided that:
  - (a) Any 'fit and proper/due diligence' requirements as regards the non-resident investor as stipulated by the respective financial sector regulator, from time to time, have been complied with; and
  - (b) The FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, pricing, etc.), reporting requirements, documentation etc., are complied with.

### **CONVERSION OF ECB/LUMP SUM FEE/ROYALTY ETC. INTO EQUITY**

**(I)** Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) (excluding those deemed as ECB) in convertible foreign currency into equity shares/fully compulsorily and mandatorily convertible preference shares, subject to the following conditions and reporting requirements:

- (a) The activity of the company is covered under the Automatic Route for FDI or the company has obtained Government approval for foreign equity in the company;
- (b) The foreign equity after conversion of ECB into equity is within the sectoral cap, if any;
- (c) Pricing of shares is as per the issue price of shares;
- (d) Compliance with the requirements prescribed under any other statute and regulation in force; and
- (e) The conversion facility is available for ECBs availed under the Automatic or Government Route and is applicable to ECBs, due for payment or not, as well as secured/unsecured loans availed from non-resident collaborators.

**(II)** General permission is also available for issue of shares/preference shares against lump sum technical know-how fee, royalty due for payment, subject to entry route, sectoral cap and pricing guidelines (as per the issue price of shares) and compliance with applicable tax laws. Further, issue of equity shares against any other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India under FEMA, 1999 or any rules/ regulations framed or directions issued there under, or has been permitted by the Reserve Bank under the Act or the rules and regulations framed or directions issued there under is permitted, provided that:

- (a) The equity shares shall be issued in accordance with the extant FDI guidelines on sectoral caps, pricing guidelines etc. as amended by Reserve bank of India, from time to time;
- (b) The issue of equity shares under this provision shall be subject to tax laws as applicable to the funds payable and the conversion to equity should be net of applicable taxes.

**(III)** A wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100 percent foreign investment is allowed in the automatic route and there are no FDI linked conditionalities, may issue equity shares or preference shares or convertible debentures or warrants to the said non-resident

entity against pre-incorporation/ pre-operative expenses incurred by the said non-resident entity up to a limit of five percent of its capital or USD 500,000 whichever is less, subject to the conditions laid down below:

- a. Within thirty days from the date of issue of equity shares or preference shares or convertible debentures or warrants but not later than one year from the date of incorporation or such time as Reserve Bank of India or Government of India permits, the Indian company shall report the transaction in the Form FC-GPR to the Reserve Bank.
- b. The valuation of the equity shares or preference shares or convertible debentures or warrants shall be subject to the provisions of Schedule 1 of the FEM (Transferor Issue of Security by a person resident outside India) Regulations.
- c. A certificate issued by the statutory auditor of the Indian company that the amount of pre-incorporation/pre-operative expenses against which equity shares or preference shares or convertible debentures or warrants have been issued has been utilized for the purpose for which it was received should be submitted with the FC-GPR form.

*Explanation:* Pre-incorporation/pre-operative expenses shall include amounts remitted to Investee Company's account, to the investor's account in India if it exists, to any consultant, attorney or to any other material/service provider for expenditure relating to incorporation or necessary for commencement of operations.

**(IV)** Issue of equity shares under the FDI policy is allowed under the Government route for the following:

- (i) import of capital goods/ machinery/ equipment (excluding second-hand machinery), subject to compliance with the following conditions:
  - (a) Any import of capital goods/machinery etc., made by a resident in India, has to be in accordance with the Export/Import Policy issued by Government of India/as defined by DGFT/FEMA provisions relating to imports.
  - (b) The application clearly indicating the beneficial ownership and identity of the Importer Company as well as overseas entity.
  - (c) Applications complete in all respects, for conversions of import payables for capital goods into FDI being made within 180 days from the date of shipment of goods.
- (ii) Pre-operative/pre-incorporation expenses (including payments of rent etc.), subject to compliance with the following conditions:
  - (a) Submission of FIRC for remittance of funds by the overseas promoters for the expenditure incurred.
  - (b) Verification and certification of the pre-incorporation/pre-operative expenses by the statutory auditor.
  - (c) Payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA Regulations.
  - (d) The applications, complete in all respects, for capitalization being made within the period of 180 days from the date of incorporation of the company.

**General conditions:**

- (i) All requests for conversion should be accompanied by a special resolution of the company.



- (ii) Government's approval would be subject to pricing guidelines of RBI and appropriate tax clearance.

### **ISSUE OF RIGHTS/BONUS SHARES**

FEMA provisions allow Indian companies to freely issue Rights/Bonus shares to existing non-resident shareholders, subject to adherence to sectoral cap, if any.

Such issue of bonus/rights shares has to be in accordance with other laws/statutes like the Companies Act, as applicable, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (in case of listed companies), etc.

The offer on right basis to the person's resident outside India shall be:

- (a) in the case of shares of a company listed on a recognized stock exchange in India, at a price as determined by the company;
- (b) in the case of shares of a company not listed on a recognized stock exchange in India, at a price which is not less than the price at which the offer on right basis is made to resident shareholders.

### **Additional allocation of rights share by residents to non-residents**

- (i) Existing non-resident shareholders are allowed to apply for issue of additional shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares over and above their rights share entitlements.
- (ii) The investee company can allot the additional rights share out of unsubscribed portion, subject to the condition that the overall issue of shares to non-residents in the total paid-up capital of the company does not exceed the sectoral cap.

### **ACQUISITION OF SHARES UNDER SCHEME OF MERGER/DEMERGER/AMALGAMATION**

(I) Mergers/demergers/amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/demerger/amalgamation.

(II) Once the scheme of merger or demerger or amalgamation of two or more Indian companies has been approved by a Court in India, the transferee company or new company is allowed to issue shares to the shareholders of the transferor company resident outside India, subject to the conditions that:

- (i) the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap, and
- (ii) the transferor company or the transferee or the new company is not engaged in activities which are prohibited under the FDI policy.

*Note:* Government approval would not be required in case of mergers and acquisitions taking place in sectors under automatic route.

### **ISSUE OF EMPLOYEES STOCK OPTION SCHEME (ESOPS) / SWEAT EQUITY**

An Indian company may issue "employees' stock option" and/or "sweat equity shares" to its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas

subsidiary/subsidiaries who are resident outside India, provided that :

- a. The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act 2013, as the case may be.
- b. The “employee’s stock option”/ “sweat equity shares” issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the sectoral cap applicable to the said company.
- c. Issue of “employee’s stock option”/ “sweat equity shares” by a company where foreign investment is under the approval route shall require prior approval of Government of India.
- d. Issue of “employee’s stock option”/ “sweat equity shares” under the applicable rules/regulations to an employee/director who is a citizen of Bangladesh/Pakistan shall require prior approval of the Government of India.
- e. The issuing company shall furnish to the Regional Office concerned of the Reserve Bank of India under whose jurisdiction the registered office of the company operates, within 30 days from the date of issue of employees’ stock option or sweat equity shares, a return as per the Form-ESOP.

### SHARE SWAP

- (i) In cases of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.
- (ii) Approval of the Government will also be a prerequisite for investment by swap of shares for sector under Government approval route.
- (iii) No approval of the Government is required for investment in automatic route sectors by way of swap of shares.

### PLEDGE OF SHARES

**(A) A person being a promoter of a company registered in India (borrowing company),** which has raised external commercial borrowings, may pledge the shares of the borrowing company or that of its associate resident companies for the purpose of securing the ECB raised by the borrowing company, provided that a no objection for the same is obtained from a bank which is an authorised dealer.

The authorized dealer, shall issue the no objection for such a pledge after having satisfied itself that the external commercial borrowing is in line with the extant FEMA regulations for ECBs and that:

- (i) the loan agreement has been signed by both the lender and the borrower,
- (ii) there exists a security clause in the Loan Agreement requiring the borrower to create charge on financial securities, and
- (iii) the borrower has obtained Loan Registration Number (LRN) from the Reserve Bank; and the said pledge would be subject to the following conditions:
  - (a) the period of such pledge shall be co-terminus with the maturity of the underlying ECB;
  - (b) in case of invocation of pledge, transfer shall be in accordance with the extant FDI Policy and directions issued by the Reserve Bank;
  - (c) the Statutory Auditor has certified that the borrowing company will utilized/has utilized the proceeds of the ECB for the permitted end use/s only.

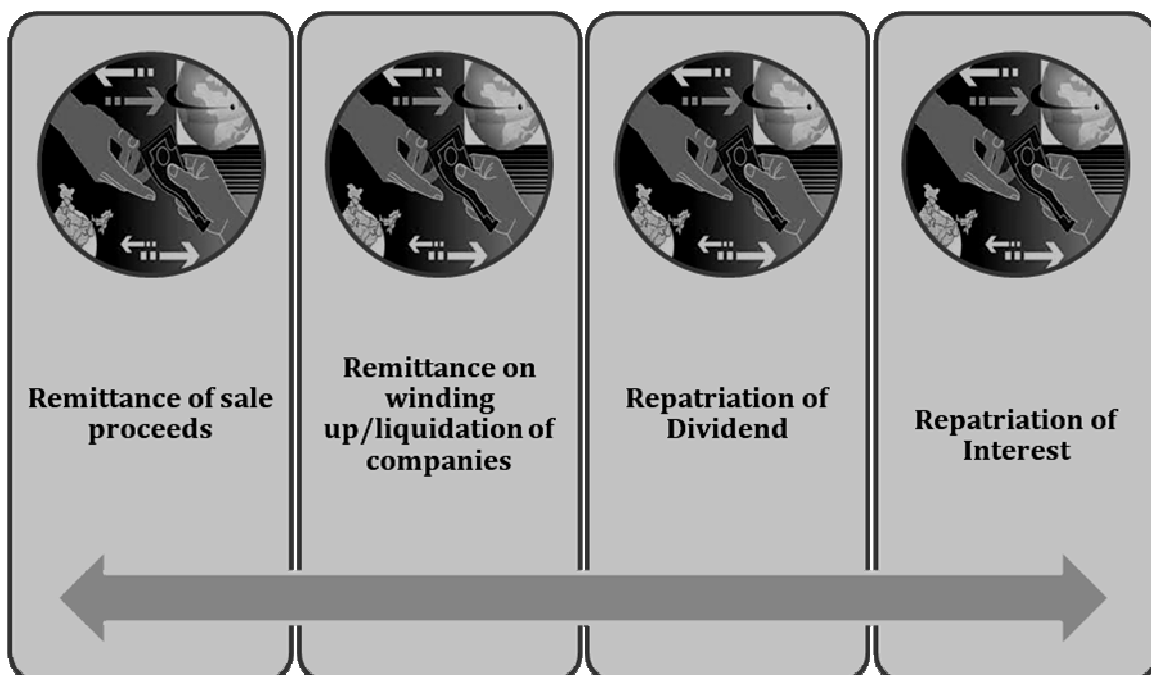
**(B) Non-residents holding shares of an Indian company,** can pledge these shares in favour of the AD bank in India to secure credit facilities being extended to the resident investee company for bonafide business purpose, subject to the following conditions:

- (i) in case of invocation of pledge, transfer of shares should be in accordance with the FDI policy in vogue at the time of creation of pledge;
- (ii) submission of a declaration/ annual certificate from the statutory auditor of the investee company that the loan proceeds will be / have been utilized for the declared purpose;
- (iii) the Indian company has to follow the relevant SEBI disclosure norms; and
- (iv) pledge of shares in favour of the lender (bank) would be subject to Section 19 of the Banking Regulation Act, 1949.

**(C) Non-residents holding shares of an Indian company,** can pledge these shares in favour of an overseas bank to secure the credit facilities being extended to the non-resident investor/non-resident promoter of the Indian company or its overseas group company, subject to the following:

- (i) loan is availed of only from an overseas bank;
- (ii) loan is utilized for genuine business purposes overseas and not for any investments either directly or indirectly in India;
- (iii) overseas investment should not result in any capital inflow into India;
- (iv) in case of invocation of pledge, transfer should be in accordance with the FDI policy in vogue at the time of creation of pledge; and
- (v) submission of a declaration/annual certificate from a Chartered Accountant/ Certified Public Accountant of the non-resident borrower that the loan proceeds will be / have been utilized for the declared purpose.

## REMITTANCE AND REPATRIATION



### Remittance of sale proceeds

- (i) Sale proceeds of shares and securities and their remittance is 'remittance of asset' governed by The Foreign Exchange Management (Remittance of Assets) Regulations, 2000 under FEMA.
- (ii) AD Category-I bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC/tax clearance certificate from the Income Tax Department has been produced.

### Remittance on Winding Up/Liquidation of Companies

AD Category-I banks have been allowed to remit winding up proceeds of companies in India, which are under liquidation, subject to payment of applicable taxes. Liquidation may be subject to any order issued by the court winding up the company or the official liquidator in case of voluntary winding up under the provisions of the Companies Act, as applicable.

AD Category-I banks shall allow the remittance provided the applicant submits:

- a. No objection or Tax clearance certificate from Income Tax Department for the remittance.
- b. Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.
- c. Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act, as applicable.
- d. In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no legal proceeding pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

### Repatriation of Dividend

- (i) Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be).
- (ii) The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

### Repatriation of Interest

- (i) Interest on fully, mandatorily & compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes).
- (ii) The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

### MODES OF PAYMENT ALLOWED FOR RECEIVING FDI IN AN INDIAN COMPANY

An Indian company issuing shares/ convertible debentures to a person resident outside India shall receive the amount of consideration by:

- (a) inward remittance through normal banking channels;
- (b) debit to NRE/ FCNR (B) account of a person concerned maintained with an AD Category I bank;
- (c) debit to non-interest bearing escrow account in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of

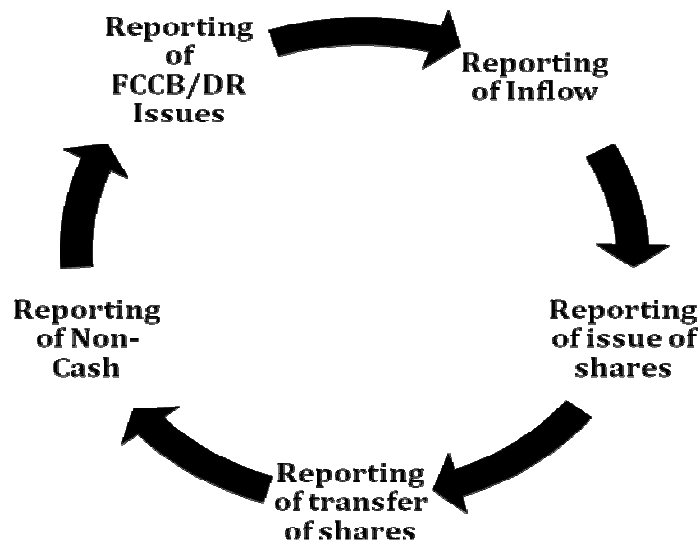
residents and non-residents towards payment of share purchase consideration;

- (d) conversion of royalty/ lump sum/ technical know-how fee due for payment or conversion of ECB;
- (e) conversion of pre-incorporation/ pre-operative expenses incurred by the a non-resident entity up to a limit of five percent of its capital or USD 500,000 whichever is less;
- (f) conversion of import payables/ pre incorporation expenses/ can be treated as consideration for issue of shares with the approval of FIPB;
- (g) against any other funds payable to a person resident outside India, the remittance of which does not require the prior approval of the Reserve Bank or the Government of India: and
- (h) Swap of capital instruments, provided where the Indian investee company is engaged in a Government route sector, prior Government approval shall be required

If the shares or convertible debentures are not issued within 180 days from the date of receipt of the inward remittance or date of debit to NRE/ FCNR (B)/ escrow account, the amount shall be refunded.

Further, Reserve Bank may on an application made to it and for sufficient reasons permit an Indian Company to refund/ allot shares for the amount of consideration received towards issue of security if such amount is outstanding beyond the period of 180 days from the date of receipt.

## REPORTING OF FDI



### Reporting of Inflow

- (i) An Indian company receiving investment from outside India for issuing shares/convertible debentures/preference shares under the FDI Scheme, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank not later than 30 days from the date of receipt in the **Advance Reporting Form**.
- (ii) Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares/convertible debentures, through an AD Category-I bank, together with a copy/ies of

the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which will allot a Unique Identification Number (UIN) for the amount reported.

- (iii) An Indian company issuing partly paid equity shares, shall furnish a report not later than 30 days from the date of receipt of each call payment.

### Reporting of issue of shares

- (i) After issue of shares (including bonus and shares issued on rights basis and shares issued under ESOP and against Convertible Notes)/fully, mandatorily & compulsorily convertible debentures/fully, mandatorily & compulsorily convertible preference shares, the Indian company has to file **Form FC-GPR**, not later than 30 days from the date of issue of shares.
- (ii) Form FC-GPR has to be duly filled up and signed by Managing Director/Director/Secretary of the Company and submitted to the Authorized Dealer of the company, who will forward it to the Reserve Bank. The following documents have to be submitted along with the form:

**(a) A certificate from the Company Secretary of the company certifying that:**

- (A) all the requirements of the Companies Act, as applicable, have been complied with;
- (B) terms and conditions of the Government of India approval, if any, have been complied with;
- (C) the company is eligible to issue shares; and
- (D) the company has all original certificates issued by authorized dealers in India evidencing receipt of amount of consideration.

**Note: For companies with paid up capital with less than Rs.5 crore, the above mentioned certificate can be given by a practicing company secretary.**

(b) A certificate from SEBI registered Merchant Banker or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

(c) The report of receipt of consideration as well as Form FC-GPR have to be submitted by the AD Category-I bank to the Regional Office concerned of the Reserve Bank under whose jurisdiction the registered office of the company is situated.

*Note:* An Indian company issuing partly paid equity shares shall file a report in form FC-GPR to the extent they become paid up.

(d) Annual return on Foreign Liabilities and Assets should be filed on an annual basis by the Indian company, directly with the Reserve Bank. This is an annual return to be submitted by 15th of July every year, pertaining to all investments by way of direct/portfolio investments/reinvested earnings/other capital in the Indian company made during the previous years (i.e. the information submitted by 15th July will pertain to all the investments made in the previous years up to March 31). The details of the investments to be reported would include all foreign investments made into the company which is outstanding as on the balance sheet date. The details of overseas investments in the company both under direct/portfolio investment may be separately indicated.

(e) Issue of bonus/rights shares or stock options to persons resident outside India directly or on amalgamation/merger/demerger with an existing Indian company, as well as issue of shares on conversion of ECB/royalty/lumpsum technical know-how fee/import of capital goods by units in SEZs, has to be reported in Form FC-GPR.

### Reporting of transfer of shares

- (i) Reporting of transfer of shares between residents and non-residents and vice-versa is to be done in Form FC-TRS.
- (ii) The Form FC-TRS should be submitted to the AD Category-I bank, within 60 days from the date of receipt of the amount of consideration.
- (iii) The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee, resident in India.
- (iv) In cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the investee company would have to file form FC-TRS with the AD Category-I bank. The AD Category-I bank, would forward the same to its link office. The link office would consolidate the Form FC-TRS and submit a monthly report to the Reserve Bank.

### Reporting of Non-Cash

Details of issue of shares against conversion of ECB have to be reported to the Regional Office concerned of the RBI, as indicated below:

- (i) In case of **full conversion** of ECB into equity, the company shall report the conversion in Form FC-GPR to the Regional Office concerned of the Reserve Bank as well as in Form ECB-2 to the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai- 400 051, within seven working days from the close of month to which it relates. The words "ECB wholly converted to equity" shall be clearly indicated on top of the Form ECB-2. Once reported, filing of Form ECB-2 in the subsequent months is not necessary.
- (ii) In case of **partial conversion** of ECB, the company shall report the converted portion in Form FC-GPR to the Regional Office concerned as well as in Form ECB-2 clearly differentiating the converted portion from the non-converted portion. The words "ECB partially converted to equity" shall be indicated on top of the Form ECB-2. In the subsequent months, the outstanding balance of ECB shall be reported in Form ECB-2 to DSIM.

### Reporting of FCCB/DR Issues

The domestic custodian shall report the issue/transfer of sponsored/unsponsored depository receipts as per DR Scheme 2014 in 'Form DRR' within 30 days of close of the issue/ program.

### ADHERENCE TO GUIDELINES/ORDERS

- (i) FDI is a capital account transaction and thus any violation of FDI regulations are covered by the penal provisions of the FEMA.
- (ii) Reserve Bank of India administers the FEMA and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA. The Directorate takes up investigation in any contravention of FEMA.

### PENALTIES

If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/non-compliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of India/ Reserve Bank of India, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contraventions where such amount is quantifiable, or

up to two lakh Rupees where the amount is not quantifiable, and where such contraventions is a continuing one, further penalty which may extend to five thousand Rupees for every day after the first day during which the contraventions continues.

Where a person committing a contravention of any provisions of this Act or of any rule, direction or order made there under is a company (company means any body corporate and includes a firm or other association of individuals as defined in the Companies Act), every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Any Adjudicating Authority adjudging any contraventions under 3.1(i) above, may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government.

### **ADJUDICATION AND APPEALS**

For the purpose of adjudication of any contravention of FEMA, the Ministry of Finance as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 appoints officers of the Central Government as the Adjudicating Authorities for holding an enquiry in the manner prescribed. A reasonable opportunity has to be given to the person alleged to have committed contraventions against whom a complaint has been made for being heard before imposing any penalty.

The Central Government may appoint as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, an Appellate Authority/ Appellate Tribunal to hear appeals against the orders of the adjudicating authority.

### **COMPOUNDING PROCEEDINGS**

Under the Foreign Exchange (Compounding Proceedings) Rules 2000, the Central Government may appoint 'Compounding Authority' an officer either from Enforcement Directorate or Reserve Bank of India for any person contravening any provisions of the FEMA. The Compounding Authorities are authorized to compound the amount involved in the contravention to the Act made by the person. No contravention shall be compounded unless the amount involved in such contravention is quantifiable. Any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention. The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings. The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerns as expeditiously as and not later than 180 days from the date of application made to the Compounding Authority. Compounding Authority shall issue order specifying the provisions of the Act or of the rules, directions, requisitions or orders made there under in respect of which contravention has taken place along with details of the alleged contraventions.

### **ESTABLISHMENT OF BRANCH OFFICE (BO)/ LIAISON OFFICE (LO)/ PROJECT OFFICE (PO) IN INDIA**

Establishment of branch office/ liaison office / project office or any other place of business in India by foreign entities is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 and amended from time to time.



### Branch Office

Branch office in relation to a company, means any establishment described as such by the company.

#### *Permitted activities for a branch office in India of a person resident outside India*

Normally, the branch office should be engaged in the activity in which the parent company is engaged.

- (i) Export/import of goods.
- (ii) Rendering professional or consultancy services.
- (iii) Carrying out research work in which the parent company is engaged.
- (iv) Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
- (v) Representing the parent company in India and acting as buying/ selling agent in India.
- (vi) Rendering services in Information Technology and development of software in India.
- (vii) Rendering technical support to the products supplied by parent/group companies.
- (viii) Representing a foreign airline/shipping company.

### Liaison Office

Liaison Office means a place of business to act as a channel of communication between the principal place of business or Head Office or by whatever name called and entities in India but which does not undertake any commercial /trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel.

#### *Permitted activities for a liaison office in India of a person resident outside India*

- (i) Representing the parent company / group companies in India.
- (ii) Promoting export / import from / to India.
- (iii) Promoting technical/ financial collaborations between parent / group companies and companies in India.
- (iv) Acting as a communication channel between the parent company and Indian companies.

### Project Office

Project office means a place of business in India to represent the interests of the foreign company executing a project in India but excludes a Liaison Office.

#### *Parameters of project office*

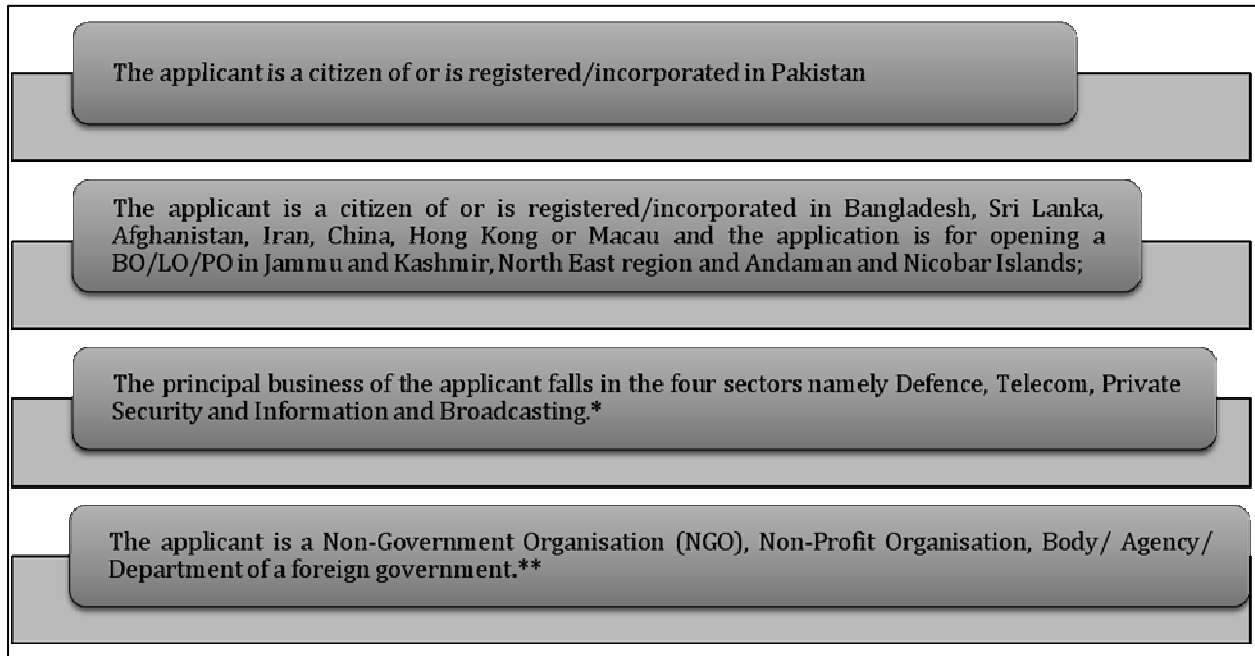
A foreign company may open project office/s in India provided it has secured from an Indian company, a contract to execute a project in India, and

- (i) the project is funded directly by inward remittance from abroad; or
- (ii) the project is funded by a bilateral or multilateral International Financing Agency; or
- (iii) the project has been cleared by an appropriate authority; or
- (iv) a company or entity in India awarding the contract has been granted term loan by a Public Financial Institution or a bank in India for the Project.

*The Hon'ble Supreme Court vide its interim orders dated July 4, 2012 and September 14, 2015, passed in the case of the **Bar Council of India vs A.K. Balaji & Ors.**, has directed RBI not to grant any permission to any foreign law firm, on or after the date of the said interim order, for opening of LO in India. Hence, no foreign law firm shall be permitted to open any LO in India till further orders/notification in this regard. However, foreign law firms which have been granted permission prior to the date of interim order for opening LOs in India may be allowed to continue provided such permission is still in force. No fresh permissions/renewal of permission shall be granted by the Reserve Bank/AD Category-I banks respectively till the policy is reviewed based on, among others, final disposal of the matter by the Hon'ble Supreme Court.*

### General criteria

- i. Applications from foreign companies (a body corporate incorporated outside India, including a firm or other association of individuals) for establishing BO/ LO/ PO in India shall be considered by the AD Category-I bank as per the guidelines given by Reserve Bank of India (RBI). If the principal business of the entity resident outside India falls under sectors where 100 percent Foreign Direct Investment (FDI) is allowed in terms Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000, as amended from time to time, and the entity seeks to open a BO/LO/PO, the AD Category-I bank may consider such applications under the delegated powers.
- ii. An application from a person resident outside India for opening of a BO/LO/PO in India shall require prior approval of Reserve Bank of India in the following cases:



\* In the case of proposal for opening a PO relating to defence sector, no separate reference or approval of Government of India shall be required if the said non-resident applicant has been awarded a contract by/ entered into an agreement with Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings. No separate approval is required from Reserve Bank of India for such cases only.

\*\* Such applications may be forwarded by the AD Category-I bank to the General Manager, Reserve Bank of India, Central Office Cell, Foreign Exchange Department, 6, Sansad Marg, New Delhi - 110 001 who shall

process the applications in consultation with the Government of India.

iii. The non-resident entity applying for a BO/LO in India should have a financially sound track record viz:

Branch Office	A profit making track record during the immediately preceding five financial years in the home country and net worth of not less than USD 100,000 or its equivalent.  <b>Net Worth</b> [ <i>total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name called</i> ].
Liaison Office	A profit making track record during the immediately preceding three financial years in the home country and net worth of not less than USD 50,000 or its equivalent.
An applicant that is not financially sound and is a subsidiary of another company	May submit a Letter of Comfort (LOC) from its parent/ group company, subject to the condition that the parent/ group company satisfies the prescribed criteria for net worth and profit.

### Procedure for Establishment

- i. The application for establishing BO / LO/ PO in India may be submitted by the non-resident entity in Form FNC to a designated AD Category - I bank (i.e. an AD Category – I bank identified by the applicant with whom they intend to pursue banking relations) along with the prescribed documents and the LOC, wherever applicable.

Following are the prescribed documents:

- (a) Copy of the Certificate of Incorporation / Registration; Memorandum of Association and Articles of Association attested by the Notary Public in the country of registration.  
  
[If the original Certificate is in a language other than in English, the same may be translated into English and notarized as above and cross verified/attested by the Indian Embassy/ Consulate in the home country].
- (b) Audited Balance sheet of the applicant company for the last three/ five years in case of branch office/liaison office respectively.  
  
[If the applicants' home country laws/regulations do not insist on auditing of accounts, an Account Statement certified by a Certified Public Accountant (CPA) or any Registered Accounts Practitioner by any name, clearly showing the net worth may be submitted]
- (c) Bankers' Report from the applicant's banker in the host country / country of registration showing the number of years the applicant has had banking relations with that bank.
- (d) Power of Attorney in favour of signatory of Form FNC in case the Head of the overseas entity is not signing the Form FNC.

The AD Category-I bank shall after exercising due diligence in respect of the applicant's background, and satisfying itself as regards adherence to the eligibility criteria for establishing BO/LO/PO, antecedents of the promoter, nature and location of activity of the applicant, sources

of funds, etc., and compliance with the extant KYC norms grant approval to the foreign entity for establishing BO/LO/PO in India.

- ii. However, before issuing the approval letter to the applicant, the AD Category-I bank shall forward a copy of the Form FNC along with the details of the approval proposed to be granted by it to the General Manager, Reserve Bank of India, CO Cell, New Delhi, for allotment of Unique Identification Number (UIN) to each BO/LO.

After receipt of the UIN from the Reserve Bank, the AD Category-I bank shall issue the approval letter to the non-resident entity for establishing BO/LO in India. This is in order to enable the Reserve Bank to keep, maintain and upload up-to-date list of all foreign entities which have been granted permission for establishing BO/LO in India, on its website.

- iii. The validity period of an LO is generally for three years, except in the case of Non-Banking Finance Companies (NBFCs) and those entities engaged in construction and development sectors, for whom the validity period is two years only.

The validity period of the project office is for the tenure of the project.

- iv. An applicant that has received permission for setting up of a BO/LO/PO shall inform the designated AD Category I bank as to the date on which the BO/LO/PO has been set up. The AD Category I bank in turn shall inform Reserve Bank accordingly. In case an approval granted by the AD bank has either been surrendered by the applicant or has expired without any BO/LO/PO being set up, the AD Category I bank shall inform RBI accordingly.
- v. The approval granted by the AD Category I bank should include a proviso to the effect that in case the BO/LO/PO for which approval has been granted is not opened within six months from the date of the approval letter, the approval shall lapse. In cases where the non-resident entity is not able to open the office within the stipulated time frame due to reasons beyond its control, the AD Category-I bank may consider granting extension of time for a further period of six months for setting up the office. Any further extension of time shall require the prior approval of Reserve Bank of India in this regard.
- vi. All applications for establishing a BO/LO in India by foreign banks and insurance companies will be directly received and examined by the Department of Banking Regulation (DBR), Reserve Bank of India, Central Office and the Insurance Regulatory and Development Authority (IRDA), respectively. No UIN for such representative offices is required from the Foreign Exchange Department, Reserve Bank of India.
- vii. There is a general permission to non-resident companies for establishing BO in the Special Economic Zones (SEZs) to undertake manufacturing and service activities subject to the conditions that:
  - (a) such BOs are functioning in those sectors where 100% FDI is permitted;
  - (b) such BOs comply with Chapter XXII of the Companies Act, 2013; and
  - (c) such BOs function on a stand-alone basis.

### **Opening of bank account by BO/LO/PO**

- i. An LO may approach the designated AD Category I Bank in India to open an account to receive remittances from its Head Office outside India. It may be noted that an LO shall not maintain more than one bank account at any given time without the prior permission of Reserve Bank of India. The permitted Credits

and Debits to the account shall be:

a. Credits

1. Funds received from Head Office through normal banking channels for meeting the expenses of the office.
2. Refund of security deposits paid from LO's account or directly by the Head Office through normal banking channels.
3. Refund of taxes, duties etc., received from tax authorities, paid from LO's bank account.
4. Sale proceeds of assets of the LO.

b. Debits

Only for meeting the local expenses of the office.

ii. A BO may approach any AD Category-I Bank in India to open an account for its operations in India. Credits to the account should represent the funds received from Head Office through normal banking channels for meeting the expenses of the office and any legitimate receivables arising in the process of its business operations. Debits to this account shall be for the expenses incurred by the BO and towards remittance of profit/winding up proceeds.

iii. Any foreign entity except an entity from Pakistan who has been awarded a contract for a project by the Government authority/Public Sector Undertakings or are permitted by the AD to operate in India may open a bank account without any prior approval of the Reserve Bank. An entity from Pakistan shall need prior approval of Reserve Bank of India to open a bank account for its project office in India.

iv. AD Category – I banks can open non-interest bearing foreign currency account for POs in India subject to the following:

- (a) The PO has been established in India, with the general / specific permission of Reserve Bank of India, having the requisite approval from the concerned Project Sanctioning Authority concerned as per FEM (Establishment in India of Branch Office or a Project Office or any other Place of Business Regulations, 2016).
- (b) The contract governing the project specifically provides for payment in foreign currency.
- (c) Each PO can open two foreign currency accounts, usually one denominated in USD and other in home currency of the project awardee, provided both are maintained with the same AD Category-I bank.
- (d) The permissible debits to the account shall be payment of project related expenditure and credits shall be foreign currency receipts from the Project Sanctioning Authority and remittances from parent/group company abroad or bilateral / multilateral international financing agency.
- (e) The responsibility of ensuring that only the approved debits and credits are allowed in the foreign currency account shall rest solely with the AD Category-I bank. Further, the accounts shall be subject to 100 per cent scrutiny by the Concurrent Auditor of the respective AD Category-I bank.

The foreign currency accounts have to be closed at the completion of the project.

### Annual Activity Certificate by BO/LO/PO

- (i) The Annual Activity Certificate (AAC) as at the end of March 31 each year along with the required documents needs to be submitted by the following:

In case of a sole BO/ LO/PO, by the BO/LO/PO concerned;

In case of multiple BOs / LOs, a combined AAC in respect of all the offices in India by the nodal office of the BOs / LOs.

The LO/BO needs to submit the AAC to the designated AD Category -I bank as well as Director General of Income Tax (International Taxation), New Delhi whereas the PO needs to submit the AAC only to the designated AD Category -I bank.

- (ii) The designated AD Category - I bank shall scrutinize the AACs and ensure that the activities undertaken by the BO/LO are being carried out in accordance with the terms and conditions of the approval given.

In the event of any adverse findings reported by the auditor or noticed by the designated AD Category -I bank, the same should immediately be reported to the General Manager, Reserve Bank of India, CO Cell, New Delhi, along with the copy of the AAC and their comments thereon.

### **Extension of validity period of the approval of LO and PO**

- i. Requests for extension of time for LOs may be submitted before the expiry of the validity of the approval, to the AD Category-I bank concerned under whose jurisdiction the LO/nodal office is located. The designated AD Category - I bank may extend the validity period of LO/s for a period of 3 years from the date of expiry of the original approval / extension granted if the applicant has complied with the following conditions and the application is otherwise in order:
  - (a) The LO should have submitted the Annual Activity Certificates for the previous years and
  - (b) The account of the LO maintained with the designated AD Category – I bank is being operated in accordance with the terms and conditions stipulated in the approval letter.

Such extension has to be granted, as expeditiously as possible as and in any case not later than one month from the receipt of the request under intimation to the General Manager, Reserve Bank of India, CO Cell, New Delhi quoting the reference number of the original approval letter and the UIN. Reserve Bank shall update the information on its website immediately.

- ii. Further, entities engaged in construction and development sectors and Non-Banking Finance Companies are permitted to open a liaison office for two years only. No further extension would be considered for liaison offices of entities which are Non-Banking Finance Companies and those engaged in construction and development sectors (excluding infrastructure development companies). Upon expiry of the validity period, the offices shall have to either close down or be converted into a Joint Venture / Wholly Owned Subsidiary in conformity with the extant Foreign Direct Investment policy.

### **Registration with police authorities**

Applicants from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong, Macau or Pakistan desirous of opening BO/LO/PO in India shall have to register with the state police authorities. Copy of approval letter for 'persons' from these countries shall be marked by the AD Category-I bank to the Ministry of Home Affairs, Internal Security Division-I, Government of India, New Delhi for necessary action and record.

### **Application for additional offices and activities**

- i. Requests for establishing additional BOs / LOs may be submitted to the AD Category-I bank in a fresh FNC form. However, the documents mentioned in form FNC need not be resubmitted, if there are no

changes to the documents already submitted earlier.

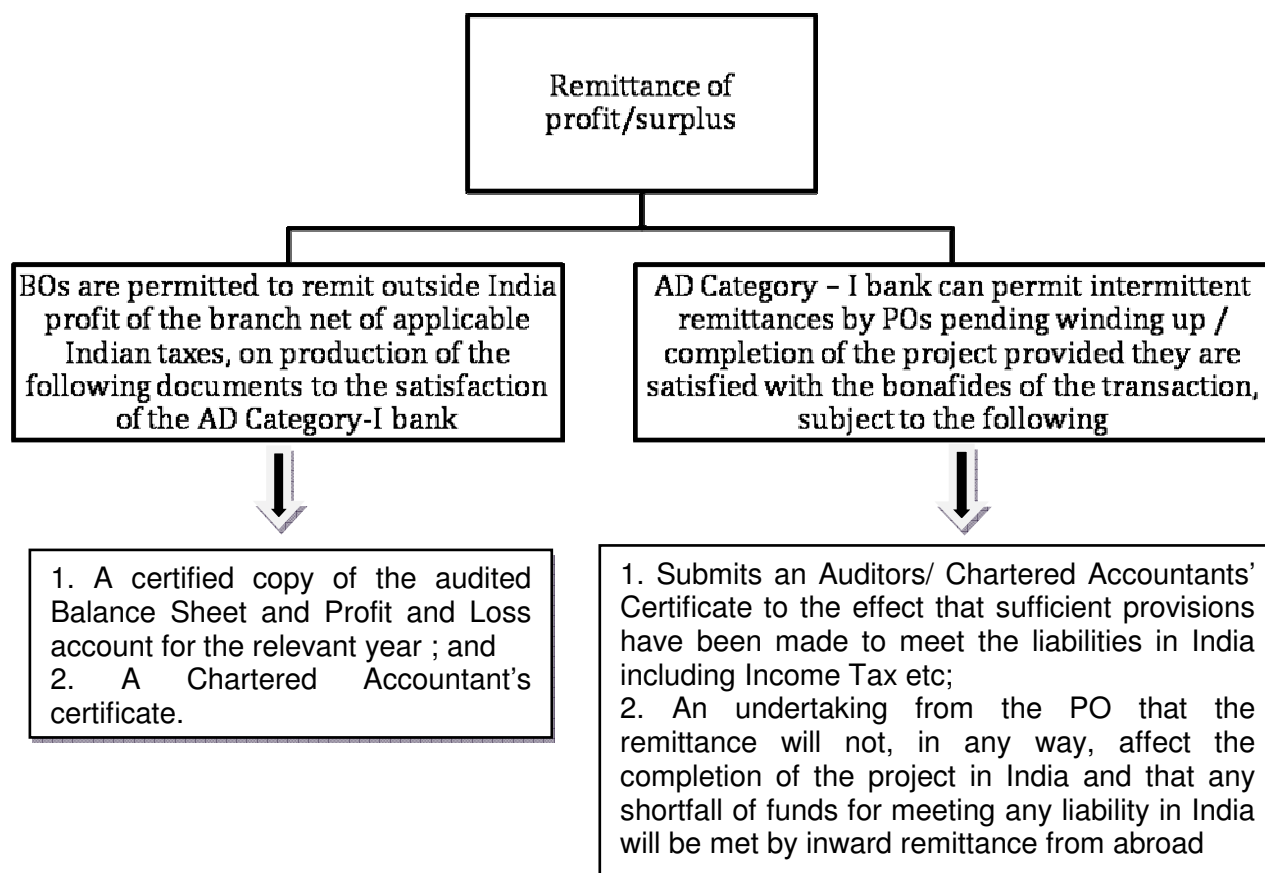
- (a) If the number of offices exceeds 4 (i.e. one BO / LO in each zone viz; East, West, North and South), the applicant has to justify the need for additional office/s and it shall require prior approval of RBI.
- (b) The applicant may identify one of its offices in India as the Nodal Office, which will coordinate the activities of all of its offices in India.
- (c) Whenever the existing BO/LO is shifting to another city in India, prior approval from the AD Category-I bank is required. However, no permission is required if the LO/BO is shifted to another place in the same city subject to the condition that the new address is intimated to the designated AD Category-I bank. Changes in the postal address may be intimated to the CO Cell, New Delhi by the AD Category-I bank at the earliest.

ii. Requests for undertaking activities in addition to what has been permitted initially (Annex C) by Reserve Bank of India/ AD Category-I bank may be submitted by the applicant to the Reserve Bank through the designated AD Category -I bank justifying the need.

### Extension of fund and non-fund based facilities

AD Category-I bank may based on their business prudence, Board approved policy and compliance to extant rules/regulations stipulated by DBR, RBI extend fund/non-fund based facilities to BOs/POs only.

### Remittance of profit/surplus



i. BOs are permitted to remit outside India profit of the branch net of applicable Indian taxes, on production of the following documents to the satisfaction of the AD Category-I bank through whom the remittance is effected:

- a. A certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year.
- b. A Chartered Accountant's certificate certifying
  - (i) the manner of arriving at the remittable profit;
  - (ii) that the entire remittable profit has been earned by undertaking the permitted activities; and
  - (iii) that the profit does not include any profit on revaluation of the assets of the branch.

ii. AD Category – I bank can permit intermittent remittances by POs pending winding up / completion of the project provided they are satisfied with the bonafides of the transaction, subject to the following:

- (a) The PO submits an Auditors' / Chartered Accountants' Certificate to the effect that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.
- (b) An undertaking from the PO that the remittance will not, in any way, affect the completion of the project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.

1.

Requests for closure of the BO / LO/ PO and submit the application along with following documents for remittance of winding up proceeds of BO / LO/ PO to the designated AD Category - I bank

- Copy of the Reserve Bank's/AD Category-I bank's approval
- Auditor's certificate ;
- Confirmation from the applicant/parent company that no legal proceedings is pending in any Court in India ;
- A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013;
- The designated AD Category - I banks has to ensure that the BO / LO/ PO had filed their respective AACs ; and
- Any other document/s, specified by Reserve Bank of India/AD Category-I bank.

2.

Designated AD Category-I bank may allow remittance of winding up proceeds in respect of offices of banks and insurance companies, after obtaining copies of permission of closure from the sectoral regulators along with the documents mentioned above.

### Closure of BO/LO/PO

(i) Requests for closure of the BO / LO/ PO and allowing the remittance of winding up proceeds of BO / LO/



PO may be submitted to the designated AD Category - I bank by the BO/ LO/ PO or their nodal office, as the case may be. The application for winding up may be submitted along with the following documents:

- a. Copy of the Reserve Bank's/AD Category-I bank's approval for establishing the BO/ LO/ PO.
- b. Auditor's certificate:
  - (i) indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant and indicating the manner of disposal of assets;
  - (ii) confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc. of the office have been either fully met or adequately provided for; and
  - (iii) confirming that no income accruing from sources outside India (including proceeds of exports) has remained unrepatriated to India.
- c. Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending against the BO / LO/ PO and there is no legal impediment to the remittance.
- d. A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the BO /LO in India, wherever applicable.
- e. The designated AD Category - I banks has to ensure that the BO / LO/ PO had filed their respective AACs.
- f. Any other document/s, specified by Reserve Bank of India/AD Category-I bank while granting approval.

(ii) Designated AD Category-I bank may allow remittance of winding up proceeds in respect of offices of banks and insurance companies, after obtaining copies of permission of closure from the sectoral regulators along with the documents mentioned above.

### **Transfer of assets of BO/LO/PO**

Proposals for transfer of assets may be considered by the AD Category-I bank only from BOs/LOs/POs who are adhering to the operational guidelines such as submission of AACs (up to the current financial year) at regular annual intervals with copies endorsed to DGIT (International Taxation); have obtained PAN from IT Authorities and have got registered with ROC under the Companies Act 2013, if necessary. Also,

- (i) Transfer of assets by way of sale to the JV/WoS be allowed by AD Category-I bank only when the non-resident entity intends to close their BO/LO/PO operations in India.
- (ii) A certificate is to be submitted from the Statutory Auditor furnishing details of assets to be transferred indicating their date of acquisition, original price, depreciation till date, present book value or written down value (WDV) and sale consideration to be obtained. Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. The sale consideration should not be more than the book value in each case.
- (iii) The assets should have been acquired by the BO/LO/PO from inward remittances and no intangible assets such as good will, pre-operative expenses should be included. No revenue expenses such as lease hold improvements incurred by the BO/LO can be capitalised and transferred to JV/WOS.
- (iv) AD Category-I bank must ensure payment of all applicable taxes while permitting transfer of assets.
- (v) Credits to the bank accounts of BO/LO/PO on account of such transfer of assets will be treated as permissible credits.

- (vi) Donation by BO/LO/PO of old furniture, vehicles, computers and other office items etc. to NGOs or other not-for-profit organisations may be permitted by the AD category-I banks after satisfying itself about the bonafide of the transaction.

### Checklist for BO/LO/PO

1	Register with the Registrar of Companies (ROC)	A BO/LO/PO or any other place of business by whatever name called is required to register with the Registrar of Companies (ROCs) once it establishes a place of business in India if such registration is required under the Companies Act, 2013.
2	Application to an Authorised Dealer Category-I bank ( Form FNC)	A person resident outside India desiring to establish a branch office or a liaison office or a project office or any other place of business in India shall submit an application in Form FNC to an Authorised Dealer Category-I bank.
3	Profit Making Track Record	A branch office or a liaison office or a project office need to meet the profit making track record.
4	Permissible Activities	A branch office or a liaison office or a project office shall undertake or carry on permissible activities and shall not undertake or carry on any other activity unless otherwise specifically permitted by the Reserve Bank.
5	Obtain Permanent Account Number (PAN)	The BOs / LOs shall obtain Permanent Account Number (PAN) from the Income Tax Authorities on setting up of their office in India and report the same in the AACs.
6	LO upgrade into a BO	The existing PAN and bank accounts can be continued when an LO is permitted to upgrade into a BO.
7	Transaction	Each BO/ LO/PO are required to transact through one designated AD Category-I bank only who shall be responsible for the due diligence and KYC norms of the BO/LO/PO. BO /LO/PO, present in multiple locations, are required to transact through their designated AD.
8	Annual Activity Certificate(AAC)	The branch office/liaison office shall submit the Annual Activity Certificate as at the end of March 31 along with the audited financial statements including receipt and payment account on or before September 30 of that year.
9	BO/LO/PO change their existing AD Category-I bank	BO/LO/PO can change their existing AD Category-I bank subject to both the AD banks giving consent in writing for the transfer and the transferring AD bank confirming submission of all AACs and absence of any adverse features in conducting the account by the BO/LO/PO.
10	Acquisition of property by BO/PO	Acquisition of property by BO/PO shall be governed by the guidelines issued under Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations.
11	Carry out permitted/	As per section 6 (3) (h) of the Foreign Exchange Management Act,

	incidental activities from leased property	1999, BOs/LOs/POs have general permission to carry out permitted/incidental activities from leased property subject to lease period not exceeding five years.
12	Term Deposit Account	AD Category-I bank can allow term deposit account for a period not exceeding 6 months in favour of a BO/LO/PO of a person resident outside India provided the bank is satisfied that the term deposit is out of temporary surplus funds and the BO/LO/PO furnishes an undertaking that the maturity proceeds of the term deposit will be utilised for their business in India within 3 months of maturity. However, such facility may not be extended to shipping/airline companies.
13	The foreign entities who may have established LO or BO in the pre-FEMA period	In case a BO/LO has been established and continues to exist without approval of the Reserve Bank, such BO/LO may approach their AD Category-I bank to regularise their offices under FEMA 1999, even if permission of Reserve Bank was not required as per the regulations existing at the time of setting up of the office. Such cases may be brought to the notice of Reserve Bank immediately for allotment of UIN. The foreign entities who may have established LO or BO with the permission from the Government of India in the pre-FEMA period shall also approach their AD Category-I bank with a copy of the said approval for allotment of a UIN by the Reserve Bank.
14	Change in the name of the existing LO/BO	Change in the name of the existing LO/BO may be permitted by the AD Category-I bank only if the non-resident entity changes its name without change in ownership and if the application to this effect is received with the Board resolution for change of name and documents/certificate from ROC India showing change of name. The change in name of the BO/LO should be reported to FED, CO Cell, New Delhi. Where change in name is requested on account of acquisitions or mergers of foreign entities involving change in ownership, the acquired entity or new entity is required to apply afresh by closing the existing entity. Foreign entities should note that the approvals are given by the Reserve Bank/AD Category-I bank after detailed scrutiny as per laid down guidelines and FDI policies and hence the approvals given to one foreign entity is not transferrable to another foreign entity.
15	Change in the Top Management	Change in the Top Management or CEO/MD/CMD etc. of the BO/LO does not require prior approval from the Reserve Bank/AD Category-I bank. However, AD Category-I bank should be intimated about the same.
16	Closure of the Branch office/Liaison office	Requests for closure of the branch office/liaison office may be submitted to the Authorised Dealer Category - I bank along with the copy of the Reserve Bank's/Authorised Dealer Category-I bank's approval for establishing the office; Auditor's certificate; Confirmation from the applicant/parent company that no legal proceedings in any

		Court in India are pending against the office and there is no legal impediment to the remittance; A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the branch office/liaison in India and any other document/s specified by the Reserve Bank/Authorised Dealer Category-I bank while granting approval.
17	Remittance of winding up proceeds	Remittance of winding up proceeds of branch or liaison office established in India shall be governed by the guidelines issued under Foreign Exchange Management (Remittance of Assets) Regulations

### LESSON ROUND-UP

- Foreign Direct Investment means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations.
- A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, a citizen of Bangladesh or an entity incorporated in Bangladesh can invest only under the Government route.
- A citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.
- Indian companies can issue capital against Foreign Direct Investment.
- Indian companies which are eligible to issue shares to person's resident outside India under the FDI Policy may be allowed to retain the share subscription amount in a Foreign Currency Account, with the prior approval of RBI.
- FDI is permitted under the automatic route in Limited Liability Partnership (LLPs) operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions.
- FDI is allowed under the automatic route without prior approval either of the Government or the Reserve Bank of India in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time.
- FDI in activities not covered under the automatic route requires prior approval of the Government. Proposals for foreign investment under Government route, are considered by respective Administrative Ministry/Department.
- If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/non-compliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of India/ Reserve Bank of India, he shall, upon adjudication, be liable to a penalty.





# Lesson 6

## Overseas Direct Investments (ODI)

### LESSON OUTLINE

- Learning objectives
- Introduction
- Approval Route
- Proposal for making Overseas Direct Investment
- Overseas Direct Investment transactions require prior approval
- Financial commitment
- Permissible source of funding
- Overseas investment by Trust
- Overseas investment by Societies
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Joint Ventures/Wholly Owned Subsidiaries abroad promote economic co-operation between India and the host countries. They result in transfer of technology and skills, sharing the results of Research & Development, access to global market, promotion of brand image, generation of employment and utilization of raw materials available in India and the host country, increased exports of plant and machinery and goods and services from India, foreign exchange earnings through dividend, royalty, technical know-how fee, etc. Since globalization of trade is a two-way process, integration of Indian economy with rest of the world with all its attendant benefits is achieved through overseas investment.

The object of the study is to familiarize the students with the regulatory and procedural aspect of investment in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS), abroad.

*Direct investment outside India means investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity, signifying a long term interest (setting up a Joint Venture (JV) or a Wholly Owned Subsidiary (WOS)) overseas and thus does not include portfolio investment.*

## INTRODUCTION

Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues for promoting global reach of Indian entrepreneurs. Joint Ventures are perceived as a medium of economic and business co-operation between India and other countries.

*"Financial Commitment"* means the amount of direct investment by way of contribution to equity, loan and 100 per cent of the amount of guarantees and 50 per cent of the performance guarantees issued by an Indian Party to or on behalf of its overseas Joint Venture Company or Wholly Owned Subsidiary.

*Direct investment outside India* means investments, either under the Automatic Route or the Approval Route, by way of contribution to the capital or subscription to the Memorandum of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS).

A foreign entity is termed as JV of the Indian Party when there are other foreign promoters holding the stake along with the Indian Party. In case of WOS entire capital is held by the one or more Indian Company.

It may be noted that the Indian party/ Resident Individual is required to route all transactions in respect of a particular overseas JV/WOS only through one branch of an Authorized Dealer. This branch would be the 'designated Authorised Dealer' in respect of that JV/WOS and all transactions and communications relating to the investment in that particular JV/WOS are to be reported only through this 'designated' branch of an Authorized Dealer.

*"Joint Venture (JV)"/ "Wholly Owned Subsidiary (WOS)"* means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian party makes a direct investment.

## Approval Route

The Government has adopted two way approach to the approval of direct investment, i.e. Automatic Route and Approval Route.

Under the Automatic Route, an Indian Party does not require any prior approval from the Reserve Bank for making direct investments in a JV/WOS abroad. The Indian Party should approach an Authorized Dealer Category – I bank with an application in Form ODI and the prescribed enclosures / documents for effecting the remittances towards such investments. However, in case of investment in the financial services sector, prior approval is required from the regulatory authority concerned, both in India and abroad.

Proposals not covered by the conditions under the automatic route require prior approval of the Reserve Bank for which a specific application in Form ODI with the documents prescribed therein is required to be made through Authorized Dealer Category – I banks.

## Proposal for making Overseas Direct Investment (ODI) under approval route

The applicant should approach their designated Authorized Dealer (AD) with the proposal which is submitted to Reserve Bank after due scrutiny and with the specific recommendations of the designated AD bank along with supporting documents.

The designated Authorised Dealer, before forwarding the proposal is required to submit the Form ODI in the on-line ODI application under approval route and the transaction number generated by the application should be mentioned in the letter. In case the proposal is approved, the AD bank should effect the remittance under advice to Reserve Bank so that the Unique Identification Number (UIN) is allotted.



For approval by Reserve Bank, following documents need to be submitted along with Section D and Section E of Form ODI - Part I by the designated Authorized Dealer:

- (a) A letter from the designated Authorised Dealer' of the Indian party in a sealed cover mentioning the following details:
  - Transaction number generated by the OID application.
  - Brief details of the Indian entity.
  - Brief details of the overseas entity.
  - Background of the proposal, if any.
  - Brief details of the transaction.
  - Reason/s for seeking approval mentioning the extant FEMA provisions.
  - Observations of the designated AD bank with respect to the following:
    - *Prima facie* viability of the JV/ WOS outside India;
    - Contribution to external trade and other benefits which will accrue to India through such investment;
    - Financial position and business track record of the Indian Party (IP) and the foreign entity;
    - Expertise and experience of the IP in the same or related line of activity of the JV/ WOS outside India.
  - Recommendations of the designated AD bank.
- (b) A letter from the IP addressed to the designated AD bank.
- (c) Board resolution for the proposed transaction/s.
- (d) Diagrammatic representation of the organisational structure indicating all the subsidiaries of the IP horizontally and vertically with their stake (direct & indirect) and status (whether operating company or SPV).
- (e) Incorporation certificate and the valuation certificate for the overseas entity (if applicable).
- (f) Other relevant documents properly numbered, indexed and flagged.

It may be noted that the Indian party/ Resident Individual is required to route all transactions in respect of a particular overseas JV/WOS only through one branch of an Authorized Dealer. This branch would be the 'designated Authorised Dealer' in respect of that JV/WOS and all transactions and communications relating to the investment in that particular JV/WOS are to be reported only through this 'designated' branch of an Authorized Dealer.

### **ODI transactions that require RBI approval**

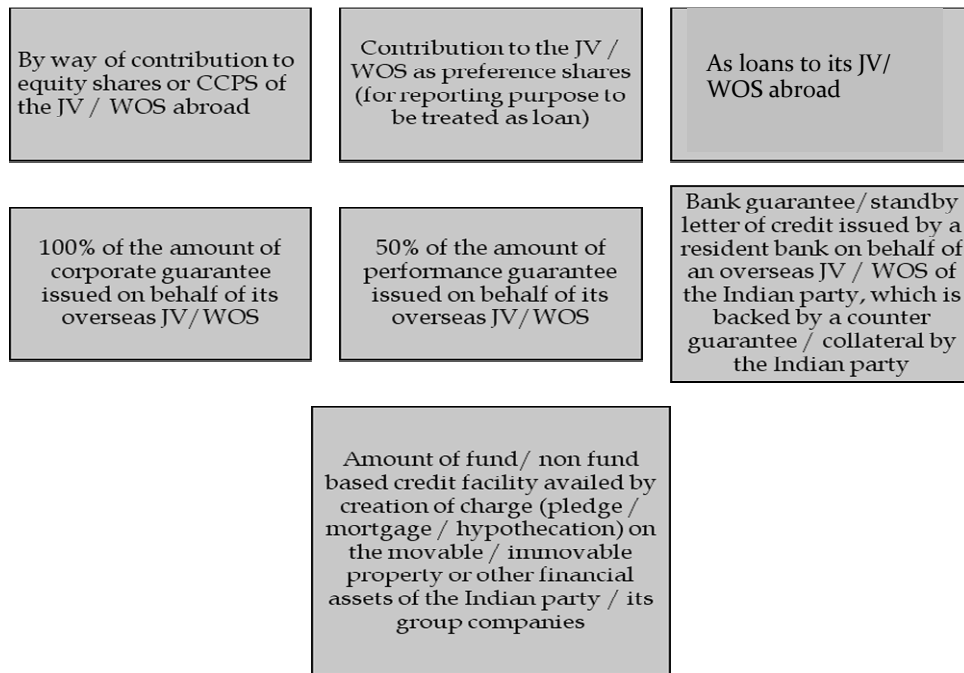
Some of the proposals which require prior approval are:

- (i) Overseas Investments in the energy and natural resources sector exceeding the prescribed limit of net worth of Indian companies as on the date of the last audited balance sheet;
- (ii) Investments in Overseas Unincorporated entities in the oil sector by resident corporates exceeding the prescribed limit of their net worth as on the date of last audited balance sheet, provided the proposal has been approved by the competent authority and is duly supported by a certified copy of Board Resolution approving such investment. However, Navaratna Public Sector Undertakings, ONGC Videsh Ltd and Oil India Ltd are allowed to invest in overseas unincorporated / incorporated entities in oil sector (i.e. for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits, under the automatic route;

- (iii) Overseas Investments by proprietorship concerns and unregistered partnership firms satisfying certain eligibility criteria;
- (iv) Investments by Registered Trusts / Societies (satisfying certain eligibility criteria) engaged in the manufacturing / educational / hospital sector in the same sector in a JV / WOS outside India;
- (v) Corporate guarantee by the Indian Party to second and subsequent level of Step Down Subsidiary (SDS);
- (vi) All other forms of guarantees which are offered by the Indian Party to its first and subsequent level of SDS;
- (vii) Restructuring of the balance sheet of JV/WOS involving write-off of capital and receivables in the books of listed/ unlisted Indian Company satisfying certain eligibility;
- (viii) Capitalization of export proceeds remaining unrealized beyond the prescribed period of realization to require prior approval of the Reserve Bank; and
- (ix) Proposals from the Indian party for undertaking *financial commitment* without equity contribution in JV / WOS may be considered by the Reserve Bank under the approval route based on the business requirement of Indian Party and legal requirement of host country in which JV/WOS is located.

**Financial Commitment**

Financial commitment is the amount of direct investments outside India by an Indian Party -



**Eligibility to make Overseas Direct Investment under the Automatic Route**

An Indian Party is eligible to make overseas direct investment under the Automatic Route.

An Indian Party is a company incorporated in India or a body created under an Act of Parliament or a

partnership firm registered under the Indian Partnership Act 1932 or a Limited Liability Partnership (LLP) incorporated under the Limited Liability Partnership Act, 2008 and any other entity in India as may be notified by the Reserve Bank. When more than one such company, body or entity makes investment in the foreign JV / WOS, such combination will also form an “Indian Party”.

### Permissible Sources for Funding Overseas Direct Investment

Funding for overseas direct investment can be made by one or more of the following sources:

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Drawal of foreign exchange from an AD bank in India

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Swap of shares (refers to the acquisition of the shares of an overseas JV/WOS by way of exchange of the shares of the Indian party).

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Capitalization of exports and other dues and entitlements

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Proceeds of External Commercial Borrowings/Foreign Currency Convertible Bonds.

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In exchange of ADRs/GDRs issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and the guidelines issued by Government of India in the matter.

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Balance held in Exchange Earners Foreign Currency account of the Indian Party maintained with an Authorized Dealer

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Proceeds of foreign currency funds raised through ADR/GDR issues

### ***Indian company making investment in a JV/WOS abroad in the financial services sector***

Only an Indian company engaged in financial services sector activities can make investment in a JV/WOS abroad in the financial services sector, provided it fulfills the following additional conditions:

- i. has earned net profit during the preceding three financial years from the financial services activities;
- ii. is registered with the appropriate regulatory authority in India for conducting financial services activities;
- iii. has obtained approval for undertaking such activities from the concerned regulatory authorities both in India and abroad before venturing into such financial activity;
- iv. has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India;

## Overseas investments by proprietorship concerns and registered Trust/ Society

### Proprietorship Concerns

The proposal for overseas direct investment (or financial commitment), by a proprietorship concern / unregistered partnership firm in India are to be considered by the Reserve Bank under the approval route are subject to following terms and conditions:

- (a) The proprietorship concern / unregistered partnership firm in India is classified as 'Status Holder' as per the Foreign Trade Policy issued by the Ministry of Commerce and Industry, Government of India from time to time;
- (b) The proprietorship concern / unregistered partnership firm in India has a proven track record, i.e., the export outstanding does not exceed 10% of the average export realisation of preceding three years and a consistently high export performance;
- (c) The Authorised Dealer bank is satisfied that the proprietorship concern / unregistered partnership firm in India is KYC (Know Your Customer) compliant, engaged in the proposed business and has turnover as indicated;
- (d) The proprietorship concern / unregistered partnership firm in India has not come under the adverse notice of any Government agency like the Directorate of Enforcement, Central Bureau of Investigation, Income Tax Department, etc. and does not appear in the exporters' caution list of the Reserve Bank or in the list of defaulters to the banking system in India; and
- (e) The amount of proposed investment (or financial commitment) outside India does not exceed 10 per cent of the average of last three years' export realisation or 200 per cent of the net owned funds of the proprietorship concern/ unregistered partnership firm in India, whichever is lower.

### Registered Trusts and Societies

Registered Trusts and Societies engaged in manufacturing/ educational/ hospital sector are allowed to make investment (or financial commitment) in the same sector(s) in a JV/WOS outside India, with the prior approval of the Reserve Bank.

#### **Eligibility Criteria for Trust**

- (i) The Trust should be registered under the Indian Trust Act, 1882;
- (ii) The Trust deed permits the proposed investment overseas;
- (iii) The proposed investment should be approved by the trustee/s;
- (iv) The AD Category – I bank is satisfied that the Trust is KYC (Know Your Customer) compliant and is engaged in a bonafide activity;
- (v) The Trust has been in existence at least for a period of three years;
- (vi) The Trust has not come under the adverse notice of any Regulatory / Enforcement agency like the Directorate of Enforcement, Central Bureau of Investigation (CBI), etc.

#### **Eligibility Criteria for Society**

- (i) The Society should be registered under the Societies Registration Act, 1860.
- (ii) The Memorandum of Association and rules and regulations permit the Society to make the proposed investment which should also be approved by the governing body/council or a managing/

executive committee.

- (iii) The AD Category - I bank is satisfied that the Society is KYC (Know Your Customer) compliant and is engaged in a *bonafide* activity;
- (iv) The Society has been in existence at least for a period of three years;
- (v) The Society has not come under the adverse notice of any Regulatory / Enforcement agency like the Directorate of Enforcement, CBI etc.

In addition to registration, the AD Category – I bank should ensure that the special license / permission has been obtained by the applicant in case the activities require special license / permission either from the Ministry of Home Affairs, Government of India or from the relevant local authority, as the case may be.

An application in form ODI may be made to the Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Overseas Investment Division, through the AD Category - I bank. AD Category - I banks may forward the application to the Reserve Bank, after ensuring the above terms and conditions along with their comments and recommendations, for consideration.

### **Acquisition/Sale of Foreign Securities by Resident Individual in India**

Resident individuals can acquire/sell foreign securities without prior approval in the following cases:—

- i. As a gift from a person resident outside India;
- ii. By way of ESOPs issued by a company incorporated outside India under Cashless Employees Stock Option Scheme which does not involve any remittance from India;
- iii. By way of ESOPs issued to an employee or a director of Indian office or branch of a foreign company or of a subsidiary in India of a foreign company or of an Indian company irrespective of the percentage of the direct or indirect equity stake in the Indian company;
- iv. As inheritance from a person whether resident in or outside India;
- v. By purchase of foreign securities out of funds held in the Resident Foreign Currency Account maintained in accordance with the Foreign Exchange Management (Foreign Currency Account) Regulations, 2000; and
- vi. By way of bonus/rights shares on the foreign securities already held by them.

### **Resident individual acquiring shares of a foreign company in the capacity as Director**

Reserve Bank has given general permission to a resident individual to acquire foreign securities to the extent of the minimum number of qualification shares required to be held for holding the post of Director.

Accordingly, resident individuals are permitted to remit funds under general permission for acquiring qualification shares for holding the post of a Director in the overseas company to the extent prescribed as per the law of the host country where the company is located and the limit of remittance for acquiring such qualification shares shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

### **Indian Mutual Funds for investment abroad**

Indian Mutual Funds registered with SEBI are permitted to invest within the overall cap of USD 7 billion in:

- a. ADRs / GDRs of the Indian and foreign companies;

- b. Equity of overseas companies listed on recognized overseas stock exchanges; initial and follow on public offerings for listing at recognized overseas stock exchanges;
- c. Foreign debt securities- short term as well as long term with rating not below investment grade - in the countries with fully convertible currencies;
- d. Money market investments not below investment grade; repos where the counter party is not below investment grade;
- e. Government securities where countries are not rated below investment grade;
- f. Derivatives traded on recognized stock exchanges overseas only for hedging and portfolio balancing with underlying as securities;
- g. Short term deposits with banks overseas where the issuer is rated not below investment grade; and
- h. Units / securities issued by overseas Mutual Funds or Unit Trusts registered with overseas regulators.

### **Obligations of Indian party which has made direct investment outside India**

An Indian Party which has made direct investment outside India is required to comply with the following:-

- (i) Receive share certificates or any other documentary evidence of investment in the foreign JV / WOS as an evidence of investment and submit the same to the designated AD within 6 months;
- (ii) Repatriate to India, all dues receivable from the foreign JV / WOS, like dividend, royalty, technical fees etc.;
- (iii) Submit to the Reserve Bank through the designated Authorized Dealer, every year, an Annual Performance Report in Part III of Form ODI in respect of each JV or WOS outside India set up or acquired by the Indian party..
- (iv) Report the details of the decisions taken by a JV/WOS regarding diversification of its activities /setting up of step down subsidiaries/alteration in its share holding pattern within 30 days of the approval of those decisions by the competent authority concerned of such JV/WOS in terms of the local laws of the host country. These are also to be included in the relevant Annual Performance Report; and
- (v) In case of disinvestment, sale proceeds of shares/securities are to be repatriated to India immediately on receipt thereof and in any case not later than 90 days from the date of sale of the shares /securities and documentary evidence to this effect is to be submitted to the Reserve Bank through the designated Authorised Dealer.
- (vi) Submit an Annual Performance Report (APR) in Form ODI Part III to the Reserve Bank by 30th of June every year in respect of each Joint Venture (JV) / Wholly Owned Subsidiary (WOS) outside India set up or acquired by the Indian Party/Resident Individual .

### **LESSON ROUND-UP**

- Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues for promoting global business by Indian entrepreneurs.
- "Financial Commitment" means the amount of direct investment by way of contribution to equity, loan and 100 per cent of the amount of guarantees and 50 per cent of the performance guarantees issued by an Indian Party to or on behalf of its overseas Joint Venture Company or Wholly Owned Subsidiary.







# Lesson 7

## Liberalized Remittance Scheme (LRS)

### LESSON OUTLINE

- Learning objectives
- Introduction
- permissible capital account transactions
- permissible current account transactions
- Documentation by the remitter
- Prohibited Transactions
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

In terms of Section 5 of the FEMA, persons resident in India are free to buy or sell foreign exchange for any current account transaction except for those transactions for which drawal of foreign exchange has been prohibited by Central Government.

As liberalization measure to facilitate resident individuals to remit funds abroad for permitted current or capital account transactions or combination of both, Reserve Bank of India issues Liberalised Remittance Scheme.

The object of the study is to familiarize the students regulatory framework and procedure relating to remittance of funds abroad under Liberalized Remittance Scheme.

*The Liberalized Remittance Scheme was introduced on February 4, 2004. The Liberalized Remittance Scheme has been revised in stages consistent with prevailing macro and micro economic conditions.*

## INTRODUCTION

The Reserve Bank of India as part of its liberalization measure to facilitate resident individuals to remit funds abroad for permitted current or capital account transactions or combination of both issues Liberalised Remittance Scheme.

Liberalised Remittance Scheme permits the Authorised Dealers to freely allow remittances by resident individuals up to *USD 2,50,000 per Financial Year (April-March)* for any permitted current or capital account transaction or a combination of both. The Scheme is available to all resident individuals including minors. In case of remitter being a minor, the Form A2 must be countersigned by the minor's natural guardian. The Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

The LRS limit has been revised in stages consistent with prevailing macro and micro economic conditions. During the period from February 4, 2004 till date, the LRS limit has been revised as under:

(Amount in USD)							
	Feb 4, 2004	Dec 20, 2006	May 8, 2007	Sep 26, 2007	Aug 14, 2013	Jun 3, 2014	May 26, 2015
<b>LRS limit (USD)</b>	25,000	50,000	1,00,000	2,00,000	75,000	1,25,000	2,50,000

Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions. However, clubbing is not permitted by other family members for capital account transactions such as opening a bank account/investment/purchase of property, if they are not the co-owners/co-partners of the overseas bank account/ investment/property. Further, a resident cannot gift to another resident, in foreign currency, for the credit of the latter's foreign currency account held abroad under LRS.

All other transactions which are otherwise not permissible under FEMA and those in the nature of remittance for margins or margin calls to overseas exchanges/ overseas counterparty are not allowed under the Scheme.

## Permissible capital account transactions by an individual under LRS

The permissible capital account transactions by an individual under LRS are:

Opening of foreign currency account abroad with a bank

Purchase of property abroad

Making investments abroad- acquisition and holding shares of both listed and unlisted overseas company or debt instruments

Acquisition of qualification shares of an overseas company for holding the post of Director; acquisition of shares of a foreign company towards professional services rendered or in lieu of Director's remuneration

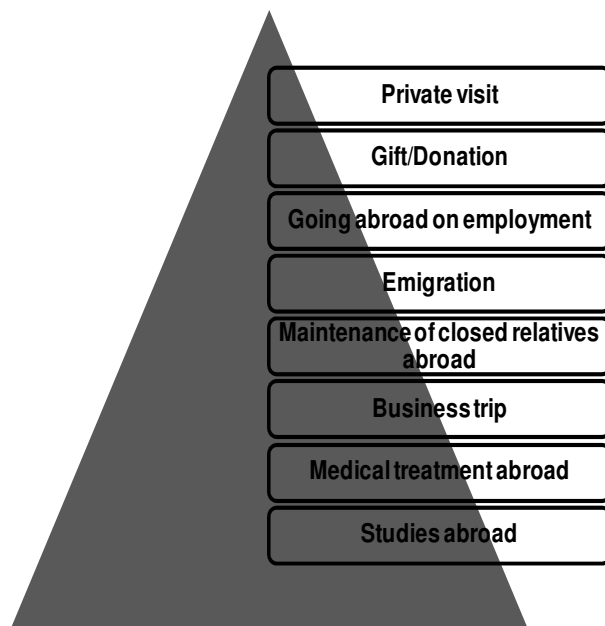
Investment in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes

Setting up Wholly Owned Subsidiaries and Joint Ventures outside India for bonafide business subject to the stipulated terms & conditions

Extending loans including loans in Indian Rupees to Non-Resident Indians (NRIs) who are relatives as defined in Companies Act.

### Permissible Current Account Transactions by an individual under LRS

The limit of USD 2,50,000 per Financial Year (FY) under the Scheme also includes/subsumes remittances for current account transactions such as:



It may be noted that release of foreign exchange in excess of USD 2,50,000, requires prior permission from the Reserve Bank of India.

#### **a. Private visits**

For private visits abroad, other than visit to Nepal and Bhutan, resident individual can obtain foreign exchange up to an aggregate amount of USD 2,50,000, from an Authorised Dealer, in any one financial year, irrespective of the number of visits undertaken during the year.

Further, all tour related expenses including cost of rail/road/water transportation; cost of Euro Rail; passes/tickets, etc. outside India; and overseas hotel/lodging expenses are to be subsumed under the LRS limit. The tour operator can collect this amount either in Indian rupees or in foreign currency from the resident traveller.

#### **b. Gift/donation**

Any resident individual may remit up-to USD 2,50,000 in one Financial Year as gift to a person residing outside India or as donation to an organization outside India.

#### **c. Going abroad on employment**

A person going abroad for employment can draw foreign exchange up to USD 2,50,000 per Financial Year from any Authorised Dealer in India.

#### **d. Emigration**

A person wanting to emigrate can draw foreign exchange from AD Category I bank and AD Category II up to the amount prescribed by the country of emigration or USD 250,000. Remittance of any amount of foreign

exchange outside India in excess of this limit may be allowed only towards meeting incidental expenses in the country of immigration and not for earning points or credits to become eligible for immigration by way of overseas investments in government bonds; land; commercial enterprise; etc.

***e. Maintenance of close relatives abroad***

A resident individual can remit up-to USD 2,50,000 per Financial Year towards maintenance of close relatives.

***f. Business trip***

Visits by individuals in connection with attending of an international conference, seminar, specialised training, apprentice training, etc., are treated as business visits. For business trips to foreign countries, resident individuals can avail of foreign exchange up to USD 2,50,000 in a Financial Year irrespective of the number of visits undertaken during the year.

However, if an employee is being deputed by an entity for any of the above and the expenses are borne by the latter, such expenses are to be treated as residual current account transactions outside LRS and may be permitted by the AD without any limit, subject to verifying the bonafides of the transaction.

***g. Medical treatment abroad***

Authorised Dealers may release foreign exchange up to an amount of USD 2,50,000 or its equivalent per Financial Year without insisting on any estimate from a hospital/doctor. For amount exceeding the above limit, Authorised Dealers may release foreign exchange under general permission based on the estimate from the doctor in India or hospital/ doctor abroad. A person who has fallen sick after proceeding abroad may also be released foreign exchange by an Authorised Dealer (without seeking prior approval of the Reserve Bank of India) for medical treatment outside India.

In addition to the above, an amount up to USD 250,000 per financial year is allowed to a person for accompanying as attendant to a patient going abroad for medical treatment/check-up.

***h. Facilities available to students for pursuing their studies abroad***

AD Category I banks and AD Category II, may release foreign exchange up to USD 2,50,000 or its equivalent to resident individuals for studies abroad without insisting on any estimate from the foreign University. However, AD Category I bank and AD Category II may allow remittances (without seeking prior approval of the Reserve Bank of India) exceeding USD 2,50,000 based on the estimate received from the institution abroad.

**Documentation by the remitter**

- The resident individual is required to compulsorily designate a branch of an AD through which all the remittances under the Scheme will be made. The resident individual seeking to make the remittance should furnish Form A2 for purchase of foreign exchange under LRS.
- It is mandatory to have PAN card to make remittances under the Scheme for capital account transactions. However, PAN card need not be insisted upon for remittances made towards permissible current account transactions up to USD 25,000.
- Investor, who has remitted funds under LRS can retain, reinvest the income earned on the investments. At present, the resident individual is not required to repatriate the funds or income generated out of investments made under the Scheme. However, a resident individual who has made overseas direct

investment in the equity shares; compulsorily convertible preference shares of a JV/WoS outside India or ESOPs, within the LRS limit, is required to comply with the terms and conditions prescribed by the overseas investment guidelines under Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2013.

## **REMITTANCE FACILITIES TO PERSONS OTHER THAN INDIVIDUALS**

### **Gift/donation**

General permission has been granted to persons other than individuals to remit towards donations up-to one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for creation of Chairs in reputed educational institutes,

- (a) contribution to funds (not being an investment fund) promoted by educational institutes; and
- (b) contribution to a technical institution or body or association in the field of activity of the donor Company.
- (c) Any additional remittance in excess of the same shall require prior approval of the Reserve Bank of India.

### **Procedure for remittance:**

Applications for remittances for purposes other than those specified above may be forwarded to the Reserve Bank of India together with

- (a) details of their foreign exchange earnings during the last 3 years,
- (b) brief background of the company's activities,
- (c) purpose of the donation.

### **Commission to agents abroad for sale of residential flats or commercial plots in India**

Remittances by persons other than individuals is subject to prior approval of the Reserve Bank of India if commission per transaction to agents abroad for sale of residential flats or commercial plots in India exceeds USD 25,000 or five percent of the inward remittance whichever is more.

### **Remittances towards consultancy services**

Remittances by persons other than individuals is subject to prior approval of the Reserve Bank of India, if remittance exceeds USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

### **Remittances towards re-imburement of pre-incorporation expenses**

Remittances by persons other than individuals are subject to prior approval of the Reserve Bank of India if remittance exceed five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

### **Payment of fees in foreign currency - Embassy affiliated educational institutions**

Authorised Dealers may sell foreign exchange towards payment of fees to schools/educational institutions under the administrative control of foreign embassies.

### **Remittance towards payments of collected subscription to overseas TV media company**

Authorised dealers may allow cable operators or collection agents in India of overseas TV media companies,

to remit subscription collected from subscribers in India/advertisement charges collected from the advertisers who are eligible to advertise on overseas TV channels without any prior permission from the Reserve Bank.

### **Bids in foreign currency for projects to be executed in India**

Persons resident in India are permitted to incur liability in foreign exchange and to make or to receive payments in foreign exchange, in respect of global bids where the Central Government has authorised such projects to be executed in India.

In such cases, authorised dealers may sell foreign exchange to the concerned resident Indian company which has been awarded the contract.

### **Sale of overseas telephone cards**

Authorised Dealers may allow agents in India of the overseas organisations issuing pre-paid telephone cards to remit the sale proceeds of such cards, net of their commission, to the issuers of the telephone cards.

### **Liberalization of foreign technical collaboration agreements**

AD Category-I banks may permit drawal of foreign exchange by persons for payment of royalty and lump-sum payment under technical collaboration agreements without the approval of Ministry of Commerce and Industry, Government of India.

### **Drawal of foreign exchange for remittance for purchase of trademark or franchise in India**

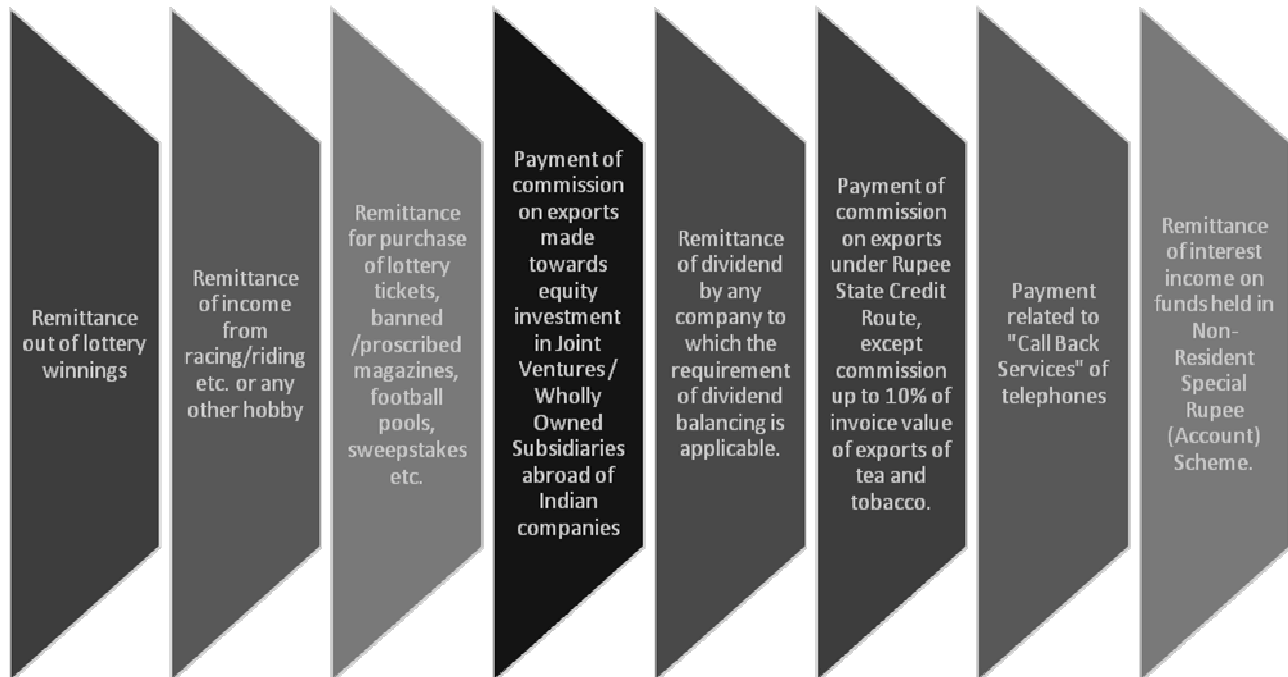
AD Category-I banks may permit drawal of foreign exchange by person for purchase of trademark or franchise in India without approval of the Reserve Bank.

### **Remittances for making tour arrangements by agents**

- Authorised Dealers may effect remittances at the request of agents in India who have tie-up arrangements with hotels/ agents etc., abroad for providing hotel accommodation or making other tour arrangements for travel from India, provided the Authorised Dealer is satisfied that the remittance is being made out of the foreign exchange purchased by the traveller concerned from an Authorised Person (including exchange drawn for private travel abroad) in accordance with the Rules, Regulations and Direction in force.
- Authorised Dealer may open foreign currency accounts in the name of agents in India who have tie up arrangements with hotels/ agents, etc., abroad for providing hotel accommodation or making other tour arrangements for travellers from India provided:-
  - (i) the credits to the account are by way of depositing:-
    - (a) collections made in foreign exchange from travellers; and
    - (b) refunds received from outside India on account of cancellation of bookings/tour arrangements etc., and
  - (ii) the debits in foreign exchange are for making payments towards hotel accommodation, tour arrangements etc., outside India.
- Authorised Dealer may also allow tour operators to remit the cost of rail/ road/ water/transportation charges outside India without any prior approval from Reserve Bank, net of commission/ mark up due to the agent. The sale of passes/ ticket in India can be made either against the payment in Indian Rupees or in foreign exchange released for visits abroad.

- In respect of consolidated tours arranged by travel agents in India for foreign tourists visiting India and neighbouring countries like Nepal, Bangladesh, Sri Lanka etc., against advance payments/reimbursement through an Authorised Dealer, part of the foreign exchange received in India against such consolidated tour arrangement, may require to be remitted from India to these neighbouring countries for services rendered by travel agents and hoteliers in these countries. Authorised Dealer may allow such remittances after verifying that the amount being remitted to the neighbouring countries (inclusive of remittances, if any, already made against the tour) does not exceed the amount actually remitted to India and the country of residence of the beneficiary is not Pakistan.

### Prohibited Transactions



### LESSON ROUND-UP

- As liberalization measure to facilitate resident individuals to remit funds abroad for permitted current or capital account transactions or combination of both Reserve Bank of India issues Liberalised Remittance Scheme.
- The Scheme is available to all resident individuals including minors.
- Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions.
- For private visits abroad, other than to Nepal and Bhutan, any resident individual can obtain foreign exchange up to an aggregate amount of USD 2,50,000, from an Authorised Dealer in any one financial year, irrespective of the number of visits undertaken during the year.
- The individual will have to designate a branch of an AD through which all the remittances under the Scheme will be made. The resident individual seeking to make the remittance should furnish Form A2 for purchase of foreign exchange under LRS.





# Lesson 8

## External Commercial Borrowings (ECB)

### LESSON OUTLINE

- Learning objectives
- Introduction
- Available routes for raising ECB
- Minimum Average Maturity Period
- Eligible Borrowers
- Recognised Lenders/Investors
- End-use prescriptions
- Conversion of ECB into equity
- Reporting Requirements
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Transactions on account of External Commercial Borrowings (ECB) are governed by clause (d) of sub-section 3 of section 6 of the Foreign Exchange Management Act, 1999 (FEMA). Various provisions in respect of borrowings from overseas are included in the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations framed under FEMA. Within the contours of the Regulations, Reserve Bank of India also issues directions to Authorised Persons.

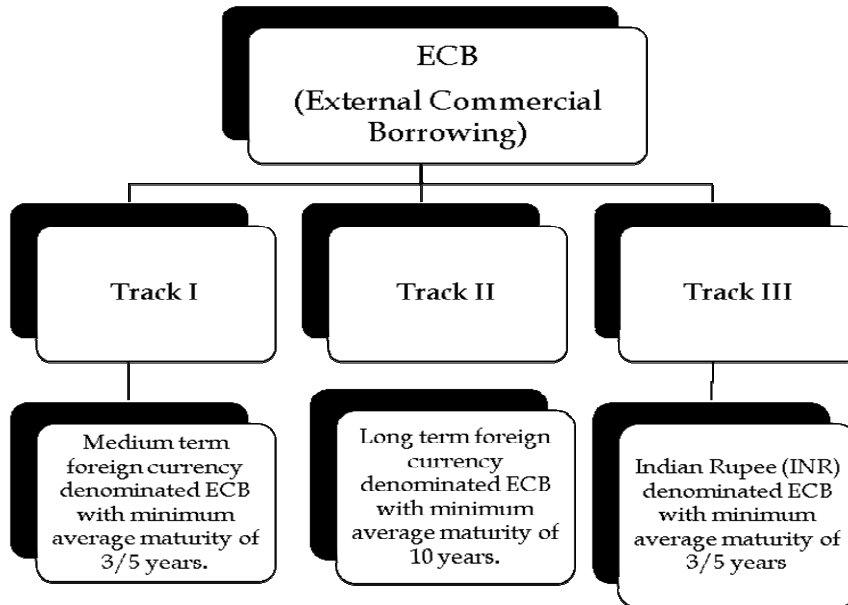
The object of the study is to familiarize the students with the regulatory framework and procedural aspects regarding External Commercial Borrowings.

*The External Commercial Borrowings Framework enables permitted resident entities to borrow from recognized non-resident entities.*

**Introduction**

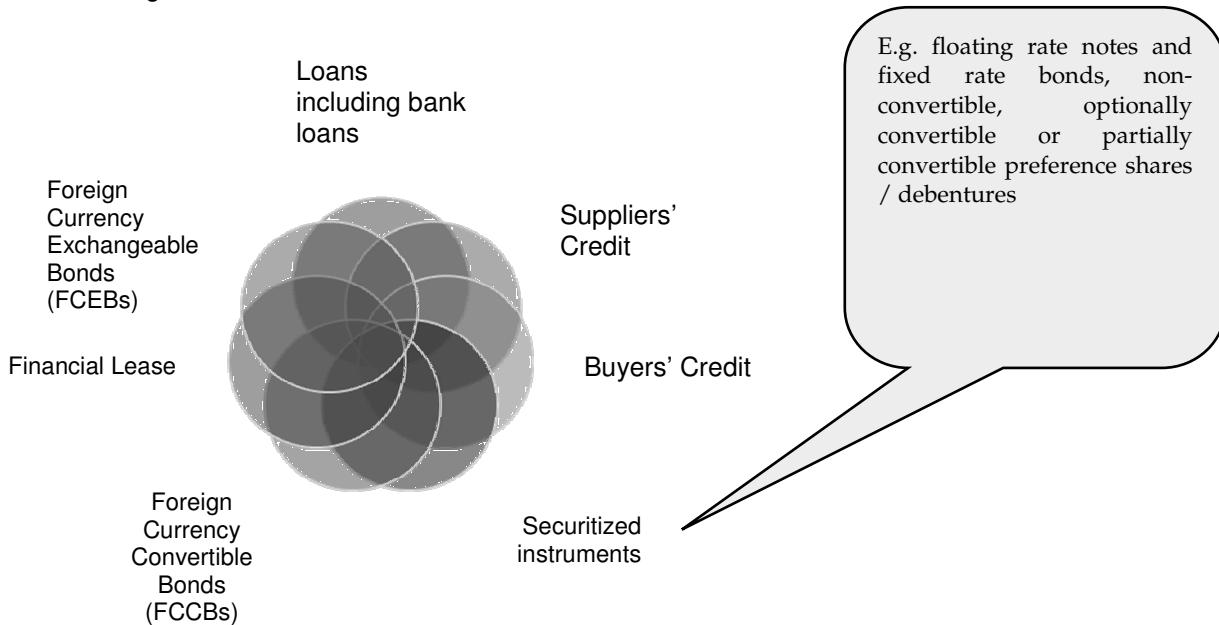
ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. These parameters apply in totality and not on a standalone basis.

The framework for raising loans through ECB comprises the following three tracks:



**Kinds of ECB**

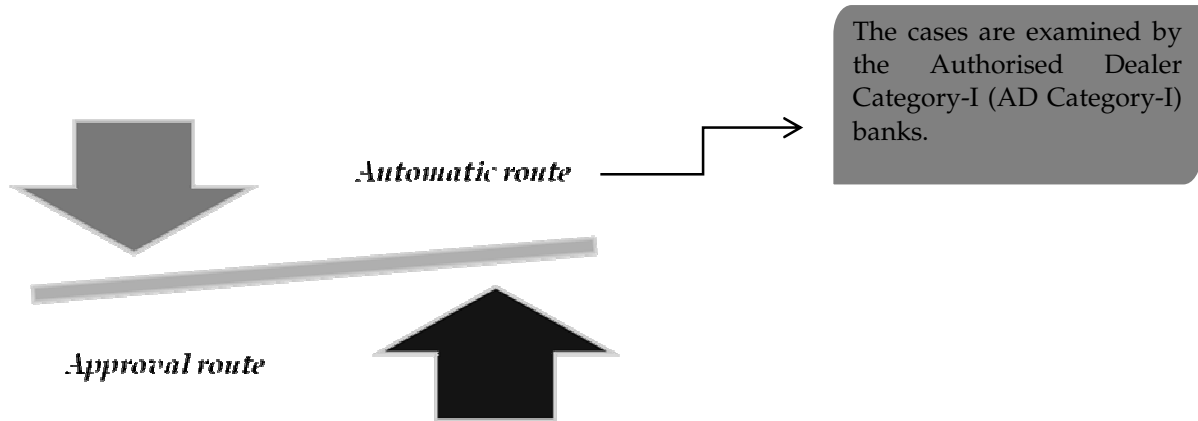
The ECB Framework enables permitted resident entities to borrow from recognized non-resident entities in the following forms:



However, ECB framework is not applicable in respect of investment in Non-convertible Debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs)

### Available routes for raising ECB

Under the ECB framework, ECBs can be raised either under the automatic route or under the approval route.



The cases are examined by the Authorised Dealer Category-I (AD Category-I) banks.

The prospective borrowers are required to send their requests to the RBI through their ADs for examination.

### Minimum Average Maturity Period

The minimum average maturities for the three tracks are set out as under:

#### Track I:

Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.

- 3 years for ECB upto USD 50 million or its equivalent.
- 5 years for ECB beyond USD 50 million or its equivalent.
- 5 years for eligible borrowers under Companies in infrastructure sector, Non-Banking Financial Companies -Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs)., irrespective of the amount of borrowing.
- 5 years for Foreign Currency Convertible Bonds (FCCBs)/ Foreign Currency Exchangeable Bonds (FCEBs) irrespective of the amount of borrowing. The call and put option, if any, for FCCBs shall not be exercisable prior to 5 years

#### Track II:

Long term foreign currency denominated ECB with minimum average maturity of 10 years.

#### Track III:

Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

### Eligible Borrowers

The list of entities eligible to raise ECB under the three tracks is set out below:

**Track I:**

Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.

- Companies in manufacturing and software development sectors.
- Shipping and airlines companies.
- Small Industries Development Bank of India (SIDBI).
- Units in Special Economic Zones (SEZs).
- Export Import Bank of India (Exim Bank) (only under the approval route).
- Companies in infrastructure sector, Non-Banking Financial Companies -Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs).

**Track II:**

Long term foreign currency denominated ECB with minimum average maturity of 10 years.

- (i) All entities listed under Track I above.
- (ii) Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (INVITs) coming under the regulatory framework of the Securities and Exchange Board of India (SEBI).

**Track III:**

Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

- (i) All entities listed under Track II above.
- (ii) All Non-Banking Financial Companies (NBFCs) coming under the regulatory purview of the Reserve Bank.
- (iii) NBFCs-Micro Finance Institutions (NBFCs-MFIs), Not for Profit companies registered under the Companies Act, 1956/2013, Societies, trusts and cooperatives (registered under the Societies Registration Act, 1860, Indian Trust Act, 1882 and State-level Cooperative Acts/Multi-level Cooperative Act/State-level mutually aided Cooperative Acts respectively), Non-Government Organisations (NGOs) which are engaged in micro finance activities.
- (iv) Companies engaged in miscellaneous services viz. research and development (R&D), training (other than educational institutes), companies supporting infrastructure, companies providing logistics services.
- (v) Developers of Special Economic Zones (SEZs)/ National Manufacturing and Investment Zones (NMIZs).

It may be noted that entities engaged in micro-finance activities to be eligible to raise ECB:

- (i) should have a satisfactory borrowing relationship for at least three years with an AD Category I bank in India, and
- (ii) should have a certificate of due diligence on 'fit and proper' status from the AD Category I bank.

## Recognised Lenders/Investors

The list of recognized lenders / investors are as follows:

- (i) International banks.
- (ii) International capital markets.
- (iii) Multilateral financial institutions (such as, IFC, ADB, etc.) / regional financial institutions and Government owned (either wholly or partially) financial institutions.
- (iv) Export credit agencies.
- (v) Suppliers of equipment.
- (vi) Foreign equity holders.
- (vii) Overseas long term investors such as:
  - (a) Prudentially regulated financial entities;
  - (b) Pension funds;
  - (c) Insurance companies;
  - (d) Sovereign Wealth Funds;
  - (e) Financial institutions located in International Financial Services Centres in India
- (viii) Overseas branches / subsidiaries of Indian banks

Overseas branches / subsidiaries of Indian banks can be lenders only under Track I. Further, their participation under track I is subject to the prudential norms issued by Department of Banking Regulation, RBI. Indian banks are not permitted to participate in refinancing of existing ECBs.

Overseas Organizations proposing to lend ECB are required to furnish to the authorised dealer bank of the borrower a certificate of due diligence from an overseas bank, which, in turn, is subject to regulation of host-country and such host country adheres to the Financial Action Task Force (FATF) guidelines on Anti-Money Laundering (AML)/ Combating the Financing of Terrorism (CFT).

The certificate of due diligence should comprise the following:

- (i) The lender maintains an account with the bank at least for a period of two years,
- (ii) The lending entity is organised as per the local laws and held in good esteem by the business/local community, and
- (iii) There is no criminal action pending against it.

Individual lender has to obtain a certificate of due diligence from an overseas bank indicating that the lender maintains an account with the bank for at least a period of two years. Other evidence /documents such as audited statement of account and income tax return, which the overseas lender may furnish, need to be certified and forwarded by the overseas bank. Individual lenders from countries which do not adhere to FATF guidelines on Anti-Money Laundering (AML)/ Combating the Financing of Terrorism (CFT) are not eligible to extend ECB.

## Individual Limits of ECB

The individual limits refer to the amount of ECB that can be raised in a financial year under the automatic route.

- i. The individual limits of ECB that can be raised by eligible entities under the automatic route per

financial year for all the three tracks are set out as under:

- (a) Up to USD 750 million or equivalent for the companies in infrastructure and manufacturing sectors, Non-Banking Financial Companies -Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies;
  - (b) Up to USD 200 million or equivalent for companies in software development sector;
  - (c) Up to USD 100 million or equivalent for entities engaged in micro finance activities; and
  - (d) Up to USD 500 million or equivalent for remaining entities.
- ii. ECB proposals beyond aforesaid limits come under the approval route. For computation of individual limits under Track III, exchange rate prevailing on the date of agreement is to be taken into account.
  - iii. In case the ECB is raised from direct equity holder, aforesaid individual ECB limits will also subject to ECB liability: equity ratio requirement. For ECB raised under the automatic route, the ECB liability of the borrower (including all outstanding ECBs and the proposed one) towards the foreign equity holder should not be more than four times of the equity contributed by the latter. For ECB raised under the approval route, this ratio should not be more than 7:1. This ratio will not be applicable if total of all ECBs raised by an entity is up to USD 5 million or equivalent.

It may be noted that for the purpose of ECB liability: equity ratio, the paid-up capital, free reserves (including the share premium received in foreign currency) as per the latest audited balance sheet can be reckoned for calculating the 'equity' of the foreign equity holder. Where there are more than one foreign equity holders in the borrowing company, the portion of the share premium in foreign currency brought in by the lender(s) concerned shall only be considered for calculating the ratio.

### **End-use prescriptions**

The end-use prescriptions for ECB raised under the three tracks are as under:

#### **Track I:**

#### **Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.**

- (i) ECB proceeds can be utilised for capital expenditure in the form of:
  - (a) Import of capital goods including payment towards import of services, technical know-how and license fees, provided the same are part of these capital goods;
  - (b) Local sourcing of capital goods;
  - (c) New project;
  - (d) Modernisation /expansion of existing units;
  - (e) Overseas direct investment in Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS);
  - (f) Acquisition of shares of public sector undertakings at any stage of disinvestment under the disinvestment programme of the Government of India;
  - (g) Refinancing of existing trade credit raised for import of capital goods;
  - (h) Payment of capital goods already shipped / imported but unpaid;
  - (i) Refinancing of existing ECB provided the residual maturity is not reduced.
- (ii) SIDBI can raise ECB only for the purpose of on-lending to the borrowers in the Micro, Small and Medium Enterprises (MSME sector), where MSME sector is as defined under the MSME

Development Act, 2006, as amended from time to time:

- (iii) Units of SEZs can raise ECB only for their own requirements.
- (iv) Shipping and airlines companies can raise ECB only for import of vessels and aircrafts respectively.
- (v) ECB proceeds can be used for general corporate purpose (including working capital) provided the ECB is raised from the direct / indirect equity holder or from a group company for a minimum average maturity of 5 years.
- (vi) NBFC-Infrastructure Finance Company and NBFCs-Asset Finance Company can raise ECB only for financing infrastructure.
- (vii) Holding Companies and Core Investment Company are to use ECB proceeds only for on-lending to infrastructure Special Purpose Vehicles (SPVs).
- (viii) ECBs for the following purposes are to be considered only under the approval route:
  - (a) Import of second hand goods as per the Director General of Foreign Trade (DGFT) guidelines;
  - (b) On-lending by Exim Bank.

**Track II:**

***Long term foreign currency denominated ECB with minimum average maturity of 10 years.***

The ECB proceeds can be used for all purposes excluding the following:

- (i) Real estate activities
- (ii) Investing in capital market
- (iii) Using the proceeds for equity investment domestically;
- (iv) On-lending to other entities with any of the above objectives;
- (v) Purchase of land

**Track III:**

***Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.***

NBFCs can use ECB proceeds only for:

- (i) On-lending for any activities, including infrastructure sector as permitted by the concerned regulatory department of RBI;
  - (ii) providing hypothecated loans to domestic entities for acquisition of capital goods/equipment; and
  - (iii) providing capital goods/equipment to domestic entities by way of lease and hire-purchases
2. Developers of SEZs/ NMIZs can raise ECB only for providing infrastructure facilities within SEZ/ NMIZ.
  3. NBFCs-Micro Finance Institution (MFI), other eligible Micro Finance Institution (MFI), NGOs and not for profit companies registered under the Companies Act, 1956/2013 can raise ECB only for on-lending to self-help groups or for micro-credit or for bonafide micro finance activity including capacity building.
  4. For other eligible entities under track III, the ECB proceeds can be used for all purposes excluding the following:
    - (i) Real estate activities

- (ii) Investing in capital market
- (iii) Using the proceeds for equity investment domestically;
- (iv) On-lending to other entities with any of the above objectives;
- (v) Purchase of land

### **Conversion of ECB into equity**

Conversion of ECBs, including those which are matured but unpaid, into equity is permitted subject to the following conditions:

- (i) The activity of the borrowing company is covered under the automatic route for Foreign Direct Investment (FDI) or approval route wherever applicable, for foreign equity participation which has been obtained as per the extant FDI policy;
- (ii) The conversion, which should be with the lender's consent and without any additional cost, will not result in breach of applicable sector cap on the foreign equity holding;
- (iii) Applicable pricing guidelines for shares are complied with;
- (iv) Reporting requirements under ECB framework are complied with;
- (v) If the borrower concerned has availed of other credit facilities from the Indian banking system, including overseas branches/subsidiaries, the applicable prudential guidelines issued by the Department of Banking Regulation of RBI, including guidelines on restructuring are complied with; and
- (vi) Consent of other lenders, if any, to the same borrower is available or atleast information regarding conversions is exchanged with other lenders of the borrower.

### **Exchange rate for conversion of ECB dues into equity**

For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender.

It may be noted that the fair value of the equity shares to be issued is to be worked out with reference to the date of conversion only.

### **Procedure for raising ECB**

The procedure for raising ECB under approval route requires the borrowers to approach the RBI with an application in prescribed format Form ECB for examination through their AD Category I bank. Such cases are considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals. ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) are placed before the Empowered Committee set up by the Reserve Bank. The Reserve Bank takes a final decision taking into account recommendation of the Empowered Committee.

Entities desirous to raise ECB under the automatic route may approach an AD Category I bank with their proposal along with duly filled in Form 83.

### **Reporting Requirements**

Borrowings under ECB Framework are subject to following reporting requirements:



*1. Loan Registration Number (LRN):* Any draw-down in respect of an ECB as well as payment of any fees / charges for raising an ECB should happen only after obtaining the LRN from RBI. To obtain the LRN, borrowers are required to submit duly certified Form 83, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank. In turn, the AD Category I bank will forward one copy to the Director, Balance of Payments Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank of India. Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

*2. Changes in terms and conditions of ECB:* Permitted changes in ECB parameters should be reported to the DSIM by submitting revised Form 83 at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form 83 the changes should be specifically mentioned in the communication.

*3. Reporting of actual transactions:* The borrowers are required to report actual ECB transactions through ECB 2 Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of the month to which it relates. Changes, if any, in ECB parameters should also be incorporated in ECB 2 Return.

*4. Reporting on account of conversion of ECB into equity:* In case of partial or full conversion of ECB into equity, the reporting to the RBI will be as under:

- (i) For partial conversion, the converted portion is to be reported to the concerned Regional Office of the Foreign Exchange Department of RBI in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to DSIM in ECB 2 Return will be with suitable remarks "ECB partially converted to equity".
- (ii) For full conversion, the entire portion is to be reported in Form FC-GPR, while reporting to DSIM in ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of ECB 2 Return is not required.
- (iii) For conversion of ECB into equity in phases, reporting through ECB 2 Return will also be in phases.

### **LESSON ROUND-UP**

- External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.
- External Commercial Borrowings Framework enables permitted resident entities to borrow from recognized non-resident entities.
- ECBs can be raised either under the automatic route or under the approval route.
- The minimum average maturities for the three tracks.
- For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender.
- Under External Commercial Borrowings Framework, borrowers may approach the RBI with an application in prescribed format Form ECB for examination through their AD Category I bank. Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals.
- Borrowings under ECB Framework are subject to reporting requirements Loan Registration Number, Changes in terms and conditions of ECB and Reporting of actual transactions.



# Lesson 9

## Foreign Trade Policy and Procedure

### LESSON OUTLINE

- Learning objectives
- Introduction
- Focus of the Foreign Trade Policy
- Legal Basis of Foreign Trade Policy
- Transitional Arrangements
- Importer-Exporter Code (IEC) number/e-IEC
- Merchandise Exports from India Scheme (MEIS)
- Service Exports from India Scheme (SEIS)
- Status Holder
- Duty Exemption/Remission Schemes
- Duty Free Import Authorisation Scheme (DFIA)
- Schemes for Exporters of Gems and Jewellery
- Export Promotion Capital Goods (EPCG) Scheme
- Export Oriented Units (EOUs), Electronics Hardware, Technology Parks (EHTPs), Software Technology Parks, (STPs) and Bio-Technology Parks (BTPs)
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports. The Foreign Trade Policy for 2015-2020 seeks to provide a stable and sustainable policy environment for foreign trade in merchandise and services.

There is a symbiotic relationship between the Foreign Trade Policy (FTP) and the Government's "Make in India" initiative. Foreign Trade Policy 2015-20 contemplates increasing export of goods and services as well as generation of employment which support the "Make in India" initiative of the Government. Further, Online filing of documents/applications, paperless trade in 24x7 environment and simplification of procedures/processes, digitization, e-governance initiatives under FTP definitely improve the ease of doing business in India.

*The Foreign Trade Policy 2015-20, is notified by Central Government, in exercise of powers conferred under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992, as amended. The Foreign Trade Policy, 2015-20 came into force with effect from 01.04.2015*

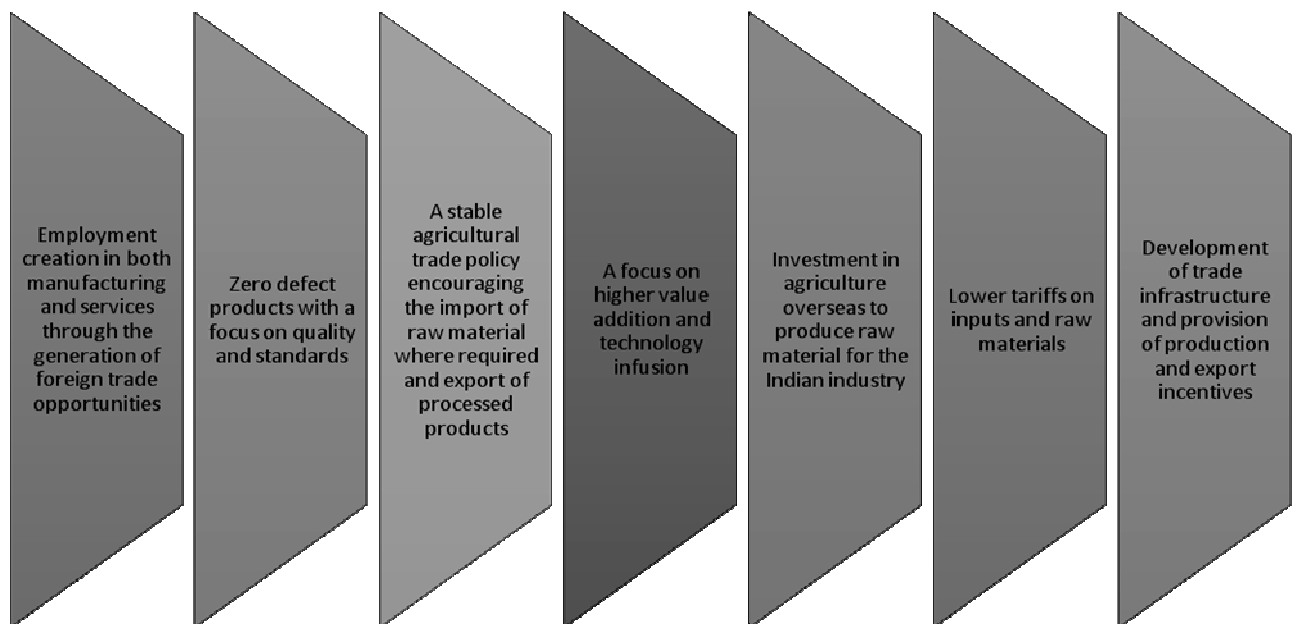
**INTRODUCTION**

India’s Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports. The FTP for 2015-2020 seeks to achieve the following objectives:

- To provide a stable and sustainable policy environment for foreign trade in merchandise and services
- To link rules, procedures and incentives for exports and imports with other initiatives such as “Make in India”, “Digital India” and “Skills India” to create an “Export Promotion Mission” for India
- To promote the diversification of India’s export basket by helping various sectors of the Indian economy to gain global competitiveness with a view to promoting exports
- To create an architecture for India’s global trade engagement with a view to expanding its markets and better integrating with major regions, thereby increasing the demand for India’s products and contributing to the government’s flagship “Make in India” initiative
- To provide a mechanism for regular appraisal in order to rationalize imports and reduce the trade imbalance

Exports should not merely be a function of marketable surplus but should also reflect an enhancement of economic capacity and development. Foreign Trade Policy envisages:

Foreign Trade Policy envisages:-



### Focus of the Foreign Trade Policy (FTP)

The Foreign Trade Policy is primarily focused on accelerating exports. This is sought to be implemented through various schemes intended to exempt and remit indirect taxes on inputs physically incorporated in the export product, import capital goods at concessional duty, stimulate services exports and focus on specific markets and products. The Policy attempts to dovetail these schemes with the specific market access openings that India has achieved through negotiations with its trading partners for various bilateral and regional trading arrangements.

### Legal Basis of Foreign Trade Policy (FTP)

The Foreign Trade Policy 2015-20, is notified by Central Government, in exercise of powers conferred under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992, as amended. The Foreign Trade Policy, 2015-20 came into force with effect from 01.04.2015

### Amendment to Foreign Trade Policy (FTP)

Central Government, in exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, as amended from time to time, reserves the right to make any amendment to the FTP, by means of notification, in public interest.

### Duration of Foreign Trade Policy (FTP)

The Foreign Trade Policy (FTP), 2015-2020, incorporating provisions relating to export and import of goods and services, shall come into force with effect from the date of notification and shall remain in force up to 31st March, 2020, unless otherwise specified. All exports and imports made upto the date of notification shall, accordingly, be governed by the relevant FTP, unless otherwise specified.

### Transitional Arrangements

Any License/Authorisation/Certificate/Scrip/any instrument bestowing financial or fiscal benefit issued before commencement of FTP 2015-20 shall continue to be valid for the purpose and duration for which such License/Authorisation/Certificate/Scrip/any instrument bestowing financial or fiscal benefit Authorisation was issued, unless otherwise stipulated.

In case an export or import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restriction and it shall be restricted to the balance value and quantity available and time period of such irrevocable letter of credit. For operationalising such irrevocable letter of credit, the applicant shall have to register the Letter of Credit with jurisdictional Regional Authority (RA) against computerized receipt, within 15 days of the imposition of any such restriction or regulation.

### DEFINITIONS

For purpose of Foreign Trade Policy, unless context otherwise requires, the following words and expressions shall have the following meanings attached to them:-

**"Accessory" or "Attachment"** means a part, sub-assembly or assembly that contributes to efficiency or effectiveness of a piece of equipment without changing its basic functions.

**"Act"** means Foreign Trade (Development and Regulation) Act, 1992 (No.22 of 1992) [FT (D&R) Act] as amended from time to time.

**"Actual User"** is a person (either natural or legal) who is authorized to use imported goods in his/its own premise which has a definitive postal address.

(a) **"Actual User (Industrial)"** is a person (either natural & legal) who utilizes imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit which has a definitive postal address.

(b) **"Actual User (Non-Industrial)"** is a person (either natural & legal) who utilizes the imported goods for his own use in:

- (i) any commercial establishment, carrying on any business, trade or profession, which has a definitive postal address; or
- (ii) any laboratory, Scientific or Research and Development (R&D) institution, university or other educational institution or hospital which has a definitive postal address; or
- (iii) any service industry which has a definitive postal address.

**"AEZ"** means Agricultural Export Zones notified by Director General of Foreign Trade (DGFA) in Appendix 2V of Appendices and Aayat Niryat Forms of FTP 2015.

**"Appeal"** is an application filed under section 15 of the Act and includes such applications preferred by DGFT officials in government interest against decision by designated adjudicating/appellate authorities.

**"Applicant"** means person on whose behalf an application is made and shall, wherever context so requires, includes person signing the application.

**"Authorization"** means permission as included in Section 2 (g) of the Act to import or export as per provisions of FTP.

**"Capital Goods"** means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological up-gradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.

**"Competent Authority"** means an authority competent to exercise any power or to discharge any duty or function under the Act or the Rules and Orders made there under or under FTP.

**"Component"** means one of the parts of a sub-assembly or assembly of which a manufactured product is made up and into which it may be resolved. A component includes an accessory or attachment to another component.

**"Consumables"** means any item, which participates in or is required for a manufacturing process, but does not necessarily form part of end-product. Items, which are substantially or totally consumed during a manufacturing process, will be deemed to be consumables.

**"Consumer Goods"** means any consumption goods, which can directly satisfy human needs without further processing and includes consumer durables and accessories thereof.

**"Counter Trade"** means any arrangement under which exports/imports from /to India are balanced either by direct imports/exports from importing/exporting country or through a third country under a Trade Agreement or otherwise. Exports/ Imports under Counter Trade may be carried out through Escrow Account, Buy Back arrangements, Barter trade or any similar arrangement. Balancing of exports and imports could wholly or partly be in cash, goods and/or services.

**"Developer"** means a person or body of persons, company, firm and such other private or government undertaking, who develops, builds, designs, organises, promotes, finances, operates, maintains or manages a part or whole of infrastructure and other facilities in SEZ as approved by Central Government and also includes a co-developer.

**"Development Commissioner"** means Development Commissioner of Special Economic Zone (SEZ).

**"Domestic Tariff Area (DTA)"** means area within India which is outside SEZs and Export Oriented Undertaking (EOU)/Electronic Hardware Technology Park (EHTP)/Software Technology Park (STP) Biotechnology Park (BTP).

**"Drawback on deemed export"** in relation to any goods manufactured in India and supplied as deemed exports, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods.

**"EOU"** means Export Oriented Unit for which a letter of permit has been issued by Development Commissioner.

**"Excisable goods"** means any goods produced or manufactured in India and subject to duty of excise under Central Excise and Salt Act 1944 (1 of 1944).

**"Export"** is as defined in FT (D&R) Act, 1992, as amended from time to time.

**"Exporter"** means a person who exports or intends to export and holds an IEC number, unless otherwise specifically exempted.

**"Export Obligation"** means obligation to export product or products covered by Authorisation or permission in terms of quantity, value or both, as may be prescribed or specified by Regional or competent authority.

**"Free"** as appearing in context of import/export policy for items means goods which do not need any 'Authorisation'/ License or permission for being imported into the country or exported out.

**"FTP"** means the Foreign Trade Policy which specifies policy for exports and imports under Section 5 of the Act.

**"Import"** is as defined in FT (D&R) Act, 1992 as amended from time to time.

**"Importer"** means a person who imports or intends to import and holds an Import Export Number (IEC) number, unless otherwise specifically exempted.

**ITC (HS)** refers to Indian Trade Classification (Harmonized System) at 8 digits.

**"Jobbing"** means processing or working upon of raw materials or semi-finished goods supplied to job worker, so as to complete a part of process resulting in manufacture or finishing of an article or any operation which is essential for aforesaid process.

**"Licensing Year"** means period beginning on the 1st April of a year and ending on the 31st March of the following year.

**"Managed Hotel"** means hotels managed by a three star or above hotel/ hotel chain under an operating management contract for a duration of at least three years between operating hotel/ hotel chain and hotel being managed. Management contract must necessarily cover the entire gamut of operations/ management of managed hotel.

**"Manufacture"** means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labelling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering.

Manufacture, for the purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.

**"Manufacturer Exporter"** means a person who exports goods manufactured by him or intends to export such goods.

**"Merchant Exporter"** means a person engaged in trading activity and exporting or intending to export goods.

**"NC"** means the Norms Committee in the Directorate General of Foreign Trade for approval of adhoc input – output norms in cases where SION does not exist and recommend SION to be notified in DGFT.

**"Notification"** means a notification published in Official Gazette.

**"Order"** means an Order made by Central Government under the Act.

**"Part"** means an element of a sub-assembly or assembly not normally useful by itself, and not amenable to further disassembly for maintenance purposes. A part may be a component, spare or an accessory.

**"Person"** means both natural and legal and includes an individual, firm, society, company, corporation or any other legal person including the DGFT officials.

**"Policy"** means Foreign Trade Policy (2015-2020) as amended from time to time.

**"Prescribed"** means prescribed under the Act or the Rules or Orders made there under or under FTP.

**"Prohibited"** indicates the import/export policy of an item, as appearing in ITC (HS) or elsewhere, whose import or export is not permitted.

**"Public Notice"** means a notice published under provisions of paragraph 2.04 of FTP.

**"Quota"** means the quantity of goods of a specific kind that is permitted to be imported without restriction or imposition of additional Duties.

**"Raw material"** means input(s) needed for manufacturing of goods. These inputs may either be in a raw/natural/ unrefined/ unmanufactured or manufactured state.

**"Regional Authority"** means authority competent to grant an Authorisation under the Act/Order.

**"Registration-Cum-Membership Certificate"** (RCMC) means certificate of registration and membership granted by an Export Promotion Council/Commodity Board/Development Authority or other competent authority as prescribed in FTP or Handbook of Procedures.

**"Restricted"** is a term indicating the import or export policy of an item, which can be imported into the country or exported outside, only after obtaining an authorization from the offices of DGFT.



**"Rules"** means Rules made by Central Government under Section 19 of the FT (D&R) Act.

**"SCOMET"** is the nomenclature for dual use items of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET). Export of dual-use items and technologies under India's Foreign Trade Policy is regulated. It is either prohibited or is permitted under an authorization.

**"Services"** include all tradable services covered under General Agreement on Trade in Services (GATS) and earning free foreign exchange. "Service Provider" means a person providing:

- (i) Supply of a 'service' from India to any other country; (Mode1- Cross border trade)
- (ii) Supply of a 'service' from India to service consumer(s) of any other country; (Mode 2-Consumption abroad)
- (iii) Supply of a 'service' from India through commercial presence in any other country. (Mode 3 – Commercial Presence.)
- (iv) Supply of a 'service' from India through the presence of natural persons in any other country (Mode 4- Presence of natural persons.)

**"Ships"** mean all types of vessels used for sea borne trade or coastal trade, and shall include second hand vessels.

**"SION"** means Standard Input Output Norms notified by DGFT.

**"Spares"** means a part or a sub-assembly or assembly for substitution that is ready to replace an identical or similar part or sub- assembly or assembly. Spares include a component or an accessory.

**"Specified"** means specified by or under the provisions of this Policy through Notification/Public Notice.

**"Status holder"** means an exporter recognized as One Star Export House/ Two Star Export House/Three Star Export House/Four Star Export House/ Five Star Export House by DGFT/ Development Commissioner.

**"Stores"** means goods for use in a vessel or aircraft and includes fuel and spares and other articles of equipment, whether or not for immediate fitting.

- (a) **"Supporting Manufacturer"** is one who manufactures goods/products or any part/accessories/components of a good/product for a merchant exporter or a manufacturer exporter under a specific authorization.
- (b) **"Supporting Manufacturer"** for the EPCG Scheme shall be one in whose premises/factory Capital Goods imported/ procured under EPCG authorization is installed.

**State Trading Enterprises (STEs)**, for the purpose of this FTP, are those entities which are granted exclusive right/privileges export and/or import as per FTP.

**"Third-party exports"** means exports made by an exporter or manufacturer on behalf of another exporter(s).

In such cases, export documents such as shipping bills shall indicate name of manufacturing exporter/ manufacturer and third party exporter(s). Bank Realisation Certificate, Self Declaration Form (SDF), export order and invoice should be in the name of third party exporter.

"Transaction Value" is as defined in Customs Valuation Rules of Department of Revenue.

## **GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS**

### **Exports and Imports – 'Free', unless regulated**

- (a) Exports and Imports shall be 'Free' except when regulated by way of 'prohibition', 'restriction' or 'exclusive trading through State Trading Enterprises (STEs)' as laid down in Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports.
- (b) Further, there are some items which are 'free' for import/export, but subject to conditions stipulated in other Acts or in law for the time being in force.

### **Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports**

- (a) ITC (HS) is a compilation of codes for all merchandise/goods for export/ import. Goods are classified based on their group or sub-group at 2/4/6/8 digits.
- (b) ITC (HS) is aligned at 6 digit level with international Harmonized System goods nomenclature maintained by World Customs Organization (<http://www.wcoomd.org>). However, India maintains national Harmonized System of goods at 8 digit level which may be viewed by clicking on 'Downloads' at <http://dgft.gov.in>.
- (c) The import/export policies for all goods are indicated against each item in ITC (HS). Schedule 1 of ITC (HS) lays down the Import Policy regime while Schedule 2 of ITC (HS) details the Export Policy regime.
- (d) Except where it is clearly specified, Schedule 1 of ITC (HS), Import Policy is for new goods and not for the Second Hand goods. For Second Hand goods, the Import Policy regime is given in Para 2.31 in this FTP.

### **Compliance of Imports with Domestic Laws**

- (a) Domestic Laws/ Rules/ Orders/ Regulations/Technical specifications/ environmental/ safety and health norms applicable to domestically produced goods shall apply, mutatis mutandis, to imports, unless specifically exempted.
- (b) However, goods to be utilized/ consumed in manufacture of export products, as notified by DGFT, may be exempted from domestic standards/quality specifications.

### **Authority to specify Procedures**

Director General of Foreign Trade (DGFT) may specify procedure to be followed by an exporter or importer or by any licensing/Regional Authority (RA) or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and FTP. Such procedure, or amendments, if any, shall be published by means of a Public Notice.

### **IMPORTER-EXPORTER CODE (IEC) NUMBER/E-IEC**

An IEC is a 10-digit number allotted to a person that is mandatory for undertaking any export/import activities. Now the facility for IEC in electronic form or e-IEC has also been operationalised.

- (a) Application for obtaining IEC can be filed manually and submitting the form in the office of Regional Authority (RA) of DGFT. Alternatively, Exporters/Importers shall file an application in ANF 2A

format for grant of e-IEC. Those who have digital signatures can sign and submit the application online along with the requisite documents. Others may take a printout of the application, sign the undertaking/declaration, upload the same with other requisite documents and thereafter submit the signed copy of the online application form to concerned jurisdictional Regional Authorities (RA) either through post or by hand.

- (b) Deficiency in the application form has to be removed by re-logging onto “Online IEC application” on DGFT website and filling the form again by paying the requisite application processing charges.
- (c) When an e-IEC is approved by the competent authority, applicant is informed through e-mail that a computer generated e-IEC is available on the DGFT website. By clicking on “Application Status” after having filled and submitted the requisite details in “Online IEC Application” webpage, applicant can view and print his e-IEC.

Briefly, following are the requisite details/documents (scanned copies) to be submitted/ uploaded along with the application for IEC:

- (i) Details of the entity seeking the IEC:
  - (1) PAN of the business entity in whose name Import/Export would be done (Applicant individual in case of Proprietorship firms).
  - (2) Address Proof of the applicant entity.
  - (3) LLPIN /CIN/ Registration Certification Number (whichever is applicable).
  - (4) Bank account details of the entity. Cancelled Cheque bearing entity's pre-printed name or Bank certificate in prescribed format ANF2A(I).
- (ii) Details of the Proprietor/ Partners/ Directors/ Secretary or Chief Executive of the Society/ Managing Trustee of the entity:
  - (1) PAN (for all categories)
  - (2) DIN/DPIN (in case of Company /LLP firm)
- (iii) Details of the signatory applicant:
  - (1) Identity proof
  - (2) PAN
  - (3) Digital photograph
- (d) In case the applicant has digital signature, the application can also be submitted online and no physical application or document is required. In case the applicant does not possess digital signature, a print out of the application filed online duly signed by the applicant has to be submitted to the concerned jurisdictional RA, in person or by post.

### **No Export/Import without IEC:**

No export or import shall be made by any person without obtaining an IEC number unless specifically exempted.

- (a) The following categories of importers or exporters are exempted from obtaining IEC.

**IEC Number Exempted Categories:**

Sl. No.	Categories Exempted from obtaining IEC
(i)	Importers covered by clause 3(1) [except sub-clauses (e) and (l)] and exporters covered by clause 3(2) [except sub-clauses (i) and (k)] of Foreign Trade (Exemption from application of Rules in certain cases) Order, 1993.
(ii)	Ministries /Departments of Central or State Government
(iii)	Persons importing or exporting goods for personal use not connected with trade or manufacture or agriculture.
(iv)	Persons importing/exporting goods from/to Nepal, Myanmar through Indo-Myanmar border areas and China (through Gunji, Namgaya Shipkila and Nathula ports), provided CIF value of a single consignment does not exceed Indian Rs.25,000. In case of Nathula port, the applicable value ceiling will be Rs. 1,00,000/-

Further, exemption from obtaining IEC shall not be applicable for export of Special Chemicals, Organisms, Materials, Equipments and Technologies (SCOMET) as listed in Appendix - 3, Schedule 2 of ITC (HS) except in case of exports by category (ii) above.

(b) Following permanent IEC numbers shall be used by non – commercial Public Sector Undertaking (PSUs) and categories or importers/exporters mentioned against them for import/export purposes:

Sr. No.	Permanent IEC	Categories of Importer/Exporter
1	0100000011	All Ministries/Departments of Central Government and agencies wholly or partially owned by them.
2	0100000029	All Ministries/Departments of any State Government and agencies wholly or partially owned by them.
3	0100000037	Diplomatic personnel, Counsellor officers in India and officials of UNO and its specialised agencies.
4	0100000045	Indians returning from/going abroad and claiming benefit under Baggage Rules.
5	0100000053	Persons/Institutions/Hospitals importing or exporting goods for personal use, not connected with trade or manufacture or agriculture.
6	0100000061	Persons importing/exporting goods from /to Nepal
7	0100000070	Persons importing/exporting goods from/to Myanmar through Indo-Myanmar border areas
8	0100000088	Ford Foundation.
9	0100000096	Importers importing goods for display or use in fairs/exhibitions or similar events under provisions of ATA carnet. This IEC number can also be used by importers importing for exhibitions/fairs as per Paragraph 2.63 of Handbook of Procedures

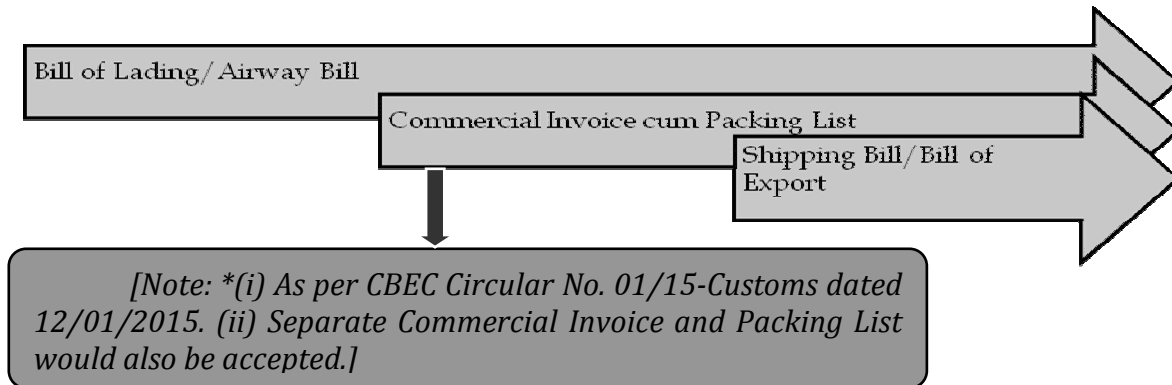
10	0100000100	Director, National Blood Group
11	0100000126	Individuals/Charitable Institution/Registered NGOs importing goods, which have been exempted from Customs duty under Notification issued by Ministry of Finance for bonafide use by victims affected by natural calamity.
12	0100000134	Persons importing/exporting permissible goods as notified from time to time, from /to China through Gunji, Namgaya Shipkila and Nathula ports, subject to value ceilings of single consignment as given in a (iv) above.
13	0100000169	Non-commercial imports and exports by entities who have been authorised by Reserve Bank of India.

**Only one IEC against one Permanent Account Number (PAN)**

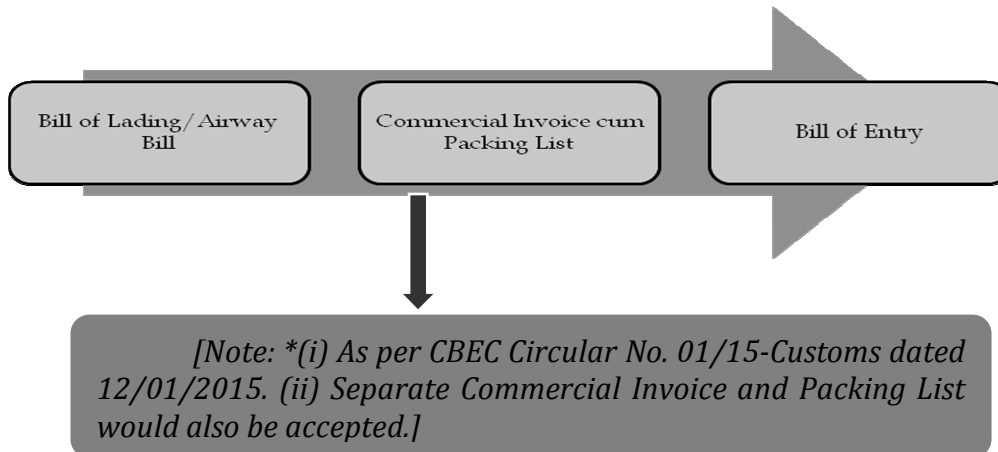
Only one IEC is permitted against on Permanent Account Number (PAN). If any PAN card holder has more than one IEC, the extra IECs shall be disabled.

**MANDATORY DOCUMENTS FOR EXPORT/IMPORT OF GOODS FROM/INTO INDIA**

(a) Mandatory documents required for export of goods from India:



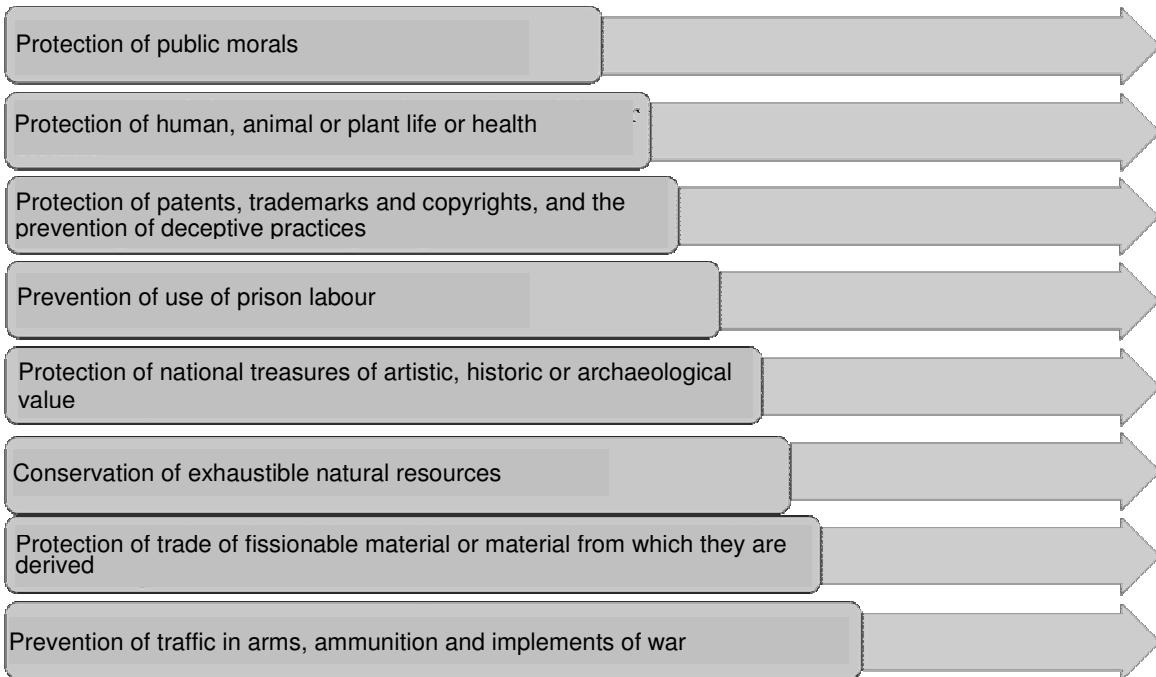
(b) Mandatory documents required for import of goods into India



- (c) For export or import of specific goods or category of goods, which are subject to any restrictions/policy conditions or require NOC or product specific compliances under any statute, the regulatory authority concerned may notify additional documents for purposes of export or import.
- (d) In specific cases of export or import, the regulatory authority concerned may electronically or in writing seek additional documents or information, as deemed necessary to ensure legal compliance.

**PRINCIPLES OF RESTRICTIONS**

DGFT may, through a Notification, impose restrictions on export and import, necessary for: -



**EXPORT/IMPORT OF RESTRICTED GOODS/SERVICES**

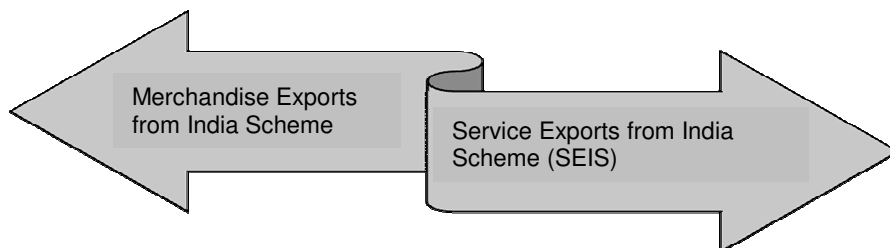
Any goods/service, the export or import of which is 'Restricted' may be exported or imported only in accordance with an Authorisation/Permission or in accordance with the procedure prescribed in a Notification/Public Notice issued in this regard.

**EXPORTS FROM INDIA SCHEMES**

The objective of the Export from India Schemes is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved and to provide exporters a level playing field.

There shall be following two schemes for exports of Merchandise and Services respectively:

Two schemes for exports of Merchandise and Services:



### Nature of Rewards

Duty Credit Scrips shall be granted as rewards under MEIS and SEIS. The Duty Credit Scrips and goods imported/domestically procured against them shall be freely transferable. The Duty Credit Scrips can be used for:

- (i) Payment of Customs Duties for import of inputs or goods, except items listed in Appendix 3A of Appendices and Aayat Niryat Forms of FTP 2015-2020.
- (ii) Payment of excise duties on domestic procurement of inputs or goods, including capital goods as per Department of Revenue (DoR) notification.
- (iii) Payment of service tax on procurement of services as per DoR notification.
- (iv) Payment of Customs Duty and fee as per Foreign Trade Policy.

### Merchandise Exports from India Scheme (MEIS)

The objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

### Entitlement under MEIS:

Exports of notified goods/products with ITC[HS] code, to notified markets as listed in Appendix 3B of Appendices and Aayat Niryat Forms of FTP 2015-2020, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less, unless otherwise specified.

### Export of goods through courier or foreign post offices using e-Commerce:

- (i) Exports of goods through courier or foreign post office using e-commerce, as notified in Appendix 3C of Appendices and Aayat Niryat Forms) of FTP 2015-2020, of FOB value upto Rs. 25000 per consignment shall be entitled for rewards under MEIS.
- (ii) If the value of exports using e-commerce platform is more than Rs 25000 per consignment then MEIS reward would be limited to FOB value of Rs.25000 only.
- (iii) Such goods can be exported in manual mode through Foreign Post Offices at New Delhi, Mumbai and Chennai.
- (iv) Export of such goods under Courier Regulations shall be allowed manually on pilot basis through Airports at Delhi, Mumbai and Chennai as per appropriate amendments in regulations to be made by Department of Revenue. Department of Revenue shall fast track the implementation of Electronic Data Interchange (EDI) mode at courier terminals.

### Ineligible categories under MEIS:

The following exports categories /sectors shall be ineligible for Duty Credit Scrip entitlement under MEIS:

- (i) EOUs/EHTPs/BTPs/ STPs who are availing direct tax benefits/exemption.
- (ii) Supplies made from DTA units to SEZ units
- (iii) Export of imported goods covered;

- (iv) Exports through trans-shipment, meaning thereby exports that are originating in third country but trans-shipped through India;
- (v) Deemed Exports;
- (vi) SEZ/EOU/EHTP/BPT/FTWZ products exported through DTA units;
- (vii) Items, which are restricted or prohibited for export under Schedule-2 of Export Policy in ITC (HS), unless specifically notified in Appendix 3B.
- (viii) Service Export.
- (ix) Red sanders and beach sand.
- (x) Export products which are subject to Minimum export price or export duty.
- (xi) Diamond Gold, Silver, Platinum, other precious metal in any form including plain and studded jewellery and other precious and semi-precious stones.
- (xii) Ores and concentrates of all types and in all formations.
- (xiii) Cereals of all types.
- (xiv) Sugar of all types and all forms.
- (xv) Crude/petroleum oil and crude/primary and base products of all types and all formulations.
- (xvi) Export of milk and milk products.
- (xvii) Export of Meat and Meat Products.
- (xviii) Products wherein precious metal/diamond are used or Articles which are studded with precious stones.
- (xix) Exports made by units in Free Trade and Warehousing Zone( FTWZ) .

#### Service Exports from India Scheme (SEIS)

The objective of Service Exports from India Scheme (SEIS) is to encourage export of notified Services from India.

#### **Eligibility:**

- (a) Service Providers of notified services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. The notified services and rates of rewards are listed in Appendix 3D of Appendices and Aayat Niryat Forms of FTP 2015-2020. Following Services shall be eligible:
  - (i) Supply of a 'service' from India to any other country; (Mode1- Cross border trade)
  - (ii) Supply of a 'service' from India to service consumer(s) of any other country; (Mode 2- Consumption abroad).
- (b) Such service provider should have minimum net free foreign exchange earnings of US\$15,000 in preceding financial year to be eligible for Duty Credit Scrip. For Individual Service Providers and sole proprietorship, such minimum net free foreign exchange earnings criteria would be US\$10,000 in preceding financial year.
- (c) Payment in Indian Rupees for service charges earned on specified services, shall be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India. The list of such services is indicated in Appendix 3E of Appendices and Aayat Niryat Forms of FTP 2015-2020.



- (d) Net Foreign exchange earnings for the scheme are defined as under:

Net Foreign Exchange = Gross Earnings of Foreign Exchange minus Total expenses/payment/remittances of Foreign Exchange by the IEC holder, relating to service sector in the Financial year.

- (e) If the IEC holder is a manufacturer of goods as well as service provider, then the foreign exchange earnings and Total expenses/payment/remittances shall be taken into account for service sector only.
- (f) In order to claim reward under the scheme, Service provider shall have to have an active IEC at the time of rendering such services for which rewards are claimed.

### **Ineligible categories under SEIS:**

- (1) Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible.
- (2) Following shall not be taken into account for calculation of entitlement under the scheme
- (a) Foreign Exchange remittances:
- I. Related to Financial Services Sector
    - (i) Raising of all types of foreign currency Loans;
    - (ii) Export proceeds realization of clients;
    - (iii) Issuance of Foreign Equity through ADRs/GDRs or other similar instruments;
    - (iv) Issuance of foreign currency Bonds;
    - (v) Sale of securities and other financial instruments;
    - (vi) Other receivables not connected with services rendered by financial institutions; and
  - II. Earned through contract/regular employment abroad (e.g. labour remittances);
- (b) Payments for services received from EEFC Account;
- (c) Foreign exchange turnover by Healthcare Institutions like equity participation, donations etc.
- (d) Foreign exchange turnover by Educational Institutions like equity participation, donations etc.
- (e) Export turnover relating to services of units operating under SEZ/EOU/EHTP/STPI/BTP Schemes or supplies of services made to such units;
- (f) Clubbing of turnover of services rendered by SEZ/EOU /EHTP/STPI/BTP units with turnover of DTA Service Providers;
- (g) Exports of Goods.
- (h) Foreign Exchange earnings for services provided by Airlines, Shipping lines service providers plying from any foreign country X to any foreign country Y routes not touching India at all.
- (i) Service providers in Telecom Sector.

### **Entitlement under SEIS:**

Service Providers of eligible services shall be entitled to Duty Credit Scrip at notified rates on net foreign exchange earned.

## STATUS HOLDER

- (a) Status Holders are business leaders who have excelled in international trade and have successfully contributed to country's foreign trade. Status Holders are expected to not only contribute towards India's exports but also provide guidance and handholding to new entrepreneurs.
- (b) All exporters of goods, services and technology having an import-export code (IEC) number shall be eligible for recognition as a status holder. Status recognition depends upon export performance. An applicant shall be categorized as status holder upon achieving export performance during current and previous two financial years, as indicated in Foreign Trade Policy. The export performance will be counted on the basis of FOB value of export earnings in free foreign exchange.
- (c) For deemed export, FOR value of exports in Indian Rupees shall be converted in US\$ at the exchange rate notified by CBEC, as applicable on 1st April of each Financial Year.
- (d) For granting status, export performance is necessary in at least two out of three years.

### Status Category

Status Category	Export Performance FOB/FOR (as converted) Value (in US \$ million)
One Star Export House	3
Two Star Export House	25
Three Star Export House	100
Four Star Export House	500
Five Star Export House	2000

### Grant of double weightage

- (a) The exports by IEC holders under the following categories shall be granted double weightage for calculation of export performance for grant of status.
  - (i) Micro, Small & Medium Enterprises (MSME) as defined in Micro, Small & Medium Enterprises Development (MSMED) Act 2006.
  - (ii) Manufacturing units having International Organisation for Standardisation (ISO)/Bureau of Indian Standards (BIS).
  - (iii) Units located in North Eastern States including Sikkim and Jammu & Kashmir.
  - (iv) Units located in Agri Export Zones.
- (b) Double Weightage shall be available for grant of One Star Export House Status category only. Such benefit of double weightage shall not be admissible for grant of status recognition of other categories namely Two Star Export House, Three Star Export House, Four Star export House and Five Star Export House.
- (c) A shipment can get double weightage only once in any one of above categories.

### Other conditions for grant of status

- (a) Export performance of one IEC holder shall not be permitted to be transferred to another IEC holder. Hence, calculation of exports performance based on disclaimer shall not be allowed.

- (b) Exports made on re-export basis shall not be counted for recognition.
- (c) Export of items under authorization, including SCOMET items, would be included for calculation of export performance.

### Privileges of Status Holders

A Status Holder shall be eligible for privileges as under:

- (a) Authorisation and Customs Clearances for both imports and exports may be granted on self-declaration basis;
- (b) Input-Output norms may be fixed on priority within 60 days by the Norms Committee;
- (c) Exemption from furnishing of Bank Guarantee for Schemes under FTP, unless specified otherwise anywhere in FTP or Hand Book of Procedure (HBP);
- (d) Exemption from compulsory negotiation of documents through banks. Remittance/receipts, however, would be received through banking channels;
- (e) Two star and above Export houses shall be permitted to establish Export Warehouses as per Department of Revenue guidelines.
- (f) Three Star and above Export House shall be entitled to get benefit of Accredited Clients Programme (ACP) as per the guidelines of CBEC (website: <http://cbec.gov.in>).
- (g) The status holders would be entitled to preferential treatment and priority in handling of their consignments by the concerned agencies.
- (h) Manufacturers who are also status holders (Three Star/Four Star/Five Star) will be enabled to self-certify their manufactured goods (as per their Industrial Entrepreneurial Memorandum (IEM)/ Industrial Licensing (IL)/ Letter of Intent (LOI) as originating from India with a view to qualify for preferential treatment under different preferential trading agreements (PTA), Free Trade Agreements (FTAs), Comprehensive Economic Cooperation Agreements (CECA) and Comprehensive Economic Partnership Agreements (CEPA). Subsequently, the scheme may be extended to remaining Status Holders.
- (i) Manufacturer exporters who are also Status Holders shall be eligible to self-certify their goods as originating from India as per Hand Book of Procedures.
- (j) Status holders shall be entitled to export freely exportable items on free of cost basis for export promotion subject to an annual limit of Rs 10 lakh or 2% of average annual export realization during preceding three licencing years whichever is higher.

### DUTY EXEMPTION/REMISSION SCHEMES

Duty Exemption/Remission Schemes enable duty free import of inputs for export production, including replenishment of input or duty remission.

#### Schemes:

(a) *Duty Exemption Schemes.*

The Duty Exemption schemes consist of the following:

- (i) Advance Authorisation (AA) (which will include Advance Authorisation for Annual Requirement).
- (ii) Duty Free Import Authorisation (DFIA).

*(b) Duty Remission Scheme.*

Duty Drawback (DBK) Scheme, administered by Department of Revenue.

### **ADVANCE AUTHORISATION**

- (a) Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed/utilised in the process of production of export product, may also be allowed.
- (b) Advance Authorisation is issued for inputs in relation to resultant product, on the following basis:
  - (i) As per Standard Input Output Norms (SION) notified (available in Hand Book of Procedures);  
OR
  - (ii) On the basis of self declaration as per Handbook of Procedures.

### **Advance Authorisation for Spices**

Duty free import of spices covered under Chapter-9 of ITC (HS) shall be permitted only for activities like crushing/grinding/sterilization/manufacture of oils or oleoresins. Authorisation shall not be available for simply cleaning, grading, re-packing etc.

### **Eligible Applicant/Export/Supply**

- (a) Advance Authorisation can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.
- (b) Advance Authorisation for pharmaceutical products manufactured through Non-Infringing (NI) process (as indicated in Handbook of Procedures) shall be issued to manufacturer exporter only.
- (c) Advance Authorisation shall be issued for:
  - (i) Physical export (including export to SEZ);
  - (ii) Intermediate supply; and/or
  - (iii) Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (e), (f), (g) and (h) of this FTP (Category of Supply under Deemed Exports).
  - (iv) Supply of 'stores' on board of foreign going vessel/aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

### **Advance Authorisation for Annual Requirement**

- (i) Advance Authorisation for Annual Requirement shall only be issued for items notified in Standard Input Output Norms (SION), and it shall not be available in case of adhoc norms under FTP.
- (ii) Advance Authorisation for Annual Requirement shall also not be available in respect of SION where any item of input appears in Appendix 4-J of Appendices and Aayat Niryat Forms of FTP 2015-2020.

### **Eligibility Condition to obtain Advance Authorisation for Annual Requirement**

- (i) Exporters having past export performance (in at least preceding two financial years) shall be entitled for Advance Authorisation for Annual requirement.
- (ii) Entitlement in terms of CIF value of imports shall be upto 300% of the FOB value of physical export and/or FOR value of deemed export in preceding financial year or Rs 1 crore, whichever is higher.

### Value Addition

Value Addition for the Duty Exemption/Remission Schemes (except for Gems and Jewellery sector for which value addition is prescribed in FTP) shall be:-

$$VA = \frac{A-B}{B} \times 100, \text{ where}$$

A = FOB value of export realized/FOR value of supply received.

B = CIF value of inputs covered by Authorisation, plus value of any other input used on which benefit of DBK is claimed or intended to be claimed.

### Minimum Value Addition

- (i) Minimum value addition required to be achieved under Advance Authorisation is 15%.
- (ii) Export Products where value addition could be less than 15% are given in Appendix 4D of Appendices and Aayat Niryat Forms of FTP 2015-2020.
- (iii) For physical exports for which payments are not received in freely convertible currency, value addition shall be as specified in Appendix 4C of Appendices and Aayat Niryat Forms of FTP 2015-2020.
- (iv) Minimum value addition for Gems & Jewellery Sector is given in paragraph 4.61 of Handbook of Procedures.
- (v) In case of Tea, minimum value addition shall be 50%.

### Details of Duties exempted

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, wherever applicable. However, Import against supplies covered under certain category of supply under Deemed Exports of FTP will not be exempted from payment of applicable Anti-dumping Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any.

### Admissibility of Drawback

Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid imported or indigenous inputs (not specified in the norms) used in the export product. For this purpose, applicant shall indicate clearly details of duty paid input in the application for Advance Authorisation. As per details mentioned in the application, Regional Authority shall also clearly endorse details of such duty paid inputs in the condition sheet of the Advance Authorisation.

### Actual User Condition for Advance Authorisation

- (i) Advance Authorisation and/or material imported under Advance Authorisation shall be subject to 'Actual User' condition. The same shall not be transferable even after completion of export obligation. However, Authorisation holder will have option to dispose of product manufactured out of duty free input once export obligation is completed.
- (ii) In case where CENVAT credit facility on input has been availed for the exported goods, even after completion of export obligation, the goods imported against such Advance Authorisation shall be utilized only in the manufacture of dutiable goods whether within the same factory or outside (by a supporting manufacturer). For this, the Authorisation holder shall produce a certificate from either

the jurisdictional Central Excise Authority or Chartered Accountant, at the option of the exporter, at the time of filing application for Export Obligation Discharge Certificate to Regional Authority concerned.

- (iii) Waste/scrap arising out of manufacturing process, as allowed, can be disposed off on payment of applicable duty even before fulfillment of export obligation.

### **Validity Period for Import**

- (i) Validity period for import of Advance Authorisation shall be 12 months from the date of issue of Authorisation.
- (ii) Advance Authorisation for Deemed Export shall be co-terminus with contracted duration of project execution or 12 months from the date of issue of Authorisation, whichever is more.

### **Importability/Exportability of items that are Prohibited/Restricted/ State Trading Enterprise (STE)**

- (i) No export or import of an item shall be allowed under Advance Authorisation/DFIA if the item is prohibited for exports or imports respectively. Export of a prohibited item may be allowed under Advance Authorisation provided it is separately so notified, subject to the conditions given therein.
- (ii) Items reserved for imports by STEs cannot be imported against Advance Authorisation/DFIA. However those items can be procured from STEs against ARO or Invalidation letter. STEs are also allowed to sell goods on High Sea Sale basis to holders of Advance Authorisation/DFIA holder. STEs are also permitted to issue "No Objection Certificate (NOC)" for import by Advance Authorisation/DFIA holder. Authorisation Holder would be required to file Quarterly Returns of imports effected against such NOC to concerned STE and STE would submit half-yearly import figures of such imports to concerned administrative Department for monitoring with a copy endorsed to DGFT.
- (iii) Items reserved for export by STE can be exported under Advance Authorisation /Duty Free Import Authorisation (DFIA) only after obtaining a 'No Objection Certificate' from the concerned STE.
- (iv) Import of restricted items shall be allowed under Advance Authorisation/ Duty Free Import Authorisation (DFIA).
- (v) Export of restricted/Special Chemicals, Organisms, Materials, Equipment and Technology (SCOMET) items however, shall be subject to all conditionalities or requirements of export authorisation or permission, as may be required, under Schedule 2 of ITC (HS).

### **Free of Cost Supply by Foreign Buyer**

Advance Authorisation shall also be available where some or all inputs are supplied free of cost to exporter by foreign buyer. In such cases, notional value of free of cost input shall be added in the CIF value of import and FOB value of export for the purpose of computation of value addition. However, realization of export proceeds will be equivalent to an amount excluding notional value of such input.

### **Domestic Sourcing of Inputs**

- (i) Holder of an Advance Authorisation/Duty Free Import Authorisation can procure inputs from indigenous supplier/ State Trading Enterprise in lieu of direct import. Such procurement can be against Advance Release Order (ARO), Invalidation Letter, and Back-to-Back Inland Letter of Credit.
- (ii) When domestic supplier intends to obtain duty free material for inputs through Advance

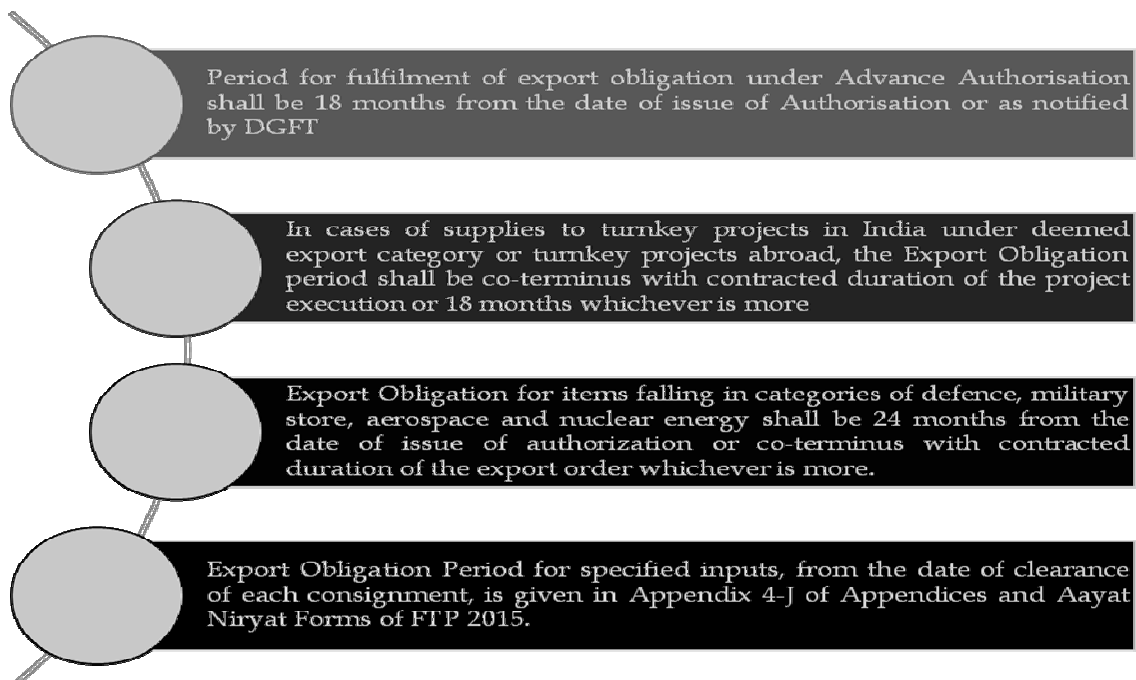
Authorisation for supplying resultant product to another Advance Authorisation/Duty Free Import Authorisation (DFIA)/Export Promotion Capital Goods (EPCG) Authorisation, Regional Authority shall issue Invalidation Letter.

- (iii) Regional Authority shall issue Advance Release Order if the domestic supplier intends to seek refund of duty through Deemed Exports mechanism of FTP.
- (iv) Regional Authority may issue Advance Release Order or Invalidation Letter at the time of issue of Authorisation simultaneously or subsequently.
- (v) Advance Authorisation holder under Domestic Tariff Area (DTA) can procure inputs from EOU/EHTP/BTP/STP/SEZ units without obtaining Advance Release Order or Invalidation Letter.
- (vi) Duty Free Import Authorisation holder shall also be eligible for Advance Release Order/Invalidation Letter facility.
- (vii) Validity of Advance Release Order/Invalidation Letter shall be co-terminous with validity of Authorisation.

### Currency for Realisation of Export Proceeds

- (i) Export proceeds shall be realized in freely convertible currency except otherwise specified.
- (ii) Export to Rupee Payment Area (RPA) (for which payments are not received in freely convertible currency) shall be subject to minimum value addition as specified in Appendix-4C.
- (iii) Export to SEZ Units shall be taken into account for discharge of export obligation provided payment is realised from Foreign Currency Account of the SEZ unit.
- (iv) Export to SEZ Developers/Co-developers can also be taken into account for discharge of export obligation even if payment is realised in Indian Rupees.
- (v) Authorisation holder needs to file Bill of Export for export to SEZ unit/developer/co-developer in accordance with the procedures given in SEZ Rules, 2006.

### Export Obligation



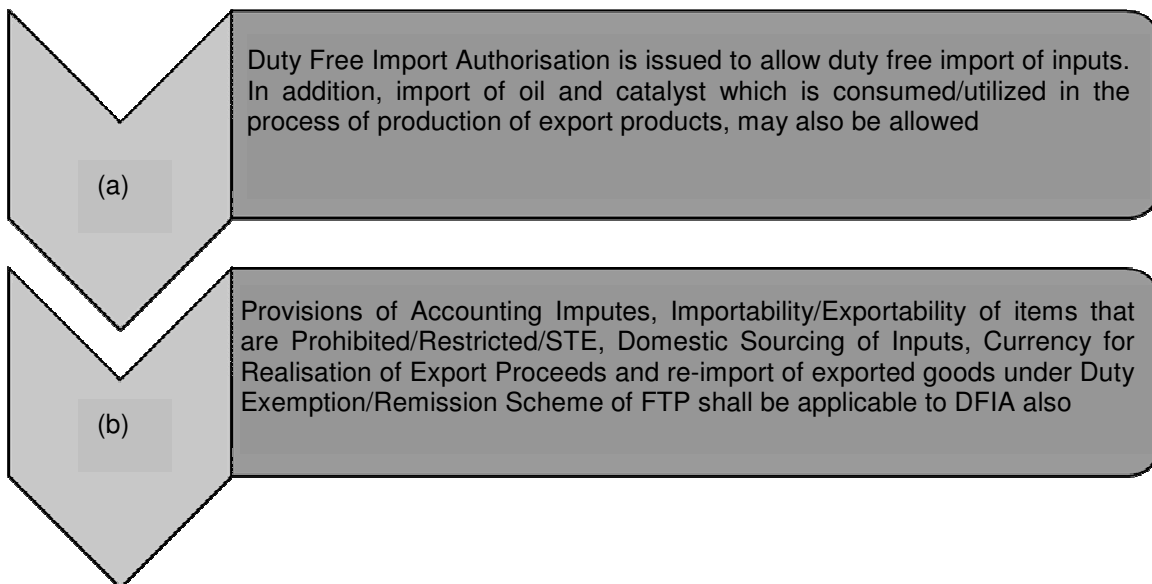
### Export Obligation Period (EOP) Extension for units under Board of Industrial and Financial Reconstruction (BIFR)/ Rehabilitation

A company holding Advance Authorisation and registered with BIFR/Rehabilitation Department of State Government or any firm/company acquiring a unit holding Advance Authorisation which is under BIFR/Rehabilitation, may be permitted export obligation extension for the Advance Authorisation(s) held by the acquired unit, as per rehabilitation package prepared by operating agency and approved by BIFR/Rehabilitation Department of State Government. If time-period upto which Export Obligation (EO) extension is to be granted is not specifically mentioned in the BIFR order, EO extension of two years from the date of expiry of Export Obligation Period( EOP) (including extended period) or the date of BIFR order, whichever is later, shall be granted without payment of composition fee.

### Re-import of exported goods under Duty Exemption/Remission Scheme

Goods exported under Advance Authorisation/Duty Free Import Authorisation may be re-imported in same or substantially same form subject to such conditions as may be specified by Department of Revenue. Authorisation holder shall also inform about such re-importation to the Regional Authority which had issued the Authorisation within one month from date of re-import.

### DUTY FREE IMPORT AUTHORISATION SCHEME (DFIA)



### Duties Exempted and Admissibility of CENVAT and Drawback

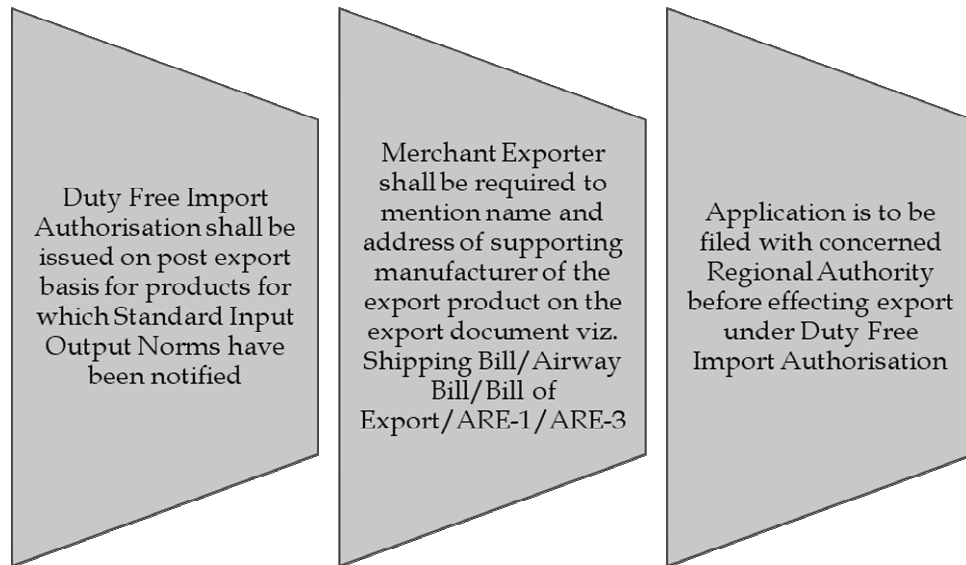
- (i) Duty Free Import Authorisation shall be exempted only from payment of Basic Customs Duty.
- (ii) Additional customs duty/excise duty, being not exempt, shall be adjusted as CENVAT credit as per DoR rules.
- (iii) Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid inputs, whether imported or indigenous, used in the export product. However, in case such drawback is claimed for inputs not specified in SION, the applicant should have indicated clearly details of such duty paid inputs also in the application for Duty Free Import Authorization, and as per



the details mentioned in the application, the Regional Authority should also have clearly endorsed details of such duty paid inputs in the condition sheet of the Duty Free Import Authorization.

## Eligibility

### Eligibility of DFIA



## Minimum Value Addition

Minimum value addition of 20% shall be required to be achieved. For items where higher value addition has been prescribed under Advance Authorisation in Appendix 4C of Appendices and Aayat Niryat Forms of FTP 2015, the same value addition shall be applicable for Duty Free Import Authorisation also.

## Validity & Transferability of DFIA

- (i) Applicant shall file online application to Regional Authority concerned before starting export under DFIA.
- (ii) Export shall be completed within 12 months from the date of online filing of application and generation of file number.
- (iii) While doing export/supply, applicant shall indicate file number on the export documents viz. Shipping Bill/Airway Bill/ Bill of Export/ARE-1/ARE-3, Central Excise certified Invoice.
- (iv) After completion of exports and realization of proceeds, request for issuance of transferable Duty Free Import Authorisation may be made to concerned Regional Authority within a period of twelve months from the date of export or six months (or additional time allowed by RBI for realization) from the date of realization of export proceeds, whichever is later.
- (v) Applicant shall be allowed to file application beyond 24 months from the date of generation of file number as per paragraph 9.03 of Hand Book of Procedures.
- (vi) Separate DFIA shall be issued for each SION and each port.
- (vii) Exports under DFIA shall be made from a single port as mentioned in paragraph 4.37 of Handbook of Procedures.

- (viii) No Duty Free Import Authorisation shall be issued for an export product where SION prescribes 'Actual User' condition for any input.
- (ix) Regional Authority shall issue transferable DFIA with a validity of 12 months from the date of issue. No further revalidation shall be granted by Regional Authority.

### **Sensitive Items under Duty Free Import Authorisation**

- (a) In respect of resultant products requiring following inputs, exporter shall be required to provide declaration with regard to technical characteristics, quality and specification in Shipping Bill:  
"Alloy steel including Stainless Steel, Copper Alloy, Synthetic Rubber, Bearings, Solvent, Perfumes/Essential Oil/ Aromatic Chemicals, Surfactants, Relevant Fabrics, marble, Articles made of polypropylene, Articles made of Paper and Paper Board, Insecticides, Lead Ingots, Zinc Ingots, Citric Acid, Relevant Glass fibre reinforcement (Glass fibre, Chopped/Stranded Mat, Roving Woven Surfacing Mat), Relevant Synthetic Resin (unsaturated polyester resin, Epoxy Resin, Vinyl Ester Resin, Hydroxy Ethyl Cellulose), Lining Material".
- (b) While issuing Duty Free Import Authorisation, Regional Authority shall mention technical characteristics, quality and specification in respect of above inputs in the Authorisation.

### **SCHEMES FOR EXPORTERS OF GEMS AND JEWELLERY**

#### **Import of Input**

Exporters of gems and Jewellery can import/procure duty free input for manufacture of export product.

#### **Items of Export**

Following items, if exported, would be eligible:

- (i) Gold jewellery, including partly processed jewellery and articles including medallions and coins (excluding legal tender coins), whether plain or studded, containing gold of 8 carats and above;
- (ii) Silver jewellery including partly processed jewellery, silverware, silver strips and articles including medallions and coins (excluding legal tender coins and any engineering goods) containing more than 50% silver by weight;
- (iii) Platinum jewellery including partly processed jewellery and articles including medallions and coins (excluding legal tender coins and any engineering goods) containing more than 50% platinum by weight.

#### **Schemes**

The schemes are as follows:

- (i) Advance Procurement/Replenishment of Precious Metals from Nominated Agencies;
- (ii) Replenishment Authorisation for Gems;
- (iii) Replenishment Authorisation for Consumables;
- (iv) Advance Authorisation for Precious Metals.

#### **Value Addition**

Minimum Value Addition norms for gems and jewellery sector would be calculated as under:

$$VA = \frac{A-B}{B} \times 100, \text{ where}$$

A = FOB value of the export realised/FOR value of supply received.

B = Value of inputs (including domestically procured) such as gold/silver/platinum content in export product plus admissible wastage along with value of other items such as gemstone etc. Wherever gold has been obtained on loan basis, value shall also include interest paid in free foreign exchange to foreign supplier.

### DFIA not available

Duty Free Import Authorisation scheme shall not be available for Gems and Jewellery sector.

## EXPORT PROMOTION CAPITAL GOODS (EPCG) SCHEME

### Objective

The objective of the Export Promotion Capital Goods(EPCG) Scheme is to facilitate import of capital goods for producing quality goods and services to enhance India's export competitiveness.

### EPCG Scheme

- (a) EPCG Scheme allows import of capital goods for pre-production, production and post-production at Zero customs duty. Alternatively, the Authorisation holder may also procure Capital Goods from indigenous sources. Capital goods for the purpose of the EPCG scheme shall include:
  - (i) Capital Goods including in Completely Knocked down (CKD)/ Semi- Knocked Down (SKD) condition thereof;
  - (ii) Computer software systems;
  - (iii) Spares, moulds, dies, jigs, fixtures, tools & refractories for initial lining and spare refractories; and
  - (iv) Catalysts for initial charge plus one subsequent charge.
- (b) Import of capital goods for Project Imports notified by Central Board of Excise and Customs is also permitted under EPCG Scheme.
- (c) Import under EPCG Scheme shall be subject to an export obligation equivalent to 6 times of duty saved on capital goods, to be fulfilled in 6 years reckoned from date of issue of Authorisation.
- (d) Authorisation shall be valid for import for 18 months from the date of issue of Authorisation. Revalidation of EPCG Authorisation shall not be permitted.
- (e) In case countervailing duty (CVD) is paid in cash on imports under EPCG, incidence of CVD would not be taken for computation of net duty saved, provided CENVAT is not availed.
- (f) Second hand capital goods shall not be permitted to be imported under EPCG Scheme.
- (g) Authorisation under EPCG Scheme shall not be issued for import of any Capital Goods (including Captive plants and Power Generator Sets of any kind) for
  - (i) Export of electrical energy (power)
  - (ii) Supply of electrical energy (power) under deemed exports

- (iii) Use of power (energy) in their own unit, and
- (iv) Supply/export of electricity transmission services
- (h) Import of items which are restricted for import shall be permitted under EPCG Scheme only after approval from Exim Facilitation Committee (EFC) at DGFT Headquarters.
- (i) If the goods proposed to be exported under EPCG authorisation are restricted for export, the EPCG authorisation shall be issued only after approval for issuance of export authorisation from Exim Facilitation Committee at DGFT Headquarters.

### **Coverage of the Scheme**

- (a) EPCG scheme covers manufacturer exporters with or without supporting manufacturer(s), merchant exporters tied to supporting manufacturer(s) and service providers. Name of supporting manufacturer(s) shall be endorsed on the EPCG authorisation before installation of the capital goods in the factory/premises of the supporting manufacturer (s). In case of any change in supporting manufacturer (s) the RA shall intimate such change to jurisdictional Central Excise Authority of existing as well as changed supporting manufacturer (s) and the Customs at port of registration of Authorisation.
- (b) Export Promotion Capital Goods (EPCG) Scheme also covers a service provider who is designated/certified as a Common Service Provider (CSP) by the DGFT, Department of Commerce or State Industrial Infrastructural Corporation in a Town of Export Excellence subject to provisions of Foreign Trade Policy/Handbook of Procedures with the following conditions:-
  - (i) Export by users of the common service, to be counted towards fulfilment of EO of the Common Service Provider shall contain the EPCG authorisation details of the Common Service Provider in the respective Shipping bills and concerned RA must be informed about the details of the Users prior to such export;
  - (ii) Such export will not count towards fulfilment of specific export obligations in respect of other EPCG authorisations (of the CSP/User);
  - (iii) Authorisation holder shall be required to submit Bank Guarantee (BG) which shall be equivalent to the duty saved. BG can be given by Common Service Provider or by any one of the users or a combination thereof, at the option of the Common Service Provider.

### **Actual User Condition**

Import of capital goods shall be subject to Actual User condition till export obligation is completed.

### **Export Obligation (EO)**

Following conditions shall apply to the fulfillment of EO:-

- (a) Export Obligation shall be fulfilled by the authorisation holder through export of goods which are manufactured by him or his supporting manufacturer/services rendered by him, for which the EPCG authorisation has been granted.
- (b) Export Obligation under the scheme shall be, over and above, the average level of exports achieved by the applicant in the preceding three licensing years for the same and similar products within the overall EO period including extended period, if any; except for categories mentioned in paragraph 5.13(a) of Hand Book of Procedures (HBP). Such average would be the arithmetic mean of export performance in the preceding three licensing years for same and similar products.
- (c) In case of indigenous sourcing of Capital Goods, specific EO shall be 25% less than the EO

stipulated in EPCG scheme.

- (d) Shipments under Advance Authorisation, DFIA, Drawback scheme or reward schemes under FTP; would also count for fulfillment of EO under EPCG Scheme.
- (e) Export shall be physical export. However, deemed exports as specified FTP shall also be counted towards fulfillment of export obligation, alongwith usual benefits available under Actual user condition of EPCG scheme.
- (f) Export Obligation can also be fulfilled by the supply of ITA-I items to DTA, provided realization is in free foreign exchange.
- (g) Royalty payments received by the Authorisation holder in freely convertible currency and foreign exchange received for R&D services shall also be counted for discharge under EPCG.
- (h) Payment received in rupee terms for such Services as notified in Appendix 3E of Appendices and Aayat Niryat Forms of FTP 2015 shall also be counted towards discharge of export obligation under the EPCG scheme.

### **Legal Undertaking (LUT)/Bond/ Bank Guarantee (BG)in case of Agro units**

Legal Undertaking /Bond or 15% Bank Guarantee, as applicable, may be furnished for EPCG authorisation granted to units in Agri-Export Zones provided EPCG authorisation is taken for export of primary agricultural product(s) notified or their value added variants.

### **Indigenous Sourcing of Capital Goods and benefits to Domestic Supplier**

A person holding an EPCG authorisation may source capital goods from a domestic manufacturer. Such domestic manufacturer shall be eligible for deemed export benefit under FTP. Such domestic sourcing shall also be permitted from EOUs and these supplies shall be counted for purpose of fulfilment of positive Net Foreign Exchange (NFE) by said EOU as provided in FTP.

### **Calculation of Export Obligation**

In case of direct imports, Export Obligation shall be reckoned with reference to actual duty saved amount. In case of domestic sourcing, Export Obligation shall be reckoned with reference to notional Customs duties saved on FOR value.

### **Incentive for early EO fulfilment**

With a view to accelerating exports, in cases where Authorisation holder has fulfilled 75% or more of specific export obligation and 100% of Average Export Obligation till date, if any, in half or less than half the original export obligation period specified, remaining export obligation shall be condoned and the Authorisation redeemed by Regional Authority(RA) concerned. However no benefit under Hand Book of Procedure (HBP) shall be permitted where incentive for early EO fulfilment has been availed.

### **Reduced Export Obligation for Green Technology Products**

For exporters of Green Technology Products, Specific Export Obligation shall be 75% of Export Obligation. The list of Green Technology Products is given in Para 5.29 of Hand Book of Procedure (HBP).

### **Reduced Export Obligation for North East Region and Jammu & Kashmir**

For units located in Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Jammu & Kashmir, specific Export Obligation shall be 25% of the Export Obligation.

### Post Export EPCG Duty Credit Scrip(s)

- (a) Post Export EPCG Duty Credit Scrip(s) shall be available to exporters who intend to import capital goods on full payment of applicable duties in cash and choose to opt for this scheme.
- (b) Basic Customs duty paid on Capital Goods shall be remitted in the form of freely transferable duty credit scrip(s).
- (c) Specific Export Obligation shall be 85% of the applicable specific EO under the EPCG Scheme. However, average Export Obligation shall remain unchanged.
- (d) Duty remission shall be in proportion to the EO fulfilled.
- (e) All provisions for utilization of scrips issued under FTP shall also be applicable to Post Export EPCG Duty Credit Scrip (s).
- (f) All provisions of the existing EPCG Scheme shall apply insofar as they are not inconsistent with this scheme.

### EXPORT ORIENTED UNITS (EOUs), ELECTRONICS HARDWARE TECHNOLOGY PARKS (EHTPs), SOFTWARE TECHNOLOGY PARKS (STPs) AND BIO-TECHNOLOGY PARKS (BTPs)

#### Introduction and Objective

- (a) Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services, development of software, agriculture including agro-processing, aquaculture, animal husbandry, bio-technology, floriculture, horticulture, pisciculture, viticulture, poultry and sericulture. Trading units are not covered under these schemes.
- (b) Objectives of these schemes are to promote exports, enhance foreign exchange earnings, attract investment for export production and employment generation.

#### Export and Import of Goods

- (a) An EOU/EHTP/STP/BTP unit may export all kinds of goods and services except items that are prohibited in ITC (HS).
- (b) Export of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) shall be subject to fulfilment of the conditions indicated in ITC (HS). In respect of an EOU, permission to export a prohibited item may be considered, by Board of Approval (BOA), on a case to case basis, provided such raw materials are imported and there is no procurement of such raw material from Domestic Tariff Area (DTA).
- (c) Procurement and supply of export promotion material like brochure/literature, pamphlets, hoardings, catalogues, posters etc up to a maximum value limit of 1.5% of FOB value of previous years exports shall also be allowed.
- (d) An EOU/EHTP/STP/BTP unit may import and/or procure, from Domestic Tariff Area or bonded warehouses in Domestic Tariff Area/international exhibition held in India, without payment of duty, all types of goods, including capital goods, required for its activities, provided they are not prohibited items of import in the ITC (HS). Any permission required for import under any other law shall be applicable. Units shall also be permitted to import goods including capital goods required for

approved activity, free of cost or on loan/lease from clients. Import of capital goods will be on a self-certification basis. Goods imported by a unit shall be with actual user condition and shall be utilized for export production.

- (e) State Trading regime shall not apply to EOU manufacturing units. However, in respect of Chrome Ore/Chrome concentrate, State Trading Regime as stipulated in export policy of these items, will be applicable to EOUs.
- (f) EOU/EHTP/STP/BTP units may import/procure from Domestic Tariff Area, without payment of duty, certain specified goods for creating a central facility. Software EOU/DTA units may use such facility for export of software.
- (g) An EOU engaged in agriculture, animal husbandry, aquaculture, floriculture, horticulture, pisciculture, viticulture, poultry or sericulture may be permitted to remove specified goods in connection with its activities for use outside bonded area.
- (h) Gems and jewellery EOUs may source gold/silver/platinum through nominated agencies on loan/outright purchase basis. Units obtaining gold/silver/platinum from nominated agencies, either on loan basis or outright purchase basis shall export gold/silver/platinum within 90 days from date of release.
- (i) EOU/EHTP/STP/BTP units, other than service units, may export to Russian Federation in Indian Rupees against repayment of State Credit/ Escrow Rupee Account of buyer subject to RBI clearance, if any.
- (j) Procurement and export of spares/components, upto 5% of FOB value of exports, may be allowed to same consignee/buyer of the export article, subject to the condition that it shall not count for Net Foreign Exchange (NFE) and direct tax benefits.
- (k) BOA may allow, on a case to case basis, requests of EOU/EHTP/STP/ BTP units in sectors other than Gems & Jewellery, for consolidation of goods related to manufactured articles and export thereof along with manufactured article. Such goods may be allowed to be imported/procured from DTA by EOU without payment of duty, to the extent of 5% FOB value of such manufactured articles exported by the unit in preceding financial year. Details of procured/imported goods and articles manufactured by the EOU will be listed separately in the export documents. In such cases, value of procured/imported goods will not be taken into account for calculation of NFE and DTA sale entitlement. Such procured/imported goods shall not be allowed to be sold in DTA. BOA may also specify any other conditions.

### **Second hand Capital goods**

Second hand capital goods, without any age limit, may also be imported duty free.

### **Leasing of Capital Goods**

- (a) An EOU/EHTP/STP/BTP unit may, on the basis of a firm contract between parties, source capital goods from a domestic/foreign leasing company without payment of customs/excise duty. In such a case, EOU/EHTP/STP/BTP unit and domestic/foreign leasing company shall jointly file documents to enable import/procurement of capital goods without payment of duty.
- (b) An EOU/EHTP/BTP/STP unit may sell capital goods and lease back the same from a Non Banking Financial Company (NBFC), subject to the following conditions:
  - (i) The unit should obtain permission from the jurisdictional Deputy/Assistant Commissioner of Customs or Central Excise, for entering into transaction of 'Sale and Lease Back of Assets', and

submit full details of the goods to be sold and leased back and the details of NBFC;

- (ii) The goods sold and leased back shall not be removed from the unit's premises;
- (iii) The unit should be NFE positive at the time when it enters into sale and lease back transaction with NBFC;
- (iv) A joint undertaking by the unit and NBFC should be given to pay duty on goods in case of violation or contravention of any provision of the notification under which these goods were imported or procured, read with Customs Act, 1962 or Central Excise Act, 1944, and that the lien on the goods shall remain with the Customs/Central Excise Department, which will have first charge over the said goods for recovery of sum due from the unit to Government under provision of Section 142(b) of the Customs Act, 1962 read with the Customs (Attachment of Property of Defaulters for Recovery of Govt. Dues) Rules, 1995.

### **Net Foreign Exchange Earnings**

EOU/EHTP/STP/BTP unit shall be a positive net foreign exchange earner except for sector specific provision of Appendix 6 B of Appendices & ANFs, where a higher value addition shall be required. Net Foreign Exchange (NFE) Earnings shall be calculated cumulatively in blocks of five years, starting from commencement of production. Whenever a unit is unable to achieve NFE due to prohibition/restriction imposed on export of any product mentioned in Letter of Permit (LoP), the five year block period for calculation of Net Foreign Exchange (NFE) earnings may be suitably extended by Board of Approval. Further, wherever a unit is unable to achieve NFE due to adverse market condition or any grounds of genuine hardship having adverse impact on functioning of the unit, the five year block period for calculation of NFE earnings may be extended by Board of Approval for a period of upto one year, on a case to case basis.

### **Letter of Permission/Letter of Intent and Legal Undertaking**

- (a) On approval, a Letter of Permission (LoP)/Letter of Intent (LoI) shall be issued by DC/designated officer to EOU/ EHTP/STP/BTP unit. LoP/LoI shall have an initial validity of 2 years to enable the Unit to construct the plant & install the machinery and by this time the unit should have commenced production. In case the unit is not able to commence production in initial validity of 2 years, an extension of one year may be given by the DC for valid reasons to be recorded in writing. Subsequent extension of one year may be given by the Unit Approval Committee subject to condition that two-thirds of activities including construction, relating to the setting up of the Unit are complete and Chartered Engineer's certificate to this effect is submitted by the Unit. Further extension, if necessary, will be granted by the Board of Approval. Once unit commences production, LoP/LoI issued shall be valid for a period of 5 years for its activities. This period may be extended further by DC for a period of 5 years at a time.
- (b) LoP/LoI issued to EOU/EHTP/STP/BTP units by concerned authority, subject to compliance of provision pertaining to export and import of goods under EOU/EHTP/STP/BTP Scheme above, would be construed as an Authorisation for all purposes.
- (c) Unit shall execute an LUT with DC concerned. Failure to ensure positive NFE or to abide by any of the terms and conditions of LoP/LoI/IL/LUT shall render the unit liable to penal action under provisions of the FT (D&R) Act, as amended, and Rules and Orders made thereunder, without prejudice to action under any other law/rules and cancellation or revocation of LoP/LoI/IL.

### **Investment Criteria**

Only projects having a minimum investment of Rs. 1 Crore in plant & machinery shall be considered for



establishment as EOUs. However, this shall not apply to existing units, units in EHTP/STP/BTP, and EOUs in Handicrafts/Agriculture/Floriculture/Aquaculture/Animal Husbandry/Information Technology, Services, Brass Hardware and Handmade jewellery sectors. BOA may allow establishment of EOUs with a lower investment criteria.

### Applications & Approvals

- (a) Applications for setting up of units under EOU scheme shall be approved or rejected by the Units Approval Committee within 15 days as per criteria indicated in Handbook of Procedures (HBP).
- (b) In other cases, approval may be granted by BOA set up for this purpose as indicated in HBP.
- (c) Proposals for setting up EOU requiring industrial licence may be granted approval by DC after clearance of proposal by BOA and Department of Industrial Policy & Promotion (DIPP) within 45 days.
- (d) Applications for conversion into an EOU/EHTP/STP/BTP unit from existing DTA units, having an investment of Rs. 50 crores and above in plant and machinery or exporting Rs. 50 crores and above annually, shall be placed before BOA for a decision.

### DTA Sale of Finished Products/Rejects/Waste/ Scrap/Remnants and By-products

Entire production of EOU/EHTP/STP/BTP units shall be exported subject to following:

- (a) Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of exports, subject to fulfilment of positive NFE, on payment of concessional duties. Within entitlement of DTA sale, unit may sell in DTA, its products similar to goods which are exported or expected to be exported from units.

However, units which are manufacturing and exporting more than one product can sell any of these products into DTA, upto 90% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports for the unit, as stipulated above. No DTA sale at concessional duty shall be permissible in respect of motor cars, alcoholic liquors, books, tea (except instant tea), pepper & pepper products, marble and such other items as may be notified from time to time. Such DTA sale shall also not be permissible to units engaged in activities of packaging/ labelling/ segregation/ refrigeration/ compacting/ micronisation/ pulverization/ granulation/ conversion of monohydrate form of chemical to anhydrous form or vice-versa.

Sales made to a unit in SEZ shall also be taken into account for purpose of arriving at FOB value of export by EOU provided payment for such sales are made from Foreign Currency Account of SEZ unit. Sale to DTA would also be subject to mandatory requirement of registration of pharmaceutical products (including bulk drugs). An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.

- (b) For services, including software units, sale in DTA in any mode, including on line data communication, shall also be permissible up to 50% of FOB value of exports and /or 50% of foreign exchange earned, where payment of such services is received in foreign exchange.
- (c) Gems and jewellery units may sell upto 10% of FOB value of exports of the preceding year in DTA, subject to fulfilment of positive NFE. In respect of sale of plain jewellery, recipient shall pay concessional rate of duty as applicable to sale from nominated agencies. In respect of studded jewellery, duty shall be payable as applicable.

- (d) Unless specifically prohibited in LoP, rejects within an overall limit of 50% may be sold in DTA on payment of duties as applicable to sale under Sub - para 6.08 (a) on prior intimation to Customs authorities. Such sales shall be counted against DTA sale entitlement. Sale of rejects upto 5% of FOB value of exports shall not be subject to achievement of NFE.
- (e) Scrap/waste/remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under Duty Exemption Scheme, on payment of concessional duties as applicable, within overall ceiling of 50% of FOB value of exports. Such sales of scrap/waste/remnants shall not be subject to achievement of positive NFE. In respect of items not covered by norms, DC may fix ad-hoc norms for a period of six months and within this period, norms should be fixed by Norms Committee. Ad-hoc norms will continue till such time norms are fixed by Norms Committee. Sale of waste/scrap/remnants by units not entitled to DTA sale, or sales beyond DTA sale entitlement, shall be on payment of full duties. Scrap/waste/remnants may also be exported.
- (f) There shall be no duties/taxes on scrap/waste/remnants, in case same are destroyed with permission of Customs authorities.
- (g) By-products included in LoP may also be sold in DTA subject to achievement of positive NFE, on payment of applicable duties, within the overall entitlement of Sub - para 6.08 (a). Sale of by-products by units not entitled to DTA sales, or beyond entitlements of Sub-para 6.08 (a), shall also be permissible on payment of full duties.
- (h) EOU/EHTP/STP/BTP units may sell finished products, except pepper and pepper products and marble, which are freely importable under FTP in DTA, under intimation to DC, against payment of full duties, provided they have achieved positive NFE. An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.
- (i) In case of units manufacturing electronics hardware and software, NFE and DTA sale entitlement shall be reckoned separately for hardware and software.
- (j) In case of DTA sale of goods manufactured by EOU/EHTP/STP/BTP, where basic duty and CVD is nil, such goods may be considered as non-excisable for payment of duty.
- (k) In case of new EOUs, advance DTA sale will be allowed not exceeding 50% of its estimated exports for first year, except pharmaceutical units where this will be based on its estimated exports for first two years.
- (l) Units in Textile and Granite sectors shall have an option to sell goods into DTA, on payment of an amount equal to aggregate of duties of excise leviable under section 3 of the Central Excise Act, 1944 or under any other law for the time being in force, on like goods produced or manufactured in India other than in an EOU, subject to the condition that they have not used duty paid imported inputs in excess of 3% of the FOB value of exports of the preceding year and they have achieved positive NFE. Once this option is exercised, the unit will not be allowed to import any duty free inputs for any purpose.
- (m) Procurement of spares/components, up to 2% of the value of manufactured articles, cleared into DTA, during the preceding year, may be allowed for supply to the same consignee/buyer for the purpose of after-sale-service. The same can be cleared in DTA on payment of applicable duty but such clearances shall be within the overall entitlement of the unit for DTA sale at concessional rate

of duty as prescribed under DTA Sale of Finished Products/Rejects/Waste/ Scrap/Remnants and By-products of EOU/EHTP/STP/BTP Scheme.

### Other Supplies

Following supplies effected from EOU/EHTP/STP/BTP units will be counted for fulfilment of positive NFE. Such supplies shall not include “marble”, except if such supply of marble is an inter unit supply as provided at Sub - para (c) below:

- (a) Supplies effected in DTA to holders of Advance Authorisation/Advance Authorisation for annual requirement/DFIA under duty exemption/remission scheme/EPCG scheme. However, printing sector EOUs (or any other sector that may be notified in HBP), can't supply goods, where basic customs duty and CVD is nil or exempted otherwise, to holders of Advance Authorisation/Advance Authorization for annual requirement.
- (b) Supplies affected in DTA against foreign exchange remittance received from overseas.
- (c) Supplies to other EOU/EHTP/STP/BTP/SEZ units, provided that such goods are permissible for procurement in terms of Export and Imports of Goods under EOU/EHTP/STP/BTP Scheme of FTP.
- (d) Supplies made to bonded warehouses set up under FTP and/or under section 65 of Customs Act and free trade and warehousing zones, where payment is received in foreign exchange.
- (e) Supplies of goods and services to such organizations which are entitled for duty free import of such items in terms of general exemption notification issued by MoF, as may be provided in HBP.
- (f) Supplies of Information Technology Agreement (ITA-1) items and notified zero duty telecom/electronics items.
- (g) Supplies of items like tags, labels, printed bags, stickers, belts, buttons or hangers to DTA unit for export.
- (h) Supply of LPG produced in an EOU refinery to Public Sector domestic oil companies for being supplied to household domestic consumers at subsidized prices under the Public Distribution System (PDS) Kerosene and Domestic LPG Subsidy Scheme, 2002, as notified by the Ministry of Petroleum and Natural Gas vide notification No. E-20029/18/2001-PP dated 28.01.2003 (hereinafter referred to as PDS Scheme) subject to the following conditions:-
  - (i) Only supply of such quantity of LPG would be eligible for which Ministry of Petroleum and Natural Gas declines permission for export and requires the LPG to be cleared in DTA; and
  - (ii) The Ministry of Finance by a notification has permitted duty free imports of LPG for supply under the aforesaid PDS Scheme.

### Export through others

An EOU/EHTP/STP/BTP unit may export goods manufactured/software developed by it through another exporter or any other EOU/EHTP/STP/SEZ unit subject to conditions mentioned in Para 6.19 of Hand Book of Procedure.

### Entitlement for Supplies from the DTA

- (a) Supplies from DTA to EOU/EHTP/STP/BTP units will be regarded as “deemed exports” and DTA supplier shall be eligible for relevant entitlements under chapter 7 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, EOU/EHTP/STP/BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements

specified in chapter 7 of FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry Rates of Drawback are not available.

- (b) Suppliers of precious and semi-precious stones, synthetic stones and processed pearls from DTA to EOU shall be eligible for grant of Replenishment Authorisations at rates and for items mentioned in HBP.
- (c) In addition, EOU/EHTP/STP/BTP units shall be entitled to following:-
  - (i) Reimbursement of Central Sales Tax (CST) on goods manufactured in India. Simple interest @ 6% per annum will be payable on delay in refund of CST, if the case is not settled within 30 days of receipt of complete application (as in Para 9.10 (b) of HBP).
  - (ii) Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.
  - (iii) Reimbursement of duty paid on fuel procured from Domestic Oil Companies/Depots of Domestic Oil Public Sector Undertakings as per drawback rate notified by DGFT from time to time. Reimbursement of additional duty of excise levied on fuel under the Finance Acts would also be admissible.
  - (iv) CENVAT Credit on service tax paid.

### Other Entitlements

Other entitlements of EOU/EHTP/STP/BTP units are as under:

- (a) Exemption from industrial licensing for manufacture of items reserved for SSI sector.
- (b) Export proceeds will be realized within nine months.
- (c) Units will be allowed to retain 100% of its export earnings in the EEFC account.
- (d) Unit will not be required to furnish bank guarantee at the time of import or going for job work in DTA, where:
  - (i) the unit has turnover of Rs. 5 crore or above;
  - (ii) the unit is in existence for at least three years; and
  - (iii) the unit:
    - (1) has achieved positive NFE/export obligation wherever applicable;
    - (2) has not been issued a show cause notice or a confirmed demand, during the preceding 3 years, on grounds other than procedural violations, under the penal provision of the Customs Act, the Central Excise Act, the Foreign Trade (Development & Regulation) Act, the Foreign Exchange Management Act, the Finance Act, 1994 covering Service Tax or any allied Acts or the rules made thereunder, on account of fraud/collusion/wilful mis-statement/suppression of facts or contravention of any of the provisions thereof;
- (e) 100% FDI investment permitted through automatic route similar to SEZ units.
- (f) Units shall pay duty on the goods produced or manufactured and cleared into DTA on monthly basis in the manner prescribed in the Central Excise Rules.
- (g) The Units Approval Committee may consider on a case-to-case basis request for sharing of infrastructural facilities among EOUs and it shall forward its recommendation to the Board of Approval for

its consideration. While accepting such proposals, the NFE obligations of the Units shall not be altered. Such facilities will be available to Units in EHTP/STP after getting approval from IMSC. However, sharing of facilities between EOUs and SEZ Units shall not be permitted.

### Inter Unit Transfer

- (a) Transfer of manufactured goods from one EOU/EHTP/STP/BTP unit to another EOU/EHTP/STP/BTP unit is allowed with prior intimation to concerned Development Commissioners of the transferor and transferee units as well as concerned Customs authorities, following procedure of in-bond movement of goods. Transfer of manufactured goods shall also be allowed from EOU/EHTP/STP/BTP unit to a SEZ developer or unit as per procedure prescribed in SEZ Rules, 2006.
- (b) Capital goods may be transferred or given on loan to other EOU/EHTP/STP/BTP/SEZ units, with prior intimation to concerned DC and Customs authorities.  
Such transferred goods may also be returned by the second unit to the original unit in case of rejection or for any reason without payment of duty.
- (c) Goods supplied by one unit of EOU/EHTP/STP/BTP to another unit shall be treated as imported goods for second unit for payment of duty, on DTA sale by second unit.
- (d) In respect of a group of EOUs/EHTPs/STPs/BTP Units which source inputs centrally in order to obtain bulk discount and/or reduce cost of transportation and other logistics cost and/or to maintain effective supply chain, inter unit transfer of goods and services may be permitted on a case-to-case basis by the Unit Approval Committee. In case inputs so sourced are imported and then transferred to another unit, then value of the goods so transferred shall be taken as inflow for the unit transferring these goods and as outflow for the unit receiving these goods, for the purpose of calculation of NFE.

### Sub – Contracting

- (a)
  - (i) EOU/EHTP/STP/BTP units, including gems and jewellery units, may on the basis of annual permission from Customs authorities, sub - contract production processes to DTA through job work which may also involve change of form or nature of goods, through job work by units in DTA.
  - (ii) These units may sub - contract upto 50% of overall production of previous year in value terms in DTA with permission of Customs authorities.
- (b)
  - (i) EOU may, with annual permission from Customs authorities, undertake job work for export, on behalf of DTA exporter, provided that goods are exported directly from EOU and export document shall jointly be in name of DTA/EOU. For such exports, DTA units will be entitled for refund of duty paid on inputs by way of brand rate of duty drawback.
  - (ii) Duty free import of goods for execution of export order placed on EOU by foreign supplier on job work basis, would be allowed subject to condition that no DTA clearance shall be allowed.
  - (iii) Sub - contracting of both production and production processes may also be undertaken without any limit through other EOU/EHTP/STP/ BTP/SEZ units, on the basis of records maintained in unit.
  - (iv) EOU/EHTP/STP/BTP units may sub - contract part of production process abroad and send intermediate products abroad as mentioned in LoP. No permission would be required when goods are sought to be exported from sub - contractor premises abroad. When goods are

sought to be brought back, prior intimation to concerned DC and Customs authorities shall be given.

- (c) Scrap/waste/remnants generated through job work may either be cleared from job worker's premises on payment of applicable duty on transaction value or destroyed in presence of Customs/Central Excise authorities or returned to unit. Destruction shall not apply to gold, silver, platinum, diamond, precious and semi-precious stones.
- (d) Sub - contracting/exchange by gems and jewellery EOUs through other EOUs or SEZ units or units in DTA, shall be as per procedure indicated in Hand Book of Procedure.

### **Sale of Unutilized Material**

- (a) In case an EOU/EHTP/STP/BTP unit is unable to utilize goods and services, imported or procured from DTA, it may be:
  - (i) Transferred to another EOU/EHTP/STP/BTP/SEZ unit; or
  - (ii) Disposed of in DTA with approval of Customs authorities on payment of applicable duties and submission of import authorization; or
  - (iii) Exported.

Such transfer from EOU/EHTP/STP/BTP unit to another such unit would be treated as import for receiving unit.

- (b) Capital goods and spares that have become obsolete/surplus, may either be exported, transferred to another EOU/EHTP/STP/BTP/SEZ unit or disposed of in DTA on payment of applicable duties. Benefit of depreciation, as applicable, will be available in case of disposal in DTA only when the unit has achieved positive NFE taking into consideration the depreciation allowed. No duty shall be payable in case capital goods, raw material, consumables, spares, goods manufactured, processed or packaged, and scrap/waste/remnants/rejects are destroyed within unit after intimation to Customs authorities or destroyed outside unit with permission of Customs authorities. Destruction as stated above shall not apply to gold, silver, platinum, diamond, precious and semi-precious stones.
- (c) In case of textile sector, disposal of left over material/fabrics upto 2% of CIF value or quantity of import, whichever is lower, on payment of duty on transaction value, may be allowed, subject to certification of Central Excise/Customs officers that these are leftover items.
- (d) Disposal of used packing material will be allowed on payment of duty on transaction value.

### **Reconditioning/Repair and Re - engineering**

- (a) EOUs shall be set up with approval of UAC to carry out reconditioning, repair, remaking, testing, calibration, quality improvement, upgradation of technology and re-engineering activities for export in foreign currency.
- (b) EHTP/STP/BTP units shall be set up with approval of IMSC to carry out reconditioning, repair, remaking, testing, calibration, quality improvement, upgradation of technology and re-engineering activities for export in foreign currency.

### **Replacement/Repair of Imported/Indigenous Goods**

- (a) General provisions of FTP relating to export/import of replacement/repair of goods would also apply equally to EOU/EHTP/STP/BTP units. Cases not covered by these provisions shall be considered on merits by Development Commissioner (DC).

- (b) Goods sold in DTA and not accepted for any reasons, may be brought back for repair/replacement, under intimation to concerned jurisdictional Customs/Central Excise authorities.
- (c) Goods or parts thereof, on being imported/indigenously procured and found defective or otherwise unfit for use or which have been damaged or become defective subsequently, may be returned and replacement obtained or destroyed. In the event of replacement, goods may be brought back from foreign suppliers or their authorized agents in India or indigenous suppliers. The unit can take free of cost replacement (duty paid) from the authorized agents in India of foreign suppliers, provided the defective part is re-exported or destroyed. However, destruction shall not apply to precious and semi-precious stones and precious metals.

### Exit from EOU Scheme

- (a) With approval of Development Commissioner, an EOU may opt out of scheme. Such exit shall be subject to payment of Excise and Customs duties and industrial policy in force.
- (b) If unit has not achieved obligations, it shall also be liable to penalty at the time of exit.
- (c) In the event of a gems and jewellery unit ceasing its operation, gold and other precious metals, alloys, gems and other materials available for manufacture of jewellery, shall be handed over to an agency nominated by Department of Commerce (DoC), at price to be determined by that agency.
- (d) An EOU/EHTP/STP/BTP unit may also be permitted by Development Commissioner to exit from the scheme at any time on payment of duty on capital goods under the prevailing EPCG Scheme for DTA Units. This will be subject to fulfilment of positive NFE criteria under EOU scheme, eligibility criteria under EPCG scheme and standard conditions indicated in Hand Book of Procedure.
- (e) Unit proposing to exit out of EOU scheme shall intimate DC and Customs and Central Excise authorities in writing. Unit shall assess duty liability arising out of de-bonding and submit details of such assessment to Customs and Central Excise authorities. Customs and Central Excise authorities shall confirm duty liabilities on priority basis, subject to the condition that the unit has achieved positive NFE, taking into consideration the depreciation allowed. After payment of duty and clearance of all dues, unit shall obtain "No Dues Certificate" from Customs and Central Excise authorities.

On the basis of "No Dues Certificate" so issued by the Customs and Central Excise authorities, unit shall apply to Development Commissioner for final de-bonding. In case there is no proceeding pending under FT(D&R) Act, as amended, Development Commissioner shall issue final de-bonding order within a period of 7 working days. Between "No Dues Certificate" issued by Customs and Central Excise authorities and final de-bonding order by DC, unit shall not be entitled to claim any exemption for procurement of capital goods or inputs. However, unit can claim Advance Authorisation/DFIA/Duty Drawback. Since the duty calculations and dues are disputed and take a long time, a BG/Bond/Instalment processes backed by BG shall be provided for expediting the exit process.

- (f) In cases where a unit is initially established as DTA unit with machines procured from abroad after payment of applicable import duty, or from domestic market after payment of excise duty, and unit is subsequently converted to EOU, in such cases removal of such capital goods to DTA after de-bonding would be without payment of duty. Similarly, in cases where a DTA unit imported capital goods under EPCG Scheme and after completely fulfilling export obligation gets converted into EOU, unit would not be charged customs duty on capital goods at the time of removal of such capital goods in DTA when de-bonding.

- (g) An EOU/EHTP/STP/BTP unit may also be permitted by DC to exit under Advance Authorization as one time option. This will be subject to fulfilment of positive NFE criteria.
- (h) A simplified procedure may be provided to fast track the De-bonding/ Exit of the STP/EHTP Unit which has not availed any duty benefit on procurement of raw material, capital goods etc.

**Conversion**

- (a) Existing DTA units may also apply for conversion into an EOU/EHTP/STP/BTP unit.
- (b) Existing EHTP/STP units may also apply for conversion/merger to EOU unit and vice-versa. In such cases, units will remain in bond and avail exemptions in duties and taxes as applicable.

**Monitoring of NFE**

Performance of EOU/EHTP/STP/BTP units shall be monitored by Units Approval Committee as per guidelines in HBP.

**Export through Exhibitions/Export Promotion Tours/Showrooms Abroad/Duty Free Shops**

EOU/EHTP/STP/BTP are permitted to:



**Personal Carriage of Import/Export Parcels including through Foreign Bound Passengers**

Import/export through personal carriage of gems and jewellery items may be undertaken as per Customs procedure. However, export proceeds shall be realized through normal banking channel. Import/export through personal carriage by units, other than gems and jewellery units, shall be allowed provided goods are not in commercial quantity. An authorized person of Gems & Jewellery EOU may also import gold in primary form, upto 10 Kgs in a financial year through personal carriage, as per guidelines prescribed by Reserve Bank Of India and Department of Revenue.

**Export/Import by Post/Courier**

Goods including free samples, may be exported/imported by air freight or through foreign post office or through courier, as per Customs procedure.

**Revival of Sick Units**

Subject to a unit being declared sick by appropriate authority, proposals for revival of the unit or its take over



may be considered by Board of Approval.

### Approval of EHTP/STP

In case of units under EHTP/STP schemes, necessary approval/permission under relevant paras of this Chapter shall be granted by officer designated by Ministry of Communication and Information Technology, Department of Electronics & Information Technology, instead of Development Commissioner, and by Inter-Ministerial Standing Committee (IMSC) instead of Board of Approval.

### Approval of BTP

Bio-Technology Parks (BTP) would be notified by DGFT on recommendations of Department of Biotechnology. In case of units in BTP, necessary approval/permission under relevant provisions of this chapter will be granted by designated officer of Department of Biotechnology.

### Warehousing Facilities

An EOU which intends to set up warehousing facilities outside the EOU premises and outside the jurisdiction of Development Commissioner, at a place near to the port of export, to reduce lead time for delivery of goods overseas and to address unpredictability of supply orders, is permitted to do so subject to the provisions related to export warehousing as per terms and conditions of Notifications issued by the Department of Revenue.

## QUALITY COMPLAINTS AND TRADE DISPUTES

### Objective

Exporters need to project a good image of the country abroad to promote exports. Maintaining an enduring relationship with foreign buyers is of utmost importance, and complaints or trade disputes, whenever they arise, need to be settled amicably as soon as possible. Importers too may have grievances as well.

In an endeavour to resolve such complaints or trade disputes and to create confidence in the business environment of the country, a mechanism is being laid down to address such complaints and disputes in an amicable way.

### Quality Complaints/ Trade Disputes

The following type of complaints may be considered:



### **Obligation on the part of importer/ exporter**

- (a) Rule 11 of the Foreign Trade (Regulation) Rules, 1993, requires that on the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act, 1962 (52 of 1962), state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents. Violation of this provision renders the exporter liable for penal action.
- (b) Certain export commodities have been notified for Compulsory Quality Control & Pre-shipment Inspection prior to their export. Penal action can be taken under the Export (Quality Control & Inspection) Act, 1963 as amended in 1984, against exporters who do not conform to these standards and/ or provisions of the Act as laid down for such products.

### **Provisions in FT (D&R) Act & FT (Regulation) Rules for necessary action against erring exporters/importers**

Action against erring exporters can be taken under the Foreign Trade (Development and Regulation) Act, 1992, as amended and under Foreign Trade (Regulation) Rules, 1993, as follows:-

- (a) Section 8 of the Act empowers the Director General of Foreign Trade or any other person authorized by him to suspend or cancel the Importer Exporter Code Number for the reasons as given therein.
- (b) Section 9 (2) of the Act empowers the Director General of Foreign Trade or an officer authorised by him to refuse to grant or renew a license, certificate, scrip or any other instrument bestowing financial or fiscal benefit granted under the Act.
- (c) Section 9(4) empowers the Director General of Foreign Trade or the officer authorized by him to suspend or cancel any License, certificate, scrip or any instrument bestowing financial or fiscal benefit granted under the Act.
- (d) Section 11(2) of the Act provides for imposition of fiscal penalty in cases where a person makes or abets or attempts to make any import or export in contravention of any provision of the Act, any Rules or Orders made there under or the Foreign Trade Policy.

### **Mechanism for handling of Complaints/ Disputes**

#### *(a) Committee on Quality complaints and Trade Disputes (CQCTD)*

To deal effectively with the increasing number of complaints and disputes, a 'Committee on Quality Complaints and Trade Disputes' (CQCTD) will be constituted in the 22 offices of the Regional Authority(RA's) of DGFT.

#### *(b) Composition of the CQCTD*

The CQCTD would be constituted under the Chairpersonship of the Head of Office. The CQCTD may comprise of the following members:

1. Additional DGFT/Joint DGFT/ (H.O.O): Chairperson
2. Representative of Bureau of India Standard (BIS): Member

3. Representative of Agricultural and Processed Food Products Export Development Authority: Member
4. Representative of the Branch Manager of the concerned Bank: Member
5. Representative of Federation of Indian Exporter Organisation/and OR Export Promotion Council: Member
6. Representative of Export Inspection Agency: Member
7. Nominee of Director of Industries of State Government: Member
8. Nominee of Development Commissioner of MSME: Member
9. Officer as nominated by Chairperson: Member Secretary
10. Any other agency, as co-opted by Chairperson: Member.

*(c) Functions of CQCTD*

The Committee (CQCTD) will be responsible for enquiring and investigating into all Quality related complaints and other trade related complaints falling under the jurisdiction of the respective RAs. It will take prompt and effective steps to redress and resolve the grievances of the importers, exporters and overseas buyers, preferably within three months of receipt of the complaint. Wherever required, the Committee (CQCTD) may take the assistance of the Export Promotion Councils/FIEO/Commodity Boards or any other agency as considered appropriate for settlement of these disputes.

**Proceedings under CQCTD**

CQCTD proceedings are only reconciliatory in nature and the aggrieved party, whether the foreign buyer or the Indian importer, is free to pursue any legal recourse against the other erring party.

Procedures to deal with complaints and trade disputes

The procedure for making an application for such complaints or trade disputes and the procedure to deal with such quality complaints and disputes is given in the Handbook of Procedures.

**Corrective Measures**

The Committee at RA level can authorize the Export Inspection Agency or any technical authority to assess whether there has been any technical failure of not meeting the standards, manufacturing/ design defects, etc. for which complaints have been received.

**Nodal Officer**

Director General of Foreign Trade would appoint an officer, not below the rank of Joint Director General, in the Headquarters, to function as the 'Nodal Officer' for coordinating with various Regional Authorities of DGFT.

**LESSON ROUND-UP**

- India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports.
- The Foreign Trade Policy is primarily focused on accelerating exports. This is sought to be implemented through various schemes intended to exempt and remit indirect taxes on inputs physically incorporated in the export product, import capital goods at concessional duty, stimulate services exports and focus on specific markets and products.
- The Foreign Trade Policy, 2015-20, is notified by Central Government, in exercise of powers conferred

under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992) [FT (D&R) Act], as amended. The Foreign Trade Policy, 2015-20 came into force with effect from 01.04.2015.

- Capital Goods means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological up-gradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control.
- An Importer-Exporter Code (IEC) Number is a 10-digit number allotted to a person that is mandatory for undertaking any export/import activities. Now the facility for IEC in electronic form or e-IEC has also been operationalised.
- The objective of the Export from India Schemes is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved and to provide exporters a level playing field.
- Status Holders are business leaders who have excelled in international trade and have successfully contributed to country's foreign trade. Status Holders are expected to not only contribute towards India's exports but also provide guidance and handholding to new entrepreneurs.
- The objective of the Export Promotion Capital Goods(EPCG) Scheme is to facilitate import of capital goods for producing quality goods and services to enhance India's export competitiveness.
- Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services, development of software, agriculture including agro-processing, aquaculture, animal husbandry, bio-technology, floriculture, horticulture, pisciculture, viticulture, poultry and sericulture. Trading units are not covered under these schemes.

### SELF-TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. What are the objectives of foreign trade policy?
2. Discuss briefly the Export Oriented Unit (EOU) Scheme under FTP 2015-20.
3. What do you mean by IEC Number/e-IEC?
4. Distinguish between Merchandise Exports from India Scheme (MEIS) and Service Exports from India Scheme (SEIS).
5. Write short notes on:
  - Status Holder
  - Quality Complaints and Trade Disputes

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# Lesson 10

## Non-Banking Financial Companies (NBFCs)

### LESSON OUTLINE

- Learning Objectives
- Types of NBFCs
- Registration as NBFC
- Prudential Regulation
- Micro Finance Institutions
- Deposit Accepting and Non-deposit Accepting NBFCs
- Corporate Governance
- Systemically Important Core Investment Companies
- Peer to Peer Lending
- Lesson Round up
- Self-Test Questions

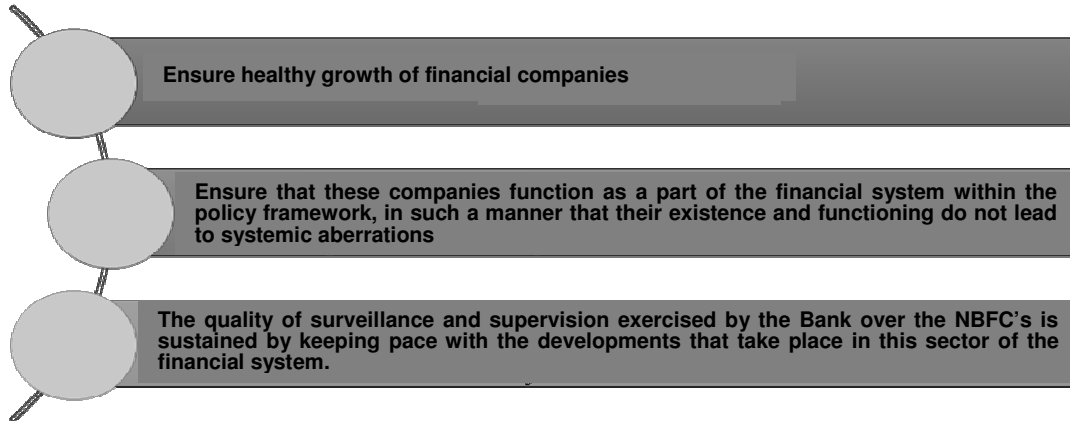
### LEARNING OBJECTIVES

The NBFC (Non-Banking Finance Company) sector has grown in size and complexity over the years. The Reserve Bank of India is entrusted with the responsibility of regulating and supervising the Non-Banking Financial Companies by virtue of powers vested in Chapter III B of the Reserve Bank of India Act, 1934.

The object of the study is to familiarize the students with the Non-Banking Financial Company (NBFC) engaged in the business of loans and advances, acquisition of shares/stocks/ bonds/ debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business etc.

## INTRODUCTION

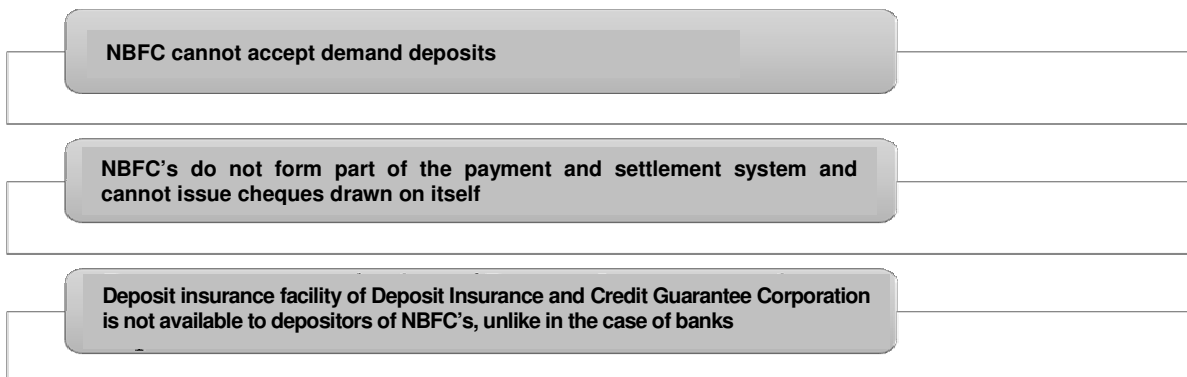
The Reserve Bank of India is entrusted with the responsibility of regulating and supervising the Non-Banking Financial Companies by virtue of powers vested in Chapter III B of the Reserve Bank of India Act, 1934. The regulatory and supervisory objective, is to:



A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, engaged in the business of loans and advances, acquisition of shares/stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property

A non-banking institution which is a company and has principal business of receiving deposits under any scheme or arrangement in one lump sum or in installments by way of contributions or in any other manner, is also a non-banking financial company (Residuary non-banking company).

NBFCs lend and make investments and hence their activities are akin to that of banks; however there are few differences such as:



## Registration with RBI

A company incorporated under the Companies Act and desirous of commencing business of non-banking

financial institution as defined under Section 45 I(a) of the RBI Act, 1934 should comply with the following:

- i. it should be a company registered under the Companies Act, and
- ii. It should have a minimum net owned fund.

It may be noted that '*Owned Fund*' means aggregate of the paid-up equity capital, preference shares which are compulsorily convertible into equity, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of asset, excluding reserves created by revaluation of asset, after deducting therefrom accumulated balance of loss, deferred revenue expenditure and other intangible assets.

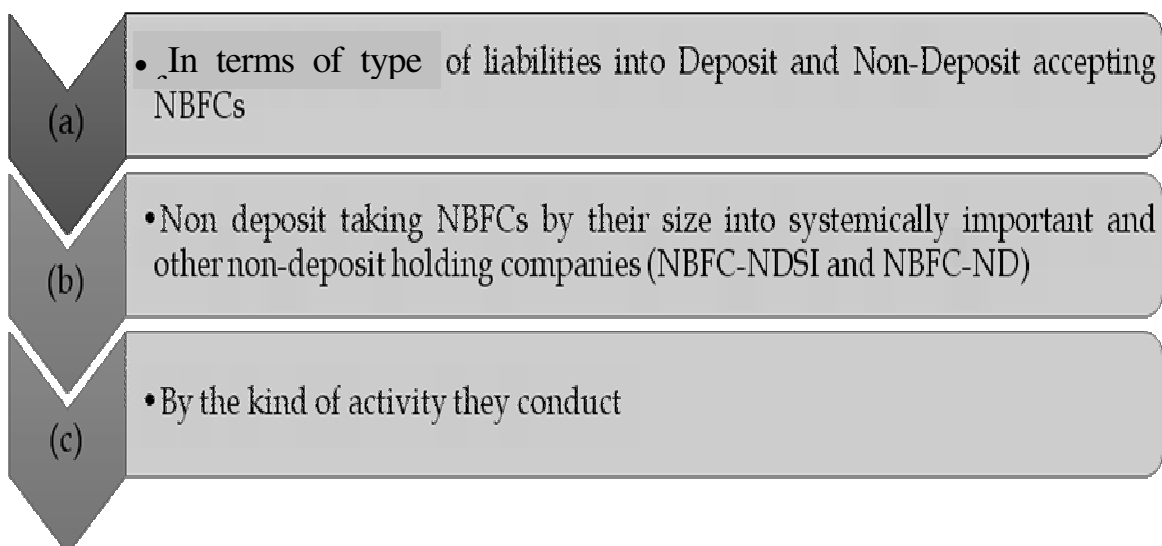
'*Net Owned Fund*' is the amount as arrived at above, minus the amount of investments of such company in shares of its subsidiaries, companies in the same group and all other NBFCs and the book value of debentures, bonds, outstanding loans and advances including hire purchase and lease finance made to and deposits with subsidiaries and companies in the same group, to the extent it exceeds 10% of the owned fund.

In terms of Section 45-IA of the RBI Act, 1934, no Non-banking Financial company can commence or carry on business of a non-banking financial institution without obtaining a certificate of registration from the Reserve Bank.

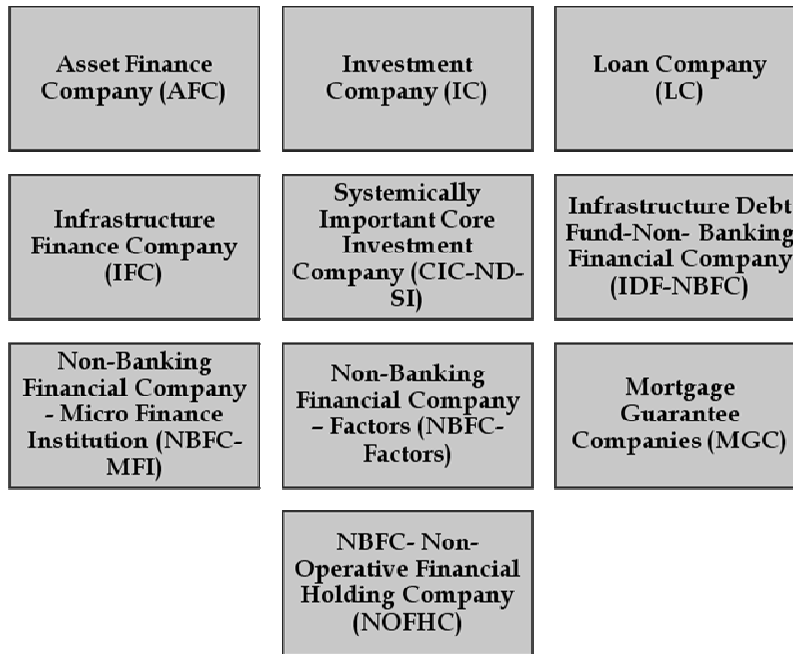
However, in terms of the powers given to the Bank, to obviate dual regulation, certain categories of NBFCs which are regulated by other regulators are exempted from the requirement of registration with RBI viz. Venture Capital Fund/Merchant Banking companies/Stock broking companies registered with SEBI, Insurance Company holding a valid Certificate of Registration issued by IRDA, Nidhi companies as notified under the Companies Act, Chit companies as defined in clause (b) of Section 2 of the Chit Funds Act, 1982, Housing Finance Companies regulated by National Housing Bank, Stock Exchange or a Mutual Benefit company.

### Categories of NBFCs registered with RBI

**NBFCs are categorized:**



## Types of NBFCs



### **Asset Finance Company (AFC)**

An AFC is a company which is a financial institution carrying on as its principal business the financing of physical assets supporting productive/economic activity, such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipments, moving on own power and general purpose industrial machines. Principal business for this purpose is defined as aggregate of financing real/physical assets supporting economic activity and income arising therefrom is not less than 60% of its total assets and total income respectively.

### **Investment Company (IC)**

IC means any company which is a financial institution carrying on as its principal business the acquisition of securities,

### **Loan Company (LC)**

LC means any company which is a financial institution carrying on as its principal business the providing of finance whether by making loans or advances or otherwise for any activity other than its own but does not include an Asset Finance Company.

### **Infrastructure Finance Company (IFC)**

IFC is a non-banking finance company

- (a) which deploys at least 75 per cent of its total assets in infrastructure loans,
- (b) has a minimum Net Owned Funds of ₹300 crore,



- (c) has a minimum credit rating of 'A' or equivalent,
- (d) a CRAR of 15%.

### **Systemically Important Core Investment Company (CIC-ND-SI)**

CIC-ND-SI is a NBFC carrying on the business of acquisition of shares and securities which satisfies the following conditions:-

- (a) it holds not less than 90% of its Total Assets in the form of investment in equity shares, preference shares, debt or loans in group companies;
- (b) its investments in the equity shares (including instruments compulsorily convertible into equity shares within a period not exceeding 10 years from the date of issue) in group companies constitutes not less than 60% of its Total Assets;
- (c) it does not trade in its investments in shares, debt or loans in group companies except through block sale for the purpose of dilution or disinvestment;
- (d) it does not carry on any other financial activity referred to in Section 45I(c) and 45I(f) of the RBI act, 1934 except investment in bank deposits, money market instruments, government securities, loans to and investments in debt issuances of group companies or guarantees issued on behalf of group companies;
- (e) Its asset size is ₹100 crore or above, and
- (f) It accepts public funds.

### **Infrastructure Debt Fund-Non- Banking Financial Company (IDF-NBFC)**

IDF-NBFC is a company registered as NBFC to facilitate the flow of long term debt into infrastructure projects. IDF-NBFC raise resources through issue of Rupee or Dollar denominated bonds of minimum 5 year maturity. Only Infrastructure Finance Companies (IFC) can sponsor IDF-NBFCs.

### **Non-Banking Financial Company - Micro Finance Institution (NBFC-MFI)**

NBFC-MFI is a non-deposit taking NBFC having not less than 85% of its assets in the nature of qualifying assets which satisfy the following criteria:

- a. loan disbursed by an NBFC-MFI to a borrower with a rural household annual income not exceeding ₹1,00,000 or urban and semi-urban household income not exceeding ₹1,60,000;
- b. loan amount does not exceed ₹50,000 in the first cycle and ₹1,00,000 in subsequent cycles;
- c. total indebtedness of the borrower does not exceed ₹1,00,000;
- d. tenure of the loan not to be less than 24 months for loan amount in excess of ₹15,000 with prepayment without penalty;
- e. loan to be extended without collateral;
- f. aggregate amount of loans, given for income generation, is not less than 50 per cent of the total loans given by the MFIs;
- g. loan is repayable on weekly, fortnightly or monthly instalments at the choice of the borrower.

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

NBFC-Factor is a non-deposit taking NBFC engaged in the principal business of factoring. The financial assets in the factoring business should constitute at least 50 percent of its total assets and its income derived from factoring business should not be less than 50 percent of its gross income.

### **Mortgage Guarantee Companies (MGC)**

MGC are financial institutions for which at least 90% of the business turnover is mortgage guarantee business or at least 90% of the gross income is from mortgage guarantee business and net owned fund is Rs. 100 crore.

### **NBFC- Non-Operative Financial Holding Company (NOFHC)**

NBFC- Non-Operative Financial Holding Company (NOFHC) is financial institution through which promoter / promoter groups will be permitted to set up a new bank .It's a wholly-owned Non-Operative Financial Holding Company (NOFHC) which will hold the bank as well as all other financial services companies regulated by RBI or other financial sector regulators, to the extent permissible under the applicable regulatory prescriptions.

### **Powers of the Reserve Bank**

The Reserve Bank has been given the powers under the RBI Act, 1934 to register, lay down policy, issue directions, inspect, regulate, supervise and exercise surveillance over NBFCs that meet the 50-50 criteria of principal business.

The Reserve Bank can penalize NBFCs for violating the provisions of the RBI Act or the directions or orders issued by RBI under RBI Act. The penal action can also result in RBI cancelling the Certificate of Registration issued to the NBFC, or prohibiting them from accepting deposits and alienating their assets or filing a winding up petition.

### **Prudential Regulations applicable to NBFCs**

The Reserve Bank has issued detailed directions on prudential norms:

Non-Banking Financial Company – Non-Systemically Important Non-Deposit taking Company (Reserve Bank) Directions, 2016

Non-Banking Financial Company – Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016

Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 2016

Core Investment Companies (Reserve Bank) Directions, 2016

Non-Banking Financial Company – Peer to Peer Lending Platform (Reserve Bank) Directions, 2017

The directions *inter- alia*, prescribe guidelines on income recognition, asset classification and provisioning

requirements applicable to NBFCs, exposure norms, disclosures in the balance sheet, requirement of capital adequacy, restrictions on investments in land and building and unquoted shares, loan to value (LTV) ratio for NBFCs predominantly engaged in business of lending against gold jewellery, besides others.

Deposit accepting NBFCs have also to comply with the statutory liquidity requirements.

### **Salient features of NBFC regulations which the depositor may note at the time of investment**

Some of the important regulations relating to acceptance of deposits by NBFCs are as under:

- The NBFCs are allowed to accept/renew public deposits for a minimum period of 12 months and maximum period of 60 months. They cannot accept deposits repayable on demand.
- NBFCs cannot offer interest rates higher than the ceiling rate prescribed by RBI from time to time. The present ceiling is 12.5 per cent per annum. The interest may be paid or compounded at rests not shorter than monthly rests.
- NBFCs cannot offer gifts/incentives or any other additional benefit to the depositors.
- NBFCs should have minimum investment grade credit rating.
- The deposits with NBFCs are not insured.
- The repayment of deposits by NBFCs is not guaranteed by RBI.
- Certain mandatory disclosures are to be made about the company in the Application Form issued by the company soliciting deposits.

### **Returns to be submitted by deposit taking NBFCs**

- **NBS-1** Quarterly Returns on deposits in First Schedule.
- **NBS-2** Quarterly return on Prudential Norms is required to be submitted by NBFC accepting public deposits.
- **NBS-3** Quarterly return on Liquid Assets by deposit taking NBFC.
- **NBS-4** Annual return of critical parameters by a rejected company holding public deposits.
- **NBS-5** stands withdrawn as submission of NBS 1 has been made quarterly.)
- **NBS-6** Monthly return on exposure to capital market by deposit taking NBFC with total assets of ₹100 crore and above.
- **Half-yearly ALM return** by NBFC holding public deposits of more than ₹20 crore or asset size of more than ₹100 crore
- Audited Balance sheet and Auditor's Report by NBFC accepting public deposits.
- Branch Information Return.

### **Returns to be submitted by NBFCs-ND-SI**

- **NBS-7** Quarterly statement of capital funds, risk weighted assets, risk asset ratio etc., for NBFC-ND-SI.
- **Monthly Return on Important Financial Parameters of NBFCs-ND-SI.**

➤ **ALM returns such as:**

- (i) Statement of short term dynamic liquidity in format ALM [NBS-ALM1] -Monthly,
- (ii) Statement of structural liquidity in format ALM [NBS-ALM2] Half yearly,
- (iii) Statement of Interest Rate Sensitivity in format ALM -[NBS-ALM3], Half yearly

➤ Branch Information return

### **Interest rate charge by NBFC**

Reserve Bank of India has deregulated interest rates to be charged to borrowers by financial institutions (other than NBFC- Micro Finance Institution). The rate of interest to be charged by the company is governed by the terms and conditions of the loan agreement entered into between the borrower and the NBFCs.

However, the NBFCs have to be transparent and the rate of interest and manner of arriving at the rate of interest to different categories of borrowers should be disclosed to the borrower or customer in the application form and communicated explicitly in the sanction letter etc.

### **CORE INVESTMENT COMPANIES (RESERVE BANK) DIRECTIONS, 2016**

#### **Registration**

Every CIC-ND-SI is required to apply to the Reserve Bank for grant of Certificate of Registration, irrespective of any advice in the past, issued by the Bank, to the contrary, within a period of three months from the date of becoming a CIC-ND-SI.

Every CIC exempted from registration requirement with Bank shall pass a Board Resolution to the effect that it will not, in future, access public funds. However CICs may be required to issue guarantees or take on other contingent liabilities on behalf of their group entities. Before doing so, all CICs must ensure that they can meet the obligations thereunder, as and when they arise. In particular, CICs which are exempt from registration requirement must be in a position to do so without recourse to public funds in the event the liability devolves, else they should approach the Bank for registration before accessing public funds. If unregistered CICs with asset size above ₹100 crore access public funds without obtaining a Certificate of Registration (CoR) from the Bank, they shall be liable for violating Core Investment Companies (Reserve Bank) Directions, 2016.

#### **Capital Requirements**

Adjusted Net Worth of a CIC-ND-SI should at no point of time be less than 30% of its aggregate risk weighted assets on balance sheet and risk adjusted value of off-balance sheet items as on the date of the last audited balance sheet as at the end of the financial year prescribed under the Core Investment Companies (Reserve Bank) Directions, 2016.

#### **Leverage Ratio**

The outside liabilities of a CIC-ND-SI should at no point of time exceed 2.5 times of its Adjusted Net Worth as on the date of the last audited balance sheet as at the end of the financial year.

It may be noted that “adjusted net worth” means –

- (a) the aggregate, as appearing in the last audited balance sheet as at the end of the financial year, of Owned Funds.
- (b) as increased by:-

- (A) 50% of the unrealized appreciation in the book value of quoted investments as at the date of the last audited balance sheet as at the end of the financial year (such appreciation being calculated, as excess of aggregate market value of such investments over the book value of such investments); and
  - (B) the increase, if any, in the equity share capital since the date of last audited balance sheet.
- (c) as reduced by:-
- (A) the amount of diminution in the aggregate book value of quoted investments (such diminution being calculated as excess of the book value of such investments over the aggregate market value of such investments); and
  - (B) the reduction, if any, in the equity share capital since the date of last audited balance sheet.

### Accounting of investments

- (1)
  - (a) The Board of Directors of every CIC-ND-SI should frame investment policy for the company and shall implement the same;
  - (b) The criteria to classify the investments into current and long term investments shall be spelt out by the Board of the company in the investment policy;
  - (c) Investments in securities should be classified into current and long term, at the time of making each investment;
  - (d) In case of inter-class transfer –
    - (i) There should be no such transfer on ad-hoc basis;
    - (ii) Such transfer, if warranted, should be effected only at the beginning of each half year, on April 1 or October 1, with the approval of the Board;
    - (iii) The investments should be transferred scrip-wise, from current to long-term or vice-versa, at book value or market value, whichever is lower;
    - (iv) The depreciation, if any, in each scrip should be fully provided for and appreciation, if any, shall be ignored;
    - (v) The depreciation in one scrip should not be set off against appreciation in another scrip, at the time of such inter-class transfer, even in respect of the scrips of the same category.
- (2) Quoted current investments should, for the purposes of valuation, be grouped into the following categories, viz.
  - (i) equity shares,
  - (ii) preference shares,
  - (iii) debentures and bonds,
  - (iv) Government securities including treasury bills,
  - (v) units of mutual fund, and
  - (vi) others.
- (3) Unquoted equity shares in the nature of current investments should be valued at cost or breakup value, whichever is lower. However, CICs-ND-SI may substitute fair value for the breakup value of the shares, if considered necessary. Where the balance sheet of the investee company is not available for two years, such shares are to be valued at one Rupee only.

- (4) Unquoted preference shares in the nature of current investments should be valued at cost or face value, whichever is lower.
- (5) Investments in unquoted Government securities or Government guaranteed bonds should be valued at carrying cost.
- (6) Unquoted investments in the units of mutual funds in the nature of current investments should be valued at the net asset value declared by the mutual fund in respect of each particular scheme.
- (7) Commercial papers should be valued at carrying cost.
- (8) A long term investment should be valued in accordance with the Accounting Standard issued by ICAI.

*Note:* Unquoted debentures should be treated as term loans or other type of credit facilities depending upon the tenure of such debentures for the purpose of income recognition and asset classification.

#### **Need for policy on demand/ call loans**

- (1) The Board of Directors of every CIC-ND-SI granting/intending to grant demand/call loans should frame a policy and implement for the company.
- (2) Such policy shall, inter alia, stipulate the following,-
  - (i) A cut-off date within which the repayment of demand or call loan be demanded or called up;
  - (ii) The sanctioning authority is required to record specific reasons in writing at the time of sanctioning demand or call loan, if the cut-off date for demanding or calling up such loan is stipulated beyond a period of one year from the date of sanction;
  - (iii) The rate of interest to be payable on such loans;
  - (iv) Interest on such loans, as stipulated shall be payable either at monthly or quarterly rests;
  - (v) The sanctioning authority to record specific reasons in writing at the time of sanctioning demand or call loan, if no interest is stipulated or a moratorium is granted for any period;
  - (vi) A cut-off date, for review of performance of the loan, not exceeding six months commencing from the date of sanction;
  - (vii) Such demand or call loans need not be renewed unless the periodical review has shown satisfactory compliance with the terms of sanction.

#### **Acquisition / Transfer of Control of Systemically important CICs**

A systemically important CIC, shall require prior written permission of the Reserve Bank for the following:

- (a) any takeover or acquisition of control of CIC, which may or may not result in change of management;
- (b) any change in the shareholding of CIC, including progressive increases over time, which results in acquisition / transfer of shareholding of 26 per cent or more of the paid up equity capital of the CIC.

Provided that, prior approval shall not be required in case of any shareholding going beyond 26% due to buyback of shares / reduction in capital where it has approval of a competent Court. The same is to be reported to the Bank not later than one month from its occurrence;

- (c) any change in the management of the CIC which results in change in more than 30 per cent of the directors, excluding independent directors.

Provided that, prior approval need not be required in case of directors who get re-elected on retirement by rotation.

Notwithstanding anything as above, CICs are required to continue to inform the Bank regarding any change in their directors / management not later than one month from the occurrence of any change.

### **Requirement of Prior Public Notice about change in control / management**

- (i) A public notice of at least 30 days is to be given before effecting the sale of, or transfer of the ownership by sale of shares, or transfer of control, whether with or without sale of shares. Such public notice be given by the CIC and also by the other party or jointly by the parties concerned, after obtaining prior permission of the Bank.
- (ii) The public notice should indicate the intention to sell or transfer ownership / control, the particulars of transferee and the reasons for such sale or transfer of ownership / control. The notice be published in at least one leading national and in one leading local (covering the place of registered office) vernacular newspaper.

### **Reporting Requirements**

The reporting requirements in respect of CIC-ND-SIs as prescribed by Department of Non-Banking Supervision are required to be complied with.

### **Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016**

#### **Applicability**

The provisions of Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016 shall apply to the following:

- (i) Every Systemically Important Non-Deposit taking Non-Banking Financial Company (NBFC-ND-SI) registered with the Bank under the provisions of RBI Act, 1934;
- (ii) Every Deposit taking Non-Banking Financial Company (NBFC-D) registered with the Bank under the provisions of RBI Act, 1934;
- (iii) Every NBFC-Factor registered with the Bank under section 3 of the Factoring Regulation Act, 2011 and having an asset size of Rs. 500 crore and above;
- (iv) Every Infrastructure Debt Fund – Non-Banking Finance Company (IDF-NBFC) registered with the Bank under the provisions of RBI Act, 1934;
- (v) Every Non-Banking Finance Company – Micro Finance Institutions (NBFC-MFIs) registered with the Bank under the provisions of RBI Act, 1934 and having an asset size of Rs.500 crore and above;
- (vi) Every Non-Banking Finance Company - Infrastructure Finance Company (NBFC-IFC) registered with the Bank under the provisions of RBI Act, 1934 and having an asset size of ₹500 crore and above.

## Registration

In exercise of the powers conferred under clause (b) of sub-section (1) of section 45 –IA of the Reserve Bank of India Act, 1934 and all the powers enabling it in that behalf, the Reserve Bank, specifies two hundred lakhs rupees as the Net Owned Fund (NOF) required for a non-banking financial company to commence or carry on the business of non-banking financial institution, except wherever otherwise a specific requirement as to NOF is prescribed by the Bank.

Provided that a non-banking financial company holding a Certificate of Registration (CoR) issued by the Bank and having net owned fund of less than two hundred lakhs of rupees, may continue to carry on the business of non-banking financial institution, if such company achieves net owned fund of two hundred lakhs of rupees before April 1, 2017.

It will be incumbent upon such NBFCs, the NOF of which currently falls below Rs. 200 lakh, to submit a statutory auditor's certificate certifying compliance with the prescribed levels by the end of the period as given above.

NBFCs failing to achieve the prescribed level within the stipulated period shall not be eligible to hold the CoR as NBFCs.

## Capital Requirements

Every applicable NBFC shall maintain a minimum capital ratio consisting of Tier I and Tier II capital which shall not be less than 15 percent of its aggregate risk weighted assets on-balance sheet and of risk adjusted value of off-balance sheet items.

The Tier I capital in respect of applicable NBFCs (other than NBFC-MFI and IDFNBFC), at any point of time, shall not be less than 8.5% by March 31, 2016 and 10% by March 31, 2017.

Applicable NBFCs primarily engaged in lending against gold jewellery (such loans comprising 50 percent or more of their financial assets) shall maintain a minimum Tier I capital of 12 percent.

## Prudential Regulations

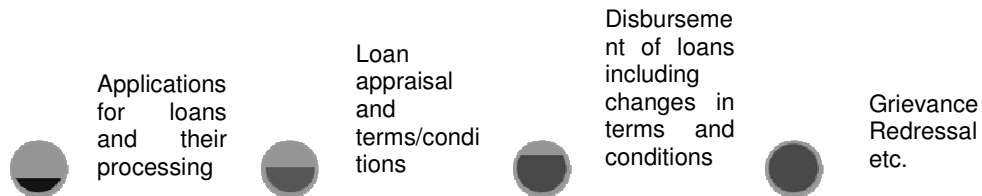
Every applicable NBFC shall comply with prudential regulations such as:

- Income recognition
- Income from investments
- Accounting standards
- Accounting of investments
- Need for policy on demand/ call loans
- Asset classification
- Provisioning requirements
- Standard asset provisioning
- Disclosure in the balance sheet
- Accounting year
- Information with respect to change of address, directors, auditors, etc. to be submitted
- Flexible Structuring of Long Term Project Loans to Infrastructure and Core Industries etc.



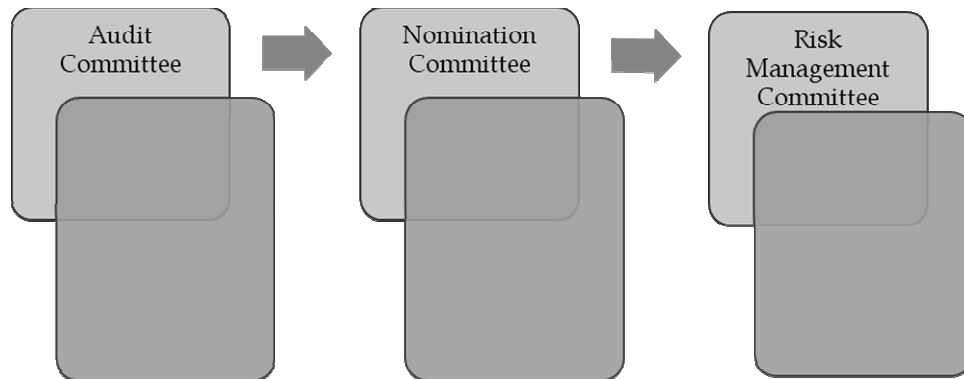
**Fair Practices Code for applicable NBFC**

Applicable NBFCs having customer interface shall adopt the following guidelines:



**CORPORATE GOVERNANCE**

**Constitution of Committees of the Board**



**(1) Audit Committee**

(i) All applicable NBFCs shall constitute an Audit Committee, consisting of not less than three members of its Board of Directors.

*Explanation I:* The Audit Committee constituted by an applicable NBFC as required under section 177 of the Companies Act, 2013 shall be the Audit Committee.

*Explanation II:* The Audit Committee constituted under this paragraph shall have the same powers, functions and duties as laid down in section 177 of the Companies Act, 2013.

(ii) The Audit Committee must ensure that an Information System Audit of the internal systems and processes is conducted at least once in two years to assess operational risks faced by the applicable NBFCs.

**(2) Nomination Committee**

All applicable NBFCs shall form a Nomination Committee to ensure 'fit and proper' status of proposed/ existing directors.

*Explanation 1:* The Nomination Committee constituted under this paragraph shall have the same powers, functions and duties as laid down in section 178 of the Companies Act, 2013.

### **(3) Risk Management Committee**

To manage the integrated risk, all applicable NBFCs shall form a Risk Management Committee, besides the Asset Liability Management Committee.

### **Fit and Proper Criteria**

(1) All applicable NBFCs shall-

- (i) ensure that a policy is put in place with the approval of the Board of Directors for ascertaining the fit and proper criteria of the directors at the time of appointment, and on a continuing basis.
- (ii) obtain a declaration and undertaking from the directors giving additional information on the directors.
- (iii) obtain a Deed of Covenant signed by the directors.
- (iv) furnish to the Bank a quarterly statement on change of directors, and a certificate from the Managing Director of the applicable NBFC that fit and proper criteria in selection of the directors has been followed. The statement must reach the Regional Office of the Department of Non-Banking Supervision of the Bank where the company is registered, within 15 days of the close of the respective quarter. The statement submitted by applicable NBFC for the quarter ending March 31, shall be certified by the auditors.

Provided that the Bank, if it deems fit and in public interest, reserves the right to examine the fit and proper criteria of directors of any NBFC irrespective of the asset size of such NBFC.

### **Disclosure and transparency**

(1) All applicable NBFCs shall put up to the Board of Directors, at regular intervals, as may be prescribed by the Board in this regard, the following:

- (i) the progress made in putting in place a progressive risk management system and risk management policy and strategy followed by the applicable NBFC;
- (ii) conformity with corporate governance standards viz., in composition of various committees, their role and functions, periodicity of the meetings and compliance with coverage and review functions, etc.

(2) All applicable NBFCs shall also disclose the following in their Annual Financial Statements:

- (i) registration/ licence/ authorisation, by whatever name called, obtained from other financial sector regulators;
- (ii) ratings assigned by credit rating agencies and migration of ratings during the year;
- (iii) penalties, if any, levied by any regulator;
- (iv) information namely, area, country of operation and joint venture partners with regard to joint ventures and overseas subsidiaries and
- (v) Asset-Liability profile, extent of financing of parent company products, NPAs and movement of NPAs, details of all off-balance sheet exposures, structured products issued by them as also securitization/ assignment transactions and other disclosures.

### **Rotation of partners of the Statutory Auditors Audit Firm**

All applicable NBFCs shall rotate the partner/s of the Chartered Accountant firm conducting the audit, every three years so that same partner shall not conduct audit of the company continuously for more than a period of three years.

However, the partner so rotated shall be eligible for conducting the audit of the applicable NBFC after an interval of three years, if the applicable NBFC, so decides. The applicable NBFC shall incorporate appropriate terms in the letter of appointment of the firm of auditors and ensure its compliance.

### **Framing of Internal Guidelines**

All applicable NBFCs shall frame their internal guidelines on corporate governance with the approval of the Board of Directors, enhancing the scope of the guidelines without sacrificing the spirit underlying the above guidelines and it shall be published on the company's web-site, if any, for the information of various stakeholders.

### **Applicability of Know Your Customer (KYC) Direction, 2016**

All applicable NBFCs having customer interface shall follow the Know Your Customer (KYC) Direction, 2016, issued by the Department of Banking Regulation as amended from time to time.

### **Need for public notice before Closure of the Branch / Office by applicable NBFC**

Applicable NBFCs shall give at least three months public notice prior to the date of closure of any of its branches / offices in, at least, one leading national newspaper and a leading local (covering the place of branch / office) vernacular newspaper indicating therein the purpose and arrangements being made to service the depositors etc.

### **Reporting Requirements**

All applicable NBFCs are required to comply with the reporting requirements as prescribed by Department of Non-Banking Supervision.

### **NON-BANKING FINANCIAL COMPANY – PEER TO PEER LENDING PLATFORM (RESERVE BANK) DIRECTIONS, 2017**

Non-banking financial company - Peer to Peer Lending Platform” (NBFC-P2P) means a non-banking institution which carries on the business of a Peer to Peer Lending Platform.

”Peer to Peer Lending Platform” is an intermediary providing services of loan facilitation via online medium or otherwise, to person who has entered into an arrangement with NBFC-P2P to lend on it or to avail of loan facilitation services provided by it.

### **Eligibility Criteria**

- (i) No non-banking institution other than a company can undertake the business of Peer to Peer Lending Platform.
- (ii) No NBFC-P2P can commence or carry on the business of a Peer to Peer Lending Platform without obtaining a Certificate of Registration (hereinafter referred to as “CoR”) from the Bank. However, an entity carrying on the business of a Peer-to-Peer Lending Platform as on the effective date of these directions, can continue to do so, subject to the conditions laid down in this directions.
- (iii) Every company seeking registration with the Bank as an NBFC-P2P is required to have a net

owned fund of not less than rupees twenty million or such higher amount as the Bank may specify.

### Scope of Activities

The scope of activities of a Non-banking financial company - Peer to Peer Lending Platform" (NBFC-P2P) are as follows:

- act as an intermediary providing an online marketplace or platform to the participants involved in Peer to Peer lending;
- not to raise deposits as defined by or under Section 45l(bb) of the Act or the Companies Act, 2013;
- not to lend on its own;
- not to provide or arrange any credit enhancement or credit guarantee;
- not to facilitate or permit any secured lending linked to its platform; i.e. only clean loans will be permitted;
- not to hold, on its own balance sheet, funds received from lenders for lending, or funds received from borrowers for servicing loans; or such funds as stipulated Fund Transfer Mechanism
- not to cross sell any product except for loan specific insurance products;
- not to permit international flow of funds;
- ensure adherence to legal requirements applicable to the participants as prescribed under relevant laws.
- store and process all data relating to its activities and participants on hardware located within India.

Further, NBFC-P2P shall-

- undertake due diligence on the participants;
- undertake credit assessment and risk profiling of the borrowers and disclose the same to their prospective lenders;
- require prior and explicit consent of the participant to access its credit information;
- undertake documentation of loan agreements and other related documents;
- provide assistance in disbursement and repayments of loan amount;
- render services for recovery of loans originated on the platform.

### Process of Registration

- (i) Every existing and prospective NBFC-P2P is required to make an application for registration to the Department of Non-Banking Regulation, Mumbai of the Bank, in the form which will be specified by the Bank for the purpose.
- (ii) The Bank, for the purpose of considering the application for registration, shall require the following conditions, among others, to be fulfilled:
  - The company is incorporated in India;
  - The company has the necessary technological, entrepreneurial and managerial resources to offer such services to the participants;
  - The company has the adequate capital structure to undertake the business of Peer to Peer Lending Platform;

- The promoters and the Directors of the company are fit and proper;
- The general character of the management of the company is not prejudicial to the public interest;
- The company has submitted a plan for, or implemented, a robust and secure Information Technology system;
- The company has submitted a viable business plan for conducting the business of Peer to Peer Lending Platform;
- Public interest shall be served by the grant of CoR;
- Any other condition as may be specified by the Bank, fulfillment of which, in the opinion of the Bank, is necessary to ensure that the commencement of or carrying on the business in India shall not be prejudicial to the public interest.

### Prudential Norms

- (1) NBFC-P2P shall maintain a Leverage Ratio not exceeding 2.
- (2) The aggregate exposure of a lender to all borrowers at any point of time, across all P2Ps, shall be subject to a cap of Rs. 10,00,000/-.
- (3) The aggregate loans taken by a borrower at any point of time, across all P2Ps, shall be subject to a cap of Rs. 10,00,000/-.
- (4) The exposure of a single lender to the same borrower, across all P2Ps, shall not exceed Rs. 50,000/-.
- (5) The maturity of the loans shall not exceed 36 months.
- (6) P2Ps shall obtain a certificate from the borrower or lender, as applicable, that the limits prescribed above are being adhered to.

### Operational Guidelines

- (1) NBFC-P2P shall have a Board approved policy in place -
  - Setting out the eligibility criteria for participants on it.
  - Determining the pricing of services provided by it.
  - Setting out the rules for matching lenders with borrowers in an equitable and non-discriminatory manner.
- (2) The outsourcing of any activity by NBFC-P2P does not diminish its obligations and it shall be responsible for the actions of its service providers including recovery agents and the confidentiality of information pertaining to the participant that is available with the service providers.
- (3) No loan shall be disbursed unless the individual lender/s have approved the individual recipient/s of the loan and all concerned participants have signed the loan contract.

### Transparency and Disclosure Requirements

- (1) NBFC-P2P shall be required to disclose the following:
  - (i) to the lender
    - details about the borrower/s including personal identity, required amount, interest rate sought and credit score as arrived by the NBFC-P2P.

- details about all the terms and conditions of the loan, including likely return, fees and taxes;
- (ii) to the borrower - details about the lender/s including proposed amount, interest rate offered but excluding personal identity and contact details;
- (iii) publicly disclose on its website:
  - overview of credit assessment/score methodology and factors considered;
  - disclosures on usage/protection of data;
  - grievance redressal mechanism;
  - portfolio performance including share of non-performing assets on a monthly basis and segregation by age; and
  - its broad business model.

(2) NBFC-P2P shall ensure that the providing of services to a participant, who has applied for availing of such services, is backed by appropriate agreements between the participants and the NBFC-P2P. The agreements shall categorically specify all the terms and conditions among the borrower, the lender and the NBFC-P2P.

(3) The interest rates displayed on the platform shall be in Annualized Percentage Rate (APR) format.

### Reporting Requirements

- (1) The Bank may, from time to time, prescribe return/s to be submitted by NBFC-P2P, as it deems fit.
- (2) The following quarterly statements shall be submitted to the aforesaid Regional Office within 15 days after the quarter to which these relate.
  - (i) A statement, showing the number and amount in respect of loans;
    - ▶ disbursed during the quarter;
    - ▶ closed during the quarter; and
    - ▶ outstanding at the beginning and at the end of the quarter, including the number of lenders and borrowers outstanding as at the end of the quarter
  - (ii) The amount of funds held in the Escrow Account, bifurcated into funds received from lenders and funds received from borrowers, with credit and debit summations for the quarter.
  - (iii) Number of complaints outstanding at beginning and at end of quarter, and disposed of during the quarter, bifurcated as received from lenders and borrowers.
  - (iv) The Leverage Ratio, with details of its numerator and denominator.

### LESSON ROUND-UP

- The Reserve Bank of India is entrusted with the responsibility of regulating and supervising the Non-Banking Financial Companies by virtue of powers vested in Chapter III B of the Reserve Bank of India Act, 1934.
- A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, engaged in the business of loans and advances, acquisition of shares/stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property.







# Lesson 11

## Special Economic Zones Act, 2005

### LESSON OUTLINE

- Learning Objectives
- Objective of SEZ Act, 2005
- Salient Features of the SEZ Act, 2005
- Developers
- • Infrastructure Facilities
- International Financial Service Centre
- Establishment of SEZ
- Guidelines for notifying SEZ
- Board of Approval
- Development Commissioner
- Setting of Unit
- Offshore Banking Unit
- SEZ Authority
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Special Economic Zones (SEZ) are growth engines that can boost manufacturing, augment exports and generate employment. The SEZs require special fiscal and regulatory regime in order to impart a hassle free operational regime encompassing the state of the art infrastructure and support services.

Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs. Goods and services going into the SEZ area from Domestic Tariff Area treated as exports and goods coming from the SEZ area into DTA treated as if these are being imported.

SEZ units may be set up for manufacture of goods and rendering of services. The Government of India had announced a Special Economic Zone scheme in April, 2000 with a view to provide an internationally competitive environment for exports. To instil confidence in investors and signal the Government's commitment to a stable SEZ policy regime and with a view to impart stability to the SEZ regime thereby generating greater economic activity and employment through the establishment of SEZs, the Special Economic Zones Act, 2005, was passed by Parliament in 2005.

The object of the study is to familiarize the students, how Special Economic Zones Act provides single window approval mechanism, establishment of Authority, Off-Shore Banking Units and Special Court for Special Economic Zones.

*SEZ Act, 2005 to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.*

## INTRODUCTION

While the policy relating to the Special Economic Zones is contained in the Foreign Trade Policy, incentives and other facilities offered to the Special Economic Zone developer and units are implemented through various notifications and circulars issued by the concerned Ministries/Departments. The system, therefore, did not lend enough confidence for investors to commit substantial funds for development of infrastructure and for setting up of the units in the Zones for export of goods and services. In order to give a long term and stable policy framework with minimum regulatory regime and to provide expeditious and single window clearance mechanism, the Government enacted Special Economic Zones Act, 2005.

*The salient features of the Act are as under:—*

- (i) matters relating to establishment of Special Economic Zone and for setting up of units therein, including requirements, obligations and entitlements;
- (ii) matters relating to requirements for setting up of off-shore banking units and units in International Financial Service Center in Special Economic Zone, including fiscal regime governing the operation of such units;
- (iii) the fiscal regime for developers of Special Economic Zones and units set up therein;
- (iv) single window clearance mechanism at the Zone level;
- (v) establishment of an Authority for each Special Economic Zone set up by the Central Government to impart greater administrative autonomy; and
- (vi) designation of special courts and single enforcement agency to ensure speedy trial and investigation of notified offences committed in Special Economic Zones.

## DEFINITIONS

Section 2 of the Act contains definitions of the terms used in the Act.

**“Co-Developer”** means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (12) of Section 3. [Section 2(f)]

**“Developer”** means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of Section 3 and includes an Authority and a Co-Developer. [Section 2(g)]

**“Export” means—**

- (i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or
- (ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or
- (iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone. [Section 2(m)]

**“Import” means—**

- (i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or

- (ii) receiving goods, or services by a Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone. [Section 2(o)]

**“Infrastructure facilities”** means industrial, commercial or social infrastructure or other facilities necessary for the development of a Special Economic Zone or such other facilities which may be prescribed. [Section 2(p)]

**“International Financial Services Centre”** means an International Financial Services Centre which has been approved by the Central Government under sub-section (1) of Section 18. [Section 2(q)]

**“Manufacture”** means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining. [Section 2(r)]

**“Offshore Banking Unit”** means a branch of a bank located in a Special Economic Zone and which has obtained the permission under clause (a) of sub-section (1) of Section 23 of the Banking Regulation Act, 1949. [Section 2(u)]

**“person”** includes an individual, whether resident in India or outside India, a Hindu undivided family, co-operative society, a company, whether incorporated in India or outside India, a firm, proprietary concern, or an association of persons or body of individuals, whether incorporated or not, local authority and any agency, office or branch owned or controlled by such individual, Hindu undivided family, co-operative, association, body, authority or company. [Section 2(v)]

**“Services”** means such tradable services which.—

- (i) are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organisation concluded at Marrakesh on the 15th day of April, 1994;
- (ii) may be prescribed by the Central Government for the purposes of this Act; and
- (iii) earn foreign exchange. [Section 2(z)]

*What is Special Economic Zone?*

***Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs.***

### **Establishment of Special Economic Zone**

Section 3 of the Act provides that the Central Government, State Government, or any other person, jointly or severally, may establish a Special Economic Zone. Any person who, intends to set up a Special Economic Zone, may, after identifying the area, make a proposal to the State Government concerned for the purposes of setting up a Special Economic Zone. It also allows a person, at his option to make a proposal directly to the Board for the purpose of setting up Special Economic Zone. In cases where such proposal has been received directly from a person, the Board may grant approval and after receipt of such approval, the person concerned, is required to obtain the concurrence of the State Government within prescribed time.

In case a State Government intends to set up the Special Economic Zone, it may after identifying the area, forward the proposal directly to the Board of Approval for setting up of Special Economic Zone. However, the Central Government has been empowered to set up and notify the Special Economic Zone without

consulting the State Government concerned; without referring the proposal to the Board.

The State Government may, on receipt of the proposal for setting up a Special Economic Zone forward the proposal together with its recommendations to the Board of Approval within the specified time. The Board of Approval may, after receipt of the proposal for setting up a Special Economic Zone either approve the proposal or, approve the proposal subject to such terms and conditions as it may deem fit to impose. It can also modify or reject the proposal for setting up a Special Economic Zone.

The Central Government has been empowered to specify the minimum area of land for setting up a Special Economic Zone and other terms and conditions subject to which the Board may approve, modify or reject any such proposal received by it. Section 3(9) further provides that if the Board approves the proposal without any modification, it shall communicate the same to the Central Government. If it approves the proposal with modification, it shall, communicate the same to the person or the State Government concerned if the modifications are accepted by the person or State Government, the Board of Approval shall communicate the approval to the Central Government. If it rejects the proposal, it shall record the reasons therefor and communicate the rejection to the person or the State Government concerned.

Section 3(10) requires the Central Government to grant on receipt of communication from the Board of Approval, a letter of approval on such terms and conditions and obligations and entitlements, as approved by Board of Approval, to the person or the State Government concerned. However the Central Government may, on the basis of approval of the Board, approve more than one developer in one Special Economic Zone in cases where one Developer does not have in his possession the minimum area of contiguous land, as may be prescribed, for setting up a Special Economic Zone. In all such cases, each Developer is considered as a Developer in respect of the land in his possession.

This section also provides that any person or a State Government, who intends to provide any infrastructure facilities in the identified area or undertaken any authorised operations may, after entering into an agreement with the Developer, make a proposal for the same to the Board of Approval, for its approval. Every such person or State Government, whose proposal has been approved by the Board and who, or which, has been granted letter of approval by the Central Government, shall be considered a Co-Developer of the Special Economic Zone.

*Who can set up SEZs?*

***Any private/public/joint sector or State Government or its agencies can set up Special Economic Zone (SEZ)***

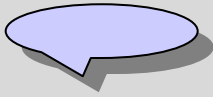
### **Establishment, Approval and Authorization to Operate Special Economic Zone**

Section 4 of the SEZ Act requires the Developer to submit, after the grant of letter of approval, the exact particulars of the identified area to the Central Government which after satisfying that the specified requirements are fulfilled, notify the specifically identified area in the State as a Special Economic Zone. However, the Central Government has been empowered to notify any additional area as a part of a Special Economic Zone. This section empowers the Central Government to authorise the Developer to undertake such operations in a Special Economic Zone, as it may prescribe.

### **Guidelines for notifying Special Economic Zone**

*Section 5 stipulates broader guidelines to be considered by the Central Government, while notifying any*

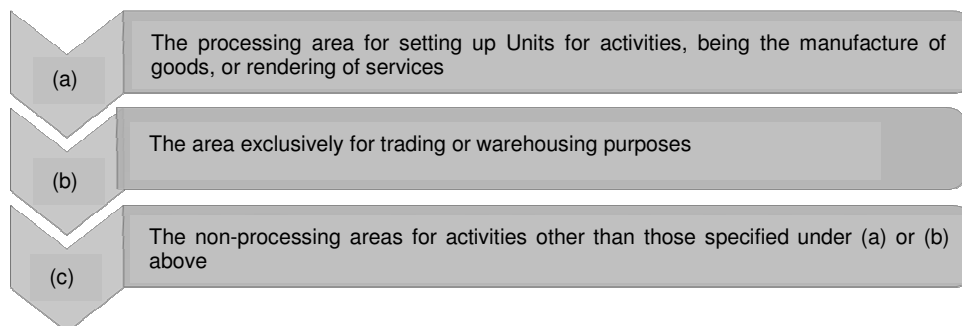
area as a Special Economic Zone or an area to be included in the SEZ and in discharging its functions under the Act. These include:



- (a) generation of additional economic activity;
- (b) promotion of exports of goods and services;
- (c) promotion of investment from domestic and foreign sources;
- (d) creation of employment opportunities;
- (e) development of infrastructure facilities; and
- (f) maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States

### The Processing and Non-Processing areas

Section 6 empowers the Central Government or any specified authority to demarcate the areas falling within the Special Economic Zones as –



### Exemption from taxes, duties or cess

Section 7 exempts all goods or services exported out of, or imported into, or procured from the Domestic Tariff Area, by a Unit or Developer in a Special Economic Zone from the payment of taxes, duties or cess under all enactments specified in the First Schedule. The enactments specified in the First Schedule generally relate to levy and payment of cess.

### Constitution of Board of Approval

Section 8 empowers the Central Government to constitute, by notification, the Board of Approval within fifteen days of the commencement of the Act. This section also provides for composition of Board, term of office of Members, co-option of certain persons as Members of the Board, its meetings and quorum, etc.

### Duties, powers and functions of Board of Approval

Section 9 casts upon the Board the duty to promote and ensure orderly development of the Special Economic Zones. The powers and functions of the Board, inter alia, include:

- (a) granting of approval or rejecting proposal or modifying such proposals for establishment of the Special Economic Zones;
- (b) granting approval of authorised operations to be carried out in the Special Economic Zones by the

Developer;

- (c) granting of approval to the Developers or Units (other than the Developers or the Units which are exempt from obtaining approval under any law or by the Central Government) for foreign collaborations and foreign direct investments (including investments by a person resident outside India) in the Special Economic Zone for its development, operation and maintenance;
- (d) granting of approval or rejecting proposal for providing infrastructure facilities in a Special Economic Zone or modifying such proposals;
- (e) granting, a licence to an industrial undertaking referred to in section 3(d) of IDR Act, if such undertaking is established, as a whole or part thereof, or proposed to be established, in a Special Economic Zone;
- (f) suspension of the letter of approval granted to a Developer and appointment of an Administrator under Section 10(1) of the Act;
- (g) disposing of appeals preferred under Section 15(4) and Section 16(4) of the Act;
- (h) performing such other functions as may be assigned to it by the Central Government.

Section 9(3) empowers the Board of Approval to delegate such powers and functions as it may deem fit to one or more Development Commissioners for effective and proper discharge of the functions of the Board. Section 9(5) stipulates that the Board in exercise of its powers and performance of its functions be bound by such directions on questions of policy, as the Central Government may give in writing to it from time to time.

**Suspension of letter of approval and transfer of Special Economic Zone in certain cases**

Section 10 empowers the Board to suspend the letter of approval granted to the Developer for a whole or part of his area established as Special Economic Zone for a period not exceeding one year and appoint an Administrator to discharge the functions of the developer in accordance with the terms and conditions of the letter of approval and manage the Special Economic Zone accordingly. The suspension may be ordered by the Board, if in its opinion following circumstances exist:

	<p><b>The developer is unable to discharge the functions or perform the duties imposed on him</b></p>
	<p><b>The developer has persistently defaulted in complying with the directions of the Board</b></p>
	<p><b>The developer has violated the terms and conditions of the letter</b></p>
	<p><b>The financial position of the developer is such that he is unable to fully and efficiently discharge the duties and obligations imposed on him by the letter of approval</b></p>

However, no letter of approval can be suspended unless the Board has given to the Developer not less than

three months' notice, in writing, stating the grounds on which it proposes to suspend the letter of approval, and has considered any cause shown by the Developer within the period of that notice, against the proposed suspension.

It has been further provided that the Board may, instead of suspending the letter of approval permit it to remain in force subject to such further terms and conditions as it thinks fit to impose. Section 10(4) makes any further terms or conditions so imposed binding upon the Developer. These terms and conditions have the force and effect as if they were contained in the letter of approval.

In case the Board suspends a letter of approval, it has been put under obligation to serve a notice of suspension upon the Developer and fix a date for suspension to take effect. Upon suspension of the letter of approval, the Special Economic Zone of the Developer vests in the Administrator for a period not exceeding one year or up to the date on which the letter of approval for such Special Economic Zone is transferred, whichever is earlier. This section also contains provisions for transfer of the Special Economic Zone of a Developer whose licence has been suspended and take other actions consequent upon the suspension of the letter of approval. The Board of Approval has been empowered to issue such directions or formulate such scheme as it may consider necessary for operation of such Special Economic Zone.

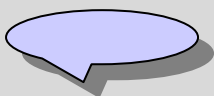
### **Development Commissioner**

Section 11 empowers the Central Government to appoint the Development Commissioner for one or more Special Economic Zones and such Officers and other employees as it considers necessary to assist every Development Commissioner. It also contains provisions for salary and allowances and other terms and conditions of service in respect of leave, pension, provident fund and other matters of the Development Commissioner, officers and other employees.

### **Functions of the Development Commissioner**

Section 12 dealing with the functions of the Development Commissioner requires every Development Commissioner to take steps in order to discharge his functions to ensure speedy development of the Special Economic Zone and promotion of exports therefrom.

*The functions of the Development Commissioner include :*



- (a) guide the entrepreneurs for setting up of Units in the Special Economic Zone;
- (b) ensure and take suitable steps for effective promotion of exports from the Special Economic Zone;
- (c) ensure proper coordination with the Central Government or State Government Departments concerned or agencies with respect to, or for above purposes;
- (d) monitor the performance of the Developer and the Units in SEZ;
- (e) discharge such other functions as may be assigned to him by the Central Government under this Act or any other law for the time being in force; and
- (f) any other functions as may be delegated to him by the Board of approval.

This section entitles the Development Commissioner to be overall in charge of the Special Economic Zone and to exercise administrative control and supervision over the officers and employees. Every Development Commissioner is also required to discharge such functions and exercise such powers as may be delegated

to him by a general or special order by the Central Government or the State Government concerned, as the case may be. The section further empowers the Development Commissioner to call for such information from a Developer or Unit from time to time as may be necessary to monitor the performance of the Developer and the Unit. The Development Commissioner has been authorised to delegate any or all of his powers or functions to any of the officers employed under him.

### **Constitution of Approval Committee**

Section 13 empowers the Central Government to constitute by notification, a Committee for every Special Economic Zone, to be called the Approval Committee to exercise the powers and perform the functions as specified. In the case of existing Special Economic Zones, the Approval Committee is required to be constituted within six months from the date of commencement of the Act and in case of other Special Economic Zones established after the commencement of the Act within six months from the date of establishment of such Special Economic Zone. This section also contains provisions relating to composition of meetings and its quorum and requires all orders and decisions and instructions of the Approval Committee to be authenticated by the signature of the Chairperson or any other Member as may be authorised by the Approval Committee.

### **Powers and Functions of Approval Committee**

Section 14 empowers every Approval Committee to discharge the functions and exercise the powers in respect of the following matters:

- (a) approve, the import or procurement of goods from the Domestic Tariff Area, for carrying on the authorised operations by a Developer in the Special Economic Zone;
- (b) approve providing of services by a service provider from outside India or from the Domestic Tariff Area for carrying on the authorised operations by the Developer, in the Special Economic Zone;
- (c) monitor the utilisation of goods or services or warehousing or trading in the Special Economic Zone;
- (d) approve, modify or reject proposals for setting up Units for manufacturing or rendering of services or warehousing or trading in SEZ in accordance with the provisions of Section 15(8) of the Act;
- (e) allow on receipt of approval foreign collaborations and foreign direct investments, including investments by a person outside India for setting up a Unit;
- (f) monitor and supervise compliance of conditions subject to which the letter of approval or permission, if any, is granted to the Developer or entrepreneur; and
- (g) perform any other functions as may be entrusted to it by the Central Government or the State Government concerned, as the case may be.

In case the developer is Central Government, the approval committee has been empowered to exercise all powers of the approval committee, until the constitution of Approval Committee.

### **Setting up of Unit**

Section 15 entitles any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, to submit a proposal to the Development Commissioner concerned. The Development Commissioner in turn place the proposal before the Approval Committee for its approval. The Approval Committee may, approve the proposal with or without modification, and subject to such terms and conditions as it may deem fit, or reject the same. In case of modification or rejection of a proposal, the Approval Committee has been put under obligation to afford a reasonable opportunity of being heard to the



person concerned and after recording the reasons therefor, either modify or reject the proposal. Sub-section (4) entitles a person aggrieved by an order of the Approval Committee, to make an appeal to the Board of Approvals, within the prescribed time and specified manner. Sub-section (8) empowers the Central Government to prescribe the requirements (including the period for which a unit may be set up) subject to which the Approval Committee may approve, modify or reject the proposal. The Development Commissioner may, after the approval of the proposal, grant a letter of approval to the person concerned to set up a Unit and undertake in the Unit such operations which the Development Commissioner may authorise and every such operation so authorised is mentioned in the letter of approval.

### **Cancellation of letter of approval granted to entrepreneur**

Section 16 empowers the Approval Committee to cancel the letter of approval of an entrepreneur after reasonable opportunity of being heard has been afforded to the entrepreneur. The Approval Committee may, at any time, cancel the letter of approval if it has any reason or cause to believe that the entrepreneur has persistently contravened any of the terms and conditions or its obligation subject to which the letter of approval was granted to the entrepreneur. It further provides that where the letter of approval has been cancelled, the Unit shall not, from the date of such cancellation, be entitled to any exemption, concession, benefit or deduction available to it as such and such Unit shall remit the exemption, concession, drawback and any other benefit availed by the entrepreneur in respect of the capital goods, finished goods lying in the stock and unutilised raw materials in the prescribed manner. Sub-section (4) entitles any person aggrieved from an order of the Approval Committee to make an appeal to the Board of Approval within the prescribed time.

### **Setting up and operation of Offshore Banking Unit**

Section 17 dealing with setting up and operation of offshore Banking Unit provides that an application for setting up and operation of an Offshore Banking Unit in a Special Economic Zone may be made to the Reserve Bank, in the prescribed form and manner. The Reserve Bank of India may, on being satisfied that the applicant fulfills all the specified conditions, grant permission to such applicant for setting up and operation of an Offshore Banking Unit in a Special Economic Zone. Sub-section (3) empowers the Reserve Bank to specify, by notification, the terms and conditions subject to which an Offshore Banking Unit may be set up and operated in the Special Economic Zone.

What do you mean by Offshore Banking Unit?

***“Offshore Banking Unit” means a branch of a bank located in a Special Economic Zone and which has obtained the permission under clause (a) of sub-section (1) of Section 23 of the Banking Regulation Act, 1949.***

### **Setting up of International Financial Services Centre**

Section 18 empowers the Central Government to approve setting up of an International Financial Services Centre in a Special Economic Zone and to specify requirements for setting up the operation of such Centre. However, the Central Government may approve only one international Financial Services Centre in a Special Economic Zone. The Central Government may subject to the guidelines as may be framed by the Reserve Bank, the Security and Exchange Board of India, the Insurance Regulatory and Development Authority and such other authority as it may deem fit, prescribe the requirement for setting up and terms and conditions of the operation of International Financial Services Center.

### **Single application form, return, etc.**

Section 19 empowers the Central Government to prescribe single application form for obtaining any licence,

permission or registration or approval by a Developer or an entrepreneur under one or more Central Acts. Section 19(b) empowers the Central Government to authorise the Board, the Development Commissioner and the approval Committee to exercise its powers on matters relating to the development of SEZ or setting up or operation of units. Section 19(c) empowers the Central Government to prescribe single form for furnishing returns or information by a developer or an entrepreneur under one or more Central Acts.

### **Agency to inspect**

Section 20 empowers the Central Government to specify, by notification, any officer or agency for carrying out surveys or inspections for securing the compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency is required to submit verification or compliance report, in such manner and within such time as may be specified in the said notification.

### **Single enforcement officer or agency for notified offences**

Section 21 empowers the Central Government to specify by notification, any act or omission made punishable under any Central Act, as notified offence for purposes of the proposed legislation. It further empowers the Central Government to authorise any officer or agency to be the enforcement officer or agency in respect of any notified offence committed in a Special Economic Zone. Every officer or agency so authorised has been granted all the corresponding powers of investigation, inspection, search or seizure as provided under the relevant Central Act in respect of the notified offences.

### **Investigation, Inspection, Search or Seizure**

Section 22 empowers the agency or officer, with prior intimation to the Development Commissioner concerned to carry out the investigation, inspection, search or seizure in the Special Economic Zone or in a Unit if such agency or officer has reason to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone. However, no investigation, inspection, search or seizure is allowed to be carried out in a SEZ by any agency or officer other than those referred to in Section 21(2) or (3), without prior intimation or approval of the concerned Development Commissioner. It is further provided that an officer or agency, if so authorised by the Central Government, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner.

### **Designated Courts to try suits and notified offences**

Section 23 empowers the concerned State Government, in which SEZ is situated, to designate, with the concurrence of the Chief Justice of the High Court of that State, one or more Courts to try all suits of a civil nature arising out of offences committed in the Special Economic Zone. Section 23(2) provides that no court, other than the designated court shall try any suit or conduct the trial of any notified offence.

### **Appeal to High Court**

Section 24 entitles any person aggrieved by any decision or order of the designated Court to file an appeal to the High Court within sixty days from the date of communication of the decision or order of the said court to him on any question of fact or law arising out of such orders. However the High Court can, if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the prescribed period of sixty days allow it to be filed within a further period not exceeding sixty days.

### **Offences by Companies**

Section 25 dealing with offences by companies provides that where an offence has been committed by a

company, every person who at the time the offence was committed was in charge of and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However such person shall not be liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Section 25(2) provides that where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall, also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

### **Exemptions, drawbacks and concessions to every Developer and entrepreneur**

Section 26 contains provisions relating to exemptions, drawbacks and concessions to Developer and entrepreneur from any duty of customs under the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, exemption from the service tax under Chapter V of the Finance Act, 1994 and exemption from levy of taxes on sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carrying on authorised operations by the developer or entrepreneur. The developer or entrepreneur has also been entitled to drawback or such other benefits as may be admissible from time to time on goods brought or services provided from DTA into SEZ or unit or services provided in SEZ or unit by service providers located outside India to carry on the authorised operations by the Developer or entrepreneur. The Central Government has also been empowered to specify the manner in which and the terms and conditions subject to which, the exemptions, concessions, drawbacks or other benefits are to be granted to developer or entrepreneur.

### **Application of the provisions of the Income Tax Act, 1961 with certain modifications in relation to Developers and entrepreneurs**

Section 27 provides for application of the provisions of the Income Tax Act, 1961 to the Developer and entrepreneur for carrying on the authorised operations in the Special Economic Zones or Unit subject to modifications specified in the second schedule.

### **Duration of goods & services in Special Economic Zones**

Section 28 empowers the Central Government to specify, the period during which any goods brought into, or services provided in, any Unit or Special Economic Zone without payment of taxes, duties, levies or cess, shall remain or continue to be provided in such Unit or Special Economic Zone.

### **Transfer of ownership and removal of goods**

Section 29 allows the transfer of ownership in any goods brought into, or produced or manufactured in, any Unit or Special Economic Zone or removal thereof from such Unit or Zone, subject to such terms and conditions as specified by the Central Government.

### **Domestic clearance by Units**

Section 30 provides that any goods removed from a Special Economic Zone to the Domestic Tariff Area be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported. This section further provides that the rate of duty and tariff valuation, if any, applicable to goods removed from a Special

Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty. This section empowers the Central Government to make rules specifying conditions in this regard.

### **Special Economic Zone Authority**

Section 31 dealing with the Constitution of Authority empowers the Central Government to constitute by notification in the Official Gazette, an Authority for every SEZ to exercise powers conferred on and discharge the functions assigned to it.

In the case of an existing SEZ established by the Central Government the Central Government has been empowered to establish such authority within six months from the date of commencement of the Act. It is further provided that the person or authority (including Development Commissioner) which is exercising control over an existing SEZ, shall continue to do so till the authority is constituted. Section 31(2) provides that every authority shall be a body corporate by name as assigned, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable and to contract and shall sue and be sued. Section 31(9) stipulates that no act or proceedings of an authority shall be invalidated merely by reason of:

- (i) any vacancy in or any defect;
- (ii) any defect in the appointment of a person as its member; or
- (iii) any irregularity in the procedure of the authority not affecting the merits of the case.

### **Functions of Authority**

Section 34 casts upon the Authority a duty to undertake such measures as it thinks fit for the development, operation and management of the respective Special Economic Zone. Section 34(2) provides for following measures :

- (a) the development of infrastructure in the Special Economic Zone;
- (b) promoting exports from the Special Economic Zone;
- (c) reviewing the functioning and performance of the Special Economic Zone;
- (d) levy user or service charges or fees or rent for the use of properties belonging to the Authority;
- (e) performing such other functions as may be prescribed.

### **Directions by the Central Government**

Section 38 empowers the Central Government to give directions to the authority and makes it binding for every Authority of the Special Economic Zone to carry out the directions issued from time to time in this regard.

### **Returns and reports by the Authority**

Section 39 casts upon every Authority of the Special Economic Zone a duty to furnish to the Central Government such returns and statements and such particulars in regard to the promotion and development of exports and the operation and maintenance of the Special Economic Zone and Units as it may require from time to time. This section further requires every authority to submit to the Central Government after the end of each financial year a report in form and before specified date, giving a true and full account of its activities, policy and programmes during the previous financial year. Section 39(3) requires a copy of every such report to be laid before each House of Parliament, soon after its receipt

### Power of the Central Government to Supersede Authority

Section 40 empowers the Central Government to supersede an Authority for a maximum period of six months if at any time, it is of the opinion that an Authority is unable to perform, or has persistently made default in the performance of the duty imposed on it or has exceeded or abused its powers, or has wilfully or without sufficient cause, failed to comply with any direction issued by it. However, before issuing a notification superseding an authority, the Central Government is required to give reasonable time to that Authority to make representation against the proposed suppression and consider the representations, if any, of the Authority. Section 40(2) dealing with the consequences of publication of the notification superseding the Authority, provides that,

- (a) the Chairperson and other Members of the Authority shall, notwithstanding that their term of office has not expired as from the date of supersession, vacate their offices as such;
- (b) all the powers, functions and duties which may, by or under the provisions of the Act, be exercised or discharged by or on behalf of the Authority shall, during the period of supersession, be exercised and performed by such person or persons as the Central Government may direct;
- (c) all property vested in the Authority shall, during the period of supersession, vest in the Central Government.

Section 40(3) also provides that on the expiration of the period of supersession specified in the notification, the Central Government may extend the period of supersession for such further period not exceeding six months or reconstitute the Authority in the prescribed manner.

### Reference of Dispute and Limitation

Section 42 requires any dispute of civil nature arising among two or more entrepreneurs or two or more Developers or between the entrepreneur and Developer in the Special Economic Zone to be referred to arbitration provided, the court or the courts to try suits in respect of such dispute had not been designated. However no dispute should be referred to the arbitration on or after the date of the designation of court or courts under section 23(1). It further provides that where a dispute has been referred to arbitration, the same shall be settled or decided by the arbitrator to be appointed by the Central Government and the provisions of the Arbitration and Conciliation Act, 1996 shall apply to all arbitrations.

Section 43 stipulates that the period of limitation in the case of any dispute which is required to be referred to arbitration shall be regulated by the provisions of the Limitation Act, 1963, as if the dispute was a suit and the arbitrator is civil court. Section 43(2), however, empowers the arbitrator to admit, a dispute after the expiry of the period of limitation, if the arbitrator is satisfied that the applicant had sufficient cause for not referring the dispute within specified period.

### Person to whom a communication to be sent

Section 45 provides that a communication by any competent authority or person may be sent to the person who has the ultimate control over the affairs of the Special Economic Zone or Unit or where the said affairs are entrusted to a manager, director, chairperson, or managing director, or to any other officer, by whatever name called, such communication may be sent to such manager, director, chairperson, or managing director or any other officer.

### Identity card

**Section 46 requires that every person whether employed or residing or required to be present in a**

***Special Economic Zone be provided an identity card by every Development Commissioner in prescribed form and containing specified particulars.***

### **Power of the Central Government to modify provisions of the Act or other enactments in relation to Special Economic Zones**

Section 49 empowers the Central Government to direct, by notification in the Official Gazette, that any of the provision of the Act or any other Central Act, any rules or regulations made thereunder or any notification or order issued or direction given thereunder specified in the notification shall not apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones; or shall apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones only with such exceptions, modification and adaptation, as may be specified in the notification. Sub section (2) requires a copy of every notification proposed to be issued to be laid in draft before each House of Parliament. The notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses of Parliament.

### **Power of State Government to grant exemption**

Section 50 empowers the State Government to notify policies for Developers and Units and to take suitable steps for enactment of any law -

- (a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur;
- (b) delegating the powers conferred upon any person or authority under any State Act to the Development Commissioner in relation to the Developer or the entrepreneur.

### **SEZ Act to have overriding effect**

***Section 51 giving overriding effect to this Act provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.***

### **Special Economic Zones to be ports, airports inland container depots, land stations etc. in certain cases**

Section 53 provides that a Special Economic Zone, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorised operations. This section further provides that a Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations under section 7 of the Customs Act, 1962. The Central Government has been empowered to notify different dates for different Special Economic Zones.

### **Special Economic Zones Rules, 2006**

Section 55 empowers the Central Government to make rules in respect of specified matters and requires that the same be published in the Official Gazette and be laid before each House of Parliament. In this context, the Central Government has notified the Special Economic Zones Rules, 2006 on February 10, 2006.

## LESSON ROUND-UP

- Special Economic Zones (SEZ) are growth engines that can boost manufacturing, augment exports and generate employment. The SEZs require special fiscal and regulatory regime in order to impart a hassle free operational regime encompassing the state of the art infrastructure and support services.
- Special Economic Zone (SEZ) is a specifically delineated duty free enclave and is deemed to be foreign territory for the purposes of trade operations and duties and tariffs.
- SEZ units are governed by Special Economic Zones Act, 2005.
- Central Government, State Government, or any other person, jointly or severally, may establish a Special Economic Zone. Any person who, intends to set up a Special Economic Zone, may, after identifying the area, make a proposal to the State Government concerned for the purposes of setting up a Special Economic Zone.
- Board of Approval granting of approval or rejecting proposal or modifying such proposals for establishment of the Special Economic Zones.
- Every Development Commissioner to take steps in order to discharge his functions to ensure speedy development of the Special Economic Zone and promotion of exports there from.
- The Central Government to constitute by notification, a Committee for every Special Economic Zone, to be called the Approval Committee to exercise the powers and perform the functions as specified.
- Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, to submit a proposal to the Development Commissioner concerned.
- An application for setting up and operation of an Offshore Banking Unit in a Special Economic Zone may be made to the Reserve Bank of India.
- SEZ Act casts upon the SEZ Authority a duty to undertake such measures as it thinks fit for the development, operation and management of the respective Special Economic Zone.
- Every person whether employed or residing or required to be present in a Special Economic Zone shall be provided an identity card by every Development Commissioner in prescribed form and containing specified particulars.
- Provisions of the SEZ Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
- Any person aggrieved by any decision or order of the designated Court to file an appeal to the High Court within sixty days from the date of communication of the decision or order of the said court to him on any question of fact or law arising out of such orders.

## SELF-TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Special Economic Zones are growth engines. Discuss.
2. Discuss in detail the salient features of SEZ Act, 2005.
3. Explain the procedure for establishment of SEZ.





# Lesson 12

## Competition Act, 2002

### LESSON OUTLINE

- Learning Objectives
- Competition and Economic efficiency
- Competition Law and Policy
- Competition Regime in India
- Anti-Competitive Agreement
- Abuse of Dominant Position
- Combination
- Director General
- Enquiry into certain agreements and dominant position of enterprise
- Enquiry into Combination by Commission
- Competition Commission of India
- Competition Advocacy
- Offences and penalties
- Appeal to Supreme Court
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Competition refers to a situation in a market place in which firms/ entities or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, such as profits, sales, market share etc. Competition is not an end unto itself, rather a means to achieve economic efficiency and welfare objectives. Free and fair competition is one of the pillars of an efficient market economy. Therefore, competition has become a driving force in the global economy.

Indian economy is on a high growth path. In the recent years the Indian economy has been one of the strongest performers in the world. However, the full growth potential of the economy remains yet to be realised. Infusion of greater degree of competition can play a catalytic role in unlocking the fuller growth potential in many critical areas of the economy, which hitherto has been held back by restriction on competition in various forms.

The object of the study is to familiarize the students regarding anti-competitive agreements, abuse of dominance, Combination, competition Advocacy, Competition Commission of India.

*The Competition Act, 2002 to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto.*

## INTRODUCTION

There is a growing recognition that a flexible, dynamic and competitive private sector is essential to fostering sustained economic development. Promoting effective competition spurs firms to focus on efficiency and improves consumer welfare by offering greater choice of higher-quality products and services at lower prices. It also promotes greater accountability and transparency in government-business relations and decision making, helps reduce corruption, lobbying, and rent seeking. In addition, it provides opportunities for broadly based participation in the economy and for sharing in the benefits of economic growth.

The idea of competition has had, for two centuries or more, a powerful influence on the way we think about our society, the way we organise things and the way we conduct our own economic and personal lives. The competition being an essential element in the efficient working of markets encourages enterprise and efficiency and widens choice. By encouraging efficiency in industry, competition in the domestic market whether between domestic companies alone or between those and overseas companies also contribute to international competitiveness. The full benefits of competition are, however, felt in markets that are open to trade and investment.

Economic theory suggests that prices and quantities in a competitive market equilibrate to levels that generate efficient outcomes at a given point of time. Competition is therefore, beneficial as it provides to consumers wider choice and provides sellers with stronger incentives to minimize costs, so eliminating waste. Competition increases the likelihood that cost savings resulting from efficiency gains will be passed on to a firm's customers, who may be either final consumers or intermediary customers (in which case costs of those firms are also lowered). Ample empirical evidence supports these arguments. The importance of competition for achieving a higher rate of innovation and adoption of new technologies over time is critical for sustaining rapid growth. Yet it is not automatic and is not the same as *laissez faire*.

In fact, there are reasons to believe that less mature markets tend to be more, rather than less, vulnerable to anti-competitive practices than the markets of developed countries. Reasons include: (a) high "natural" entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (b) asymmetries of information in both product and credit markets; and (c) a greater proportion of local (non-tradable) markets. Competition also serves to diffuse socio-economic power, broadening participation in economic, social, and political advances while ensuring opportunities for new entrepreneurs. Moreover, it can facilitate realization of the benefits for the domestic economy of integrating into international trade and investment patterns.

Several studies have demonstrated the stimulating effects of competitive markets in terms of growth and prosperity. William Lewis in his book, *The Power of Productivity* underlines this point forcefully with his observations on the growth of productivity in the late 1990s in the United States. The author has argued that more than technology and other factors, what matters above all is competition. Similarly, economist Paul London in his book, *The Competition Solution* concludes that heightened competition in the US overshadowed tax cuts or new technologies in explaining the prosperity of the 1990s. Competitive pressures helped suppress inflation and raise living standards through improved productivity. The author noted that competition from imports forced the steel and auto industry, among other manufacturers, to streamline, thereby pushing manufacturing productivity up by 4% a year. Competition has brought down real air fares, telephone rates and several other costs. Where jobs have been lost in one industry, these have been more than compensated by jobs created elsewhere; thus employment has not suffered but has shifted from losers to winners. This argument underlines across the board, the benefits of competition to a wide sections of society, including consumers, workers and many others.

## Definition of Competition

Competition is a complex and technical subject which does not lend itself to easy summary or concise clarification. Of late, with globalisation and opening of the markets worldwide, it has become a subject of great practical importance. It involves the establishment and development of concepts, legal principles and policies for the benefit of consumer interest. The principles and policies are applied to a wide range of private agreements and arrangements, which commercial undertakings enter into for themselves or with each other. In addition, they also apply to the policies and directions of the Government.

In the absence of a generally accepted definition of the phenomenon of competition, it has to be regarded as the object fostered and protected by competition policy and law. The World Bank and OECD in its Report *A Framework for the Design and Implementation of Competition Law and Policy*, broadly defines the competition is “a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective, for example, profits, sales or market share.”

Competition can also be defined as a process of economic rivalry between market players to attract customers. These market players can be multinational or domestic companies, wholesalers, retailers, or even the neighborhood shopkeeper. In their pursuit to outdo rival enterprises, market players either adopt fair means (producing quality goods, being cost efficient, adopting appropriate technologies, etc.) or indulge in unfair measures (carrying out restrictive business practices – such as predatory pricing, exclusive dealing, tied selling, collusion, cartelisation, abuse of dominant position, etc.). However, in the interest of consumers, and the economy as a whole, it is necessary to promote an environment that facilitates fair competitive outcomes in the market, curb anti-competitive behaviour and discourage market players from adopting unfair measures.

*What is competition in the market?*

*In common parlance, competition in the market means sellers striving independently for buyers’ patronage to maximize profit (or other business objectives). A buyer prefers to buy a product at a price that maximizes his benefits whereas the seller prefers to sell the product at a price that maximizes his profit.*



## Competition and Economic Efficiency

A number of empirical studies found a positive relationship between competition and innovation, productivity and economic growth. P. Aghion and P. Howitt in *Endogenous Growth Theory* offered several theoretical situations where competition is conducive to innovation – Intensified product market competition could force managers to speed up the adoption of new technologies; Intensive product market competition with incumbent firms engaged in step by step innovative activities could enhance each firm’s incentive to acquire or increase its technological lead over its rivals and, if labour markets are flexible, competition will induce skilled workers to move to opportunities employing best practices and technologies. Competition also reduces slack by providing more incentives for managers and workers to increase efforts and improve efficiency. Therefore, the product market competition disciplines firms into efficient operation.

Nickel et. al. in his article *Competition and Corporate Performance* suggested three different channels of incentives – competition creates greater opportunities for comparing performance; a more competitive environment where price elasticity of demand tends to be higher, induces greater efforts among workers and managers for cost reducing improvements in productivity since improvements could generate larger increase in revenue and profits; and a more competitive environment forces managers to improve efficiency, because more intense the competition, greater the chances for inefficient to be extinguished.


*UK White Paper on World Class Competition Regime* clearly brings out the importance of competition in an increasingly innovative and globalised economy. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production.

Empirical evidences show that strong competition is closely linked to dynamic and efficient markets. The benefits of competitive forces for economic growth and consumer welfare are widely recognized and evidenced by several studies. Recently, an empirical study in the U.K. by the Centre for Competition Policy, University of East Anglia showed that prices were more than halved through competition in international telephony and airfares, and were significantly reduced in other areas. The survey also brought home the point that competition is not just about prices but is typically multi-faceted, bringing new ways of doing business and leading to technological and other advances.

Michel Porter in his recent work *Can Japan Compete?* shows that in Japan only those sectors characterized by strong domestic competition remain internationally competitive following the country's recent economic downturn, examples include cameras, automobiles and audio equipment. Many leading competition experts believe in the premise that, in the presence of competition, the market will achieve the objective of maximising welfare.

### Competition Law and Policy

The World Bank and OECD in its Report *A Framework for the Design and Implementation of Competition Law and Policy* pointed out that a dynamic and competitive environment, underpinned by sound competition law and policy, is an essential characteristic of a successful market economy. Effective enforcement of competition law and active competition advocacy can also be powerful catalysts for successful economic restructuring. This in turn fosters flexibility and mobility of resources, which in the current global business environment are critical elements for the competitiveness of firms and industries across nations. Although the field of competition law and policy is evolving rapidly and includes many different viewpoints on specific issues, recognition is growing that effective competition law is important in shaping business culture and that its proper implementation needs to allow for the education of business people, government officials, the judiciary, and the interested public.



***The basic purpose of Competition Policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy. Competition policy typically has two elements: one is a set of policies that enhance competition in local and national markets. The second element is legislation designed to prevent anti-competitive business practices with minimal Government intervention, i.e., a competition law. Competition law by itself cannot produce or ensure competition in the market unless this is facilitated by appropriate Government policies. On the other hand, Government policies without a law to enforce such policies and prevent competition malpractices would also be incomplete.***

Competition policies cover a much broader set of instruments than competition law and typically include all policies aimed at increasing the intensity of competition or rivalry in local and national markets by lowering entry barriers and opportunities for harmful coordination, to ensure that markets work effectively and serve the interests of all citizens. Competition law is only a subset of a nation's competition policies. Competition policies typically include pro-competition approaches to trade, investment, sectoral regulation, and consumer protection. The barriers to international or interregional trade, restrictions on Foreign Direct Investment (FDI)

and technology transfers, restrictions on entry in regulated network utility industries, regulations affecting the registration of new enterprises and the taxation and corporate governance of existing enterprises and rules on marketing practices all influence the extent of competitive pressures in markets and so are appropriate concerns of competition policies. In many countries, competition authorities have become the focal point for consultations and putting forward pro-competition viewpoints across a broad range of policy areas.

Asian Development Bank in “During economic transition or reforms”, observed that “the benefits of an open market economy cannot be fully realized unless restrictions on competition are removed. Opening markets is not enough by itself for countries to begin reaping the benefits of competition; firms will still find incentives to engage in anti-competitive practices. Thus, the intended benefits of trade reforms may not be realized without active enforcement of competition law. This highlights the importance of having faith in the benefits of competition from an early stage of economic growth and of incorporating competition policy into the broader economic policy framework.”

Prof. Paul Geroski, former Chairman, Competition Commission of the United Kingdom observed that “Competition policy is about ensuring that markets are, and remain, competitive. This brings benefits to consumers eventually in all the ways. However, eliminating anti-competitive practices and dismantling monopoly positions that lead to abuses also benefit firms whose business suffers from these practices and abuses. It is worth emphasizing that many of the benefits that emanate from proper application of competition policy are felt in the first instance by firms. This is important for those who seem to think of competition policy as an added and unnecessary burden on business. Competition policy is sometimes a burden on business, but only on those businesses that try to unfairly disadvantage their rivals in ways that reduce their competitive abilities or incentives to compete vigorously”.

Hence, competition policy and competition law need to be distinguished. The former can be regarded as a genus, of which, the latter is specie.

## COMPETITION REGIME IN INDIA

### Historical Perspective

The Indian economy remained subject to controls and regulations for several decades, such as industrial licensing, foreign exchange restrictions, small scale industry protection, control on foreign investment and technologies, quantitative restrictions on imports, administered prices, and control on capital issues. The domestic industry was thus insulated from competition.

The economic consequences of this policy regime, though initially beneficial, were reflected in a poor rate of economic growth, low levels of productivity and efficiency, absence of international competitiveness, sub-optimal size of businesses, and outdated and inefficient technologies in various sectors.

India has therefore witnessed two phases of development process with different policy regimes and institutional frameworks. In the first phase, since independence, the transformation and development of the Indian economy took place within a planned, rigidly regulated and relatively closed economic framework. In the second phase, since 1991, when the country embarked upon reform process and embraced market oriented policies.

In the late 1980s and early 1990s, need for liberalization policies was recognized and a range of policy and regulatory reforms were initiated, such as delicensing of industry, shrinking the monopoly of the public sector industries (other than those where strategic and security concerns dominated), removal of quantitative restrictions on imports, market determined exchange rate, liberalization of foreign direct investment, capital market reforms, liberalizing the financial markets, reduction in small scale industry reservations, and a much

greater role for the private sector in infrastructure industries such as power, port, transport and communications.

### **Economic Reforms and Competition**

The world economy has been experiencing a progressive international economic integration for the last half a century. There has been a marked acceleration in this process of globalisation and also liberalisation during the last three decades.

Since 1991, the Government of India has introduced a series of economic reforms, including policies of liberalisation, deregulation, disinvestment and privatisation. The seriousness of macroeconomic imbalances and unanimity towards reform rendered this possible. The broad thrust of the new policies was a move away from the centralised allocation of resources in some key sectors by the government to allocation by market forces. Private participation in economic development has emerged as an alternative to the state-oriented development strategy in the reform period.

After a decade of reforms, restraints to competition such as state monopolies and protective measures and controls have been replaced by relatively more competitive and de-regulated open market policies. In the post reform period, the private sector participation in production and supply of utility services has increased substantially. Independent regulators have been established for many sectors such as road, power, telecommunications and insurance. These sectoral regulators have been empowered to determine sector specific entry conditions and eventually the level of competition. In nutshell, post reforms period witnessed an open market orientation in industrial policy, foreign trade policy, foreign investment policy and financial sector policy, infrastructure policy, etc.

### **Competition Law-Evolution and Development**

The first Indian competition law was enacted in 1969 and was christened as the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The genesis of the MRTP Act, 1969 is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principle of State Policy in those Articles lays down, *inter-alia* that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice - social, economic and political- shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing:

1. that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
2. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Legal framework dealing with competition in India spread over other legislations, besides the Monopolies and Restrictive Trade Practices Act, 1969, other legislations dealing with competition include Consumer Protection Act, 1986, the Patents Act 1970 etc.

### **Background to the MRTP Act, 1969**

India, when it became free from the colonial power was industrially very backward. In fact, it inherited an economy in a ravaged condition. Under development of the economy in many respects led the successor Government to adopt a system of planning. In the interest of transformation of the backward industrial economy into an advanced industrial economy, the planners thought it fit to allow the then established industries to develop and grow further. Alongside, mixed economy was also developed as a concept of economic planning. No doubt, there was perceptible growth in industrialisation. However, this also brought

on its trails, concentration of wealth and economic power. This led to widening of the difference between the haves and have nots in the society. The Government of India therefore set up the Monopolies Inquiry Commission in 1964 with a view to finding out the causes, the nature and the extent of concentration of economic power in the country and to suggest remedial measures therefor.

The Monopolies Inquiry Commission submitted a detailed report in October 1965 which was well documented and revelatory of many facets of concentration of economic power. Many of the trade practices which were designed to stifle competition in the market and to promote monopolistic tendency were also noticed by the Commission in the course of its inquiry. The Commission observed that there was no need to strike at the concentration of economic power as such but to do so only when it became a menace to the best production in quality and quantity or to fair distribution. Monopolistic conditions in any industrial sphere should be discouraged without injury to the interests of the general public and monopolistic and restrictive trade practices should be curbed except when they were conducive to the common good. The Commission pointed out that on the one hand over the years certain business houses had built vast industrial empires and on the other hand they were trying to accentuate and enlarge the empires by adopting certain trade practices which were intended to distort competition in the market and promote a set of near monopoly conditions. The Commission felt that such tendencies seemed to destroy the basic concept of socio-economic justice enshrined in the Constitution. The Commission also framed a draft Bill as a part of its recommendations.

The Monopolies and Restrictive Trade Practices Bill was introduced in Parliament in 1967 which after being referred to the Joint Select Committee became an Act and finally came into force w.e.f. 1st June, 1970.

The enactment was based on the socio-economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution which provides that the State shall direct its policy towards securing that the ownership and control of material resources of the community are distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The principal objectives of the Act, as spelt out in the preamble were:

- (i) prevention of concentration of economic power to the common detriment;
- (ii) control of monopolies;
- (iii) prohibition of monopolistic trade practice;
- (iv) prohibition of restrictive trade practices.

The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991. Major changes introduced in the 1982 and 1984 Amendment Acts were based on the recommendations of the Sachar Committee. The 1984 amendment introduced the concept of unfair trade practice under the Act. Far-reaching changes have been brought about by the 1991 amendment and these were made in the wake of new industrial policy of July, 1991 which is wedded to liberalisation, globalisation and de-regulation.

### **Scheme of the MRTP Act**

Prevention of undesirable concentration of economic power was sought to be achieved essentially through the regulation of growth of undertakings of particular size, viz. undertakings having assets of the value of ₹100 crores. These business houses were officially designated as large business houses. Undertakings having a sizable share of the market, or licensed production capacity of more than 1/4th of the total production or installed capacity in India were described as dominant undertakings. These companies were declared large business houses if their assets were of the value of ₹1 crore or more.

These undertakings were referred to as MRTP undertakings. Such undertakings had to obtain approval of the Central Government to undertake substantial expansion of production, establishment of new undertakings, amalgamate with or takeover any other undertaking. Appointment of persons who were directors in such undertakings as director in any other undertaking needed the approval of the Central Government. The Central Government also had the power to order for division of such undertakings or for severance of interconnection under certain circumstances. Restrictions were placed on the acquisition and transfer of shares of, or by, bodies corporate owning such undertakings.

However, the MRTP (Amendment) Act, 1991 sought to liberalise these restrictions by removing the concept of MRTP undertakings and provisions relating to their substantial expansion, amalgamation etc., and acquisition of shares of, or by, such undertakings etc. The provisions relating to Central Government's power to direct division of undertakings or severance of interconnection have been modified such that they apply to all undertakings (hitherto, they applied only to MRTP undertakings).

Chapter IV deals with monopolistic trade practices indulged in by any undertaking. The Act defines the concept of monopolistic trade practices in terms of unreasonableness of the prices charged, unreasonableness in preventing or lessening competition in the market, unreasonably increasing prices, profits and limiting technical development to the common detriment etc. The remedy for dealing with monopolistic trade practice is an inquiry at the instance of the Central Government by the M.R.T.P. Commission or suo motu by the Commission and suitable orders being passed by the Central Government thereafter to prevent the mischief resulting from such practices.

The Act also deals with matters relating to restrictive trade practices. Briefly stated, a restrictive trade practice is one which prevents, distorts or restricts competition for goods and services in any manner. While unreasonableness is the test for monopolistic trade practices, even a small distortion in competition is sufficient to bring a case under restrictive trade practices. The provisions relating to restrictive trade practices are therefore intended to promote fair and free competition in the market. The Act provides for a scheme of registration of certain agreements relating to restrictive trade practices. The MRTP (Amendment) Act, 1984 introduced new provisions relating to unfair trade practices with a view to promoting the interest of consumers. It is essential to note that the M.R.T.P. Commission has been given full powers to regulate restrictive and unfair trade practices by means of an inquiry and pass final orders thereon. The MRTP Commission may inquire into restrictive and unfair trade practices at the instance of the Central Government, State Government, Director General of Investigation and Registration, registered consumer associations, individual consumer and on its own. The Commission has also powers to grant temporary injunctions and award compensation and punish for contempt under Sections 12A, 12B and 13B of the Act respectively.

The Commission is an independent quasi-judicial body and has powers similar to a Civil Court under the Code of Civil Procedure, 1908 on some matters. The Director General of Investigation and Registration and the Secretary of the Commission assist in the inquiry in respect of monopolistic, restrictive and unfair trade practices. The Commission conducts enquiries and other businesses in accordance with MRTPC Regulations, 1991.

The Central Government has framed the Monopolies and Restrictive Trade Practices Rules, 1970, the Monopolies and Restrictive Trade Practices (Classification of Goods) Rules, 1971, and the M.R.T.P. (Information) Rules, 1971 in exercise of the powers conferred under the Act. However these Rules have lost much of their significance in view of deletion of Sections 21 to 26 of the Act w.e.f. 27.9.91.

### **MRTP (Amendment) Act, 1991**

The new industrial policy announced by the Government in Parliament on July 24, 1991 sought to amend the



MRTP Act, 1969 by removing all pre-entry restrictions and placing more emphasis on controlling and regulating monopolistic, restrictive and unfair trade practices.

The 'Statement of Objects and Reasons to the MRTP (Amendment) Act, 1991 reiterates that the basic philosophy behind the MRTP Act, 1969 was not to inhibit industrial growth but to ensure that industrial growth was channelised for public good and growth did not perpetuate concentration of economic power to the common detriment. To quote,

1. With the growing complexity of industrial structure and the need for achieving economies of scale for ensuring higher productivity and competitive advantage in the international market, the thrust of the industrial policy has shifted to controlling and regulating the monopolistic, restrictive and unfair trade practices rather than making it necessary for certain undertakings to obtain prior approval of the Central Government for expansion, establishment of new undertakings, merger, amalgamation, take over and appointment of directors. It has been the experience of the Government that pre-entry restrictions under the MRTP Act on the investment decision of the corporate sector has outlived its utility and has become a hindrance to the speedy implementation of industrial projects. By eliminating the requirement of time-consuming procedures and prior approval of the Government, it would be possible for all productive sections of the society to participate in efforts for maximisation of production. It is, therefore, proposed to re-structure the MRTP Act by omitting the provisions of Sections 20 to 26 and transfer the provisions contained in Chapter III-A regarding restrictions on acquisition and transfer of shares to the Companies Act, 1956. The Schedule to the MRTP Act is also consequently to be transferred with modification to the Companies Act, 1956.
2. It is also proposed to enlarge the scope of inquiry by the MRTP Commission with a view to taking effective steps to curb and regulate monopolistic, restrictive and unfair trade practices which are prejudicial to public interest. It is also proposed to provide for deterrent punishment for contravention of the orders passed by the MRTP Commission and the Central Government and empower the Commission to punish for its contempt. Certain other consequential changes are also found necessary in the MRTP Act.

### **Scope and Applicability of the MRTP Act**

Section 3 of the MRTP Act, 1969 provides that unless the Central Government, by notification in the Official Gazette otherwise directs, the Act shall not apply to:

- (a) undertakings owned or controlled by the Government, a government company, a corporation, a registered cooperative society and undertakings, the management of which has been taken over by the Central Government;
- (b) trade unions and other associations of workmen;
- (c) financial institutions.

However, vide notification dated 27.9.1991, the Government has directed that the provisions of the MRTP Act shall apply to all undertakings and financial institutions specified in Section 3 which were hitherto outside the purview of the Act, except undertakings owned or controlled by a Government company, or the Government and engaged in the production of arms and ammunition and allied items of defence equipment, defence aircraft and warships, atomic energy, minerals specified in the schedule to the Atomic Energy (Control of Production and Use) Order, 1953 and industrial units under the Currency and Coinage Division, Ministry of Finance, Department of Economic Affairs. Thus, the hitherto anomaly which used to exist prior to 27.9.91 about applicability of provisions of Act between private sector enterprises and public sector undertakings and those stated in sub-clause (a) to (g) of Section 3, has been removed.

But trade unions and other associations of workmen or employees formed for their own reasonable protection as such workmen or employees continue to be exempt from the applicability of the MRTP Act. However, Truck owners or operators Unions/Associations being not of workmen have been held to be subject to the jurisdiction of MRTP Commission by Supreme Court in the case of Bharatpur Truck Operators Union.

In effect, all public sector companies, except those engaged in the production of arms and ammunition etc. and industries under the Currency and Coinage Division, have been brought within the scope of the MRTP Act in respect of monopolistic, restrictive and unfair trade practices.

## MONOPOLISTIC TRADE PRACTICES

Prohibition of monopolistic trade practices is one of the objects of the MRTP Act, 1969. The word 'monopoly' has not been defined in the MRTP Act. But it is common knowledge that a pure monopoly as well as 'monopolistic' position leads to distortion of competition in the market, besides endangering in the normal circumstances concerted action to fix prices, supplies of commodities, etc. The result of such action is no doubt detrimental to the consuming public.

*The Monopolies Inquiry Commission made copious analysis of this aspect in its report. It is worth quoting the following passages from Chapter V of the report:*

Our study of product-wise concentration brings out prominently the fact that in a large number of industries, a single undertaking is the only supplier or at least has to its credit a very large portion of the market as compared with its competitors. Such an undertaking has the power to dictate the price of the commodity or services it supplies and to regulate its volume of production in such a manner as to maximize its profits. This power is what is generally understood by the words "monopoly power" Though in the strict etymological sense of the word, and in strict economic theory, monopoly exists when there is only one single supplier, there is no reason why an enterprise enjoying the power to dictate the price and thus to control the market even though it is not the single supplier should not be considered a monopoly. What happens in such cases is that the price decided upon by the dominant producer (or distributor) is followed by others who are in a position to compete. This price leadership phenomenon is in essence a manifestation of the price leaders power to dictate the price in the market. We think it proper therefore to include within the word monopoly not only the single supplier in a market but also the one dominant supplier who has the power to dictate the price in the market."

"The question that next arises is : When such a power is shared by a few enterprises being the dominant sellers, should they be considered to be holding a monopolistic position? We see no reason to exclude such dominant sellers from our understanding of monopoly. For, the essence of monopoly is the ability to dictate the price and control the market without being materially influenced by other competing concerns."

One important difference between the situation when a single seller dominates the market and a few independent sellers together enjoy a dominating position cannot be overlooked. In the former case, monopoly power is inevitably present, in the latter it may or not be present. The effect on the market of a few dominant sellers has been widely discussed by economists, specially in recent years; but their opinions are by no means the same. We do not propose to try to resolve this controversy. It is sufficient for our purpose to notice that it is generally agreed that when a few big sellers dominate the market there will ordinarily be a high probability of their coming to some kind of agreement or understanding whether formal or not, about the price and output, by which a monopolistic power is shared between themselves. Even in the absence of such agreement or understanding it frequently happens that each has a healthy fear of the other big producers or distributors and ultimately a policy of live and let live comes into operation. Some economists point out that

when a few large sellers dominate the market, each of them is able to calculate fairly and accurately the probable effect on the market of his action in increasing or decreasing his output. So, it is said that each will try to regulate the output in such a way that the marginal costs remain well below the price. Each such seller will also be well aware that any attempt of his to reduce the price is likely to be met immediately by similar action by his competitors. The matter is succinctly put by Stocking in *Monopoly and Free Enterprise* at p. 90 thus:

“In markets where sellers are few, each in trying to determine his most profitable volume of output must, as would a monopolist, consider the probable effects of various possible rates of production not only on costs but also on prices. Indeed each seller will ordinarily decide on the price at which he will sell and adjust his output accordingly, just as a monopolist does. Each oligopolist however in determining his price must consider not merely his own cost-price relationships but also how his rivals will react to his prices. Anyone of a few sellers, if fully informed and perfectly rational, when selling a completely standardised product will realise that if he reduces his prices his rivals will meet the lower price promptly.

For all these reasons, we are convinced that when the market is dominated by a few sellers, monopolistic conditions will sometimes prevail. At the same time, we are conscious that even in a market of a few sellers, there will sometimes be keen competition. This is likely to happen apart from the effect of the mutual jealousies which sometimes characterise the relations between big business houses when one or more of the few sellers feel confident that due to superior managerial ability and technical skill and financial resources they will be able to capture a larger share of the market at the expense of their rivals. Even so, there is no gainsaying the fact that in a market of a few dominating sellers, there is real risk of the emergence of monopolistic power and consequently of monopolistic practices. To ascertain the extent to which monopolistic practices prevail, we must examine not only the cases where a single enterprise is the sole or dominant producer of the goods or services but also the cases where a few enterprises between themselves share such dominating position.”

## **RESTRICTIVE TRADE PRACTICES**

The Monopolies and Restrictive Trade Practices Act, 1969, has as one of its objects the prohibition of restrictive trade practices. In order to ensure that the benefits of free and fair competition in a market reach the ultimate consumer, it is essential that the process of competition should not be distorted by any trade practice, either by a single manufacturer or a group of manufacturers or dealers. For instance, if a manufacturer stipulates a condition that the wholesale purchaser shall sell only his products and not of others or shall resell the goods only at the prices stipulated by him or forces the wholesale purchaser to procure the entire line of manufacture from him, the result may be a distortion of competition in the market. The MRTP Act is concerned with promoting fair and free competition in the market, the securing of consumer interest being the ultimate goal.

The Monopolies Inquiry Commission in its report observed that a restrictive trade practice means a practice which obstructs the free play of competitive forces or impedes the free flow of capital or resources into the stream of production or of the finished goods in the stream of distribution at any point before they reach the hands of the ultimate consumer. The Commission list out the following types of restrictive trade practices pursued not only in India but also in many other countries. These include (i) horizontal fixation of price (ii) vertical fixation of price and re-sale price maintenance; (iii) allocation of markets between purchasers; (iv) discrimination between purchasers; (v) boycott; (vi) exclusive dealing contracts; and (vii) tie-up arrangements.

The Monopolies Inquiry Commission made a wee-bit of distinction between a monopolistic trade practice and a restrictive trade practice. It observed every monopolistic trade practice is on the face of it a restrictive trade

practice. Indeed, sometimes the two words are used indiscriminately. Thus the report of Macquarrie Committee which was set up to study Canadian Combines Legislation treats all combines or common policy among several firms designed to strengthen the market position of a group of firms as monopolistic practices. In our opinion, every practice whether it is by action or understanding or agreement, formal or informal, to which persons enjoying monopoly power resort in exercise of the same to reap the benefits of that power and every action, understanding or agreement tended to or calculated to preserve, increase or consolidate such power should properly be designated as monopolistic trade practice.

## UNFAIR TRADE PRACTICES

Unfair trade practices in trade and commerce were prevalent even in older days. Priests in Sumaria and Babylon are on record to have lent money to the needy at high rates of interest. During the period of Tudors, practices of forestalling (meaning pushing up prices by buying up supplies before they reached market), regrating (buying up supplies in the market), and engrossing (buying up supplies wherever available) were prevalent. Thus exploitation at market place is not a new phenomena of modern civilisation. At present various types of unfair trade practices are prevalent at National as well as at International markets. The legislative history of countries the world over bears redeeming testimony to the endeavours of the National Governments to enact suitable legislations to curb such unfair trade practices.

The underlying objective of such legislative endeavours has been to make the behaviour at market place conducive to righteous dealings so that the ultimate consumer gets a fair deal. Senator Murphy, the then Australian Attorney General, introducing the Restrictive Trade Practices Bill of the Commonwealth of Australia in the Senate said: In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as 'Caveat Emptor meaning 'let the buyer beware. That principle may have been appropriate for transactions conducted in village markets, it has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on organised basis and by the trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.

It is often said that consumers need no special protection; all can be safely left to the market. But the concept of perfect market is an economists dream and consumers sovereignty a myth. In real life products are complex and of great variety and consumers and retailers have imperfect knowledge. Suppliers may often have a dominant buying position. As a consequence bargaining power in the market is generally weighed against the consumer. Thus consumers have felt the need to create organisations to identify their interests and to supply information and advice.

The Federal Trade Commission of US is stated to have labelled under the Federal Trade Commission Act, 1914 numerous practices not known before. It was because a need was felt to ensure that the public was prevented from being made victims of false claims of products blatantly advertised even though it may not have an adverse effect on the competition. The effort was to shift the emphasis on detention and eradication of fraud against the consumers, particularly those belonging to the weaker sections of the society.

## Consumer Protection Law in India

The Government enacted various laws to safeguard the interest of the consumers. The Essential Commodities Act, The Trade Marks Act, The Specific Relief Act, The Drugs Control Act, The Drugs and Cosmetics Act, The Drugs and Magic Remedies (Objectionable Advertisements) Act, The Emblems and Names (Prevention of Improper Use) Act, The Indian Standard Institution (Certification Marks) Act, The Agricultural Produce (Grading and Marketing) Act, The Standards of Weights and Measures Act, etc. are a

few of the many laws intended to protect the interest of the consumer. Some of these laws alongwith the delegated legislation framed thereunder protect both the pecuniary interest as well as other interests of the consumer. Even the Indian Contract Act 1872 and the Sale of Goods Act, 1930 contain provisions for breach of contracts and remedies therefor. The Indian Penal Code provides for stringent punishment for certain offences.

In the year 1986, the Government enacted the Consumer Protection Act, 1986 and framed necessary rules thereunder, for facilitating the formation of Consumer Protection Councils in all states and setting up of Consumer Forums at district level, State Commission at state level and National Commission at national level for redressing the grievances of consumers. The Government also framed the MRTP (Recognition of Consumer Association) Rules and amended a number of economic legislations like the Essential Commodities Act, 1955; Standards of Weights and Measures Act, 1976; Prevention of Food Adulteration Act, 1954; Drugs and Cosmetics Act, 1940 etc. to provide better protection to consumers.

However, the passing of the MRTP Act, 1969, could be said to be the beginning of the Governments concern for consumer interest. Till the amendment of the Act in the year 1984, even the MRTP Act did not contain provisions directly aimed at protecting the interests of consumer, but they were intended to regulate competition in the hope that it would generate fair conduct, the effect of which would percolate to the ultimate consumer, the terminal point in the distributive line.

### **Recommendations of Sachar Committee**

The Government of India appointed a Committee in August, 1977 under the Chairmanship of Justice Rajinder Sachar to look into the simplification of the working of the companies and the MRTP Act. The Committee submitted its report in the year 1978 and as far as recommendations pertaining to the MRTP Act are concerned, far reaching changes were suggested by the Committee. For the first time, the Committee highlighted the need for introduction of suitable provisions to curb unfair trade practices.

In its view, the assumption that curbing monopolistic and restrictive trade practices and thereby preventing distortion of competition automatically results in the consumers getting a fair deal was only partly true. It was felt necessary to protect the consumers from practices adopted by trade and industry to mislead or dupe them.

The Committee pointed out that advertisements and sales promotion having become well established modes of modern business techniques, representations through such advertisements to the consumer should not become deceptive. If a consumer was falsely induced to enter into buying goods which do not possess the quality and did not have the cure for the ailment advertised, it was apparent that the consumer was being made to pay for quality of things on false representation. Such a situation could not be accepted.

Therefore, an obligation is to be cast on the seller to speak the truth when he advertises and also to avoid half truths, the purpose being preventing false or misleading advertisements.

The Committee also noted that fictitious bargain was another common form of deception and many devices were used to lure buyers into believing that they were getting something for nothing or at a nominal value for their money. The Committee observed: Prices may be advertised as greatly reduced and cut when in reality the goods may be sold at sellers regular prices. Advertised statements that could have two meanings, one of which is false, are also considered misleading. In America, it was held that statement that a tooth paste fights decay could be interpreted as a promise of complete protection and was thus deceptive. Mock-ups on television put up by companies including Colgate Palmolive had also received the attention of the Enforcement Agencies in America and have been held to be deceptive.

We cannot say that the type of misleading and deceptive practices which are to be found in other countries

are not being practised in our country. Unfortunately our Act is totally silent on this aspect. The result is that the consumer has no protection against false or deceptive advertisements. Any misrepresentation about the quality of a commodity or the potency of a drug or medicine can be projected without much risk. This has created a situation of a very safe heaven for the suppliers and a position of frustration and uncertainty for the consumers. It should be the function of any consumers legislation to meet this challenge specifically. Consumer protection must have a positive and active role.

Accordingly, the Committee specified certain unfair trade practices which were notorious and suggested prohibition of such practices. The main category of unfair trade practices recommended for prohibition by the Sachar Committee were: (a) misleading advertisements and false representations (b) bargain sale, bait and switch selling; (c) offering gifts or prizes with the intention of not providing them and conducting promotional contests; (d) supplying goods not conforming to safety standards; and (e) hoarding and destruction of goods.

In India, by an amendment to the MRTP Act in the year 1984 Part B Unfair Trade Practices was added to Chapter V. It may be recalled that Part A of Chapter V deals with registration of agreements relating to restrictive trade practices. Section 36A, 36B, 36C, 36D and 36E are relevant for the purposes of understanding the main provisions relating to unfair trade practices.

### **Scheme of the Act with respect to Unfair Trade Practices**

The term 'Unfair Trade Practices' is defined in Section 36A which enlists a number of practices as unfair trade practices. This definition has been amended vide the MRTP (Amendment) Act, 1991 making its scope wider in application. Section 36B provides for an enquiry into unfair trade practices by the MRTP Commission. Section 36C contains provision for preliminary investigation by the Director General in certain cases. Section 36D deals with the powers of the Commission to inquire into unfair trade practice and pass remedial orders. Section 36E empowers the Commission to exercise same powers in respect of unfair trade practices as it exercises in respect of restrictive trade practices.

#### **Why do we need competition in the market?**

*Competition is now universally acknowledged as the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices. Producers will have maximum incentive to innovate, reduce their costs and meet consumer demand. Competition thus promotes allocative and productive efficiency. But all this requires healthy market conditions and governments across the globe are increasingly trying to remove market imperfections through appropriate regulations to promote competition.*



### **COMPETITION ACT, 2002**

#### **Short title, extent and commencement**

Section 1 of the Act provides that it shall come into force on such date as the Central Government may notify in the Official Gazette. However, an enabling provision empowering the Government to appoint different dates for different provisions of the Act have been incorporated. The scope of the Act extends to whole of India except the State of Jammu and Kashmir.

#### **Scheme of the Act**

The Scheme of the Act has been split into nine chapters indicated hereunder: Chapter I contains preliminary provisions viz. Short title, extent and Definition clauses; Chapter II provides for substantive laws i.e. Anti

Competitive Agreements, Abuse of Dominance and Regulation of Combinations; Chapter III contains provisions relating to Establishment of Commission, Composition of Commission, Selection of Committee for Chairperson and other Members, Term of Office of Chairperson etc. Chapter IV elaborately provides the Duties, Powers and Functions of the Commission; Chapter V provides for the Duties of Director General; Chapter VI stipulates Penalties for Contravention of Orders of Commission, Failure to Comply with Directions of Commission and Director-General, Making False Statement or Omission to Furnish Material Information etc; Chapter VII deals with Competition Advocacy; Chapter VIII contains provisions relating to Finance, Accounts and Audit, Chapter VIII A contains provisions relating to “Competition Appellate Tribunal” [inserted by the Competition (Amendment) Act, 2007] and Chapter IX contains Miscellaneous provisions.

## DEFINITIONS

The important concepts incorporated in the Competition Act, 2002 have been defined under Section 2 of the Act. These have been discussed herein below:

### Acquisition

This term has been specifically defined. It means – directly or indirectly, acquiring or agreeing to acquire: (i) shares, voting rights or assets of any enterprise; (ii) control over management or control over assets of any enterprise. [(Section 2(a)]

The terms ‘acquiring’ or ‘acquisition’ are relevant for “Regulation of Combinations”.

### Agreement

The term includes any arrangement or understanding or action in concert—

- (i) whether or not, such arrangement, understanding or concert is in formal or in writing; or
- (ii) whether or not such arrangement, understanding or concert is intended to be enforceable by legal proceedings.

It implies that an arrangement need not necessarily be in writing. The term is relevant in the context of Section 3, which envisages that anti-competitive agreements shall be void and thereby prohibited by the law. [Section 2(b)]

The term “Competition” is not defined in the Act. However, in the corporate world, the term is generally understood as a process whereby the economic enterprises compete with each other to secure customers for their product. In the process, the enterprises compete to outsmart their competitors, sometimes to eliminate their rivals. Competition in the sense of economic rivalry is unstable and has a natural tendency to give way to a monopoly. Thus, competition kills competition.

### Cartel

“Cartel” includes an association of producers, sellers or distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of or, trade in goods or provision of services. [Section 2(c)]

The nature of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.

An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.

An import cartel comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country.

An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Competition Act, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements. This is because such cartels do not adversely affect markets in India and are hence outside the purview of the Competition Act.

If there is effective competition in the market, cartels would find it difficult to be formed and sustained.

*Some of the conditions that are conducive to cartelization are:*



- *high concentration - few competitors*
- *high entry and exit barriers*
- *homogeneity of the products (similar products)*
- *similar production costs*
- *excess capacity*
- *high dependence of the consumers on the product*
- *history of collusion*

### **Chairperson**

Chairperson means the Chairperson of Competition Commission of India appointed under Sub-section (1) of Section 8. [Section 2(d)]

### **Commission**

Commission means Competition Commission of India established under Section 7(1). [Section 2(e)]

### **Consumer**

Under that Act, the Consumer includes only such purchasers or buyers who make purchases for their own consumption or to earn their livelihood. This deficiency has now been made good – by defining “Consumer” under the Act. Consumer means any person who—

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use.
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment when such services are availed of with the approval of the first mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use. [Section 2(f)]

It may be noted that under the Competition Act even if a person purchases goods or avails of services for



commercial purpose, he will be a Consumer, whereas for purposes of Consumer Protection Act, a person purchasing goods/availing services for commercial purposes is not a “Consumer” and can not seek relief under that Act.

### **Director General**

Director General means the Director General appointed under Section 16(1) and includes Additional, Joint or Deputy or Assistant Director Generals. [Section 2(g)]

### **Enterprise**

Enterprise means a person or a department of the Government, who or which is, engaged in any activity, relating to production, control of goods or articles or provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities whether such unit or division or subsidiary is located at the same place where the enterprise is located or at different place(s).

However, it does not include any activity of the Central Government relating to sovereign functions of Government including all activities carried on by the Government Departments dealing with atomic energy, currency, defence and space.

‘Activity’ includes profession or occupation. ‘A unit or division’ includes a plant or factory established for production, supply, distribution, acquisition or control of any goods or any branch or office established for provision of any service. [Section 2(h)]

It may thus be noted that sovereign function of Government are excluded from definition of enterprise but Government Departments performing non-sovereign functions for consideration are subject to jurisdiction of Commission.

### **Goods**

Goods means goods as defined in Sale of Goods Act, 1930 and includes—

- (a) products manufactured, processed or mined;
- (b) debentures, shares and stocks after allotment;
- (c) in relation to ‘goods supplied’, goods imported into India. [Section 2(i)]

### **Member**

Member means a Member of the Commission appointed under Section 8(1) of the Act and includes a Chairperson. [Section 2(j)]

### **Notification**

Notification means notification published in the Official Gazette. [Section 2(k)]

### **Person**

Person includes (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons; (vi) a corporation established under Central, State Act or a Government Company (vii) a body corporate incorporated by or under a law of a foreign country; (viii) a co-operative society registered under any Law (ix) local authority (x) every artificial juridical person.

‘Government Company’ for this Section will be same as defined under Section 617 of Companies Act, 1956. [Section 2(p)]

### **Practice**

Practice includes any practice relating to carrying on of any trade by a person or enterprise. [Section 2(p)]

### **Prescribed**

Prescribed means prescribed by rules made under the Act by Central Government. [Section 2(n)]

### **Price**

Price, in relation to sale of goods or supply of services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration, which relates to sale of any goods or to performance of any services although ostensibly relating to any other matter or thing. [Section 2(o)]

### **Public Financial Institution**

Public Financial Institution means a Public Financial Institution as defined in Section 4A of Companies Act, 1956 and includes a State Financial, Industrial or Investment corporation. [Section 2(p)]

### **Regulations**

Regulations means the regulations made by the Competition Commission of India. [Section 2(q)]

### **Relevant Market**

Relevant market means the market, which may be determined by the Commission with reference to 'relevant product market' or 'relevant geographic market' or with reference to both the markets. [Section 2(r)]

### **Relevant Geographic Market**

Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas. [Section 2(s)]

### **Relevant Product Market**

Relevant Product Market means a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of products or services, their prices and intended use. [Section 2(t)]

The terms 'relevant market', 'relevant geographical market' and 'relevant product market' have relevance in determination of the agreements being anti competitive, in evaluating combinations and dominance of an enterprise or group. An agreement in the nature of cartel which limits or controls production, supply, market, technical development, investments etc. need to be looked as being anti competitive with reference to relevant market. Similarly agreement to share the market or sources of production by way of allocation of geographical area of market, types of goods or services or number of customers in the market or by any similar way and these need to be interpreted in the context of the definition of relevant geographical market under Section 2(s).

### **Service**

Service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement,

construction, repair, conveying of news or information and advertising. [Section 2(u)]

It may be noted that under the Competition Act, the services of industrial or commercial nature also fall within the scope of the Act whereas under the Consumer Protection Act, the services of commercial nature or for business or industrial purposes are excluded for interpreting deficiency in the supply thereof and for determining compensation, if any, payable to them. To this extent, the relief claimable under the Consumer Protection Act, 1986 is limited in scope. It may also be noted that “education” has been specifically included in ambit of “Service” to set at rest the dispute, if any, about the jurisdiction of Commission in such matters.

## Shares

Shares means shares in the share capital of a company carrying voting rights and includes, –

- (i) any security which entitles the holder to receive shares with voting rights;
- (ii) stock except where a distinction between stock and share is expressed or implied. [Section 2(v)]

This definition of shares is much wider than what is provided under the Companies Act. It implies that not only shares in the share capital of a company e.g. equity or preference shares are included in the definition of shares but ‘debentures convertible into shares with voting rights’ are also included.

## Statutory Authority

Statutory authority means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto. [Section 2(w)]

It implies that this definition widens the scope of type of bodies, which are empowered to make a reference for enquiring into anti-competitive agreement or abuse of dominant position or make a reference for opinion on a competition issue.

## Trade

Trade means any ‘trade’, business, industry, profession or occupation relating to production, supplies, distribution, storage or control of goods and includes the provision of any services.

The definition of the term ‘trade’ is relevant, inter-alia, to the interpretation of any of the type of agreement listed in Section 4 (a), (b), (c), (d) and (e) in relation to the trading goods and provisions of services. [Section 2(x)]

## Turnover

Turnover includes value of sale of goods or services. [Section 2(y)]

The definition of the term ‘turnover’, inter-alia, is relevant and significant in determining whether the combination of merging entities exceeds the threshold limit of the turnover specified in Section 5 of the Act. It is also relevant for the purpose of imposition of fines by the Commission.

Section 2 further provides that the words and expression used but not defined in the Competition Act, 2002 and defined in the Companies Act, 1956 [(1) of 1956] shall have the same meaning respectively assigned to them in the Companies Act, 1956 (1 of 1956).

Chapter II of the Competition Act, 2002 stipulates provisions relating to Prohibition of Certain Agreements, Abuse of Dominant Position and Regulations of Combinations.

## Anti Competitive Agreements

It is provided under Section 3(1) of the Competition Act that no enterprise or association of enterprises or

person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. Section 3(2) further declares that any anti competitive agreement within the meaning of sub-section 3(1) shall be void. Under the law, the whole agreement is construed as 'void' if it contains anti-competitive clauses having appreciable adverse effect on competition. Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or associations of persons or person or enterprise or practice carried on, or decision taken by any association of enterprises or association of persons, including "cartels", engaged in identical or similar goods or services which –

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and
- (d) directly or indirectly results in bid rigging or collusive bidding;

shall be presumed to have an appreciable adverse effect on the competition and onus to prove otherwise lies on the defendant.

The explanation appended to the Section 3 defines the term 'bid rigging' as any agreement between enterprises or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Efficiency enhancing joint ventures entered into by parties engaged in identical or similar goods or services, shall not be presumed to have appreciable adverse effect on competition but judged by rule of reason. The term "cartel" used in the Section is the most severe form of entering into 'anti competitive agreements' and has been defined in Section 2(c).

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

### **Bid rigging is anti-competitive**

Bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private bodies (companies, corporations, etc.). But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

*Some of the most commonly adopted ways in which collusive bidding or bid rigging may occur are:*

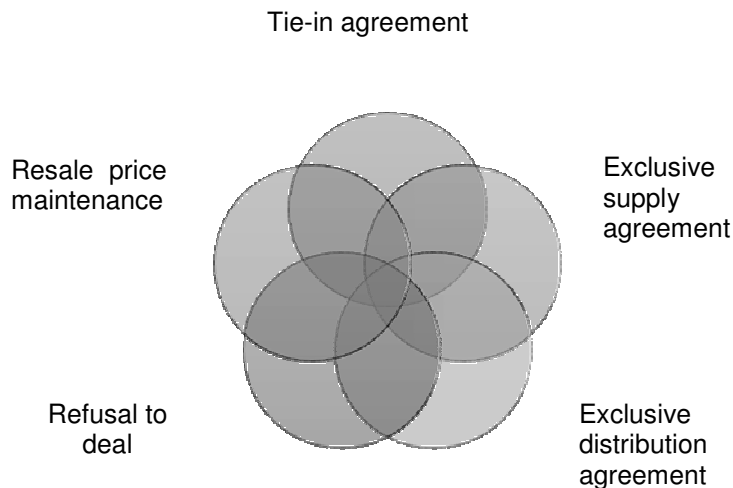


- *agreements to submit identical bids*
- *agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntarily inflated bids)*
- *agreements not to bid against each other,*

- *agreements on common norms to calculate prices or terms of bids*
- *agreements to squeeze out outside bidders*
- *agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis*

If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending. Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.

Section 3(4) provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —



shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

The term “**tie-in agreement**” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. A good example of tie-in agreement is where a gas distributor requires a consumer to buy a gas stove as a pre condition to obtain connection of domestic cooking gas. [*Chanakaya and Siddharth Gas company, In-re RTP 11/1985* decided by (MRTP Commission on 27.1.1985)]

“**Exclusive supply agreement**” includes any agreement restricting in any manner from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Thus, where a manufacturer asks a dealer not to deal in similar products of its competitor directly or indirectly and discontinues the supply on the ground that dealer also deals in product of suppliers’ competitor’s goods is an illustration of exclusive dealing agreement. [*Bhartia Curtec Hammer Ltd. In-re (1997) 24 CLA 104 (MRTPC)*]

“**Exclusive distribution agreement**” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

Requiring a distributor not to sell the goods of the manufacturer beyond the prescribed territory is a good

example of exclusive distribution agreement. Vadilal Enterprise Ltd. In-re (1998 (91) COMP CAS 824 is a good example of exclusive distribution agreement.

“**Refusal to deal**” includes any agreement, which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. For eg. an agreement which provides that the franchisees will not deal in products or goods of similar nature for a period of three years from the date of determination of agreement within a radius of five kms from showroom amounts to exclusive dealing agreement. *DGIR v. Titan industries* (2001) 43 CLA 293 MRTPC.

“**Resale price maintenance**” includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Any stipulation that the cement dealer should not sell below the stipulated price is a ‘resale price maintenance’ practice and is an anti competitive practice. (In re-India Cement Ltd. RTP Inquiry 48 /1985).

The agreements falling in Section 3(3) shall be presumed to have appreciable adverse affect on competition and thereby they are construed as deemed restrictive agreements. The agreements falling in Section 3(4) shall be judged by rule of reason and the onus lies on the prosecutor to prove its appreciable adverse effect on competition. The definition of all restrictive concepts covered under Section 3(4) is inclusive one.

Moreover, Section 3 does not restrict the right of any person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

- (a) the Copyright Act, 1957;
- (b) the Patents Act, 1970;
- (c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
- (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999;
- (e) the Designs Act, 2000;
- (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000.

That apart, the Act does not restrict any person’s right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provision of services for fulfilling export contracts. The exclusion of ‘export business’ is in view of ‘effect theory’, and doctrine of ‘relevant market’.

### **WHAT IS AN ANTI-COMPETITIVE AGREEMENT?**

*An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:-*

- *agreement to limit production and/or supply;*
- *agreement to allocate markets;*
- *agreement to fix price;*
- *bid rigging or collusive bidding;*
- *conditional purchase/ sale (tie-in arrangement);*
- *exclusive supply / distribution arrangement;*
- *resale price maintenance; and*
- *refusal to deal.*



### Prohibition of abuse of dominant position

Section 4 of the Competition Act, 2002 expressly prohibits any enterprise or group from abusing its dominant position, meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to—

- (i) operate independently of competitive forces prevailing in the relevant market; or
- (ii) affect its competitors or consumers or the relevant market in its favour”.

In line with the latest global trend, the dominance shall not be determined with reference to “assets”, “turnover” or “market share”.

As per Section 2(r) ‘relevant market’ means the market, which may be determined by the Commission with reference to the relevant ‘product market’ or ‘relevant geographic market’ or with reference to both the markets. Thus, for determining dominance, these are relevant concepts.

The term “enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

For the purposes of this clause, “activity” includes profession or occupation; “article” includes a new article and “service” includes a new service; “unit” or “division”, in relation to an enterprise, includes—

- (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
- (ii) any branch or office established for the provision of any service.

Section 4(2) states that there shall be abuse of dominant position, if an enterprise or group —

- (a) directly or indirectly imposes unfair or discriminatory;
  - (i) condition in purchase or sale of goods or services; or
  - (ii) price in purchase or sale (including predatory price) of goods or service.

Explanation appended to Section 4 (2) clarifies that the unfair or discriminatory condition in purchase or sale of goods or services shall not include any discriminatory condition or price which may be adopted to meet the competition.

Section 4(2)(b) includes in abuse of dominant position an enterprise or group limiting or restricting

- (i) production of goods or provision of services or market therefore; or
- (ii) technical or scientific development relating to goods or services to the prejudice of consumers.

Similarly Section 4 (2) (c), (d) and (e) specify three other forms of abuses namely, if any person indulges in practice or practices resulting in denial of market access in any manner; or makes conclusion of contracts

subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts and also, if any person uses dominant position in one relevant market to enter into, or protect, other relevant market.

The term “predatory price” has been defined as the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors. Thus, the two conditions precedent to bring a case with the ambit of predatory pricing are:

- (i) selling goods or provision of service at a price which is below its cost of production and
- (ii) that practice is resorted to eliminate the competitors or to reduce competition.

The Competition Commission of India has been empowered under Section 19(4) of the Act to determine whether any enterprise or group enjoys a dominant position or not, in the ‘relevant market’ and also to decide whether or not there has been an abuse of dominant position. It may be noted that mere existence of dominance is not to be frowned upon unless the dominance is abused.

#### **WHAT CONSTITUTES ABUSE OF DOMINANCE?**

*Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit. Abuse of dominant position includes:*

- *imposing unfair conditions or price,*
- *predatory pricing,*
- *limiting production/market or technical development ,*
- *creating barriers to entry,*
- *applying dissimilar conditions to similar transactions,*
- *denying market access, and*
- *using dominant position in one market to gain advantages in another market.*



#### **Combinations**

Combination has broad coverage and includes acquisition of control, shares, voting rights, assets, merger or amalgamation.

#### **WHAT IS COMBINATION?**

*Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and outside India. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.*





**Threshold of Combination specified under section 5 of the Act in tabular form given below:**

On March 4, 2016, the Central Government issued notifications pertaining to the statutory thresholds for the purposes of “combinations” under Section 5 of the Competition Act, 2002 (“Act”).

1. **Increase in thresholds:** Pursuant to Notification No. S.O. 675(E) dated March 4, 2016, the value of assets and the value of turnover has been enhanced by 100% for the purposes of Section 5 of the Act. Accordingly, the revised thresholds for notification to the Competition Commission of India (“Commission”) are:

THRESHOLDS FOR FILING NOTICE				
		Assets		Turnover
Enterprise Level	India	>2000 INR crore	OR	>6000 INR crore
	Worldwide with India Leg	>USD 1 bn with at least > 1000 INR crore in India		>USD 3 bn with at least > 3000 INR crore in India
OR				
Group Level	India	>8000 INR crore	OR	>24000 INR crore
	Worldwide with India leg	>USD 4 bn with at least >1000 INR crore in India		>USD 12 bn with at least > 3000 INR crore in India

1. **Increase in thresholds of De Minimis Exemption:** Pursuant to Notification No. S.O. 674 (E) dated March 4, 2016, acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets of not more than Rs. 350 crore in India or turnover of not more than Rs. 1000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. Accordingly, the revised threshold for availing of the De Minimis exemption for acquisitions are:

THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION FOR ACQUISITIONS				
		Assets		Turnover
Target Enterprise	In India	≤ 350 INR crore	OR	≤ 1000 INR crore

1. **Definition of Group:** As per Notification No. S.O. 673 (E) dated March 4, 2016, the exemption to the “group” exercising less than fifty per cent of voting rights in other enterprise from the provisions of Section 5 of the Act under Notification No. S.O. 481 (E) dated March 4, 2011, has been continued for a further period of 5 years.

**Regulation of Combinations**

Section 6 of the Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India

and if such a combination is formed, it shall be void. Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form, prescribed and submit the form together with the fee prescribed by regulations. Such intimation should be submitted within 30 days of—

- (a) approval of the proposal relating to merger or amalgamation, referred to in Section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;
- (b) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

A newly inserted sub-section (2A) envisages that no combination shall come into effect until 210 days have passed from the day of notice or the Commission has passed orders, whichever is earlier.

The Competition Commission of India (CCI) has been empowered to deal with such notice in accordance with provisions of Sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under Section 6(2) is correct and whether the combination has, or is likely to have, an appreciable adverse effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

The provisions of Section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. This exemption appears to have been provided in the Act to facilitate raising of funds by an enterprise in the course of its normal business. Under Section 6(5), the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement, within seven days from the date of such acquisition or entering into such agreement, as the case may be.

As per the explanation appended to Section 6(5)

- (a) “foreign institutional investor” has the same meaning as assigned to it in clause (a) of the Explanation to Section 115AD of the Income-tax Act, 1961;
- (b) “venture capital fund” has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of Section 10 of the Income-tax Act, 1961.

It may be noted that under the law, the combinations are only regulated whereas anti-competitive agreements and abuse of dominance are prohibited. Further, under the MRTP Act prior to 27.9.91, undertakings of certain size were required to be registered and such undertakings were required to seek prior approval of the Central Government before embarking upon expansion plans. In the present Act, there is no requirement of registration of an undertaking and further, there is no need to have prior approval of the Central Government but CCI will only examine as to whether or not combination is or is likely to have an appreciable adverse effect on competition.

The Competition Act with many innovative concepts coupled with power to impose fine is likely to let in harsh glare of sunlight to disinfect pernicious anti-competitive practices.

## **Competition Commission of India**

### ***Establishment of Commission***

The Central Government under Section 7 has been empowered to establish a Commission to be called

“Competition Commission of India” by issue of a Notification. The Commission is a body corporate having perpetual succession and a common seal. The Commission has power to acquire, hold movable or immovable property and to enter into contract in its name and by the said name, sue or be sued. In the premises, the set up of Commission corresponds to that of Securities & Exchange Board of India constituted under the SEBI Act, 1992.

The Head Office of the Commission shall be at such place as the Central Government may decide from time to time. Vide Notification: SO 1198(E) dated 14<sup>th</sup> Oct., 2003, the Central Government established the Competition Commission of India having its Head Office at New Delhi.

The Commission has also been authorized to establish its office at other places in India. Thus, the law provides for setting up of CCI's offices at places other than that of its Headquarter.

### ***Composition of Commission***

The composition of the Commission as spelled out under Section 8 of the Act consists of a Chairperson and not less than two and not more than six other Members. The Chairperson and the Members are to be appointed by the Central Government. Regarding the qualifications of the Chairman and other Members, Section 8(2) provides that they shall be person of ability, integrity and standing and who has special knowledge of and such professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy which in the opinion of the Central Government, may be useful to the Commission. The Chairperson and other Members are to be appointed on whole time basis.

### ***Selection of Chairperson and Members of Commission***

Section 9(1) envisages that the Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of the Chief Justice of India or his nominee, as Chairperson; and the Secretary in the Ministry of Corporate Affairs, Member; the Secretary in the Ministry of Law and Justice, Member; and two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy, as member.

### ***Term of office of Chairperson and other Members***

The Act stipulates that the Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years.

A vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 8 and 9. The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed.

In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office. When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.

### ***Resignation of Chairperson etc.***

It has been provided under section 11 that the Chairperson or any other Member may resign his office by notice in writing under his hand addressed to the Central Government. However, until the Chairperson or a Member is permitted by the Central Government to relinquish his office, he will continue to hold his office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as a successor enters into his office or until the expiry of his term, whichever is the earliest. Under Section 11(2), it is provided that in the following circumstances the Central Government may, by order, remove the Chairperson or any Member from his office if such Chairman or Member as the case may be, -

- (a) is, or at any time has been, adjudged as an insolvent; or
- (b) has engaged at any time, during his term of office, in any paid employment; or
- (c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
- (d) has acquired such financial or other interest as it likely to affect prejudicially his functions as a Member; or
- (e) has so abused his position as to render his continuance in office prejudicial to the public interest; or
- (f) has become physically or mentally incapable of acting as a Member.

However, no Member shall be removed from his office on the ground that he has acquired such financial or other interest as is likely to affect prejudicially his function as a Member or has so abused his position as to render his continuance in public office prejudicial to the public interest unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has on an inquiry as prescribed reported that the Member ought on such ground or grounds to be removed.

Section 12 provides that for a period of two years from the date on which the Chairperson and other Member cease to hold office shall not accept any appointment in or connected with the management or administration of, any enterprise which has been a party to the proceeding before the Commission. This restriction, however, shall not apply to any employment under the Central Government or a State Government or local authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956 (10 of 1956).

### **Financial and Administrative Powers of Member Administration**

A Member of the Commission as per Section 13 may be designated by the Central Government as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules made by the Central Government. However, the Member Administration shall have authority to delegate such of his financial and administrative powers to any other officer of the Commission as he may deem fit subject to the condition that, while exercising delegated powers such official shall continue to act under the direction, superintendence and control of the Member Administration.

### **Salary and Terms and Conditions of Service**

The salary allowances and other terms and conditions of service of the Chairman and other member including travel expenses, house rent allowance, conveyance facility, sumptuary allowance and medical facilities shall be such as may be prescribed. Further, to ensure freedom in the functioning of the Chairperson and the Member, Section 14(2) provides that the salary allowance and other terms and conditions of service of the Chairperson or Member shall not be varied to his disadvantage after his appointment.

No act or proceedings of the Commission shall be invalid merely because there is any vacancy in the Commission or defect in the constitution of the Commission; or any defect in the appointment of Chairperson or a Member; or any irregularity in the procedure of the Commission not affecting the merits of the case.

### **Appointment of Director General**

Director General is an important functionary under the Act. He is to assist the Commission in conducting inquiry into contravention of any of the provisions of the Act and for performing such other functions as are, or may be, provided by or under the Act.

Section 16 (1) empowers the Central Government to appoint a Director General and such number of additional, joint, deputy or assistant Director Generals or other advisers, consultants or officers for the purposes of assisting the Commission in conducting inquiry into the contravention of any provision of the Act.

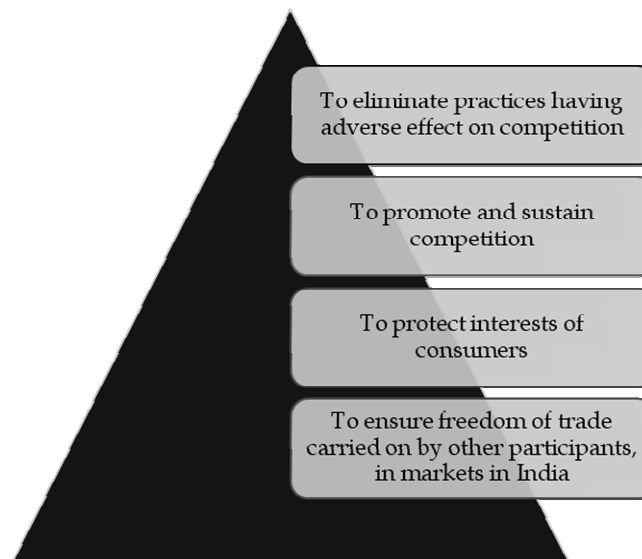
Additional, joint, deputy and assistant Director Generals, other advisers, consultants and officers shall however, exercise powers and discharge functions subject to the general control, supervision and directions of the Director General.

The salary, allowances and other terms and conditions and service of Director General, consultants, advisers or other officers assisting him shall be such as may be prescribed by the Central Government. The Director General, advisers, consultants and officers assisting him are to be appointed from amongst the persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

The Commission may appoint a Secretary and such officers and other employees, as it considers necessary for the efficient performance of his functions under the Act. The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under the Act.

### **Duties, Powers and Functions of Commission**

As per Section 18 of the Act, duties of the CCI are:—



Section 18 empowers the Commission to enter into any memorandum or arrangement, with the prior approval of the Central Government, for the purpose of discharging the duties and functions under this Act with any agency of any foreign country. This will enable the CCI to have extra territorial reach and shall facilitate exchange of information and enforcement of its order.

### **Inquiry into certain agreements and dominant position of enterprise**

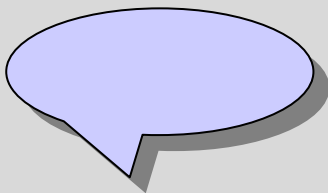
The Commission may inquire into any alleged contravention of Section 3(1) or 4(1) on its own motion or on

- (a) receipt of any information in such manner and accompanied by such fee, from any person, consumer or consumer association or trade association; or
- (b) a reference made to it by the Central Government or State Government or a statutory authority.

The Director General is not vested with a right to move an application for institution of an enquiry relating to anti-competitive agreements or abuse of dominance.

The terms 'person' and 'statutory authority' have been defined under Sections 2(l) and 2(w) respectively. The term 'person' has been given wide connotation and it includes an individual, a HUF, a company, a firm, an association of persons, any corporation established under any Central, State or Provincial Act or a Government company, a co-operative society, a local authority and every artificial juridical person.

*Section 19(3) provides that while determining whether an agreement has appreciable adverse effect on competition, the Commission shall give due regard to all or any of the following factors, namely–*

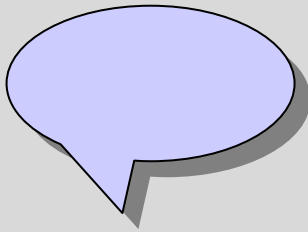


- (a) creation of barriers to new entrants in the market;
- (b) driving existing competitors out of the market;
- (c) foreclosure of competition by hindering entry into the market;
- (d) accrual of benefits to consumers;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

The first three factors are anti-competitive, while the latter three factors deal with benign effects.

“Adverse appreciable affect on competition” is a key factor while enquiring into anti-competitive agreement. The touch stone of appreciable adverse effect on competition need not be proved while enquiring into abuse of dominance.

*For the purpose of determining whether an enterprise enjoys dominant position or not under Section 4, the Commission shall have due regard to all or any of the following factors, namely –*



- (a) market share of the enterprise;
- (b) size and resources of the enterprise;
- (c) size and importance of the competitors;
- (d) economic power of the enterprise including commercial advantages over competitors;
- (e) vertical integration of the enterprises or sale or service network of such enterprises;
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (i) countervailing buying power;
- (j) market structure and size of market;
- (k) social obligations and social costs;
- (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- (m) any other factor which the Commission may consider relevant for the inquiry.

The present law makes explicit the issues and the parameters which will be considered while deciding “abuse of dominance”. The Commission shall have due regard to the, “relevant geographic market” and “relevant product market” for determining as to what constitutes a “relevant market”.

The terms ‘relevant market’ and “relevant geographic market” have been defined in Sections 2 (r) and 2(s) of the Act. ***For determining the “relevant geographic market”, the Commission shall have due regard to all or any of the following factors, namely;—***

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;

- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences;
- (h) need for secure, regular supplies or rapid after-sales service.

*Similarly, while determining 'relevant product market' the Commission shall have due regard to all or any of the following factors namely;*

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialized producers;
- (f) classification of industrial products.

The prescription of parameters for determining “appreciable adverse effect” on competition of agreement, “dominant position”, within “relevant market”, are intended to bring consistency and certainty in the working of the Commission which has to consider all or any of the applicable factors, as the case may be. It is quite apparent that any inquiry by the CCI will be a detailed exercise, which will not only involve gathering of information in regard to technological or marketing factors but also the government policy which relate to the trade or business in which the enterprise is involved beside global scenario especially with regard to regulatory trade barriers including import-export policy, tariff and subsidy issues will also be taken into account by the Commission.

### **Inquiry into Combination by Commission**

The Commission under Section 20 of the Competition Act may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination either upon its own knowledge or information (suo motu) or upon receipt of notice under Section 6(2) relating to acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b) or merger or amalgamation referred to in Section 5(c) of the Act. It has also been provided that an enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the law has provided a time limit within which suo moto inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

On receipt of the notice under Section 6(2) from the person or an enterprise which proposes to enter into a combination, it is mandatory for the Commission to inquire whether the combination referred to in that notice, has caused or is likely to cause an appreciable adverse effect on competition in India.



*The Commission shall have due regard to all or any of the factors for the purposes of determining whether the combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, namely—*



- (a) actual and potential level of competition through imports in the market;
- (b) extent of barriers to entry into the market;
- (c) level of combination in the market;
- (d) degree of countervailing power in the market;
- (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- (f) extent of effective competition likely to sustain in a market;
- (g) extent to which substitutes are available or are likely to be available in the market;
- (h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- (i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- (j) nature and extent of vertical integration in the market;
- (k) possibility of a failing business;
- (l) nature and extent of innovation;
- (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The above yardsticks are to be taken into account irrespective of fact whether an inquiry is instituted, on receipt of notice under Section 6(2) upon its own knowledge. The scope of assessment of adverse effect on competition will be confined to the “relevant market”. Most of the facts enumerated in Section 20 (4) are external to an enterprise. It is noteworthy that sub clause (n) of Section 20 (4) requires to invoke principles of a “balancing”. It requires the Commission to evaluate whether the benefits of the combination outweigh the adverse impact of the combination, if any. In other words if the benefits of the combination outweigh the adverse effect of the combination, the Commission will approve the combination. Conversely, the Commission may declare such a combination as void.

### **Reference by statutory authority**

The term “statutory authority” has been defined in Section 2(w). If in the course of a proceeding before any statutory authority, an issue is raised by any party that any decision which such authority has taken or proposes to take, is or would be, contrary to the provisions of the Competition Act 2002, it may make a reference in respect of such issue to the Commission and seek its opinion. The Commission shall, on receipt of the reference, after hearing the parties to the proceedings, give its opinion within 60 days of receipt of such reference to such authority on the issues referred to it. The statutory authority shall thereafter pass

such order on the issues referred to the Commission as it deems fit. The statutory authority may, *suo motu* make such reference in respect of such issue to the Commission. Likewise, the Commission either in the course of proceedings before it or *suo motu* may make a reference for opinion to a statutory authority and the latter has to render its opinion within 60 days of making a reference.

### **Meetings of Commission**

Section 22 provides that the Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations. The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting. All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote. However, the quorum for such meeting shall be three Members.

### **Procedure for inquiry on complaints under Section 19**

If the Commission is of the opinion that there exists a prima facie case, on receipt of an information from any person, consumer, their association or trade association or on a reference from Central Government or State Government or of a statutory authority or on its knowledge or information under Section 19, it shall direct the Director General to cause an investigation to be made into the matter. The Director General shall investigate into the matter and submit a report of its findings within the period as may be specified by the Commission. It is, however, not binding on the Commission to accept the report of the Director General.

Where upon receipt of a reference or information, the Commission is of the opinion that there is no prima-facie case, it shall pass an order dismissing the reference/information, as it deems fit and necessary.

Upon receipt of a report from the Director General, the Commission shall forward a copy thereof to (a) the parties concerned or (b) Central Government or (c) State Government or (d) statutory authority as the case may be. If the Director General, in relation to a matter referred to it, recommends that there is no contravention of any of the provisions of the Act, the Commission shall give an opportunity of hearing to the informant and after hearing, if the Commission agrees with the recommendation of the Director General, it shall dismiss the information. According to Section 26(7) if, after hearing information provider, the Commission is of the opinion that further inquiry is called for, it shall direct the enquiry to proceed further.

Where the report of the Director General relates to matter referred to Commission by the Central Government or a State Government or a statutory authority and the report contains recommendation that there is no contravention of the provisions of the Act, the Commission shall invite the comments of the Central Government or the State Government or statutory authority, as the case may be, on such report. On receipt of the comments, if there is no prima-facie case, in the opinion of the Commission the Commission shall return the reference. However, if the Commission feels that there is a prima-facie case it shall proceed with a reference.

Section 26(9) provides that the Commission on receipt of recommendation of Director General that there is contravention of any of the provisions of the Act, and a further inquiry is called for, shall inquire into such contravention in accordance with the provisions of the Act.

The provisions of the Section indicate that it is mandatory that information or reference received or a matter which comes to the knowledge of the Commission regarding alleged violation of the provisions of the Act, must be referred to the Director General for an investigation in the matter. A copy of the report of the Director General is required to be sent to the information provider or to the Central Government or State Government

or a statutory authority, as the case may be, for their comments and an opportunity of hearing is required to be given to the parties as this is warranted by the principles of natural justice. Where the Director General recommends that there is contravention of any of the provisions of the Act, and that the Commission is of opinion that further inquiry is called for, it shall institute an inquiry into the matter and pass a reasoned order. The Commission may or may not subscribe to the recommendations of the Director General.

### **Orders by Commission after inquiry into agreements or abuse of dominant position**

Section 27 envisages that the Commission after any inquiry into agreement entered into by any enterprise or association of enterprises or person or association of persons, or an inquiry into abuse of dominant position may pass all or any of the following orders, namely,—

- (i) direct that such agreement, or abuse of dominant position shall be discontinued and such agreement, which is in contravention of Section 3 shall not be re-entered or the abuse of dominant position in contravention of Section 4 shall be discontinued, as the case may be. The direction to discontinue and not to recur is commonly known as “Cease & desist” order.
- (ii) the Commission may impose penalty not exceeding ten percent of the average turnover of last three preceding financial years, upon each of person or enterprises which are parties to such agreement in contravention of Section 3 or are abusing dominant position within meaning of Section 4.

In case any agreement which is prohibited by Section 3 has been entered into by any cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider participating in that cartel, a penalty up to three times of its profits for each year of the continuance of such agreement whichever is higher.

- (iii) The Commission may direct that the agreements shall stand modified to the extent and in the manner as specified in the order.
- (iv) The Commission may direct the enterprises concerned to comply with such other orders and directions, including payment of cost, if any, as it deems fit.
- (v) to pass such order or issue such directions as it may deem fit.

### **Division of enterprise enjoying dominant position**

The Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise or group does not abuse its dominant position.

The order of the Commission referred to above may provide for all or any of the following matters, namely—

- (a) the transfer or vesting of property, rights, liabilities or obligations;
- (b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
- (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
- (e) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
- (f) any other matter which may be necessary to give effect to the division of the enterprise or group.

### Procedure for investigation of combination

The procedure for investigation by the Commission has been stipulated under Section 29 of the Act. It involves following stages -

- (i) The Commission first has to form a prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India. Further, when the Commission has come to such a conclusion then it shall proceed to issue a notice to the parties to the combination, calling upon them to show cause why an investigation in respect of such combination should not be conducted;
- (ii) After receipt of the response of the parties to the combination Commission may call for the report of the Director General.
- (iii) When pursuant to response of parties or on receipt of report of the Director General whichever is later, the Commission prima-facie is of the opinion that the Combination is likely to cause an appreciable adverse effect on competition in relevant market, it shall, within seven days direct the parties to the combination to publish within ten working days, the details of the combination, in such manner as it thinks appropriate so as, to bring to the information of public and persons likely to be affected by such combination.
- (iv) The Commission may invite any person affected or likely to be affected by the said combination, to file his written objections within fifteen working days of the publishing of the public notice, with the Commission for its consideration.
- (v) The Commission may, within fifteen working days of the filing of written objections, call for such additional or other information as it deem fit from the parties to the said combination and the information shall be furnished by the parties above referred within fifteen days from the expiry of the period notified by the Commission.
- (vi) After receipt of all the information and within forty-five days from expiry of period for filing further information, the Commission shall proceed to deal with the case, in accordance with provisions contained in Section 31 of the Act.

Thus, the provisions of Section 29 provide for a specified timetable within which the parties to the combination or parties likely to be affected by the combination are required to submit the information or further information to the Commission to ensure prompt and timely conduct of the investigation. It further imposes on Commission a time limit of forty-five working days from the receipt of additional or other information called for by it under sub-Section (4) of Section 29 for dealing with the case of investigation into a combination, which may have an adverse effect of the competition.

### Inquiry into disclosures under Section 6(2)

Section 6(2) casts an obligation on any person or enterprise, who or which proposes to enter into combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination within thirty days of—

- (i) approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned with such merger or amalgamation;
- (ii) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

Non-filing of notice attracts penalty in terms of Section 43A of the Act.

The newly inserted section 6(2A) envisages that no combination shall come into effect until two hundred and

ten days have passed from the day on which notice has been given to Commission or the Commission has passed orders, whichever is earlier.

Upon receipt of such notice, the Commission shall examine such notice and form its prima facie opinion as to whether the combination has, or is likely to have, an appreciable adverse effect on the competition in the relevant market in India.

### **Orders of Commission on Certain Combinations**

The Commission, after consideration of the relevant facts and circumstances of the case under investigation, by it under Sections 28 or 30 and assessing the effect of any combination on the relevant market in India, may pass any of the written orders indicated herein below. Where the Commission comes to a conclusion that any combination does not, or is not likely to, have an appreciable adverse effect on the Competition in relevant market in India, it may, approve that Combination.

- (i) In the case where the Commission is of the opinion that the combination has, or is likely to have an adverse effect on competition, it shall direct that the combination shall not take effect.
- (ii) Where the Commission is of the opinion that adverse effect which has been caused or is likely to be caused on competition can be eliminated by modifying such Combination then it shall direct the parties to such combination to carry out necessary modifications to the Combination.
- (iii) The parties accepting the proposed modification shall carry out such modification within the period specified by the Commission.
- (iv) Where the parties who have accepted the modification, fail to carry out such modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and shall be dealt with by the Commission in accordance with the provisions of the Act.
- (v) If the parties to the Combination do not accept the proposed modification such parties may within thirty days of modification proposed by the Commission, submit amendment to the modification proposed by the Commission.
- (vi) If the Commission agrees with the agreement submitted by the parties it shall, by an order approve the combination.
- (vii) If the Commission does not accept the amendment then, parties shall be allowed a further period of thirty days for accepting the amendment proposed by the Commission.
- (viii) Where the parties to the combination fail to accept the modification within thirty days, then it shall be deemed that the combination has an appreciable adverse effect on Competition and will be dealt with in accordance with the provisions of the Act.
- (ix) Where the Commission directs under Section 31 (2) that the combination shall not take effect or it has, or is likely to have an appreciable adverse effect, it may order that,
  - (a) the acquisition referred to in Section 5 (a); or
  - (b) the acquiring of control referred to in Section 5(b); or
  - (c) the merger or the amalgamation referred to in Section 5(c) shall not be given effect to by the parties.

As per proviso the Commission may, if it considers appropriate, frame a scheme to implement its order in regard to the above matters under Section 31(10).

- (x) A deeming provision has been introduced by Section 31(11). It provides that, if the Commission does not, on expiry of a period of two hundred ten days from the date of filing of notice under Section 6(2) pass an order or issue any direction in accordance with the provisions of Section 29(1) or Section 29(2) or Section 29(7), the combination shall be deemed to have been approved by the Commission. In reckoning the period of two hundred ten days, the period of thirty days specified in Section 29(6) and further period of thirty working days specified in Section 29(8) granted by Commission shall be excluded.
- (xi) Further more where extension of time is granted on the request of parties the period of two hundred ten days shall be reckoned after deducting extended time granted at the request of the parties.
- (xii) Where the Commission has ordered that a combination is void, as it has an appreciable adverse effect on competition, the acquisition or acquiring of control or merger or amalgamation referred to in Section 5, shall be dealt with by other concerned authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly.
- (xiii) Section 29(14) makes it clear that nothing contained in Chapter IV of the Act shall affect any proceeding initiated or may be initiated under any other law for the time being in force. It implies that provisions of this Act are in addition to and not in derogation of provisions of other Acts.

Thus, approval under one law does not make out a case for approval under another law.

### **Acts taking place outside India but having an effect on Competition in India**

Section 32 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

- (a) an agreement referred to in Section 3 has been entered into outside India; or
- (b) any party to such agreement is outside India; or
- (c) any enterprise abusing the dominant position is outside India; or
- (d) a combination has taken place outside India; or
- (e) any party to combination is outside India; or
- (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

The above clearly demonstrates that acts taking place outside India but having an effect on competition in India will be subject to the jurisdiction of Commission. The Competition Commission of India will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India.

### **Appearance before Commission**

As per Section 35 of the Act, following persons are entitled to appear before the Commission—

- (i) a complainant; or
- (ii) a defendant; or
- (iii) the Director General

They may either appear in person or authorise any of the following:

- (a) a chartered accountant as defined in Section 2(1)(b) of Chartered Accountants Act, 1949 (38 of 1949) who has obtained a certificate of practice; or
- (b) a company secretary as defined in Section 2(1)(c) of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice;
- (c) a cost accountant as defined in Section 2(1)(b) of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice;
- (d) a legal practitioner that is an advocate, vakil or an attorney of any High Court including a pleader in practice.



*The above provisions unambiguously state that a 'Company Secretary in Practice' is entitled to represent an informant or a defendant or Director General. A Company Secretary in Practice can also get himself empanelled with the Director General to prosecute his cases before the Commission.*

### Power of Commission to regulate its own procedure

The Competition Commission of India has been empowered to lay down its own procedure and regulations. It is not bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall have to observe the principles of natural justice and subject to the provisions of the Act. The Competition Commission of India shall also be subject to the rules made by the Central Government. Section 36(2) makes it clear that the Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying the suit, in respect of the following matters, namely:

**Summoning and enforcing the attendance of any person and examining him on oath**

**Requiring the discovery and production of documents**

**Receiving evidence on affidavits**

**Issuing commissions for the examination of witnesses or documents**

**Subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office.**

In terms of Section 36(3), the Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any discipline as it deems necessary to assist the Commission in the conduct of any enquiry by it.

In terms of Section 36(4), the Commission may direct any person –

- (a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of the Act;
- (b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of the Act.

The Competition Commission is thus empowered to appoint experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist in the conduct of any inquiry or proceeding before it.

As stated earlier, Director General is an important functionary assisting the Commission and the Commission may ask the Director General to investigate into any trade practice and for the purpose of examination of books, or account and other document of the parties concerned. The Director General is also vested with all the powers as are conferred upon the Commission under Section 36(2) of Act.

### **Ratification of orders**

The Commission may amend any order passed by it under the provisions of this Act with a view to rectifying any mistake apparent from the record. Section 38(2) provides that subject to other provisions of this Act, the Commission may make –

- (a) an amendment of an order of its own motion;
- (b) an amendment for rectifying any mistake apparent from record, which has been brought to its notice by any party to the order.

An explanation below the Section clarifies that while rectifying any mistake apparent from the record, the Commission shall not amend substantive part of the order passed by it under the provisions of this Act.

### **Execution of Orders of the Commission Imposing Monetary penalty**

Section 39 provides that if a person fails to pay any monetary penalty imposed on him under the Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations. In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under the Act in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine, and interest under the Income-tax Act, 1961 and to the Commission instead of the Assessing Officer.

*Explanation 1* – Any reference to sub-section (2) or sub-section (6) of section 220 of the income-tax Act, 1961 (43 of 1961), in the said provisions of that Act or the rules made thereunder shall be construed as



references to sections 43 to 45 of this Act.

*Explanation 2* – The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act, 1961 shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

*Explanation 3* – Any reference to appeal in Chapter XVIII and the Second Schedule to the Income-tax Act, 1961 shall be construed as a reference to appeal before the Competition Appellate Tribunal under section 53B of this Act.

It would be noted that Commission may by its Regulations has been empowered to evolve procedure of recovering monetary penalty. It may also make reference to Income Tax Authority for recovering of penalty as tax due under the said Act.

As per Section 39, every order passed by the Commission under this Act shall be executed in the same manner as if it were a decree or order made by the High Court or the Principal Civil Court in any suit pending therein.

It shall be lawful for the Commission to send, in event of its inability to execute it such order to the High Court or to the Principal Civil Court, as the case may be, within the limits of whose jurisdiction—

- (a) in the case of an order passed against any company or firm; the registered office or the sole or principal office of the business of company in India or where a company also has a subordinate office, that subordinate office, is situated;
- (b) in the case of an order passed against any other person, the place, where he voluntarily resides or carries on business or personally works for gain, is situated.

There upon the court to which the order is so sent shall execute the order as if it were a decree or order sent to it for execution.

### **Duties of Director General**

The Act provides that the Director General when so directed by the Commission, is to assist the Commission in investigation into any contravention of the provisions of this Act. The Director General is bound to comply with such a direction to render requisite assistance to the Commission.

The Director General, in order to effectively discharge his functions, has been given the same powers as are conferred upon the Commission under section 36(2). Under section 36(2) the Commission is having same powers as are vested in Civil Court under the Code of Civil Procedure (1908) while trying a suit, in respect of the following matters, namely;

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;

Without prejudice to the above powers, the provisions of Sections 240 and 240A of the Companies Act, 1956, so far as may be, shall apply to an investigation made by the Director General or by a person authorised by him, as they apply to an inspector under the Companies Act 1956. This power includes search and seizure of the record of any person in respect of which an investigation has been directed by the Commission. It has been provided that wherever the approval of the Central Government is required, the same shall be given by the Commission and the word 'magistrate' appearing in Section 240A shall be construed as the Chief Metropolitan Magistrate.

### **Penalties**

The Competition Act prescribes penalties for contravention of orders of the Commission. As per Section 42, the Commission may cause an inquiry to be made into compliance of its orders or directions and —

- (a) if any person, without any reasonable cause, fails to comply with any order of the Commission, or condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act; or
- (b) if any person fails to pay the penalty imposed under the Act,

he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to rupees twenty five crores or with both, as the Chief Metropolitan Magistrate may deem fit. The Chief Metropolitan Magistrate, Delhi, however, shall not take cognizance of any offence save as a complaint filed by Commission or any of its officers authorized by it.

### **Compensation in case of Contravention of Orders of commission**

Section 42A provides that without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

### ***Penalty for failure to comply with directions of Commission and Director General***

Section 43 of the Act provides that if any person fails to comply, without reasonable cause, with a direction given by the Commission under Sub-sections (2) and (4) of section 36; or the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission

### ***Power to impose penalty for non-furnishing of information on combination***

Section 43A provides that if any person or enterprise who fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination.

Thus, failure to file notice of combination falling under Section 5 attract deterrent penalty.

### ***Penalty for making false statement***

Section 44 provides that If any person, being a party to a combination, makes a statement which is false in

any material particular, or knowing it to be false; or omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

### **Power to impose lesser penalty**

If any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of alleged violations and such a disclosure is vital, the Commission may impose upon him a lesser penalty than as prescribed under the Act or rules or regulations.

However, the lesser penalty shall not be imposed where before making such disclosure, the report of Director General under Section 26 has been received in the Commission. Further, the lesser penalty shall be imposed only in respect of the producer, seller, distributor, trader or service provider included in the cartel, who has made a full, true and vital disclosures under this Section. Any producer, seller, trader or service provider included in the cartel shall also be liable to imposition of penalty, if in the course of proceedings, had,—

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
- (b) given false evidence; or
- (c) the disclosure made is not vital.

The lesser penalty is for a member of a ring who breaks the rank. There is no provision to provide any protection or incentive to a whistle blower, which is conferred upon Authorities in contemporary legislations abroad.

The Act does not vest power in the Commission to compound an offence as was the position under the MRTTP Act. It is viewed that long drawn investigation and enquiries could be arrested by provision such as compounding which allows an offence to be settled quickly. The Commission is also not vested with power to contempt.

### **Contravention by Companies**

A company means a body corporate and includes a firm or other association of individuals; director, in relation to a firm, means a partner in the firm for the purposes of penalties in connection with contravention of the provisions of the Act by companies.

Where any rule, regulation, order made by the Commission or any direction issued thereunder is contravened by a company, every person who, at the time the contravention was committed, was in charge, and was responsible to the company for conducting business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished. However it will be a good defence by a person liable to any punishment if he proves that the contravention was committed without his knowledge or that he has exercised all due diligence to prevent the commission of an offence.

Where a contravention of any of the provisions of this Act or any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that contravention has taken place with the consent or connivance of, or it is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

The word company in this Section, has been used in a wider sense and also includes a 'firm' or an 'association of persons'. Though the word 'director' is normally used in a company, in the light of the wider definition, the term director is interpreted to include a partner of the firm. The company being a legal person, its affairs are conducted by a board of directors, manager, secretary or other officer, therefore, according to Section 48 (2) such director, manager, secretary or other officer, in addition to the company itself shall be deemed to be liable to be proceeded against for contravention of any provisions of this Act or any rule, regulation, order made or direction issued thereunder by the Commission or the Director General of Investigation.

### **Competition Advocacy**

Under Section 49 the Central Government/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. In this context, Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within sixty days of making such a reference and the latter may formulate the policy as it deems fit. The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central Government/State Government in formulating such a policy. The Commission is also empowered to take suitable measures for the

- (a) promotion of competition advocacy;
- (b) creating awareness about the competition; and
- (c) imparting training about competition issues.

The creating awareness about benefits of competition and imparting training in competition issues is expected to generate conducive environment to promote and foster competition, which is sine-qua non for accelerating economic growth.

### **Finance, Accounts and Audit**

#### ***Grants by Central Government***

The Central Government may make to the Commission grants of such sums of money as it may think fit for being utilised for the purposes of the Act. Such grant is to be made after due appropriation made by the Parliament.

#### ***Constitution of Fund***

The Act provides for the constitution of a fund called the "Competition Fund" for meeting the establishment and other expenses of the Competition Commission in connection with the discharge of its functions and for the purposes of this Act. The following shall be credited to the "Competition Fund", -

- (a) all government grants received by the commission;
- (b) Omitted
- (c) the fees received under the Act;
- (d) the interest on the amounts accrued on the monies referred under clauses (a) to (c).

#### **Fee realized alongwith notice disclosing combination shall form part of 'Competition Fund'.**

The Fund shall be administered by a Committee of such Members of the Commission, as may be

determined by the Chairperson and the Committee so appointed, shall spend monies out of the Fund only for the objects for which the Fund has been constituted.

### **Accounts and Audit**

Proper accounts and other relevant records shall be maintained by the Commission and an annual statement of accounts shall be prepared by it in prescribed form in consultation with the Comptroller and Auditor General of India (CAG). The CAG shall specify the intervals within which the accounts of the Commission shall be audited by him.

Explanation to Section 52(2) clarifies that the orders passed by the Commission, being matters appealable to the Supreme Court, shall not be subject to audit by the CAG. The expenses, if any, incurred in connection with such audit shall be payable by the Commission to the CAG.

The CAG or any person appointed by him in connection with the audit of the accounts of the Commission shall have same rights, privileges and authority in connection with such audit as CAG has in connection with the audit of Government accounts and, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

Only accounts as certified by the CAG and any other person authorised by him in this behalf together with the audit report thereon shall be forwarded to the Central Government and the Government shall cause it to be laid before each House of Parliament.

### **Furnishing of Returns, etc., to Central Government**

The Commission shall furnish to the Central Government such returns and statements and such particulars in regard to any proposed or existing measures for promotion of competition advocacy, creating awareness and imparting training about competition issues, in such form and such manner as the Central Government may prescribe. An annual report giving a true and full account of activities of the Commission during the previous year shall be prepared once in every year by the Commission and submitted to the Central Government.

A copy of the annual report of the Commission received by the Government shall cause to be laid by the Central Government before each House of Parliament.

### **Right to legal representation**

A person preferring an appeal to the Appellate Tribunal may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal.

The Central Government or a State Government or a local authority or any enterprise preferring an appeal to the Appellate Tribunal may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

The Commission may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

*Explanation* – The expressions “chartered accountant” or “company secretary” or “cost accountant” or “legal practitioner” shall have the meanings respectively assigned to them in the Explanation to section 35.

### **Appeal to Supreme Court**

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them. The Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

### **Power to Punish for contempt**

The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to modifications that,—

- (a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;
- (b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf.

## **MISCELLANEOUS**

### ***Power to exempt***

The Central Government may, by notification exempt from the application of the Act, or any provision thereof—

- (a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;
- (b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;
- (c) any enterprise, which performs a sovereign function on behalf of the Central Government or a State Government.

Thus, the power to grant exemption can be invoked by the Central Government in specified circumstances and conditions.

Where any enterprise is engaged in activities, which includes any activity relatable to the sovereign functions of the Government, exemption may be granted by the Central Government only in respect of the activity relatable to the sovereign functions.

### ***Power of Central Government to issue directions***

The Central Government may give in writing to the Commission such directions on questions of policy, other than those relating to technical and administrative matters and the Commission shall be bound by such directions. The Commission shall be given an opportunity to express its views to the Central Government before any direction is given by the Government to the Commission. The decision of the Central Government as to whether the question is of one of policy or not, shall be final.

### ***Power of Central Government to supersede Commission***

It is stipulated under section 56 of the Act that if at any time the Central Government is of the opinion, -

- (a) that the Commission, on account of circumstances beyond its control is unable to discharge the functions or perform the duties imposed on it by or under the provisions of the Act; or
- (b) that the commission has persistently made default in complying with any direction given by the Central Government under this Act or in discharge of functions or performance of duties imposed on it by or under the provisions of the Act and as a result of such default the financial position or the administration of the Commission has suffered; or
- (c) that the circumstances exist which render it necessary in the public interest to do so, the Central Government may, by notification and for the reasons stated therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification.

Thus, power to supersede CCI vests in the Central Government. However before issuing any such notification, the Central Government shall give to the Commission a reasonable opportunity to make representations against the proposed supersession for its consideration. Upon publication of a notification superseding the Commission—

- (a) the Chairperson and other members shall vacate the office from the date of supersession;
- (b) until Commission is reconstituted, all powers functions and duties of the Commission shall be discharged by the Central Government or by an authority specified by the Central Government in this behalf;
- (c) until the Commission is reconstituted all of its properties shall vest in the Central Government.

The Central Government shall reconstitute the Commission by a fresh appointment of its Chairman and other Members on or before the expiration of six months from the date of order of the Central Government superseding the Commission. Any Chairperson or Member who vacates the office because the Commission is unable to discharge its functions or perform duties imposed on it by or under the provisions of this Act on account of circumstance beyond its control shall not be deemed to be disqualified for re-appointment upon re-constitution of the Commission by the Government.

The Central Government shall cause a notification superseding the Commission and a full report of any action taken under this Section and circumstances leading to such action, be laid before each House of the Parliament at the earliest.

### ***Restriction on disclosure of information***

The Commission from time to time may require any enterprise to submit information for the purposes of the Act. The information may relate to sensitive business secrets and patents of such an enterprise. In order to ensure complete secrecy of such information, Section 57 provides that no information relating to an enterprise obtained by or on behalf of the Commission for the purposes of the Act shall be disclosed except with the previous permission of the enterprise in writing otherwise than in compliance with or for the purposes of the Act or any other law for the time being in force.

### ***Protection of action taken in good faith***

While acting or purporting to act in pursuance of any of the provisions of this Act, the Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Registrar

and officers and other employees shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code. However the Act provides for protection of action taken in good faith. As per Section 59 no suit or legal proceedings shall lie against the Central Government or Commission or any Chairperson or any Member or Director General or Registrar or other officers or employees of the Commission for anything, which is done or intended to be done in good faith under the Act or rules or regulations, made thereunder.

### ***Exclusion of jurisdiction of Civil Courts***

A civil court is precluded to exercise jurisdiction in respect of any matter, which the Commission is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

### ***Application of other laws not barred***

The provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.

### ***Power to make rules***

The Central Government may, by notification, make rules to carry out provisions of this Act. In particular, the Central Government may make rules to provide for all or any of the following matters; namely-

- (a) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of Section 9;
- (b) the form and manner in which and the authority before whom the oath of office and of secrecy shall be made and subscribed to under Sub-section (3) of Section 10;
- (c) Omitted by the Competition (Amendment) Act, 2007;
- (d) the salary and the other terms and conditions of service including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities to be provided to the Chairperson and other Members under Sub-section (1) of Section 14;
- (da) the number of Additional, Joint, Deputy or Assistant Director General or such officers or other employees in the office of DG and the manner in which such Additional, Joint, Deputy or Assistant Director Generals or such officers or other employees may be appointed under sub-section (1A) of Section 16.
- (e) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under Sub-section (3) of Section 16;
- (f) the qualifications for appointment of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under Sub-section (4) of Section 16;
- (g) the salaries and allowances and other terms and conditions of service of the Secretary and officers and other employees payable, and the number of such officers and employees under Sub-section (2) of Section 17;
- (h) for securing any case or matter which requires to be decided by a Bench composed of more than two Members under Sub-section (4) of Section 23; (Omitted by the Competition (Amendment) Act, 2007)



- (i) any other matter in respect of which the Commission shall have power under clause (g) of Sub-section (2) of Section 36; (Omitted by the Competition (Amendment) Act, 2007)
- (j) the promotion of competition advocacy, creating awareness and imparting training about competition issues under Sub-section (3) of Section 49; (Omitted by the Competition (Amendment) Act, 2007)
- (k) the form in which the annual statement of accounts shall be prepared under Sub-section (1) of Section 52;
- (l) the time within which and the form and manner in which the Commission may furnish returns, statements & such particulars as the Central Government may require under Sub-section (1) of Section 53;
- (m) the form in which and the time within which the annual report shall be prepared under Sub-section (2) of Section 53;
- (ma) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (2) of section 53B and the fees payable in respect of such appeal;
- (mb) the term of the Selection Committee and the manner of selection of panel of names under sub-section(2) of section 53E;
- (mc) the salaries and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub-section (1) of section 53G;
- (md) the salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal under sub-section (3) of section 53M;
- (me) the fee which shall be accompanied with every application made under sub-section (2) of section 53N;
- (mf) the other matters under clause (i) of sub-section(2) of section 53O in respect of which the Appellate Tribunal shall have powers under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit;
- (n) the manner in which the monies transferred to the Central Government shall be dealt with by that Government under the fourth proviso to Sub-section (2) of Section 66;
- (o) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

Every notification for making such rules shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions. If both Houses agree that notification is not to be issued or rule should not be made, then rule shall not be made or if the House decides that notification or rules should have effect in such modified form then the rule or notification shall be enforced in modified form. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under the notification or rule, as the case may be.

### **Power to make Regulations**

The Commission may, by notification, make regulations, which are consistent with the Act. Without prejudice to the generality of the foregoing provision, such regulations may provide for all or any of the following matters, namely, -

- (a) the cost of production to be determined under clause (b) of the Explanation to Section 4;
- (b) the form of notice as may be specified and the fee which may be determined under Sub-section (2)

- of Section 6;
- (c) the form in which details of acquisition shall be filed under Sub-section (5) of Section 6;
- (d) the procedure to be followed for engaging the experts and the professionals under sub-section (3) of Section 17;
- (e) the fee which may be determined under clause (a) of Sub-section (1) of Section 19;
- (f) the rules of procedure in regard to transaction of business at the meetings of the Commission under sub-section (1) of Section 22;
- (g) the manner in which penalty shall be recovered under sub-section (1) of Section 39;
- (h) any other matter in respect of which provision is to be, or may be made by regulations.

Every regulation shall be laid before both the Houses of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

### **Power to remove difficulties**

The Central government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act as may appear to be necessary to remove difficulties which may arise in giving effect to the provisions of the Act. However, no such order shall be made after expiry of a period of two years from the commencement of the Act. Every order made under this Section shall be laid before both the Houses of Parliament as soon as may be, after it is made.

### **Repeal and Saving**

Section 66 provides that the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(1A) The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,-

- (a) the previous operation of the Act so repealed or anything duly done or suffered there under; or
- (b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or
- (c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or
- (d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

(2) On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or

Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service:

Provided that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission appointed on deputation basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

Provided further that the Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be.

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947(14 of 1947), or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority:

Provided also that where the Monopolies and Restrictive Trade Practices Commission has established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in ,the Competition Commission of India or the Appellate Tribunal as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be prescribed.

(3) All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 stand

transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

*“Explanation.—* For the removal of doubts, it is hereby declared that all cases referred to in this sub-section, sub-section (4) and subsection (5) shall be deemed to include all applications made for the losses or damages under section 12B of the Monopolies and Restrictive Trade Practices Act, 1969 as it stood before its repeal;

(4) Subject to the provisions of sub-section(3), all cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section(1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission immediately before the commencement of the Competition (Amendment) Act, 2009, shall, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission shall dispose of such cases as if they were cases filed under that Act:

Provided that the National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986) and that State Commission shall dispose of such case as if it was filed under that Act.

“Provided further that all the cases relating to the unfair trade practices pending, before the National Commission under this sub-section, on or before the date on which the Competition (Amendment) Act, 2009 receives the assent of the President, shall, on and from that date, stand transferred to the Appellate Tribunal and be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.”

(5) All cases pertaining to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under that Act.

(6) All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

(7) All investigations or proceedings, relating to unfair trade practices, other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969(54 of 1969) and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

“Provided that all investigations or proceedings, relating to unfair trade practices pending before the National Commission, on or before the date on which the Competition (Amendment) Bill, 2009 receives the assent of the President shall, on and from that date, stand transferred to the Appellate Tribunal and the Appellate Tribunal may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.”

(8) All investigations or proceedings relating to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969(54 of 1969), and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit.

(9) Save as otherwise provided under sub-sections (3) to (8), all cases or proceedings pending before the Monopolies and Restrictive Trade Practices Commission shall abate.

(10) The mention of the particular matters referred to in sub-sections (3) to (8) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

### LESSON ROUND-UP

- Competition Act, 2002 seeks to provide, keeping in view the economic development of the country, for the establishment of Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto besides repeal of MRTP Act and the dissolution of the MRTP Commission.
- No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition.
- Competition Act expressly prohibits any enterprise or group from abusing its dominant position. Dominant Position meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.
- Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed it shall be void.
- While formulating a policy on the competition the Central/State Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition.
- Competition Appellate Tribunal to hear and dispose of appeals against the direction issued or decision made or orders passed by the Commission under the Act, and to adjudicate on claim of compensation.
- The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court.

### SELF-TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define and discuss the Relevant Market, Relevant Geographic Market, and Relevant Product Market.
2. What are anti-competitive agreements? Discuss the procedure for enquiry into anti-competitive agreements.



# Lesson 13

## Consumer Protection Act, 1986

### LESSON OUTLINE

- Learning objectives
- Genesis of Consumer Protection Laws
- Object and scope of the Consumer Protection Act, 1986
- Consumer Rights
- Meaning of Consumer
- Commercial purpose
- Defect in Goods
- Deficiency in Service
- Contract of Service
- Contract for Service
- District Forum
- State Consumer Protection Council
- Central Consumer Protection Council
- Jurisdiction of Protection Council
- Limitation Period for Filing Complaint
- Administrative Control
- Appeal
- Nature and Scope of Remedies
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Every individual is a consumer, regardless of occupation, age, gender, community, cast, creed, religion or race. Consumer rights and welfare are an integral part of the life of an individual and we all have made use of them at some or the other point in our daily routine. Consumer is the real deciding factor for all economic activities. It is now universally accepted that the extent of consumer protection is a true indicator of the level of progress in a nation. Taking into account the interests and needs of consumers in all countries, particularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous products, as well as importance of promoting just, equitable and sustainable economic and social development, the Secretary General, United Nations submitted draft guidelines for consumer protection to the Economic and Social Council in 1983. Thereupon on an extensive discussions and negotiations among various countries on the scope and content of such impending legislation certain guidelines were arrived at.

In line with the international development on consumer protection, the Parliament enacted Consumer Protection Act, 1986 provides a forum for speedy and simple redressal of consumer disputes. The rights under the consumer protection flow from the rights enshrined in Articles 14 to 19 of the Constitution of India.

*According to the preamble, the Consumer Protection Act, 1986 to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith.*

## INTRODUCTION

A consumer is a user of goods and services, therefore, every producer is also a consumer. However, conflicting interests have categorised them, inevitably, into two different groups. The industrial revolution brought in the concept of standardisation and mass production and over the years, the type of goods and the nature of services available grew manifold. The doctrine of 'Caveat Emptor' or 'let the buyer beware' which came into existence in the middle ages had been replaced by the principle of 'Consumer Sovereignty or 'Consumer is the King'. But, with tremendous increase in the world population, the growing markets were unable to meet the rising demand which created a gap between the general 'demand' and 'supply' levels in the markets. This to some extent watered down the concept of 'Consumer Sovereignty', what with consumers being forced to accept whatever was offered to them. On the other hand, the expanding markets necessitated the introduction of various intermediaries between the producer and the ultimate consumer. 'Advertising', though ostensibly directed at informing potential consumers about the availability and uses of a product began to be resorted to as a medium for exaggerating the uses of ones products or disparaging others products so as to have an edge over competitors. Unfair and deceptive practices such as selling of defective or sub-standard goods, charging exorbitant prices, misrepresenting the efficacy or usefulness of goods, negligence as to safety standards, etc. became rampant. It, therefore, became necessary to evolve statutory measures, even in developed countries, to make producers/traders more accountable to consumers. It also became inevitable for consumers to unite on a common platform to deal with issues of common concern and having their grievances redressed satisfactorily.

## Genesis of Consumer Protection Laws

The need to ensure the basic rights to health, safety, etc. of consumers has long been recognised the world over and various general legislations were enacted in India and abroad in this direction. In India, the general enactments other than the law of torts which ultimately aimed at protection of consumers interests are the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Dangerous Drugs Act, 1930, the Agricultural Produce (Grading and Marketing) Act, 1937, the Drugs and Cosmetics Act, 1940, the Indian Standards Institution (Certification Marks) Act, 1952, the Prevention of Food Adulteration Act, 1954, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, the Essential Commodities Act, 1955, the Standards of Weights and Measures Act, 1976 (Now Legal Metrology Act, 2009), the Trade and Merchandise Marks Act, 1958, (Now Trade Marks Act, 1999), the Patents Act, 1970, the Hire Purchases Act, 1972 and the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

These legislations contained regulatory provisions and contravention of these provisions attracted civil liability. This meant that an ordinary consumer had no other remedy but to initiate action by way of a civil suit which involved lengthy legal process proving to be too expensive and time consuming for lay consumers. In fact, at times, the time and cost involved in the legal process was disproportionate to the compensation claimed and granted to an individual consumer. Though the MRTP Commission proved to be far more accessible and less time-consuming than the Civil Courts, its single central location at New Delhi did not make the redressal agency accessible to all consumers, especially those located in the remote towns and villages of the country. Therefore, it became necessary to evolve laws directed at protecting the consumers and at the same time, providing for remedies which are simpler, more accessible, quicker and less expensive.

This paved the way for enactment of the Consumer Protection Act in 1986 providing for simple, quick and easy remedy to consumers under a three-tier quasi-judicial redressal agency at the District, State and National levels. To make the Act more effective and meaningful, necessary changes have been brought by Consumer Protection (Amendment) Act, 2002, which came into force w.e.f. March 15, 2003.



## The Basic Rights of Consumers

*The basic rights of consumers that are sought to be promoted and protected are:*

- *the right to be protected against marketing of goods and services which are hazardous to life and property;*
- *the right to be informed about the quality, quantity, potency, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices;*
- *the right to be assured, wherever possible, access to variety of goods and services at competitive prices;*
- *the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;*
- *the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and*
- *right to consumer education.*

This is based on the basic rights of consumers as defined by the International Organisation of Consumers (IOCU) viz., the Rights to Safety, to Information, of Choice, to be Heard, to Redressal, to Consumer Education, to Healthy Environment and to Basic Needs.

## SCOPE OF THE ACT

The Act extends to the whole of India except the State of Jammu and Kashmir and applies to all goods and services unless otherwise notified by the Central Government. The Act received the Presidents assent on 24.12.1986. However, all provisions of the Act except those relating to establishment, composition, jurisdiction, etc. of the Consumer Disputes Agencies (which came into force on 1.7.1987) came into force on 15.4.1987.

## DEFINITIONS

Section 2(1) of the Act defines various terms used in the Act. Some of the definitions are given hereunder:

### **Complainant means**

- (i) a consumer, or
- (ii) any voluntary consumer association registered under the Companies Act, 1956, or under any other law for the time being in force; or
- (iii) the Central Government or any State Government, who or which makes a complaint; or
- (iv) one or more consumers where there are numerous consumers having the same interest;
- (v) in case of death of a consumer, his legal heir or representative; who or which makes a complaint [Section 2(1)(b)].

An association of persons, to have *locus standi* as consumer, it is necessary that all the individual persons forming the association must be consumers under Section 2(1)(d) of the Act having purchased the same goods/hired the same service from the same party i.e. they should have a common cause of action. Thus, unlike MRTP Act, 1969, the Redressal Machinery under Consumer Protection Act, 1986 has no power to initiate cases *suo-moto*.

**Complaint** means any allegation in writing made, with a view to obtaining any relief, by a complainant that

- (i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
- (ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;
- (iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;
- (iv) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price—
  - fixed by or under any law for the time being in force;
  - displayed on the goods or any package containing such goods;
  - displayed on the price list exhibited by him by or under any law for the time being in force
  - agreed between the parties.
- (v) goods which will be hazardous to life and safety when used are being offered for sale to the public,—
  - in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;
  - if the trader could have known with due diligence that the goods so offered are unsafe to the public.
- (vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety. [Section 2(1)(c)].

**Consumer** means any person who

- (a) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (b) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose. [Section 2(1)(d)].

It has been clarified that the term commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.

Therefore, to be a 'consumer' under the Act:

- (i) the goods or services must have been purchased or hired or availed of for consideration which has been paid in full or in part or under any system of deferred payment, i.e. in respect of hire purchase

transactions;

- (ii) goods purchased should not be meant for re-sale or for a commercial purpose. Goods purchased by a dealer in the ordinary course of his business and those which are in the course of his business to supply would be deemed to be for re-sale; and
- (iii) in addition to the purchaser(s) of goods, or hirer(s) or users of services, any beneficiary of such services, using the goods/services with the approval of the purchaser or hirer or user would also be deemed a 'consumer under the Act.

A purchase of goods can be said to be for a 'commercial purpose only if the goods have been purchased for being used in some profit making activity on a large-scale, and there is close and direct nexus between the purchase of goods and the profit-making activity. In *Laxmi Engineering Works v. P.S.G. Industrial Institute*, Supreme Court held that the explanation to Section 2(1)(d) is clarificatory in nature. It observed that whether the purpose for which a person has bought goods is a 'commercial purpose' is always a question of facts and to be decided in the facts and circumstances of each case. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self employment such purchaser of goods would yet be a consumer. The Supreme Court further observed that if a person purchased a machine to operate it himself for earning his livelihood, he would be a consumer. If such person took the assistance of one or two persons to assist him in operating the machine, he would still be a consumer. But if a person purchases a machine and appoint or engage another person exclusively to operate the machine, then such person would not be a consumer.

In *Bhupendra Jang Bahadur Guna v. Regional Manager and Others* (II 1995 CPJ 139), the National Commission held that a tractor purchased primarily to till the land of the purchaser and let out on hire during the idle time to till the lands of others would not amount to commercial use.

The question as to whether the widow of the deceased policy holder was a 'consumer' under the Act was decided in the affirmative by the State Commission in Andhra Pradesh in the case of *A Narasamma v. LIC of India*. The State Commission held that as the term 'consumer' includes any beneficiary of service other than the person who hires the services for consideration, the widow being the beneficiary of services is a 'consumer' under the Act entitled to be compensated for the loss suffered by her due to negligence of the LIC.

In *Laxmiben Laxmichand Shah v. Sakerben Kanji Chandan and others* 2001 CTJ 401 (Supreme Court) (CP), the Supreme Court held that the tenant entering into lease agreement with the landlord cannot be considered as consumer under Section 2(1)(d) of the Act. Where there was no provision in the lease agreement in respect of cleaning, repairing and maintaining the building, the rent paid by tenant is not the consideration for availing these services and therefore, no question of deficiency in service.

**Goods**, in terms of Section 2(1)(i) has been defined to mean goods as defined in the Sale of Goods Act, 1930. As per Section 2(7) of the Sale of Goods Act, 1930 Goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. Therefore, most consumer products come under the purview of this definition.

In *Morgan Stanley Mutual Fund v. Kartik Das* (1994) 3 CLJ 27, the Supreme Court held that an application for allotment of shares cannot constitute goods. It is after allotment, rights may arise as per the articles of association of the company. At the stage of application there is no purchase of goods for consideration and again the purchaser cannot be called the hirer of services for consideration.

**Service:** The term 'service' is defined under Section 2(1)(o) as to mean service of any description which is made available to potential users and includes, but not limited to the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. Passengers travelling by trains on payment of the stipulated fare charged for the ticket are 'consumers' and the facility of transportation by rail provided by the railway administration is a 'service' rendered for consideration as defined in the Act. Subscribers of telephones would also be 'consumer' under the Act.

### Contract of Service and Contract for Service

*The Supreme Court in the case of Indian Merchants Association v. V P Shantha, (CA No. 688 of 1993 decided on 13th November 1995) observed that a contract for service implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A contract of service on the other hand implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The Parliamentary draftsman was well aware of this well-accepted distinction between 'contract of service' and 'contract for services' and had deliberately chosen the expression 'contract of service' instead of the expression 'contract for service' in the exclusionary part of the definition of 'service', this being the reason being that an employer could not be regarded as a consumer in respect of the services rendered by his employee in pursuance of contract of employment. By affixing the adjective 'personal' to the word 'service' the nature of the contracts which were excluded were not altered. The adjective only emphasised that what was sought to be excluded was personal service only. The expression contract of personal service in the exclusionary part of Section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service free from the ambit of the expression service.*

**Service Rendered under Medicare Insurance Scheme:** Service rendered by a medical practitioner or hospital/nursing home can not be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in Section 2(1)(o). Similarly, where as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, service rendered to such an employee and his family members would not be free of charge and would constitute 'service' under Section 2(1)(o) of the Act.

*In State of Haryana v. Santra* [2000(3) SCALE 417], the Supreme Court held that in a country where the population has been increasing rapidly and the Government has taken up the family planning as an important programme, the medical officer as also the State Government must be held responsible in damages if the family planning operation is a failure on account of the medical officers negligence because this has created additional burden on the parents of the child.

*In the case of Alex J. Rebello v. Vice Chancellor, Bangalore University and others*, 2003 CTJ 575 (CP) (NCDRC) the National Commission has held that the University in conducting examination, evaluating answer sheets and publishing the result was not performing any service for consideration and a candidate who appeared for the examination cannot be regarded as a consumer.

**Consumer Dispute** means a dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint [Section 2(1)(e)].

**Restrictive Trade Practice** means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include—

- (a) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;
- (b) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent to buying, hiring or availing of other goods or services.[Section 2(1)(nn)].

**Defect** means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods [Section 2(1)(f)].

It is clear from the above definition that non-fulfilment of any of the standards or requirements laid down under any law for the time being in force or as claimed by the trader in relation to any goods fall under the ambit of defect. Therefore, contravention of any of the provisions of enactments such as the Drugs & Cosmetics Act, 1950, , the Prevention of Food Adulteration Act, 1955, the Indian Standards Institution (Certification Marks) Act, 1952 etc. or any rules framed under any such enactment or contravention of the conditions or implied warranties under the Sale of Goods Act, 1930 in relation to any goods have also been treated as a defect under the Act. Fault, imperfection or shortcoming in quality, quantity, potency, purity or standard as claimed by the trader in any manner whatsoever in relation to goods is to be determined with reference to the warranties or guarantees expressly given by a trader.

**Deficiency** means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service [Section 2(1)(g)].

Failure to maintain the quality of performance required by the law or failure to provide services as per warranties given, by the provider of the service would amount to 'deficiency'.

*In Divisional Manager, LIC of India v. Bhavanam Srinivas Reddy*, the National Commission observed that default or negligence in regard to settlement of an insurance claim (on allegation of suppression of material facts, in this particular case) would constitute a deficiency in service on the part of the insurance company and it will be perfectly open for the aggrieved consumer to approach the Redressal Forums to seek appropriate relief.

*In Jaipur Metals and Electrical Ltd. v. Laxmi Industries*, the National Commission held that a reading of Section 2(1)(g) of the Act shows that deficiency must pertain to the 'performance' in terms of quality, nature and manner to be maintained or had been undertaken to be performed in pursuance of a contract.

*In Punjab National Bank v. K.B. Shetty (First Appeal No. 7 of 1991 decided on 6th August, 1991)*, ornaments kept in the banks locker were found lost though the certificate recorded by the custodian of the bank on the day the customer operated the locker stated that all lockers operated during the day have been checked and found properly locked. The National Commission upholding the decision of the State Commission, held the bank guilty of negligence and therefore, liable to make good the loss.

However, failure to provide nursing and financing facilities to a small scale industry which consequently became sick cannot be said to constitute 'deficiency in service' as in matters of grant or withholding of further

advances and insisting on margin money, banks may exercise their discretion and act in accordance with their best judgement after taking into account various relevant factors. Therefore, the proper forum to agitate such grievances is a civil court (*Special Machines v. Punjab National Bank*, Original Petition No. 32/1989 decided on 22.12.1989; *M.L. Joseph v. SBI*: O.P. No. 2/1989 decided on 31.8.1989). It has also been held by National Commission in the case of *Mrs. Anumati v. Punjab National Bank* (2003 CTJ 921 (CP) (NCDRC) that the financial institutions have every right to protect their interests by taking conscious decisions. There shall be no deficiency in service where the bank takes conscious decision to adjust the fixed deposit of the joint holders against the loan taken by a third party when the FDR has been mortgaged as guarantee for loan.

Failure of a Housing Board to give possession of the flat after receiving the price and after registering it in favour of the allottee was held to be 'deficiency in service' in the case of *Lucknow Development Authority v. Roop Kishore Tandon* F.N. No. 54/1990 decided on 10.10.1990.

Cancellation of train services by the railways due to disturbance involving violence so as to safeguard the passengers as well as its own property was held by the National Commission as not constituting 'deficiency in service' on the part of the Railway. [*Dainik Rail Yatri Sangh (Regd.) v. The General Manager, Northern Railway - I* (1992) CPJ 218 (NC)]. Failure of the Railways to provide cushioned seats in the first class compartments as per specifications laid down by the Railway Board and to check unauthorised persons from entering and occupying first class compartments was held to be 'deficiency' [N. *Prabhakaran v. General Manager, Southern Railway, Madras - I* (1992) CPJ 323 (NC)].

In *Union Bank of India v. Seppo Rally OY* (1999) 35 CLA 203, the Supreme Court held that delay in payment of an unconditionally guaranteed amount by a bank in India to a non-resident in Finland in foreign currency can not be attributed to any deficiency in the service of the bank when the banks stand is that the delay is caused by the failure of a bank in Finland, to which the remittance was to have been made under the nonresidents instructions to reply to the Indian Banks valid query in this connection and the RBI took time to grant the necessary permission to make the remittance.

## CONSUMER PROTECTION COUNCILS

The interests of consumers are sought to be promoted and protected under the Act inter alia by establishment of Consumer Protection Councils at the Central, State and District Levels. Chapter II of the Consumer Protection Act, 1986 comprising Sections 4 to 8 deals with Consumer Protection Councils.

### Central Consumer Protection Council

Section 4 empowers the Central Government to establish a Council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council), consisting of the Minister in charge of Consumer Affairs in the Central Government, as its Chairman, and such number of other official or non official members representing such interests as may be prescribed. However, the Consumer Protection Rules, 1987 restrict the number of members of the Central Council to 150 members. Section 5 of the Act requires the Central Council to meet as and when necessary, but atleast once in every year. The procedure in regard to transaction of its business at the meeting is given in Rule 4 of the Rules.

### State Consumer Protection Council

Section 7 provides for the establishment of State Consumer Protection Councils by any State Government (by notification) to be known as Consumer Protection Council for (name of the State). The State Council shall consist of a Minister in charge of Consumer Affairs in the State Government as its Chairman and such number of other official or non-official members representing such interests as may be prescribed by the

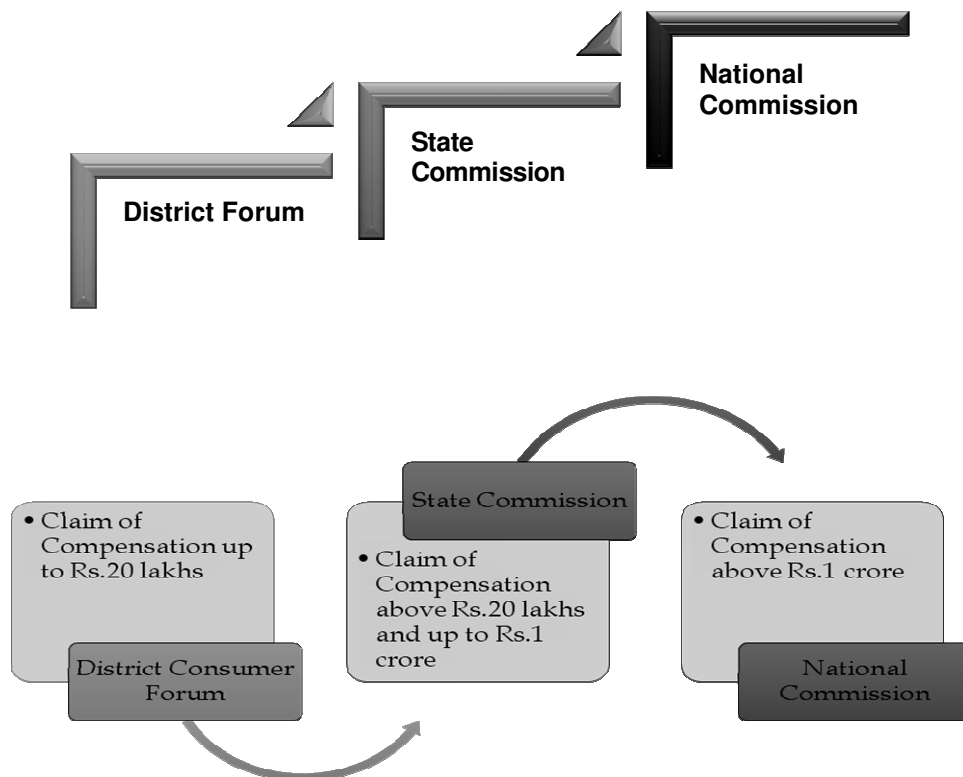
State Government and such number of other official or non official members, not exceeding ten, as may be nominated by the Central Government. The State Council shall meet as and when necessary but not less than two meetings shall be held every year. The procedure to be observed in regard to the transaction of its business at such meetings shall be prescribed by the State Government.

### District Consumer Protection Council

In order to promote and protect the rights of the consumers within the district, section 8A provides for establishment in every district of a council to be known as the District Consumer Protection Council .It shall consist of the Collector of the district (by whatever name called), who shall be its Chairman and such number of other official and non-official members representing such interests as may be prescribed by the State Government. The District Council shall meet as and when necessary but not less than two meetings shall be held every year. The District Council shall meet at such time and place within the district as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed by the State Government.

### REDRESSAL MACHINERY UNDER THE ACT

The Act provides for a three-tier quasi-judicial redressal machinery at the District, State and National level for redressal of consumer disputes and grievances. The District Forum has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, does not exceed ₹20 lakhs, the State Commission for claims exceeding ₹20 lakhs but not exceeding Rs. 1 crore; and the National Commission for claims exceeding Rs.1 crore.



## District Forum

Section 9 of the Act provides for the establishment of a District Forum by the State Government in each district of the State. However, the State Government may establish more than one District Forum in a district if it deems fit to do so. Section 10(1) provides that each District Forum shall consist of:

- (a) Person who is, or who has been, or is qualified to be, a District Judge, who shall be its President;
- (b) Two other members one of whom shall be a woman, who shall have the following qualifications, namely:
  - i) be not less than thirty-five years of age,
  - ii) possess a bachelor's degree from a recognised university,
  - iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that a person shall be disqualified for appointment as a member if he—

- (a) has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the State Government involves moral turpitude; or
- (b) is an undischarged insolvent; or
- (c) is of unsound mind and stands so declared by a competent court; or
- (d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or
- (e) has, in the opinion of the State Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or
- (f) has such other disqualification as may be prescribed by the State Government.

Every member of the District Forum shall hold office for a term of 5 years or upto the age of 65 years, whichever is earlier, and shall be eligible for reappointment for another term of five years or upto the age of sixty-five years, whichever is earlier, subject to the condition that he fulfills the qualifications and other conditions for appointment mentioned in Section 10(1)(b) and such re-appointment is also made on the basis of the recommendation of the Selection Committee. A member may resign his office in writing under his hand addressed to the State Government.

## Jurisdiction of District Forum

Section 11 provides for the jurisdiction of the District Forum under two criteria pecuniary and territorial.

### Pecuniary limits

Section 11(1) empowers the District Forum to entertain complaints where the value of goods or services and the compensation, if any, claimed does not exceed rupees twenty lakhs.

### Territorial limits

Section 11(2) requires a complaint to be instituted in the District Forum within the local limits of whose jurisdiction the opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office or personally works for gain, at the time of institution of the complaint; or any one of the opposite parties (where there are more than one) actually and voluntarily resides or carries on business or



has a branch office or personally works for gain, at the time of institution of the complaint, provided that the other opposite party/parties acquiesce in such institution or the permission of the Forum is obtained in respect of such opposite parties; or the cause of action arises, wholly or in part.

*In the case of Dynavox Electronic Pvt. Ltd. v. B.J.S. Rampuria Jain College, Bikaner* (Appeal No. 4/89 before the Rajasthan CDRC), it was held that where in a contract, the machinery was supplied and installed at a particular place, a part of cause of action would be deemed to have arisen at that place, therefore, the complaint could be instituted in the District Forum within whose jurisdiction that place falls.

### State Commission

Section 16 of the Act empowers the State Government to establish the State Consumer Disputes Redressal Commission consisting of:

- (a) a person who is or has been a judge of a High Court appointed by the State Government (in consultation with the Chief Justice of the High Court) who shall be its President.
- (b) not less than two and not more than such number of members, as may be prescribed, one of whom shall be a woman, who shall have the following qualifications, namely:
  - (i) be not less than thirty-five years of age,
  - (ii) possess a bachelor's degree from a recognised university, and
  - (iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

It is required that not more than fifty per cent of the members be from amongst persons having a judicial background. "Persons having judicial background" shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level.

A person shall be disqualified for appointment as a member if he

- (a) has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the State Government involves moral turpitude; or
- (b) is an undischarged insolvent; or
- (c) is of unsound mind and stands so declared by a competent court; or
- (d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or
- (e) has in the opinion of the State Government, such financial or other interest, as is likely to affect prejudicially the discharge by him of his functions as a member; or
- (f) has such other disqualification as may be prescribed by the State Government.

Every appointment shall be made by the State Government on the recommendation of a Selection Committee consisting of the President of the State Commission, Secretary Law Department of the State and Secretary in charge of Consumer Affairs in the State. The proviso to this clause states that where the President of the State Commission is, by reason of absence or otherwise, unable to act as Chairman of the Selection Committee, the State Government may refer the matter to the Chief Justice of the High Court for nominating a sitting Judge of that High Court to act as Chairman. Section 16(2) empowers the State

Government to decide on the salary or honorarium and other allowances payable to the members of the State Commission and the other terms and conditions of service.

Every member of the State Commission shall hold office for a term of five years or upto the age of sixty seven years, whichever is earlier and shall be eligible for reappointment for another term of five years or upto the age of sixty-seven years, whichever is earlier, subject to the condition that he fulfills the qualifications and other conditions for appointment mentioned in Section 16(1)(b) and such re-appointment is made on the basis of the recommendation of the Selection Committee.

### **Jurisdiction of State Commission**

Section 17 of the Act provides for the jurisdiction of the Commission as follows:

- (a) the State Commission can entertain complaints where the value of the goods or services and the compensation, if any claimed exceed rupees twenty lakhs but does not exceed rupees one crore;
- (b) the State Commission also has the jurisdiction to entertain appeals against the orders of any District Forum within the State. However, under second proviso to Section 15 no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty percent of the amount or rupees twenty-five thousand, whichever is less;
- (c) the State Commission also has the power to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, if it appears to it that such District Forum has exercised any power not vested in it by law or has failed to exercise a power rightfully vested in it by law or has acted illegally or with material irregularity.

A complaint shall be instituted in a State Commission within the limits of whose jurisdiction, -

- (a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or
- (b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally work for gain, as the case may be, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises

*The State Commission's jurisdiction may be original, appellate or revisional. In respect of (c) above, the State Commission may reverse the orders passed by the District Forum on any question of fact or law or correct any error of fact or of law made by the Forum.*

The National Commission in *Indian Airlines v. Consumer Education and Research Society* (1992) CPR 4(NC) held that in respect of the original jurisdiction of the State Commission, Section 17 only prescribes pecuniary limits. No territorial limits have been fixed for the exercise of original jurisdiction under the Act though the provision contained in Section 11(2) of the Act apply *mutatis mutandis* in the matter of entertaining original complaints by the State Commission. The territorial jurisdiction of the State Commission therefore extends to the territorial limit of the State. In the exercise of its appellate jurisdiction, the State Commission may entertain appeals only against the orders of any District Forum within the State. Similar condition also applies in respect of the State Commissions power to revise orders of the District Forums -

only orders of the District Forum within the State may be subject to revision by the State Commission.

### Transfer of Cases

Section 17A empowers the State Commission on the application of the complainant or of its own motion to transfer, at any stage of the proceeding any complaint pending before the District Forum to another District Forum within the State if the interest of justice so requires.

### National Commission

Section 9 empowers the Central Government to establish the National Consumer Disputes Redressal Commission, by notification in the Official Gazette. Section 20(1) provides that the National Commission shall consist of—

- (a) a person who is or has been a judge of the Supreme Court, to be appointed by the Central Government (in consultation with the Chief Justice of India), who shall be its President;
- (b) not less than four and not more than such number of members as may be prescribed one of whom shall be a woman, who shall have the following qualifications, namely:-
  - (i) be not less than thirty-five years of age;
  - (ii) possess a bachelor's degree from a recognized university; and
  - (iii) be persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that not more than fifty percent of the members shall be from amongst the persons having judicial background. "Persons having judicial background" shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level:

A person shall be disqualified for appointment if he-

- (a) has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the Central Government involves moral turpitude; or
- (b) is an undischarged insolvent; or
- (c) is of unsound mind and stands so declared by a competent court; or
- (d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or
- (e) has in the opinion of the Central Government such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or
- (f) has such other disqualification as may be prescribed by the Central Government

Every appointment by the Central Government is required to be made on the recommendation of a Selection Committee consisting of a Judge of the Supreme Court to be nominated by the Chief Justice of India, the Secretary in the Department of Legal Affairs and the Secretary in charge of Consumer Affairs in the Government of India. Section 20(2) empowers the Central Government to fix the salary/ honorarium and other allowances payable to the members as well as the other terms and conditions of their service. Every member of the National Commission shall hold office for a term of five years or upto seventy years of age, whichever is earlier and shall be eligible for reappointment for another term of five years or upto the age of seventy years, whichever is earlier, subject to the condition that he fulfills the qualifications and other

conditions for appointment mentioned in Section 20(1)(b) and such re-appointment is made on the basis of the recommendation of the Selection Committee.

### **Jurisdiction of National Commission**

Section 21 provides that the National Commission shall have jurisdiction:

- (a) to entertain complaints where the value of the goods or services and the compensation, if any, claimed exceeds rupees one crore;
- (b) to entertain appeals against the orders of any State Commission. However, under second proviso to Section 19 no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty percent of the amount or rupees thirty-five thousands, whichever is less; and
- (c) to call for the records and pass appropriate orders in any consumer dispute which is pending before, or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

### **Complaints before the District Forum and State Commission**

Section 12 provides that a complaint, in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with the District Forum by—

- (a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;
- (b) any recognised consumer association, whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided, is a member of such association or not; or
- (c) one or more consumers, where there are numerous consumers having the same interest with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or
- (d) the Central or the State Government as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.

Every complaint filed under this section is required to be accompanied with such amount of fee and payable in such manner as may be prescribed. On receipt of a complaint, the District Forum may, by order, allow the complaint to be proceeded with or rejected. However, a complaint shall not be rejected unless an opportunity of being heard has been given to the complainant. It is also to be noted that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was received. Where a complaint is allowed to be proceeded, the District Forum may proceed with the complaint in the manner provided under this Act. Where a complaint has been admitted by the District Forum, it shall not be transferred to any other court or tribunal or any authority set up by or under any other law for the time being in force.

The explanation defines the term 'recognised consumer association' as to mean any voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force.

Thus, in case the affected consumer is unable to file the complaint due to ignorance, illiteracy or poverty, any

recognised consumer association may file the complaint. The rule of 'privity of contract' or locus standi which permits only the aggrieved party to take action has very rightly been set aside in the spirit of public interest litigation. Section 13 states the procedure to be followed by the District Forum or the State Commission on receipt of a complaint. On receipt of a complaint, a copy of the complaint is to be referred to the opposite party (or each of the opposite parties, where there are more than one) within twenty-one days from the date of its admission, directing him to give his version of the case within a period of 30 days. This period may be extended by another period of 15 days. If the opposite party admits the allegations contained in the complaint, the complaint will be decided on the basis of materials on the record. Where the opposite party denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the stipulated time, the dispute will be settled in the following manner:

*(i) In case of dispute relating to any goods*

Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, a sample of the goods shall be obtained from the complainant, sealed and authenticated in the prescribed manner, for referring to the appropriate laboratory for the purpose of any analysis or test whichever may be necessary, so as to find out whether such goods suffer from any such defect. The 'appropriate laboratory' would be required to report its finding to the referring authority, i.e. the District Forum or the State Commission within a period of forty-five days from the receipt of the reference or within such extended period as may be granted by these agencies [Section 13(1)(c)].

The term 'Appropriate laboratory' has been defined to mean a laboratory or organisation recognised by the Central Government or a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf; or any such laboratory or organisation established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect.

Section 13 empowers the District Forum/State Commission to require the complainant to deposit such amount as may be specified, towards payment of fees to the 'appropriate laboratory for the purpose of carrying out the necessary analysis or tests. The amount so deposited shall be remitted to the appropriate laboratory to enable it to carry out the analysis and send the report. On receipt of the report, a copy thereof is to be sent by District Forum/State Commission to the opposite party along with its own remarks. In case any of the parties i.e. opposite party or the complainant, disputes the correctness of the methods of analysis/test adopted by the appropriate laboratory, the concerned party will be required to submit his objections in writing in regard to the report.

After giving both the parties a reasonable opportunity of being heard and to present their objections, if any, the District Forum/State Commission shall pass appropriate orders under Section 14 of the Act.

(ii) In case of dispute relating to goods not requiring testing or analysis or relating to services Section 13(2)(b) provides that where the opposite party denies or disputes the allegations contained in the complaint within the time given by the District/State Commission, the Agency concerned shall dispose of the complaint on the basis of evidence tendered by the parties. In case of failure by the opposite party to represent his case within the prescribed time, the complaint shall be disposed of on the basis of evidence tendered by the complainant.

### **Limitation Period for Filing of Complaint**

Section 24A provides that the District Forum, the State Commission, or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

However, where the complainant satisfies the Forum/Commission as the case may be, that he had sufficient cause for not filing the complaint within two years, such complaint may be entertained by it after recording the reasons for condoning the delay.

### **Administrative Control**

Section 24B authorises the National Commission to exercise administrative control over the State Commissions in the matter of calling for periodical returns regarding the institution, pendency and disposal of cases, issuance of instructions regarding adopting of uniform procedure in hearing of matters, serving copies of documents, translation of judgements etc. and generally overseeing the functioning of the State Commission/District forum to ensure that the objects and purposes of the Act are served in the best possible manner.

Similarly, the State Commission has been authorised to exercise administrative control over all the District forum within its jurisdiction in all the above matters.

### **Powers of the Redressal Agencies**

The District Forum, State Commission and the National Commission have been vested with the powers of a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters:

- (i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
- (ii) the discovery and production of any document or other material object producible as evidence;
- (iii) the reception of evidence on affidavits;
- (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
- (v) issuing of any commission for the examination of any witness; and
- (vi) any other matter which may be prescribed.

Under the Consumer Protection Rules, 1987, the District Forum, the State Commission and the National Commission have the power to require any person:

- (i) to produce before and allow to be examined by an officer of any of these agencies, such books of accounts, documents or commodities as may be required and to keep such book, documents etc. under his custody for the purposes of the Act;
- (ii) to furnish such information which may be required for the purposes of the Act to any officer so specified.

These redressal agencies have also been empowered to pass written orders authorising any officer to exercise the power of entry and search of any premises where the books, papers, commodities or documents are kept if there is any ground to believe that these may be destroyed, mutilated, altered, falsified or secreted. Such authorised officer may also seize books, papers, documents or commodities if they are required for the purposes of the Act, provided the seizure is communicated to the District Forum/State Commission/National Commission within 72 hours. On examination of such documents or commodities, the agency concerned may order the retention thereof or may return it to the party concerned.

The District forum, the State Commission and the National Commission have the power to issue remedial orders to the opposite party directing him to do any one or more of the things referred to in Section 14(1)(a) to

(i) as discussed herein below. The redressal agencies have also been empowered to dismiss frivolous and vexatious complaints under Section 26 of the Act and to order the complainant to make payment of costs, not exceeding ₹10,000 to the opposite party.

<b>COMPLAINTS TO BE REGISTERED</b>	
District Consumer Forum	for a claim of compensation up to ₹20 lakhs
State Commission	for a claim of compensation above ₹20 lakhs and up to ₹1 crore
National Commission	for a claim of compensation above Rs.1 crore

### **Nature and Scope of Remedies under the Act**

***In terms of Section 14(1) of the Act, where the goods complained against suffer from any of the defects specified in the complaint or any of the allegations contained in the complaint about the services are proved, the District Forum/State Commission/National Commission may pass one or more of the following orders:***

- (a) to remove the defects pointed out by the appropriate laboratory from the goods in question;
- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- (d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;
- (e) to remove the defects in goods or deficiencies in the services in question;
- (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- (g) not to offer the hazardous goods for sale;
- (h) to withdraw the hazardous goods from being offered for sale;
- (ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;
- (hb) to pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

*It is to be noted that the minimum amount of sum so payable shall not be less than five percent of the value of such defective goods sold or service provided, as the case may be, to such consumers. Further, the amount so obtained shall be credited in favour of such person and utilized in such manner as may be prescribed.*

- (hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;
- (i) to provide for adequate costs to parties.

The remedies that can be granted by the redressal agencies are therefore, wide enough to cover removal of defects/deficiency in goods/services, replacing defective goods with new goods, refunding price/charges paid by the complainant, payment of compensation for loss or damage suffered, providing costs to parties and

issuing prohibitory orders directing the discontinuance of unfair trade practice, sale of hazardous goods etc.

However, the redressal agencies have not been granted power to order injunctions. Section 14(1)(d) provides that the redressal agency may order payment of compensation only in the event of negligence of the opposite party which resulted in loss or damage and not otherwise, i.e. even though the complainant has suffered loss or damage, he may not be entitled for compensation if he cannot prove negligence.

## **Appeal**

Section 15 entitles a person aggrieved by an order of the District Forum to prefer an appeal to the State Commission. Similarly any person aggrieved by any original order of the State Commission may prefer an appeal to the National Commission under Section 19. Likewise, any person aggrieved by any original order of the National Commission may prefer an appeal to the Supreme Court, under Section 23.

All such appeals are to be made within thirty days from the date of the order. However, the concerned Appellate authority may entertain an appeal after the said period of thirty days if it is satisfied that there was sufficient cause for not filling it within the prescribed period. The period of 30 days would be computed from the date of receipt of the order by the appellant.

It may be noted that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum/State Commission, shall be entertained by the State Commission/National Commission respectively unless the appellant has deposited in the prescribed manner fifty percent of that amount or twenty five thousand rupees/thirty-five thousand respectively, whichever is less. It may be observed that appeals are allowable only against the original orders passed by the concerned redressal agency. Appellate orders passed by the State Commission or National Commission (i.e. on appeal against the orders of the District Forum or State Commission) cannot be further appealed against though on questions of law revision petitions may be filed. So also, the revisional orders passed by the State Commission or the National Commission are not appealable.

## **APPEAL**

Aggrieved by the orders issued by the District Consumer Redressal Forum, appeal petition may be filed before State Consumer Dispute Redressal Commission within 30 days from the date of receipt of orders.

Aggrieved by the orders issued by the State Consumer Dispute Redressal Commission, appeal petition may be filed before National Consumer Dispute Redressal Commission within 30 days from the date of receipt of orders.

Aggrieved by the orders issued by the National Consumer Dispute Redressal Commission, appeal petition may be filed before Supreme Court of India within 30 days from the date of receipt of orders

## **Penalties**

Section 27 of the Act deals with penalties and provides that failure or omission by a trader or other person against whom a complaint is made or the complainant to comply with any order of the District Forum, State Commission or the National Commission shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine of not less than Rs. 2,000 but which may extend to Rs. 10,000, or with both.

However, on being satisfied that the circumstances of any case so require, the District Forum or the State Commission or the National Commission may impose a lesser fine or a shorter term of imprisonment. Section 27(3) prescribes that all offences under the Act to be tried summarily.



## GIST OF IMPORTANT CONSUMER CASES

Gist of some of the important rulings rendered by Supreme Court, National Commission and State Commissions, are given hereunder:

### Failure to provide basic safeguards in the swimming pool – deficiency in service

In the case of *Sashikant Krishnaji Dole v. Shitshan Prasarak Mandali [F.A. No. 134 of 1993 decided on 27.9.1995 (NCDRC)]* the school owned a swimming pool and offered swimming facilities to the public on payment of a fee. The school conducted winter and summer training camps to train boys in swimming and for this purpose engaged a trainer/coach. The complainants had enrolled their son for learning swimming under the guidance of the coach. It was alleged that due to the negligence of the coach the boy was drowned and met with his death. The school denied that it had engaged the services of a coach and also denied any responsibility on its part. The coach claimed that he was a person with considerable experience in coaching young boys in swimming and that as in other cases he taught the deceased boy also the way in which he should swim and take all precautions while swimming. When the deceased was found to have been drowned the coach immediately took him out of the water and removed the water from his stomach and gave him artificial respiration and thereafter took him to a doctor, where he died.

The State Commission held the school and the coach deficient in rendering service to the deceased, that the coach was not fully trained, did not exercise even the basic commonsense needed to counter an accident in swimming. He was so casual in his behaviour that he did not attempt to take prompt action to save the life of the deceased and so far as the school was concerned it did not even provide basic facilities nor did it provide any safeguards to prevent accidents.

Dismissing the appeal the National Commission observed that the State Commission had given cogent reasons for holding the school and the coach responsible for death of the deceased. A detailed examination of the depositions of eye witnesses showed that the Commission had correctly appreciated the evidence and come to the conclusion that the coach was negligent and the school did not provide the necessary life saving mechanism to save the lives of trainee students in cases of accidents.

So far as the compensation was concerned the State Commission had taken all relevant factors into account and fixed the amount at Rs. 1.50 lakhs which was reasonable.

### Removal of ladder of an aircraft while disembarking by the passenger— deficiency in service

In *Station Manager, Indian Airlines v. Dr. Jiteswar Ahir [First Appeal No. 270 of 1994 decided on 28.2.1996 (NCDRC)]* when the complainant-passenger occupied his seat in the aircraft, an announcement was made that his luggage was lying on the ground unidentified and that he should disembark to identify his luggage. According to the complainant he moved towards the rear door, and finding that the step ladder was attached to the aircraft door, he stepped out on to the staircase but before he could actually put his entire body weight on the staircase the ladder was suddenly removed as a result of which he fell down on the ground and sustained bodily injuries which was reported to be about 10 percent. As against the complainant's claim of ₹10 lakhs the airlines was willing to pay ₹40,000 as compensation which according to them was the maximum statutory liability of the Corporation under the Carriage by Air Act, 1972.

The State Commission, after examining witnesses and the medical boards report held that there was dangerous deficiency in service and having regard to the expert opinion and other medical reports, it ordered payment of compensation of ₹4 lakhs and ₹1 lakh for mental agony and distress plus costs.

In appeal by the Corporation, the National Commission, upholding the State Commissions order, held that in terms of regulations relied upon by the appellant Corporation, if it was proved that the accident caused to the

complainant had resulted in a permanent disablement, incapacitating him from engaging in or being occupied with his usual duties or his business or occupation, the liability could not exceed Rs. 5 lakhs. This case related to the incapacity and permanent disability to the extent of 10 per cent and, therefore, the compensation could not exceed Rs. 5 lakhs. The State Commissions assessment of compensation of Rs. 4 lakhs was justified, considering the age of the complainant (37 years) at the time of accident and his having lost earning capacity. The State Commission was also right in awarding compensation of rupees one lakh for the complainants mental suffering and agony as well as feeling of inferiority in social relations. Deficiency in service cannot be alleged without attributing fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be performed by a person in pursuance of a contract or otherwise in relation to any service. The burden of proving deficiency in service is upon the person who alleged it. When the complainant has not established any willful fault, imperfection, shortcoming or inadequacy in the service of the respondent, there can be no deficiency in service.

*In Ravneet Singh Bagga v. KLM Royal Dutch Fintimes [1999(7) SCALE 43]*, the complainant booked a ticket from Delhi to New York by a KLM plane. The airport authorities in New Delhi did not find any fault in his visa and other documents. However at Amsterdam, the airport authorities instituted proceedings of verification because of which the appellant missed his flight to New York. After reaching New York, the airlines tendered apology to the appellant for the inconvenience and paid as a goodwill gesture a sum of Rs. 2,500. The appellant made a complaint to the National Commission under the Consumer Protection Act which was rejected.

The Supreme Court held that the respondent could not be held to be guilty of deficiency in service. The staff of the airline acted fairly and in a bona fide manner, keeping in mind security and safety of passengers and the Aircraft. The photograph on visa documents was a photo copy and not the original which was unusual. In the circumstances, the staff took some time to ascertain the truth and helped the appellant to reach New York the same day.

### **A doctor qualified to practice homoeopathic system of medicines treating a patient with allopathic medicines and patient dies - guilty of negligence**

*In Poonam Verma v. Ashwin Patel [1996(4) SCALE 364]* the respondent was a qualified medical practitioner in homoeopathic system of medicine. The appellant, was the widow of a person who, it was alleged, had died because of the negligence of the respondent in administering allopathic medicines in which he was not qualified to practise. It was alleged that the deceased was treated to begin with, for viral fever on allopathic medicines and since his condition had not improved antibiotics were used without conducting proper tests. When his condition further deteriorated he was removed to a nursing home and after four days he was removed to a hospital in an unconscious state. Within a few hours thereafter he died.

Her complaint to the National Consumer Disputes Redressal Commission for damages for the negligence and carelessness of respondent in treating her husband was dismissed. Allowing the appeal the Supreme Court held that the respondent who had practised in allopathy without being qualified in that system was guilty of negligence per se. A person is liable at law for the consequences of his negligence. Jurisdiction of the Commission: The Supreme Court observed that it is beyond doubt now that disputes regarding applicability of the Act to persons engaged in medical profession either as private practitioners or as Government doctors working in hospitals or Government dispensaries come within the purview of the Consumer Protection Act, 1986. It is also settled that a patient who is a consumer has to be awarded compensation for loss or injury suffered by him due to negligence of the doctor by applying the same tests as are applied in an action for damages for negligence.

*In Gopi Ram Goyal and others v. National Heart Institute and others, 2001 CTJ 405 (CP) (NCDRC)*, the

National Commission held that where the record and evidence shows that the conduct of the opposite parties i.e. doctors was more than reasonable and the level of care was as could be expected from professional in exercising reasonable degree of skill and knowledge. The complainant however failed to prove any case of negligence on the part of doctors, therefore the doctor cannot be held liable for death of patient.

### **Fall from a running train while passing through vestibule passage – deficiency in service**

*In Union of India v. Nathmal Hansaria [First Appeal No. 692 of 1993 decided on 24.1.1997 (NCDRC)]* the daughter of the respondent, travelling by a train, fell down from the running train while she was passing through the inter-connecting passage between two compartments and died as a result of crush injuries on her head. In the respondents petition for compensation, the Railways contended that the Consumer Redressal agencies had no jurisdiction to consider a complaint of this nature in view of Section 15 of the Railway Claims Tribunal Act read with Section 13 of that Act.

The State Commission held that a railway passenger travelling in a train on payment of consideration was a consumer within the meaning of the Consumer Protection Act, 1986. Section 82A of the Railways Act referred to in Section 13 of the Railway Claims Tribunal Act, 1987 and the rules made thereunder provided compensation for railway accidents and not for accidental death of this nature.

Dismissing the appeal the National Commission held that the death of the passenger could not be described as resulting from railway accident but an accidental death caused by the absence of safety devices in the vestibule passage way.

Although the railway administration had claimed that the coach was a new coach and that all coaches had been thoroughly checked at the starting point of the train and that no defect was reported, the railways had not contended that this particular coach was checked at the time of commencement of the journey. The general statement of practice and procedure was not conclusive proof that this particular coach was checked and no evidence had been produced in support of their contention. Thus, the State Commission was right in holding that the deceased passenger was a consumer. On the basis of similar facts, the MRTP Commission has recently awarded a compensation of Rs. 18 lakhs with 9% interest to the parents of deceased. The above compensation appears to be the highest award in commission's history.

### **Repudiation of Insurance claim because the driver did not have a valid license**

In the case of *Jitendra Kumar v. Oriental Insurance Company Ltd.* and another the Supreme Court has held that where the fire has occurred due to mechanical failure and not due to any act or omission of the driver, the insurance company cannot repudiate the claim because of lack of valid driving license.

### **Premium paid to the agent of the LIC but the agent did not deposit the premium, death of the insured - No deficiency of service on the part of the LIC**

*In Harshad J. Shah v. Life Insurance Corporation of India [1997(3) SCALE 423 (SC)]* the insured (since deceased) took out four life policies with double accident benefits, premium payable half-yearly. When the third premium fell due, the general agent of the Corporation met the person and took a bearer cheque towards the premium payable by him in respect of the policies. Although the cheque was encashed immediately thereafter, it was not deposited with the Corporation for another three months. In the meantime, the insured met with a fatal accident and died. The Corporation rejected the widows claim for payment of the sum assured on the ground that the policies had lapsed for non-payment of premium within the grace period.

In the widows complaint to the State Commission under the Consumer Protection Act the Corporation pleaded that the amount of premium allegedly collected by the general agent could not be said to have been

received by the Corporation, that the agent was not authorised to collect the premium amount. The State Commission held that in order to collect more business, agents of the Corporation collected premiums from policyholders either in cash or by cheque and then deposited the money so collected with the Corporation and that this practice had been going on directly within the knowledge of the Corporation's administration, notwithstanding the departmental instructions that the agent was not authorised to collect the premiums.

When the practice of the agent collecting the premiums from policyholders was in existence and the money was collected by the agent in his capacity and authority, the reasonable inference was that the Corporation was negligent in its service towards the policyholder.

The National Commission, in appeal, was of the view that the insurance agent in receiving a bearer cheque from the insured towards payment of insurance premium was not acting as agent of the Corporation nor could it be said that the Corporation had received the premium on the date the bearer cheque was received by the agent, even though he deposited the sum with the Corporation a day after the death of the insured.

Dismissing the appeal the Supreme Court held that the agent had no express authority to receive the premium on behalf of the Corporation. In his letter of appointment there was a condition expressly prohibiting him from collecting the premium. Nor could it be said that he had an implied authority to collect the premium, as regulation 8(4) expressly prohibited the agents from collecting premiums. Therefore, no case had been set up by the complainant before the State Commission that the Corporation by its conduct had induced the policyholders, including the insured, to believe that the agents were authorised to receive premiums on behalf of the Corporation. Nor was there any material on record that lent support to this contention. In the facts of this case there was no room to invoke the doctrine of apparent authority underlying Section 237 of the Indian Contract Act.

In *National Insurance Co. Ltd. v. Seema Malhotra* [2001(2) SCALE 140] (Supreme Court) a cheque was issued under a contract of insurance of motor car by the insured for payment of premium to the policy.

However, cheque was dishonoured for want of funds in the account. Meanwhile, the car met with an accident and badly damaged, killing the insured owner. The claim for insured amount was repudiated by the company.

The Supreme Court held that applying the principles envisaged under Section 51, 52 and 54 of Indian Contract Act, relating to reciprocal promises, insurer need not to perform his part of promise when the other party fails to perform his part and thus not liable to pay the insured amount.

### **Educational Institutions**

In *Sreedharan Nair N. v. Registrar, University of Kerala* [2001 CTJ 561 (CP) (NCDRC)], the University refused to provide LL.B. degree certificate on completion of course on the ground that the qualifying examination on the basis of which student was admitted in LL.B. course in Kerala law college has not been recognised by it. The National Commission held that this is a clear case of deficiency on part of University. A compensation of Rs. 50,000 was awarded to complainant.

In *Isabella Thoburn College v. Ms. Fatima Effendi* [2001 CTJ 386 (CP) (SCDR)], the State Commission held that non-refund of admission fee is not a deficiency of service on the part of the university because admission fee is consideration for admission and respondent herself voluntarily withdrawing admission from one university to join another institute cannot claim refund of admission fee.

### **Medical Negligence**

In *Kusum Sharma & Others Versus Batra Hospital & Medical Research Centre & Others* 2010 CTJ 242 Supreme Court (CP) Supreme Court held that while deciding whether the medical professional is guilty of

medical negligence following well known principles must be kept in view:-

- I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
- II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.
- III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.
- IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
- V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.
- VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.
- VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.
- VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.
- IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.
- X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.
- XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

The aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

## LESSON ROUND-UP

- The Consumer Protection Act, 1986 is the most important legislation enacted to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith.
- Consumer means any person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose.
- Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.
- Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.
- Commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.
- A contract for service implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion.
- A contract of service on the other hand implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.
- The Act has set up three-tier quasi-judicial consumer disputes redressal machinery at the National, State and District levels, for expeditious and inexpensive settlement of consumer disputes. It also postulates establishment of Consumer Protection Councils at the Central and State levels for the purpose of spreading consumer awareness.
- District Forum has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, is not exceeding ₹20 lakhs, the State Commission for claims exceeding ₹20 lakhs but not exceeding ₹1 crore; and the National Commission for claims exceeding Rs. 1 crore.
- The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.
- The District Forum, State Commission and the National Commission have been vested with the powers of a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the certain matters.







# Lesson 14

## Essential Commodities Act, 1955

### LESSON OUTLINE

- Learning objectives
- Object and Scope of the Act
- Essential Commodities
- Powers of Central Government to control production, supply and distribution etc., of essential commodities
- Fixing of price for essential commodities
- Seizure of Essential Commodities
- Confiscation of Essential Commodities
- Appeal against Confiscation
- Orders passed under Essential Commodities Act, 1955
- Offences and penalties
- Grant of Injunction by Civil Court
- Culpable Mental State
- Offences by companies
- Publication of names of convicted companies
- Attempt and abetment
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

The Essential Commodities Act, 1955 was enacted to ensure easy availability of essential commodities to the consumers and to protect them from exploitation by unscrupulous traders. The Act provides for regulation and control of production, distribution and pricing of commodities, which are declared as essential for maintaining or increasing supplies or for securing their equitable distribution and availability at fair prices.

The Essential Commodities Act is being implemented by the State Governments/UT Administrations by availing of the delegated powers under the Act. The State Governments/ UT Administrations have issued various Control Orders for regulation, production and distribution of Essential Commodities such as food grains, edible oils, pulses kerosene, sugar etc. The Central Government regularly monitors the action taken by State Governments/UT Administrations to implement the provisions of the Essential Commodities Act, 1955.

The items declared as essential commodities under the Essential Commodities Act, 1955 are reviewed from time to time in the light of liberalized economic policies in consultation with the Ministries/ Departments administering the essential commodities and particularly with regard to their production, demand, and supply.

*The preamble to the Act says that it is an Act to provide in the Interest of the general Public for the control of production, supply and distribution of, and trade and commerce in, certain commodities.*


## INTRODUCTION

In 1939 the Government of India made certain rules to control the production, supply and distribution of certain commodities under the Defence of India Act which ceased to have force in September, 1946. It was however considered necessary that control in respect of certain commodities essential for human beings should continue in the interest of the general public. Therefore, the Essential Supplies (Temporary Powers) Ordinance, XVIII of 1946 was promulgated by which certain provisions of the Defence of India Rules continued to have force. This Ordinance was subsequently replaced by the Essential Supplies (Temporary Powers) Act, 1946 (Act No. XXIV of 1946).

The operation of the Act was prolonged upto 1st April, 1948, by virtue of a Notification published in the Gazette of India, dated March 8, 1947. Under certain resolution of the Constituent Assembly passed in 1948 and 1949 and by the Adaptation of Laws Act, 1950, the operation of the Act was further extended to different periods from time to time.

Since in public interest it was considered necessary that the Centre should continue to control production, supply and distribution of certain essential commodities, the need for a permanent measure on the subject was felt. For this purpose, certain amendments were required to be made in the Constitution. The Constitution (Third Amendment) Act made the required amendments in Entry 33 of List 3 of the Seventh Schedule to the Constitution to enable the Parliament to enact the required legislation. The Essential Commodities Ordinance No. 1 of 1955, was therefore, promulgated which came into force on 26th January, 1955. This Ordinance was subsequently replaced by the present Act namely, the Essential Commodities Act, 1955 (Act No. 1 of 1955) w.e.f 1st April, 1955.

## OBJECT AND SCOPE OF THE ACT

 *The Preamble to the Act says that it is an Act to provide in the interest of the general public for the control of the production, supply and distribution of, and trade and commerce in, certain commodities. The dominant object and intendment of the Act is to secure equitable distribution and availability at fair prices of essential commodities in the interest of the general public. The interest of the general public necessarily connotes the interest of the consuming public and not the interest of the dealer (1958 Andh. LT587).*

## DEFINITIONS (SECTION 2)

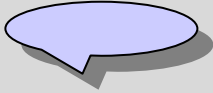
The Act contains definitions of five important terms, namely:

### Collector

“Collector” includes an Additional Collector, and such other officer not below the rank of Sub-Divisional Officer as may be authorised to perform the functions and exercise the powers of the Collector under the Act [Section 2(ia)].

### Essential Commodities

Section 2A dealing with Essential commodities declaration, etc. defines the "essential commodity" as to mean a commodity specified in the Schedule.

**Schedule to the Act lists out following commodities:**

- (1) drugs: The explanation clarifies that for the purposes of this Schedule, "drugs" has the meaning assigned to it in clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940);
- (2) fertilizer, whether inorganic, organic or mixed;
- (3) foodstuffs, including edible oilseeds and oils;
- (4) hank yarn made wholly from cotton;
- (5) petroleum and petroleum products;
- (6) raw jute and jute textiles;
- (7) (i) seeds of food-crops and seeds of fruits and vegetables;
  - (ii) seeds of cattle fodder; and
  - (iii) jute seeds.

Sub-section (2) empowers the Central Government to amend, if it is satisfied that it is necessary so to do in the public interest and for reasons to be specified in the notification published in the Official Gazette, the Schedule so as to (a) add a commodity to the said Schedule; and (b) remove any commodity from the said Schedule, in consultation with the State Governments.

In terms of Sub-section (3) any notification issued under Sub-section (2) may also direct that an entry shall be made against such commodity in the said Schedule declaring that such commodity shall be deemed to be an essential commodity for such period not exceeding six months to be specified in the notification. However, Central Government may, in the public interest and for reasons to be specified, by notification in the Official Gazette, extend such period beyond the said six months.

The Central Government may exercise its powers under Sub-section (2) in respect of the commodity to which Parliament has power to make laws by virtue of Entry 33 in List III in the Seventh Schedule to the Constitution. Every notification issued under sub-section (2) is required to be laid, as soon as may be after it is issued, before both Houses of Parliament.

In addition to the items included in the list given in the said clause, such other items which may be so declared by the Central Government by notified orders would also be included in the list of essential commodities, but in any case, such commodities would not be outside the scope of Entry 33 in List III in the Seventh Schedule to the Constitution. The Central Government has time and again, notified various commodities to be essential commodities. The term 'essential commodities' is defined in Rule 35(3) of the Defence of India Rules, 1962, to mean "food, water, fuel, light, power or any other thing notified by the Central Government in this behalf as essential for the existence of the community". Of course, the definition in the Essential Commodities Act is more comprehensive than that in the Defence of India Rules, but both definitions enumerate certain things or articles and have scope for addition to the list of other articles notified in that behalf by the Central Government. As such, the articles not expressly mentioned in the definition given in the Defence of India Rules, can become essential commodities within the meaning of the expression used in the Rules by a simple government notification and the slight difference in the definition of essential commodity in the Act from that given in the Rules does not make one repugnant to the other [*Nathuni Lai Gupta v. The State* (1964 Cr. LJ 662)].



**IN S. Samuel, MD. Harrisons Malayava v. Union of India, AIR 2004 SC 218, Supreme Court held that Tea is not foodstuff. Even in a wider sense, foodstuffs will not include tea as tea either in the form of the leaves or in the form of beverage, does not go into the preparation of food proper to make it more palatable and digestible. Tea leaves are not eaten. Tea is a beverage produced by steeping tea leaves or buds of the tea plants in the boiled water. Such tea is consumed hot or cold for its flavour, taste and its quality as a stimulant. The stimulating effect is caused by the presence of caffeine therein. Tea neither nourishes the body nor sustains nor promotes its growth. It does not have any nutritional value. It does not help formation of enzymes nor does it enable anabolism. Tea or its beverage does not go into the preparation of any foodstuff. In common parlance, any one who has taken tea would not say that he has taken or eaten food. Thus tea is not a food.**

**Order:** “Order” includes a direction issued thereunder [Section 2(c)].

**State Government:** “State Government”, in relation to a Union territory means the administrator of such territory [Section 2(d)].

**Sugar:** “Sugar” means: (i) any form of sugar containing more than 90 per cent of sucrose, including sugar candy; (ii) Khandsari sugar or bura sugar or crushed sugar, or any sugar in crystalline or powdered form; or (iii) sugar in process in vacuum pan sugar factory, or raw sugar [Section 2(e)].

### Authorities responsible to administer the Act

Necessary powers have been given to the Central Government under the Act to administer the provisions of the Act by issuing orders/directions notified in the official gazette and by delegating the authority to State Governments and administrators of Union Territories. The Central Government at its apex level is responsible for achieving the objectives enshrined by the Parliament under this Act for the welfare and general well-being of all the citizens.

### Powers of Central Government to control production, supply and distribution etc., of essential commodities [Section 3]



#### **Power to Issue Orders**

*The Central Government having been vested with power under Section 3(1) can issue order in the following circumstances providing for regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein:*

- (i) when it is necessary or expedient for maintaining or increasing supplies of any essential commodity;
- (ii) for securing the equitable distribution and availability of essential commodities at fair price; or
- (iii) for securing any essential commodity for the defence of India or the efficient conduct of military operations.

### Contents of the Order

Notwithstanding the above and without prejudice to the generality of the powers contained in Sub-section (1) above, Sub-section (2) of Section 3 provides that the Central Government may issue an order which may

provide for all or any of the following matters:

- (a) for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;
- (b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for growing thereon of food crops generally or of specified food crops and for otherwise maintaining or increasing the cultivation of food crops generally, or of specified foodcrops;
- (c) for controlling the price at which any essential commodity may be bought or sold.
- (d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity;
- (e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;
- (f) for requiring any person holding in stock, or engaged in the production, or in the business of buying or selling, of any essential commodity—(a) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or (b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the order.

*Explanation I* provides that an order made under this clause in relation to foodgrains, edible oilseeds or edible oils may, having regard to the estimated production, in the concerned area, of such foodgrains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation of the producers.

*Explanation II* provides that “production” for the purposes of this clause includes manufacture of edible oils and sugar with its grammatical variation and cognate expressions;

- (g) for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs which in the opinion of the authority making the order, are, or if unregulated, are likely to be detrimental to the public interest;
- (h) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters;
- (i) for requiring persons engaged in the production of, or trade and commerce in, any essential commodity to maintain and produce for inspection such books, accounts and record relating to their business and to furnish such information relating thereto as may be specified in the order;
- (j) for the grant or issue of licences, permits or other documents, the charging of fees therefor, the deposit of such sum, if any, as may be specified in the order as security for the due performance of the conditions of any such licence, permit or other document, the forfeiture of the sum so deposited or any part thereof for contravention of any such conditions and the adjudication of such forfeiture by such authority as may be specified in the order;
- (k) for any incidental and supplementary matters, including in particular, the entry, search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals and the seizure by a person authorised to make such entry, search or examination of any article in respect of which such person has reason to believe that a contravention of the order has been, is being or is about to be, committed and any packages, coverings, or receptacles in which such articles are

found; (ii) of any aircraft, vessel, vehicle or other conveyance or animal used in carrying such articles, if such a person has reason to believe that such aircraft, vessel, vehicle or other conveyance or animal is liable to be forfeited under the provisions of this Act; (iii) of any books of account and documents which in the opinion of such person, may be useful to, or relevant to any proceeding under this Act and the person from whose custody such books of account or documents are seized shall be entitled to make copies thereof or to take extracts therefrom in the presence of an officer having the custody of such books of account or documents.

### **Fixing the Price of Essential Commodities being sold to Government**

Section 3(3) vests powers in Central Government to deal with the pricing of the essential commodities particularly when the commodities are being sold to Central/State Government in compliance of order under clause (f) of Sub-section (2) of Section 3. In such a case, the price shall be paid as provided hereunder:

- (a) the agreed price, where the price can be agreed upon consistently with the controlled price fixed under this section;
- (b) controlled price: where no such agreement can be reached, the price calculated with reference to controlled price;
- (c) the price calculated at the market rate prevailing in the locality on the date of sale, where neither clause (a) nor clause (b) applies.

### **Fixing the Price of Essential commodities during Emergency**

Section 3(3A)(i) is in the nature of an emergency provision and can be resorted to meet a situation arising at a particular locality. It empowers the Central Government to direct the price at which the foodstuffs in any locality will be sold to general public. This direction will be issued only when the Central Government is of the opinion that takings such step is necessary for controlling price rise or preventing the hoarding of any foodstuff in any locality. The notification issued by the Government to the above effect shall be in force for 3 months only as may be specified therein as per Sub-section (3A)(ii). Further, for selling specified foodstuffs in the specified locality, the seller shall be paid price therefor as follows:

- (a) agreed price, when the price can be agreed upon consistently with the controlled price fixed under this sub-section; or
- (b) the controlled price, when no such agreement can be reached at as stated above; or
- (c) the market rate price as per the prevailing market rate in the locality at the date of sale where neither of the above clause (a) or (b) apply.

### **Payment of Procurement Price for Foodgrains and Edible Oil**

The Essential Commodities (Amendment) Act, 1976, inserted Sub-section (3B) in substitution of the then existing section providing for payment of procurement price of such foodgrains, edible oils or oilseeds as may be specified by State Government with the prior approval of Central Government. Therefore, as per Section 3(3B) where any person is required in terms of an order under Sub-section (2)(f) to sell to the Central Government or a State Government or any officer or agent of such Government or to a Corporation owned or controlled by such Government any grade or variety of foodgrains, edible oil and oilseeds in relation to which no notification has been issued Under Section 3(3A) or such notification, having been issued, has ceased to be in force, procurement price shall be paid irrespective of the provisions of Sub-section (3) having regard to the following facts:

- (a) the controlled price, if any, fixed under this section or by or under any other law for the time being in

- force for such grade or variety of foodgrains, edible oils and oilseeds;
- (b) the general crop prospects;
  - (c) the need for making such grade or variety of foodgrains, edible oils and seeds available at reasonable prices to the consumers, particularly the vulnerable sections of the consumers; and
  - (d) the recommendations, if any, of the Agricultural Prices Commission with regard to the price of the concerned grade or variety of foodgrains, edible oils and oilseeds.

### **Fixing Price for Sugar to be Paid to Producer**

Sub-section (3C) of Section 3 provides that where any producer of sugar is required by an order made under Sub-section (2)(f) to sell any kind of sugar to the Central or State Government/officer or agent of such government or to any person/class of persons, whether notification in this regard under Sub-section (3A) is issued or not or ceased to be in force and notwithstanding anything contained in Sub-section (3), the producer shall be paid such price for sugar as the Central Government may, by order, determine having regard to (a) the minimum price, if any fixed for sugar cane by the Central Government under this section; (b) the manufacturing cost of sugar; (c) the duty or tax, if any, paid or payable thereon; and (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar.

Further, the Central Government may determine different prices for different areas from time to time or for different factories or for different kinds of sugar. It is explained in the sub-section that producers for the purposes of this sub-section shall include persons carrying on business of manufacturing sugar.

Price fixation under Section 3(2) and 3(3B) is different from price fixation in the case of sugar under Sub-section (3C). In the former, the dominant purpose in fixing price is to ensure that goods are available to consumers at a reasonable price. In the latter, price fixed must also give a reasonable return on investment to the producer.

Sub-section (3D) of the Act empowers the Central Government to direct that no producer, importer or exporter to sell or otherwise dispose of or deliver any kind of sugar or remove any kind of sugar from the bonded godowns of the factory in which it is produced, whether such godowns are situated within the premises of the factory or outside or from the warehouses of the importers or exporters, as the case may be, except under and in accordance with its direction. However, this provision does not affect the pledging of such sugar by any producer or importer in favour of any scheduled bank as defined in clause (e) of Section 2 of the Reserve Bank of India Act, 1934 or any corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, so, however, that no such bank sells the sugar pledged to it except under and in accordance with a direction issued by the Central Government.

In terms of Sub-section 3(E) the Central Government has been empowered to direct from time to time, by general or special order, any producer or importer or exporter or recognised dealer or any class of producers or recognised dealers, to take action regarding production, maintenance of stocks, storage, sale, grading, packing, marking, weighment, disposal, delivery and distribution of any kind of sugar in the manner specified in the direction.

### **Power to Appoint Authorised Controller**

The Central Government has been vested with necessary powers under Sub-section (4) of Section 3 to authorise any person (known as authorised controller) when it is considered necessary for maintaining or increasing the production and supply of essential commodities. The authorised controller shall exercise such functions of control as may be provided in the order with respect to the whole or any part of any such

undertaking engaged in the production and supply of the commodity. The authorised controller shall exercise his functions in accordance with any instructions given to him by the Central Government. He shall not have any power to give any direction inconsistent with the provisions of any enactment or any instrument determining the functions of the person in charge of the management of the undertaking except in so far as may be specifically provided by the order. The undertaking shall be carried on in accordance with any directions, given by the authorised controller under the provisions of the order. The person who is responsible to function as a manager of the undertaking or part of it shall comply with such directions.

### **Issuance and Service of Order**

An order made under Section 3 of the Act shall be issued and served in the manner as provided under Section 3(5) i.e. in the following manner:

- (a) in the case of an order of general nature or affecting a class of persons be notified in the official gazette; and
- (b) in the case of an order directed to a specified individual be served on such individual (i) by delivering or tendering it to that individual, or (ii) if it cannot be so delivered or tendered, by affixing it on the outer door or some other conspicuous part of the premises in which that individual lives, and a written report thereof shall be prepared and witnessed by two persons living in the neighbourhood.

### **Laying the Order before Parliament**

Sub-section (6) provides that every order made under Section 3 by the Central Government or by any officer or authority of Central Government shall be laid before both Houses of Parliament as soon as may be, after it is made.

### **Imposition of Duties on State Government**

Section 4 of the Act provides that an order made under Section 3 may confer powers and impose duties upon the Central Government or the State Government or officers and authorities of the Central Government or State Government and may contain directions to any, State Government or to officers or authorities thereof as to the exercise of any such powers or discharge of any such duties.

### **Delegation of powers**

In terms of Section 5, the Central Government may, by notified order direct that the power to make orders or issue notifications under Section 3 shall in relation to such matters and subject to such conditions, if any, as may be specified in the direction be exercisable also by (a) such officer or authority subordinate to Central Government, (b) such State Government or such officer or authority subordinate to a State Government as may be specified in the direction.

### **NATURE OF ORDER PASSED UNDER THE ACT**

It may be noted from the foregoing paragraphs that the order notified by the Government under Section 3(2) specifies the various aspects which may be covered under the order while ensuring the production, procurement and distribution of the essential commodities. Further, Sub-sections (3), (3A), (3B), (3C) provide for issuance of order for fixation of prices of the essential commodities. Order may be passed for appointing Controlling Authority under this Act which is of different nature being administrative in kind and effect. Sub-section (5) provides for the issuance and service of the order. The order notified by the Government is such an important document that the Act provides, under Sub-section (6) of Section 3, for it to be placed before both Houses of Parliament. Thus, the order in its nature, is a medium of administering the Act and a proper



course of communication to and from the Government, exercising and delegating the powers vested in the Government under the Act.

### **Effect of the Order**

Section 6 provides that the order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

It could be seen that this section does not either expressly or by implication, repeal any of the provisions of the pre-existing laws, nor does it abrogate such laws. The object of Section 6 is simply to by-pass them. Thus, for example, an order made under Section 3 would be operative in regard to the essential commodities covered by the Textile Control Order, wherever there is any repugnancy in that order with any existing law and to that extent the existing law with regard to those commodities will not operate.

The Calcutta High Court had observed that the ultimate effect of Section 6 is that an order under Section 3 will override existing laws, only on the ground that these are orders validly made under Section 3 of the Act (*Ramananda Agrawala v. State AIR 1951 Calcutta 120*).

As rightly pointed out by the Patna High Court, Section 6 is a saving section which affords protection to the orders made under Section 3 of the Act as against the onslaught of any law, merely by reason of inconsistency (*Mohammad Anwar Hussi v. State of Bihar, AIR 1955 Patna 220*).

### **Presumption as to Orders**

Section 13 provides that where an order purports to have been made and sign by an authority in exercise of any powers conferred by or under this Act, a court so presume that such order was so made by that authority within the meaning of Indian Evidence Act, 1972.

### **Burden of Proof in certain cases**

Section 14 provides that on being prosecuted for contravention of any order made under Section 3 which prohibits him from doing any act or being in possession of a thing without lawful authority or without a permit, licence or other document such person shall have to prove that he has such authority, permit, licence or other document as the burden of proof lies upon him.

### **Protection for Acts done in Pursuance of Order**

Section 15 provides immunity against action taken in good faith under the Act and lays down that no suit, prosecution or other legal proceedings can be taken against any person for anything which is in good faith done, or intended to be done, in pursuance of any order made under Section 3 of the Act. Likewise, no suit or other legal proceedings can lie against the Government, for any damage caused or likely to be caused, by any thing which is in good faith done, or intended to be done, in pursuance of any order made under Section 3 of the Act.

It may be noted that immunity can be claimed by the Government or by its officers, only if it is shown that an order was issued under Section 3 of the Act, and the liability which the plaintiff is seeking to enforce arises from the fact that action was taken in pursuance of the order of the government under that section.

## **CONFISCATION OF ESSENTIAL COMMODITIES**

### **Seizure and Confiscation of Essential Commodities**

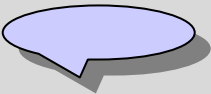
The Essential Commodities Act envisages two independent proceedings against a person charged with

contravention of the provisions of the Act. Under Section 6A, the Collector can confiscate the seized commodity and under Section 7, the contravention would be punishable. Confiscation of essential commodities is a sharp weapon which the Act has provided to the Central Government under Section 6A of the Act.

Section 6A provides that where any essential commodity is seized in pursuance of an order made under Section 3, a report of such seizure shall be made, without any unreasonable delay, to the Collector of the district or the Presidency town in which such essential commodity is seized. The Collector at his discretion, may direct for the production of the seized commodity before him and if he is satisfied that there has been contravention of the order he may pass order for confiscation of (a) the essential commodity so seized, (b) any package, covering or receptacle in which such essential commodity is found, and (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity. Provided that without prejudice to any action which may be taken under any other provision of this Act, no foodgrains or edible oilseeds seized in pursuance of an order made under Section 3 in relation thereto from a producer shall, if the seized foodgrains or edible oilseeds have been produced by him, be confiscated under this section. Provided further that in the case of any animal, vehicle, vessel or other conveyance the owner of such animal, vehicle etc., shall be given an option to pay in lieu of its confiscation, a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by such animal, vehicle, vessel, or other conveyance.

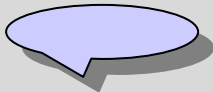
The Act uses the expressions 'confiscation' and 'seizure' in Section 6A and under this section a commodity which has been seized in pursuance of an order under Section 3 can be confiscated under the circumstances mentioned in Section 6A. Therefore, it is essential to-know in brief the distinction between seizure and confiscation.

#### **'Seizure'**



***The expression 'seize' means to take possession contrary to the wishes of the owner of the property and that such action is unilateral action of the person seizing. The person from whom anything is seized loses, from the moment of seizure, the right or power to control or regulate the use of that thing. The dictionary meaning of the word 'seize' means to lay hold of suddenly or forcible, to take hold of, to reach and grasp, to clutch'. It also means 'to take possession of or appropriate in order to subject to the force or operation of a warrant, order of Court or other legal processes. A reference to some provisions of the Codes of Criminal Procedure shows that the term seizure had been used therein in connection with the taking of actual physical possession of moveable property.***

#### **'Confiscation'**



***'Confiscation' according to Wharton's Law Lexicon, is condemnation and adjudication of property to the public treasury as of goods seized under the Customs Act. Confiscation, according to Strouds judicial Dictionary, must be an act done in some way on the part of the Government of the***

***country where it takes place and in some way beneficial to that Government, though the proceeds may not strictly speaking be brought into its treasury. In State of Kerala v. Mathai (1961 K.L.T. 169) it was pointed out that confiscation is not to be considered part of the sentence for an offence but is only a mode by which Courts can dispose of property which comes before it in criminal trials.***

That being the general distinction between confiscation and seizure, in the context of the Essential Commodities Act, it could be seen that an essential commodity which has been seized, could be confiscated. Therefore, confiscation is an action posterior to the seizure of the essential commodity. A commodity that has not been seized cannot be confiscated. Seizure itself does not imply confiscation. The seizure should have been made by virtue of an order passed under Section 3 of the Act. Clause (j) of Section 3 empowers the Government to make an order for seizure of any essential commodity if an order made by the Central Government controlling production, supply, distribution etc. of essential commodities has been or is about to be contravened. Therefore, any contravention or intended contravention of an order passed by the Government under the Act may lead to seizure, and under the circumstances mentioned in Section 6A such seized commodity could be confiscated.

Power is conferred on the Collector to confiscate any animal, vehicle, vessel or other conveyance if used in carrying the essential commodities. Where it was clear from the report of the Sub-Inspector of Police that the jeep in question was not found or used for carrying any essential commodity, it was found moving in front of the lorry which was loaded with paddy, it was held that, that by itself was no ground for its seizure. Unless the vehicle was used for carrying the essential commodities, the Deputy Commissioner had no jurisdiction to initiate proceedings for its confiscation, much less the police to seize it. [*Ramchandra v. Sub-Inspector of Police* (1976) 1 Kar. LJ. 126]

The Collector has no jurisdiction to go into the validity of the seizure; he could only confiscate goods, out of those seized, in respect of which contravention is established. Only if the seizure is valid could the Collector have jurisdiction to go on into the question whether there has been any contravention of the control order in respect of the whole or part of the goods, seized at this is entirely different from saying that the Collector could go on with the enquiry, postulated in Sections 6A and 6B, when the seizure itself, on which alone his jurisdiction to make an enquiry depends, is found to be illegal. [*Hindustan Aluminium v. Controller of Aluminium*, AIR (1976) DeWii225]

In *S. Seetharamayya Gupta v. Distt. Revenue Officer, Chittoor* (AIR 1977 AP 103) it was held that delegation of power of the Collector under Section 6A to Distt. Officer is competent and valid. Even though Section 6A authorizes confiscation of seized goods it does not say that the entire seized quantity should be directed to be confiscated. It is left to the discretion of the Distt. Revenue Officer and the appellate authority to decide whether the entire seized stock should be confiscated or only a portion of it. That, however, is a judicial discretion and must be exercised judicially having regard to the circumstances of the case, the gravity of the matter and other relevant and pertinent factors. The Act provides for enquiry and total absence of adequate opportunity to the party to make representation and consequently passing order of confiscation must be held bad.

### **Sale of the Confiscated Commodity**

Section 6A(2) provides that where the Collector, on receiving a report of seizure or on inspection of any essential commodity under Sub-section (1) above, is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do he may (i) order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; (ii) where no such price is fixed, order the same to be sold by public auction. Provided that in case of foodgrains, the collector may, for its equitable distribution and availability at

fair prices, order the same to be sold through fair price shops at the price fixed by the Central Government or by the State Government as the case may be, for the retail sale of such foodgrains to the public.

### **Disposal of Sale Proceeds of Confiscated Goods**

In terms of Section 6A(3), the sale proceeds of the essential commodity sold, after deduction of the expenses of any such sale or auction or other incidental expenses relating thereto shall be paid to the owner or person from whom it is seized in the following circumstances: (a) where no order of confiscation is ultimately passed by the Collector; (b) where an order passed on appeal under Sub-section (1) of Section 6C so requires, or (c) where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made under this section, the person concerned is acquitted.

### **Issue of Show Cause Notice before Confiscation of Essential Commodity**

Before passing an order for confiscation under Section 6A, in terms of Sub-section (1) of Section 6B of the Act, the owner of the essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance or the person from whom it is seized is required to be given a notice in writing informing him of the grounds on which it is proposed to confiscate the above goods to provide him an opportunity of making a representation in writing within a reasonable time and give him a reasonable opportunity of being heard in the matter.

It is also provided in Sub-section (2) that no order of confiscation can be made if the owner of the confiscated animal, vehicle, vessel or other conveyance proves to the satisfaction of the Collector that the said modes of transport owned by him were used in carrying the essential commodity without his knowledge or connivance of himself or his agent, if any, and each of them had taken the necessary precautions against such use.

It is not sufficient for the owner to prove that the vehicle carried the essential commodity without his knowledge or concurrence. He must also prove that the vehicle was used without the knowledge, or concurrence of the person in charge of the vehicle. In addition, he must prove that not only he but also the person in charge of the vehicle had taken all reasonable and necessary precautions against such use [*Shai Rahhim v. State of Andhra* (1976) LT 357].

However, once an order confiscating the goods of above description has been passed it shall not be held invalid in terms of Sub-section (3) merely by reason of any defect or irregularity in the notice given under clause (a) of Sub-section (1) if in giving such notice the provisions of that clause have been substantially complied with.

### **Appeal against Confiscation Order**

In terms of Sub-section (1) of Section 6C, any person aggrieved by an order of confiscation under Section 6A may appeal to the State Government concerned within one month from the date of passing the order. The State Government shall give an opportunity to the appellant to be heard and pass such order as it may think fit, confirming, modifying or annulling the order appealed against. In terms of Sub-section (2) of Section 6C, if the appeal has been decided in favour of appellant, he is entitled to the possession of the confiscated goods and if it is not possible for any reason to return the essential commodity seized from him, such person shall be paid the price therefor as if the essential commodity had been sold to the Government with reasonable interest calculated from the day of seizure of essential commodity and such price shall be determined in accordance with: (i) Sub-section (3B) of Section 3 in case of foodgrains, edible oils and oilseeds; (ii) Sub-section (3C) of Section 3 in case of sugar; and (iii) Sub-section (3) of Section 3 in case of any other essential commodity.

## Confiscation and punishment

Section 6D provides that the award of any confiscation under this Act by the Collector shall not prevent the infliction of any punishment to which the person affected thereby is liable under this Act.

### Bar of Jurisdiction in Matters of Confiscation

The 1976 Amendment Act has inserted Section 6-E in the Act which provides that no court, tribunal or authority shall have any jurisdiction to make an order with regard to the matters falling within the purview of this Act particularly wherever any essential commodity is seized in pursuance of an order made under Section 3 when the Collector or the judicial authority appointed under Section 6C shall have the jurisdiction.

## OFFENCES AND PENALTIES

### Cognizance of offences

Section 10A of the Act declares that notwithstanding anything contained in the Criminal Procedure Code, 1971, every offence punishable under the Act shall be cognizable.

A cognizable offence is one, where, under the Criminal Procedure Code or any other law in force, a police officer may arrest a person without a warrant.

Section 11 lays down that before a Court can take cognizance of any offence punishable under the Act, the following three conditions must be satisfied, viz. (i) there must be a report in writing, (ii) the report must be made by a public servant, as defined in Section 21 of Indian Penal Code, or any aggrieved person or any recognised consumer association.

### Prosecution of Public Servants (Section 15A)

If any public servant is accused of any offence alleged to have been committed by him while acting, or purporting to act, in the discharge of his duties, in pursuance of any order made under Section 3, no court can take cognizance of such an offence except with the previous sanction—(a) of the Central Government in the case of a person who is employed in connection with the affairs of the Union; and (b) of the State Government in the case of a person who is employed in connection with the affairs of the State.

### Penalties

Section 7 of the Act deals with penalties. Contravention of an order passed by the Central Government under Section 3 with reference to clause (h) or (i) of Sub-section (2) thereof is punishable with imprisonment for a term which may extend to one year and also with fine [Section 7(1)(a)(i)]. For the contravention of an order with reference to other clauses of Sub-section (2) of Section 3 the punishment is imprisonment for a term ranging from three months to seven years and in addition fine is also leviable.

Further if any person contravenes any order made under Section 3, any property in respect of which the order has been contravened shall be forfeited to the Government and any package, covering, receptacle in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the property, could also be forfeited if the court so orders.

If any person to whom a direction is given under Section 3(4) (b) fails to comply with it, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine.

If any person convicted of an offence under Section 7(1)(a)(ii) or 7(2) is again convicted of an offence under

the same provision he shall be punishable with imprisonment for the second and for every subsequent offence for a term which shall not be less than six months but which may extend to seven years besides fine. For adequate and sufficient reasons the court can award imprisonment for a term less than six months. Where an offence is committed for a second time, besides the above punishment, the Court can also order that the person shall not carry on any business of that essential commodity for such period not being less than six months as may be specified by the Court.



### **Mens rea (Sections 6A and 7)**

*In Nathulal v. State of Madhya Pradesh (AIR 1966 S.C. 43) it was held by the Supreme Court that mens rea or guilty mind is an ingredient of the offence punishable under Section 7 of the Essential Commodities Act, 1955 i.e., an intentional contravention of an order made under Section 3, is an essential ingredient of an offence under Section 7. In other words, if the dealer did believe bona fide that he could store the foodgrains for instance, without infringing any order under Section 3, there could be no contravention under Section 7.*

*It was observed by the Supreme Court in this case that mens rea is an essential ingredient of any criminal offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the Statute would otherwise be defeated. The nature of mens rea that would be implied in a Statute creating an offence depends on the object of the Act and the provisions thereof.*

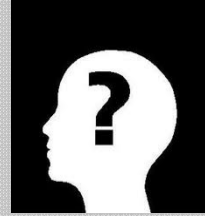
*In Hariprasad Rao v. State (AIR 1951 SC 264), it was observed that unless a Statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, an accused cannot be found guilty of an offence against the criminal law unless he has got a guilty mind. Therefore, mens rea is an essential ingredient of an offence under Section 7 of the Act.*

It is to be noted that the contravention under Section 6A is also of the same character. Section 6A in brief provides for seizure and confiscation based on 'contravention' of an order under Section 3. Therefore, the Collector before exercising his powers under the section would be entitled to take into consideration the question whether there was an intentional contravention of the order or whether the conduct of the dealer was bona fide under the belief that he was acting legally. But it should be remembered that the orders of the Collector are provisional in the sense that the Court is entitled, on appeal by the dealer, to look into whole matter to see whether there were reasons to confiscate the goods under Section 6A. It can be concluded that the provisions as regard 'contravention' under Section 6A or 7 are in *pari materia*—the contravention which details confiscation is of the same kind as that for which a dealer can be punished.

An interesting question is whether the doctrine of mens rea applies to cases of vicarious liability, as for instance, in the case of a master and servant. It is well accepted that the legislature cannot introduce the principles of vicarious liability and make the master liable for the act of his servants, although the master himself had no mens rea. Thus, in one case the charge against the respondents was that they sold some cloth in excess of the controlled price, and thus contravened the provisions of the Madhya Bharat Cotton Control Order; one of the respondents, Gangaram Saboo was not present in the shop at the time the cloth was alleged to have been sold, and it was, therefore, held that he could not be held vicariously liable for the act of his munim who had actually sold the cloth (*State v. Gangaram AIR 1935 H.B. 244*).

**Culpable Mental State**

*Section 10-C provides for a presumption of culpable mental state, which includes intention, motive, knowledge of a fact and the belief in a fact. It is now provided that in any prosecution for an offence under the Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of mental state. Of course, it is open to the accused to prove that he had no such mental state with respect of the act committed by him.*

**Attempt and Abetment**

Section 8 provides that any person who attempts to contravene or abets a contravention of any order made under Section 3 shall be deemed to have contravened that order.

**False Statement**

A person shall be punishable under Section 9 with imprisonment for a term which may extend to five years or with fine or with both for the following offences:

- (i) when required by any order made under Section 3 to make any statement or furnish any information, makes any statement or furnishes any information which is false in any material particular which he knows or has reasonable cause to believe to be false or does not believe to be true, or
- (ii) makes any such statement as aforesaid in any book, account, record, declaration, return or other document which he is required by any such order to maintain or furnish.

**Offences by Companies**

Section 10(1) provides that if the person contravening an order under Section 3 is, a company, every person who, at the time of the contravention, was in charge of, and was responsible to, the company for the conduct of the business of the company, shall be deemed to be guilty of the contravention, and shall be liable to be punished accordingly. In such cases, the company itself is also liable to be proceeded against. Any such person, can, however, escape liability if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent it.

It may be noted that the term 'company' as used above, refers to any body corporate, and even includes a firm or other association or individuals. In the case of a firm, the term 'Director' would mean a partner in the firm.

**Publication of names of convicted companies by Court**

Section 10-B of the Act provides that the Court may cause to be published in newspapers or in other manner at the expense of the company the name, place of business and the offence/contravention committed by it when a company has been convicted. However, no publication shall be made until the period for preferring an appeal against the order of the Court has expired, without any appeal having been preferred or where such appeal having been preferred, was disposed of. The expenses of any publication shall be recoverable from the company as if it were a fine imposed by Court.

**GRANT OF INJUNCTION BY CIVIL COURTS (SECTION 12B)**

It is expressly provided by Section 12B that no Civil Court can grant any injunction or make any order for any other relief against the Central or State Government or any public officer, in respect of any act done, or purporting to be done, by such person in his official capacity under the Act, or any Order made thereunder, until after notice of the application for such injunction or other report is given to the Government or to such officer.

### LESSON ROUND-UP

- Essential Commodities Act, 1955 has been enacted to provide in the interest of the general public for the control of the production, supply and distribution of and trade and commerce in, certain commodities.
- Section 2A dealing with Essential commodities declaration, etc. defines the "essential commodity" as to means a commodity specified in the Schedule to the Act.
- Central Government has been empowered to administer the provisions of the Act by issuing orders/directions notified in the official gazette and by delegating the authority to State Governments and administrators of Union Territories.
- An essential commodity which has been seized could be confiscated. Therefore, confiscation is an action posterior to the seizure of the essential commodity. A commodity that has not been seized cannot be confiscated. Seizure itself does not imply confiscation.
- *Mens rea* or guilty mind is an essential ingredient of the offence punishable under the Act.
- Culpable mental state, which includes intention, motive, knowledge of a fact and the belief in a fact.
- Where an offence is committed by a company, if it is proved that the offence had been committed with the consent or connivance of or is attributable to any neglect on the part of any Director, Manager, Secretary or other officer of the company, such a person shall be deemed to be guilty of that offence, and is liable to be proceeded against and punished accordingly.
- The Act expressly provides that no Civil Court can grant any injunction or make any order for any other relief against the Central or State Government or any public officer, in respect of any act done, or purporting to be done, by such person in his official capacity under the Act, or any Order made thereunder, until after notice of the application for such injunction or other report is given to the Government or to such officer.

### SELF TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. What do you understand by essential commodities? What are the commodities termed as essential commodities, under the Essential Commodities Act?
2. Specify the authority responsible for the administration and execution of the Act?
3. What do you know about an 'order' under the Act? What are the powers of Central Government in issuing the order under the Act?
4. There is difference in seizure and confiscation of commodities under the Act. How can the sale proceeds of confiscated commodities be utilized? What is the procedure for disposal of confiscated goods?
5. A reasonable opportunity is required to be given to the person concerned before confiscation of his commodities or vehicle etc., under the Act. Elaborate this statement in the light of provisions of the Act.

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# Lesson 15

## Legal Metrology Act, 2009

### LESSON OUTLINE

- Learning objectives
- Legal Metrology
- International Organisation of Legal Metrology
- Standard Weight and Measure
- Appointment and powers of Director and Legal Metrology Officer
- Verification and Stamping of Weight and Measure
- Maintain Records and Registers
- Pre-packed Commodities
- Declaration on Pre-packed commodities
- Forfeiture
- Power of the Central Government to make Rules
- Power of the State Government to make Rules
- Compounding offence
- Penalty for counterfeiting
- Offences by companies
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

“Weights and measures may be ranked among the necessities of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family”, said *Mr. John Quincy Adams, the Sixth US President in his report to Congress in 1821.*

The essence of these words show the importance of weights and measures. In fact, the influence and impact of the system of weights and measures for trade use is as pervasive as ever. Weights and measures embrace every aspect of modern living. It is therefore critical for any country to have an accurate system of weights and measures. Such a system is indispensable in facilitating trade – as it fosters certainty, trust and confidence in all transactions involving weights and measures. It underpins fair trade and competition and promotes efficiency, and in so doing, helps economy to grow.

Metrology studies many types of measurements. It studies not only length but also such measurements as weight and time. Each and every one of these elements can be studied in various manners as well. In metrology, there are set standards that are set for measurement qualities to determine what the typical measurement is. In many cases, they also have a well thought out plan as to how much of a degree of error there is as well in each measurement. There are various answers to questions about metrology because, in many cases, each theory can be right. Metrology goes back thousands of years to early civilization and was present well before the aspects of science as well.

The branch of knowledge concerning weights and measures is technically known as legal metrology. In basic form, metrology is the science of measurement.

*Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.*

## INTRODUCTION

Legal Metrology is the name by which the law relating to weights and measures is known in international parlance. Legal Metrology is very vital for scientific, technological and industrial progress of any country. The establishment of national standards of weights and measures and their proper enforcement aim at ensuring accuracy of measurements and measuring instruments and thus legal metrology strengthens the national economy in a broader sense besides being a potential instrument of consumer protection. The scope of legal metrology according to international practice extends to three broad fields of human activities, namely, commercial transactions, industrial measurements and measurements needed to ensure public health and human safety. The coverage of legal metrology varies from country to country. In some, almost all practical measurements are brought under the purview of legal metrology, whereas in other countries legal metrology finds restricted application in a few quantities like mass, length and volume used in trade and commerce. In most of the countries, however, legal metrology encompasses measurements which have a bearing on the protection of individuals from the financial and environmental points of view.

Legal metrology can be defined as that part of metrology which deals with units of measurement, methods of measurement and measuring instruments in so far as they concern statutory, technical and legal requirements which have the ultimate object of assuring public guarantee from the point of view of security and of appropriate accuracy of measurements.

## International Organization of Legal Metrology (OIML)

The International Organization of Legal Metrology (OIML) is an intergovernmental treaty organization whose membership includes Member States, countries which participate actively in technical activities, and Corresponding Members, countries which join the OIML as observers. It was established in 1955 in order to promote the global harmonization of legal metrology procedures. Since that time, the OIML has developed a worldwide technical structure that provides its Members with metrological guidelines for the elaboration of national and regional requirements concerning the manufacture and use of measuring instruments for legal metrology applications.

According to OIML legal Metrology is the entirety of the legislative, administrative and technical procedures established by, or by reference to public authorities, and implemented on their behalf in order to specify and to ensure, in a regulatory or contractual manner, the appropriate quality and credibility of measurements related to official controls, trade, health, safety and the environment.

The OIML develops model regulations, International Recommendations, which provide Members with an internationally agreed-upon basis for the establishment of national legislation on various categories of measuring instruments. Given the increasing national implementation of OIML guidelines, more and more manufacturers are referring to OIML International Recommendations to ensure that their products meet international specifications for metrological performance and testing.

## OIML Certificate System for Measuring Instruments

The OIML Certificate System for Measuring Instruments was introduced in 1991 to facilitate administrative procedures and lower the costs associated with the international trade of measuring instruments subject to legal requirements. The System provides the possibility for a manufacturer to obtain an OIML Certificate and a Test Report indicating that a given instrument type (pattern) complies with the requirements of the relevant OIML International Recommendations. Certificates are delivered by OIML Member States that have established one or several Issuing Authorities responsible for processing applications by manufacturers wishing to have their instrument types (patterns) certified.

Certificates issued by OIML are accepted by national metrology services on a voluntary basis, and as the climate for mutual confidence and recognition of test results develops between OIML Members, the System serves to simplify the type (pattern) approval process for manufacturers and metrology authorities by eliminating costly duplication of application and test procedures.

## DEFINITIONS

Section 2 contains definitions of various terms used in the Legal Metrology Act. Some of the important ones are reproduced hereunder.

### Dealer

According to section 2(b) Dealer in relation to any weight or measure, means a person who, carries on, directly or otherwise, the business of buying, selling, supplying or distributing any such weight or measure, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration; and includes a commission agent, an importer, a manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure manufactured by him to any person other than a dealer;

### Export

According to section 2(d) "export" with its grammatical variations and cognate expressions, means taking out of India to a place 'outside India';

### Import

According section 2(e) "import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

### Label

Under clause(j) of section 2 "label" means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity;

### Legal Metrology

As per section 2(g) "Legal Metrology" means that part of metrology which treats units of weight and measurement, methods of weight and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements;

### Manufacture

As per section 2(i) "manufacturer" in relation to any weight or measure, means a person who -

- (i) manufactures weight or measure,
- (ii) manufactures one or more parts, and acquires other parts, of such weight or measure and, after assembling those parts, claims the end product to be a weight or measure manufactured by himself or itself, as the case may be,
- (iii) does not manufacture any part of such weight or measure but assembles parts thereof manufactured by others and claims the end product to be a weight or measure manufactured by himself or itself, as the case may be,
- (iv) puts, or causes to be put, his own mark on any complete weight or measure made or manufactured

by any other person and claims such product to be a weight or measure made or manufactured by himself or itself, as the case may be;

### **Protection**

Section 2(k) define "protection" as to mean the utilisation of reading obtained from any weight or measure, for the purpose of determining any step which is required to be taken to safeguard the well-being of any human being or animal, or to protect any commodity, vegetation or thing, whether individually or collectively;

### **Pre-packed Commodity**

Section 2(l) define "pre-packaged commodity" as to mean a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity;

### **Person**

As per section 2(m) the term "person" includes,-

- (i) a Hindu undivided family,
- (ii) every department or office,
- (iii) every organisation established or constituted by Government,
- (iv) every local authority within the territory of India,
- (v) a company, firm and association of individuals,
- (vi) trust constituted under an Act,
- (vii) every co-operative society, constituted under an Act,
- (viii) every other society registered under the Societies Registration Act, 1860;

### **Premises**

As per section 2 (n) the term "premises" includes—

- (i) a place where any business, industry, production or transaction is carried on by a person, whether by himself or through an agent, by whatever name called, including the person who carries on the business in such premises,
- (ii) a warehouse, godown or other place where any weight or measure or other goods are stored or exhibited,
- (iii) a place where any books of account or other documents pertaining to any trade or transaction are kept,
- (iv) a dwelling house, if any part thereof is used for the purpose of carrying on any business, industry, production or trade,
- (v) a vehicle or vessel or any other mobile device, with the help of which any transaction or business is carried on;

### **Repairer**

Section 2 (P) defines repairer" as to mean a person who repairs a weight or measure and includes a person who adjusts, cleans, lubricates or paints any weight or measure or renders any other service to such weight

or measure to ensure that such weight or measure conforms to the standards established by or under this Act;

### **Sale**

"Sale", with its grammatical variations and cognate expressions, means transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration and includes a transfer of any weight, measure or other goods on the hire-purchase system or any other system of payment by instalments, but does not include a mortgage or hypothecation of, or a charge or pledge on, such weight, measure or other goods;[section 2 (r)]

### **Seal**

As per section 2(s) "seal" means a device or process by which a stamp is made, and includes any wire or other accessory which is used for ensuring the integrity of any stamp;

### **Stamp**

Section 2(t) defines "stamp" as to mean a mark, made by impressing, casting, engraving, etching, branding, affixing pre-stressed paper seal or any other process in relation to, any weight or measure with a view to-

- (i) certifying that such weight or measure conforms to the standard specified by or under this Act, or
- (ii) indicating that any mark which was previously made thereon certifying that such weight or measure conforms to the standards specified by or under this Act, has been obliterated;

### **Transaction**

Under section 2(u)"transaction" means,-

- (i) any contract, whether for sale, purchase, exchange or any other purpose, or
- (ii) any assessment of royalty, toll, duty or other dues, or
- (iii) the assessment of any work done, wages due or services rendered;

### **Verification**

As per section 2(v) "verification", with its grammatical variations and cognate expressions, includes, in relation to any weight or measure, the process of comparing, checking, testing or adjusting such weight or measure with a view to ensuring that such weight or measure conforms to the standards established by or under this Act and also includes re-verification and calibration;

### **Weight and measure**

Under section 2(w) "weight or measure" means a weight or measure specified by or under this Act and includes a weighing or measuring instrument.

## **STANDARD WEIGHTS AND MEASURES**

Chapter II of the Act containing sections 4 to 12 deals with standard weight and measure. Section 4 provides units of weights and measures to be based on metric system. Section 5 provides the base unit of weights and measures. Section 6 deals with base unit of numeration. Section 7 provides the standard units of weights and measures. Section 8 states standard weight, measure or numeral. Section 9 provides the reference, secondary and working standard. 10 deals with use of weight or measure for particular purposes. Section 11 contains prohibition of quotation, etc., otherwise than in terms of standard units of weight, measure or numeration.

Section 4 of the Act provides that every unit of weight or measure shall be in accordance with the metric system based on the international system of units.

Section 5 of the Act provides that the base unit of length shall be the meter; mass shall be the kilogram; time shall be the second; electric current shall be the ampere; thermodynamic temperature shall be the Kelvin; luminous intensity shall be the candela; and amount of substance shall be the mole.

Section 6 states that the base unit of numeration shall be the unit of the international form of Indian numeral. Every numeration shall be made in accordance with the decimal system. The decimal multiples and sub-multiples of the numerals shall be of such denominations and be written in such manner as may be prescribed.

As per section 7 of the Act the base units of weights and measures specified in section 5 shall be the standard units of weights and measures. The base unit of numeration specified in section 6 shall be the standard unit of numeration. For the purpose of deriving the value of base, derived and other units mentioned in section 5, the Central Government shall prepare or cause to be prepared objects or equipments in such manner as may be prescribed. The physical characteristics, configuration, constructional details, materials, equipments, performance, tolerances, period of re-verification, methods or procedures of tests shall be such as may be prescribed.

Section 8 provides that any weight or measure which conforms to the standard unit of such weight or measure and also conforms to such of the provisions of section 7 as are applicable to it shall be the standard weight or measure. Any numeral which conforms to the provisions of section 6 shall be the standard numeral.

No weight, measure or numeral, other than the standard weight, measure or numeral, shall be used as a standard weight, measure or numeral. No weight or measure, shall be manufactured or imported unless it conforms to the standards of weight or measure specified under section 8.

However, the aforesaid provisions shall not apply for manufacture done exclusively for export or for the purpose of any scientific investigation or research.

Section 11 of the Act provides that no person shall, in relation to any goods, things or service, quote, or make announcement of, whether by word of mouth or otherwise, any price or charge, or issue or exhibit any price list, invoice, cash memo or other document, or prepare or publish any advertisement, poster or other document, or indicate the net quantity of a pre-packaged commodity, or express in relation to any transaction or protection, any quantity or dimension, otherwise than in accordance with the standard unit of weight, measure or numeration.

It may be noted that the provisions mentioned above shall not be applicable for export of any goods, things or service.

Section 12 provides that any custom, usage, practice or method of whatever nature which permits a person to demand, receive or cause to be demanded or received, any quantity of article, thing or service in excess of or less than, the quantity specified by weight, measure or number in the contract or other agreement in relation to the said article, thing or service, shall be void.

### **Appointment and Power of Director, Controller and legal metrology officers**

Chapter III of the Act containing sections 13 to 23 of the Act deals with appointment and powers of director, controller and legal metrology officers.

Section 13 of the Act empowers the Central Government to appoint (by Notification) a Director of legal metrology, Additional Director, Joint Director, Deputy Director, Assistant Director and other employees for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to inter-State trade and commerce.

The Director and every legal metrology officer, appointed, shall exercise such powers and discharge such functions in respect of such local limits as the Central Government may, by notification, specify. Every legal metrology officer shall exercise powers and discharge duties under the general superintendence, direction and control of the Director.

The Director, the Controller and every legal metrology officer authorised to perform any duty by or under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code. No suit, prosecution or other legal proceeding shall lie against the Director, the Controller and legal metrology officer authorised to perform any duty by or under this Act in respect of anything which is in good faith done or intended to be done under this Act or any rule or order made there under.

The Central Government may, with the consent of the State Government and subject to such conditions, limitations and restrictions as it may specify in this behalf, delegate such of the powers of the Director under this Act as it may think fit to the Controller of legal metrology in the State, and such Controller may, if he is of opinion that it is necessary or expedient in the public interest so to do, delegate such of the powers delegated to him as he may think fit to any legal metrology officer and where any such delegation of powers is made by such Controller, the person to whom such powers are delegated shall exercise those powers in the same manner and with the same effect as if they had been conferred on him directly by this Act and not by way of delegation.

Section 14 of the Act, provides that the State Government may, by notification, appoint a Controller of legal metrology, Additional Controller, Joint Controller, Deputy Controller, Assistant Controller, Inspector and other employees for the State for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to intra State trade and commerce.

The Controller and every legal metrology officer so appointed shall exercise such powers and discharge such functions in respect of such local limits as the State Government may, by notification, specify. Every legal metrology officer shall exercise and discharge the duties under the general superintendence, direction and control of the Controller.

### **Power of inspection, seizure**

Section 15 of the Act confer powers of inspection on the Director, Controller or any legal metrology officer may, if he has any reason to believe, whether from any information given to him by any person and taken down in writing or from personal knowledge or otherwise, that any weight or measure or other goods in relation to which any trade and commerce has taken place or is intended to take place and in respect of which an offence punishable under this Act appears to have been, or is likely to be, committed are either kept or concealed in any premises or are in the course of transportation.

The powers include entry at any reasonable time into any such premises and search for and inspect any weight, measure or other goods in relation to which trade and commerce has taken place, or is intended to take place and any record," register or other document relating thereto. The power also include seizure of any weight, measure or other goods and any record, register or other document or article which he has reason to believe may furnish evidence indicating that an offence punishable under the Act has been, or is likely to be, committed in the course of or in relation to, any trade and commerce.

Where any goods seized are subject to speedy or natural decay, the Director, Controller or legal metrology officer may dispose of such goods in such manner as may be prescribed. Every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973, relating to searches and seizures.

### **Forfeiture**

Every non-standard or unverified weight or measure and every package used in the course of, or in relation to, any trade and commerce and seized under section 15, shall be liable to be forfeited, to the State Government.

However, such unverified weight or measure shall not be forfeited to the State Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed. Every weight, measure or other goods seized under section 15 but not forfeited shall be disposed of by such authority and in such manner as may be prescribed.

### **Manufacturers. etc., to maintain records and registers**

Section 17 of the Act provides that every manufacturer, repairer or dealer of weight or measure shall maintain such records and registers as may be prescribed. The records and registers maintained shall be produced at the time of inspection to the persons authorised for the purpose of Inspection.

#### **Declarations on pre-packaged commodities**



*Section 18 states that no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed. Any advertisement mentioning the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.*

### **Registration for importer of weight or measure**

Section 19 provides that no person shall import any weight or measure unless he is registered with the Director in such manner and on payment of such fees, as may be prescribed. No weight or measure, whether singly or as a part or component of any machine shall be imported unless it conforms to the standards of weight or measure established by or under this Act (Section 20).

### **Approval of model**

Every person, before manufacturing or importing any weight or measure shall seek the approval of model of such weight or measure in such manner, on payment of such fee and from such authority as may be prescribed. However, such approval of model may not be required in respect of any cast iron, brass, bullion, or carat weight or any beam scale, length measures (not being measuring tapes) which are ordinarily used in retail trade for measuring textiles or timber, capacity measures, not exceeding twenty litre in capacity, which are ordinarily used in retail trade for measuring kerosene, milk or potable liquors.

It may be noted that the prescribed authority may, if he is satisfied that the model of any weight or measure which has been approved in a country outside India conforms to the standards established by or under this Act, approve such model without any test or after such test as he may deem fit.



### **Prohibition manufacture, repair or sale of weight or measure without licence**

Section 23 of the Act provides that no person shall manufacture, repair or sell, or offer, expose or possess for repair or sale, any weight or measure unless he holds a licence issued by the Controller. However, no licence to repair shall be required by a manufacturer for repair of his own weight or measure in a State other than the State of manufacture of the same. The Controller shall issue a licence in such form and manner, on such conditions, for such period and such area of jurisdiction and on payment of such fee as may be prescribed.

Section 24 provides for verification and stamping of weight or measure. Every person having any weight or measure in his possession, custody or control in circumstances indicating that such weight or measure is being, or is intended or is likely to be, used by him in any transaction or for protection, shall, before putting such weight or measure into such use, have such weight or measure verified at such place and during such hours as the Controller may, by general or special order, specify in this behalf, on payment of such fees as may be prescribed.

The Central Government may prescribe the kinds of weights and measures for which the verification is to be done through the Government approved Test Centre. The Government approved Test Centre shall be notified by the Central Government or the State Government, as the case may be, in such manner, on such terms and conditions and on payment of such fee as may be prescribed.

### **Offences and penalties**

Chapter V of the Act deals with offences and penalties.

Section 25 of the Act provides for penalty for use of non-standard Weight or measure. The section stipulates that whoever uses or keeps for use any weight or measure or makes use of any numeration otherwise than in accordance with the standards of weight or measure or the standard of numeration, as the case may be, specified by or under this Act, shall be punished with fine which may extend to twenty-five thousand rupees and for the second or subsequent offence, with imprisonment for a term which may extend to six months and also with fine.

Under section 26 whoever tampers with, or alters in any way, any reference standard, secondary standard or working standard or increases or decreases or alters any weight or measure with a view to deceiving any person or knowing or having reason to believe that any person is likely to be deceived thereby, except where such alteration is made for the correction of any error noticed therein on verification, shall be punished with fine which may extend to fifty thousand rupees and for the second and subsequent offence with imprisonment for a term which shall not be less than six months but which may extend to one year or with fine or with both.

Section 27 provides that every person who manufactures or causes to be manufactured or sells or offers, exposes or possesses for sale, any weight or measure which does not conform to the standards of weight or measure specified by or under this Act; or which bears thereon any inscription of weight, measure or number which does not conform to the standards of weight, measure or numeration specified by or under this Act, except where he is permitted to do so under this Act, shall be punished with a fine which may extend to twenty thousand rupees and for the second or subsequent offence with imprisonment for a term which may extend to three years or with fine or with both.

Section 30 dealing with penalty for transaction in contravention of standard weight or measure provides that whoever, in selling any article or thing by weight, measure or number, delivers or causes to be delivered to the purchaser any quantity or number of that article or thing less than the quantity or number contracted for

or paid for; or in rendering any service by weight, measure or number, renders that service less than the service contracted for or paid for; or in buying any article or thing by weight, measure or number, fraudulently receives, or causes to be received any quantity or number of that article or thing in excess of the quantity or number contracted for or paid for; or in obtaining any service by weight, measure or number, obtains that service in excess of the service contracted for or paid for, shall be punished with fine which may extend to ten thousand rupees, and; for the second or subsequent offence, with imprisonment for a term which may extend to one year, or with fine, or with both

Under section 31, Whoever, being required by or under this Act or the rules made thereunder to submit returns, maintain any record or register, or being required by the Director or the Controller or any legal metrology officer to produce before him for inspection any weight or measure or any document, register or other record relating thereto, omits or fails without any reasonable excuse, so to do, shall be punished with fine which may extend to five thousand rupees and for the second or subsequent offence, with imprisonment for a term which may extend to one year and also with fine.

Section 35 provides that whoever renders or causes to be rendered, any service through means other than the weight or measure or numeration or in terms of any weight, measure or number other than the standard weight or measure, shall be punished with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees and for the second or subsequent offence, with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine, or with both.

Under section 36 whoever manufactures, packs, imports, sells, distributes, delivers or otherwise transfers, offers, exposes or possesses for sale, or causes to be sold, distributed, delivered or otherwise transferred, offered, exposed for sale any pre-packaged commodity which does not conform to the declarations on the package as provided in this Act, shall be punished with fine which may extend to twenty-five thousand rupees, for the second offence, with fine which may extend to fifty thousand rupees and for the subsequent offence, with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees or with imprisonment for a term which may extend to one year or with both. Whoever manufactures or packs or imports or causes to be manufactured or packed or imported, any pre-packaged commodity, with error in net quantity as may be prescribed shall be punished with fine which shall not be less than ten thousand rupees but which may extend to fifty thousand rupees and for the second and subsequent offence, with fine which may extend to one lakh rupees or with imprisonment for a term which may extend to one year or with both.

Section 42 provides for vexatious search and empowers the Director, the Controller or any legal metrology officer, exercising powers under this Act or any rule made thereunder, who knows that there are no reasonable grounds for so doing, and yet searches, or causes to be searched, any house, conveyance or place; or searches any person; or seizes any weight; measure or other movable property shall, for every such offence, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees or with both.

### **Penalty for counterfeiting or seals**

Section 44 provides that whoever counterfeits any seal specified by or under this Act or the rules made thereunder, or sells or otherwise disposes of any counterfeit seal or possesses any counterfeit seal, or counterfeits or removes or tampers with any stamp, specified by or under this Act or rules made thereunder, or affixes the stamp so removed on, or inserts the same into, any other weight or measure, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

Counterfeit" shall have the meaning assigned to it in section 28 of the Indian Penal Code.



A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.

**Explanation 1.** It is not essential to counterfeiting that the imitation should be exact.

**Explanation 2.** When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practice deception or knew it to be likely that deception would thereby be practiced.

Whoever obtains, by unlawful means, any seal specified by or under this Act or the rules made thereunder and uses, or causes to be used, any such seal for making any stamp on any weight or measure with a view to representing that the stamp made by such seal is authorised by or under this Act or the rules made thereunder shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

Whoever, being in lawful possession of a seal specified by or under this Act or the rules made thereunder, uses, or causes to be used, such seal without any lawful authority for such use, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

Whoever sells or offers or exposes for sale or otherwise disposes of any weight or measure which, he knows or has reason to believe, bears thereon a counterfeit stamp, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

### Compounding of offence

In terms of offence punishable under section 25, sections 27 to 39, sections 45 to 47 either before or after the institution of the prosecution, be compounded, on payment for credit to the Government of such sum as may be prescribed.

However, the Director or legal metrology officer as may be specially authorised by him in this behalf, may compound offences punishable under section 25, sections 27 to 39, or any rule made under sub-section (3) of section 52. The Controller or legal metrology officer specially authorised by him, may compound offences punishable under section 25, sections 27 to 31, sections 33 to 37, sections 45 to 47, and any rule made under sub-section (3) of section 52:

Provided that such sum shall not, in any case, exceed the maximum amount of the fine, which may be imposed under this Act for the offence so compounded.

### Offences by companies

Section 49 provides that where an offence under this Act has been committed by a company, the person, if

any, who has been nominated to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as a person responsible); or where no person has been nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

However, such person shall not be liable to any punishment, if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

Any company may, by order in writing, authorise any of its directors to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Director or the concerned Controller or any legal metrology officer authorised in this behalf by such Controller in such form and in such manner as may be prescribed, that it has nominated such director as the person responsible, along with the written consent of such director for being so nominated.

It may be noted that where a company has different establishments or branches or different, units in any establishment or branch, different persons may be nominated under this subsection in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

Where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of, any director, manager, secretary or other officer, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Where any company is convicted under the Act for contravention of any of the provisions thereof, it shall be competent for the court convicting the company to cause the name and place of business of the company, nature of the contravention, the fact that the company has been so convicted and such other particulars as the court may consider to be appropriate in the circumstances of the case, to be published at the expense of the company in such newspaper or in such other manner as the court may direct. No publication shall be made until the period for preferring an appeal against the orders of the court has expired without any appeal having been preferred, or such an appeal, having been preferred, has been disposed of. The expenses of any publication shall be recoverable from the company as if it were a fine imposed by the court. '

*'Explanation.-* For the purposes of this section,-

- (a) "company" means any body corporate and includes a 'firm or other association of individuals; and
- (b) "director", in relation to a firm, means a partner in the firm but excludes nominated directors, honorary directors, Government nominated directors.

### **Power of the Central Government to make rules**

Section 52 of the Act empowers the Central Government to make rules, by notification, for carrying out the provisions of the Act.

In making any rule the Central Government may provide that a breach thereof shall be punishable with fine which may extend to five thousand rupees.

Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session

immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

### **Power of State Government to make rules**

Section 53 empowers the State Government to make rules, by notification, and after consultation with the Central Government, to carry out the provisions of the Act.

In making any rule under this section, the State Government may provide that a breach thereof shall be punishable with fine which may extend to five thousand rupees. The power to make rules under this section shall be subject to the condition of the rules being made after previous publication in Official Gazette. Every rule made under this section shall, as soon as may be after it is made, be laid before each House of State Legislature, where there are two Houses and where there is one House of State Legislature, before that House.

### **LESSON ROUND-UP**

- Weights and measures may be ranked among the necessities of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family.
- Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.
- "Legal Metrology" means that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements.
- Every unit of weight or measure to be in accordance with the metric system based on the international system of units.
- A person shall not manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed.
- Any advertisement mentioning the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.
- Legal Metrology Act provides for penalty for use of non-standard Weight or measure.
- Label means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity.
- A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.
- Legal Metrology Act empowers the Central Government and State Governments to make rules for carrying out the provisions of this Act.



# Lesson 16

## Transfer of Property Act, 1882

### LESSON OUTLINE

- Important Definitions
- Distinction between Moveable and Immoveable Property
- Rules relating to Transfer of Property
- Who can transfer the Property
- Subject matter of Transfer
- Rules against Inalienability
- Transfer for benefit of Unborn Person
- Conditional Transfer
- Doctrine of Election
- Doctrine of Holding Out
- Doctrine of Feeding the Grant by Estoppel
- Doctrine of Fraudulent Transfer
- Doctrine of Part-Performance
- Properties which cannot be Transferred
- Rule against Perpetuity
- Accumulation of Income
- Doctrine of Lis Pendens
- Provisions relating to Specific Transfers
- Actionable Claims
- Charges
- Lesson Round up
- Self-Test Questions

### LEARNING OBJECTIVES

Article 17 of Universal Declaration on Human Rights provides that everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property. As per Article 300A of Constitution of India, persons not to be deprived of property save by authority of law.

Property has, always, been on the fundamental elements of socio economic life of an individual. Transfer of Property means an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself and one or more other living persons and "to transfer property" is to perform such an act. Consequently, the law relating to transfer of property is not only an important branch of civil law but also one that demands proper elucidation due to its complexity.

Therefore, students should be well versed in this subject so as to understand the intricacies involved in the transfer of property.

*The law relating to transfer of property is governed by the Transfer of Property Act, 1882. The very preamble to the Act suggests that it simply defines and amends certain parts of the law relating to transfer of property by act of parties.*

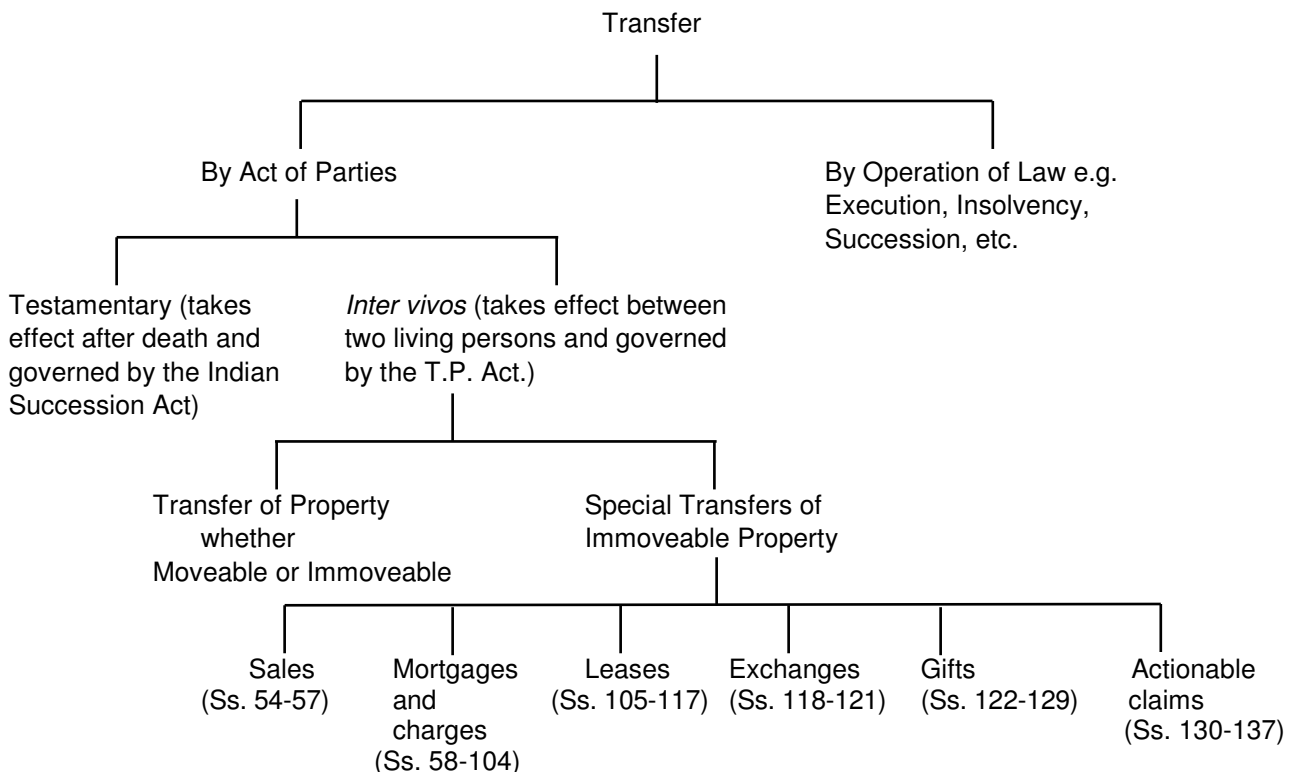
## INTRODUCTION

The law relating to transfer of property is governed by the Transfer of Property Act, 1882. Before this Act came into force there was practically no law as to real property in India. Barring few points which were covered by certain Regulations and Acts, the Courts in India in the absence of any statutory provisions, applied rules of English law as the rule of *justice, equity and good conscience*.

The Act was enacted with the object to *amend the law relating to the transfer of property by act of parties*. The Act excludes from its purview the transfers by operation of law, i.e. by sale in execution, forfeiture, insolvency or intestate succession. The scope of the Act is limited, as it is confined to transfers *inter vivos* and excludes testamentary succession, i.e. transfers *by will*.

The very preamble to the Act suggests that it simply defines and amends certain parts of the law relating to transfer of property by act of parties, and it does not at all profess to be an exhaustive enactment as is revealed by the omission of the word "*consolidate*". Therefore, the Act leaves the scope for applying rules of *justice, equity and good conscience* if a particular case is not covered by any of the provisions of the Act. But if it is covered, the Act must be applied.

### SCHEME OF THE ACT



## IMPORTANT DEFINITIONS

However, while explaining the provisions of the Act, the terms used are defined there itself, yet some of the important terms used under the Act are as follows:

### **Instrument**

"Instrument" means a non-testamentary instrument.



**Attached to the earth**

Attach to the earth means:

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; or
- (c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

**Absolute Interest**

When a person owns property, he has an "absolute interest" in the property. Ownership consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property. If A is the owner of a land, he has an absolute interest in the land. If A sells his land to B, then B becomes the owner and he acquires an absolute interest in the land he has purchased from A. Likewise if A makes a gift of his property to B, there again B gets an absolute interest in the property which is gifted to him. These are instances where persons may have an absolute interest.

**Reversion and Remainder**

Some interests in the property are called in English Law, reversion and remainders. A "reversion" is the residue of an original interest which is left after the grantor has granted the lessee a small estate. For example, A, the owner of a land may lease it to B for a period of five years. The person who grants the lease is the lessor and the person who takes the lease is called the lessee. Here, after the period of 5 years the lease will come to an end and the property reverts back to the lessor. The property which reverts back to him is called the reversion or the reversionary interest. The grantor has a larger and an absolute interest out of which he carves out a smaller estate and gives to the grantee, i.e. the lessee.

When the owner of the property grants a limited interest in favour of a person or persons and gives the remaining to others, it is called a "remainder". For instance, A the owner of a land transfers property to B for life and then to C absolutely. Here the interest in favour of B is a limited interest, i.e., it is only for life. So long as A is alive he enjoys the property. He has a limited right since he cannot sell away the property. His right is only to enjoy the property. If he sells this interest it will be valid so long as he is alive. So after B's death the property will go to C, interest is called a remainder. In the case of a "remainder", the property will not come back to the owner, but it goes over to the other person.

**Vested and Contingent Interests**

The word "vested" is used in two different senses. It may mean "vested in possession" or "vested in interest". A right is said to be "vested in possession" when it is a right to present possession of property and it is said to be "vested in interest" when it is not a right to present possession but a present right to future possession. For instance, if a land is given to A for life with a remainder to B, A's right is vested in possession, B's right is vested in interest. In the above example, the interest of B is not subject to any uncertain condition. It will come into his possession after A's life comes to an end. Therefore, an interest is said to be vested when it is not subject to any condition, precedent, i.e., when it is to take effect on the happening of an event which is certain, whereas an estate is contingent when the right to enjoyment depends upon the happening of an event which may or may not happen. Thus, a gift to A on the death of B creates a vested interest in A even during the life time of B for there is nothing more certain than death. But a gift to A on the marriage of B creates a contingent interest, for B may never marry at all but that contingent interest becomes vested if and when B marries.

A vested interest is transferable and heritable. If property is given to A for life and afterwards to B, B gets a vested interest and if B transfers this interest to C, C will take when the life estate of A comes to an end. B's interest, since it is vested, is also heritable. Therefore, if B dies during the lifetime of A, C will get the property after the death of A.

A contingent interest, as said above, is an interest which takes effect after the condition is satisfied. It is subject to a condition precedent, i.e., unless A marries B's daughter, he will not get the property. The following example will illustrate this point. Property is given to A for life and then to B if he marries C. B should marry C before A dies. If he does so, his interest is converted into vested interest. Before B marries C his interest is contingent. The contingent interest is not heritable although it is transferable. In a vested interest the transfer is complete, but when the interest is contingent the transfer depends upon a condition precedent. In a condition precedent the estate is not vested in the grantee until the condition is fulfilled.

*Distinction between a vested and a contingent interest:* The following are the principal points of distinction between a vested and a contingent interest:

1. When an interest is vested the transfer is complete. It creates an immediate proprietary interest in the property though the enjoyment may be postponed to a future date. A contingent interest on the other hand is dependant upon the fulfilment of some conditions which may or may not happen. In other words, in case of vested interest, the owner's title is already perfect; in case of a contingent interest, the title is as yet imperfect but may become perfect on the fulfilment of a stipulated condition.
2. A vested interest takes effect from the date of transfer. A contingent interest in order to become vested is conditioned by a contingency which may not occur.
3. A vested interest cannot be defeated by the death of the transferee before he obtains possession. A contingent interest may fail in case of the death of transferee before the fulfilment of condition.
4. Since vested interest is not circumscribed by any limitation which derogates from the completeness of the grant, it logically follows that a vested interest is transferable as well as heritable. If, therefore, a transferee of the vested interest dies before actual enjoyment, it will devolve on his legal heirs. A contingent interest, on the other hand, cannot be inherited though it may be transferred coupled with limitation regarding fulfilment of a condition.

## **MOVEABLE AND IMMOVEABLE PROPERTY**

The term "property" signifies the subject matter over which the right of ownership or any less right carved out of ownership (e.g. mortgage right) is exercised. The Act deals with (i) various specific transfers relating to Immoveable property and (ii) lays down general principles relating to transfer of both moveable and immoveable property. Chapter II of the Act is divided into two parts. Part A deals with the rules pertaining to both moveable and immoveable property (Section 5 to 37), Part B embodies the rules relating to immoveable property (Section 38 to 53A). The other chapters of the Act deal with transfers such as sales, mortgages, leases, gifts, exchanges and actionable claims. The rules relating to these transactions are referred to as rules governing special transfers to immoveable property. The fundamental rule relating to all transfers is that a transfer cannot be effected in any other way except as prescribed under the Act. Furthermore, the Act states that certain kinds of property cannot be transferred at all.

The first task is to define and distinguish between moveable and immoveable property.

### ***Moveable property***

The Transfer of Property Act does not define the term "moveable property". Therefore, it is to be defined

with the help of other statutes. For e.g., it has been defined in the General Clauses Act, 1897 as to mean "property of every description except immoveable property". The Registration Act defines "moveable property" to include property of every description excluding immoveable property but including standing timber, growing crops and grass.

For the purpose of law, moveable property is sometimes regarded as immoveable property. This may happen when a thing of chattel is attached or embedded in earth. For instance, if a machinery or a plant is installed on the land, the question arises whether the machinery or the plant is moveable property or immoveable property. In order to find out whether such a thing or chattel is an immoveable property or not, it is to find out the mode of annexation of the thing and the object or purpose of such annexation. If the machinery is fixed on the land permanently then it becomes immoveable property, whereas if the machinery or engine or any other thing is fixed on a temporary basis, then it will be regarded as moveable property. Thus, where the owner of a piece of land installed a bone mill along with machinery being held by iron bars which have been dug to a considerable depth then it is a permanent fixture and this will become immoveable property. Similarly, the machinery installed on a cement platform and held in position by being attached to iron pillars fixed in the ground was held to be immoveable property as the annexation was made by the person who owned the buildings as well as the machinery (*Mohamed Ibrahim v. Northern Circars Fibre Trading Company*, A.I.R. 1944 Mad. 492).

### **Immoveable property**

The term "immoveable property" is also not defined under the Act. However, it is defined in the negative sense as "the immoveable property *does not include standing timber, growing crops, or grass*" (S. 3 Para 2). Standing timber are trees fit for use for building or repairing houses. This is an exception to the general rule that growing trees are immoveable property.

*Growing crops:* It includes all vegetable growths which have no existence apart from their produce such as pan leaves, sugar cane etc.

*Grass:* Grass is moveable property, but if it is a right to cut grass it would be an interest in land and hence forms immoveable property.

The General Clauses Act defines the term "immoveable property" but not exhaustively. It states: "immoveable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to any thing attached to the earth" [Section 3(25)]. The Indian Registration Act expressly includes under to immoveable property the benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries.

If the definitions of "immoveable property" as given in the Transfer of Property Act, the General Clauses Act and the Registration Act are viewed together, it is evident that they do not say what immoveable property is. They only say what is either included or excluded therein. Still, reading the definition in the Act with one in the General Clauses Act, *immoveable property will be found to include land, benefit to arise out of land such as rent, and things attached to the earth like trees and buildings but not standing timber, growing crops and grass*. The last three things are regarded as severable from the land on which they stand and, therefore, they are not included in the term "immoveable property".

**Thus, the meaning of immoveable property is as under:**



*"Immoveable property" means land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.*

“Attached to the earth” means (a) rooted in the earth, as in the case of trees and shrubs; (b) embedded in the earth, as in the case of walls or buildings; or (c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached (S. 3 Para 6 of the Act).

*Things rooted in the earth:* Trees and Shrubs are immoveable property according to this definition subject to the exception as to standing timber.

*Things embedded in the earth:* A house being embedded in the earth is immoveable property and this is so even if it is sold for enjoyment as a house with an option to pull it down. The mode of annexation and object of annexation are the two tests to determine whether it is immoveable property or not.

*Attached to what is so...:* The attachment must be as the section says for the permanent beneficial enjoyment of that to which it is attached e.g. the doors, windows of a house or moveable parts of fixed machinery. But the attachment must be intended to be permanent.

A orally grants to B for Rs. 700/- the rights to catch and carry away fish from his lake. Is the grant valid? The Supreme Court in *Ananda Behra v. State of Orissa*, (1956) SCJ p. 96, that such a right is a benefit arising out of immoveable property namely the lake. So under General Clauses Act it is immoveable property. The sale requires a registered instrument for its validity under Section 54 of the Transfer of Property Act. Therefore, the oral grant is invalid and cannot pass away any title in favour of B.

**Distinction between moveable and immoveable property**

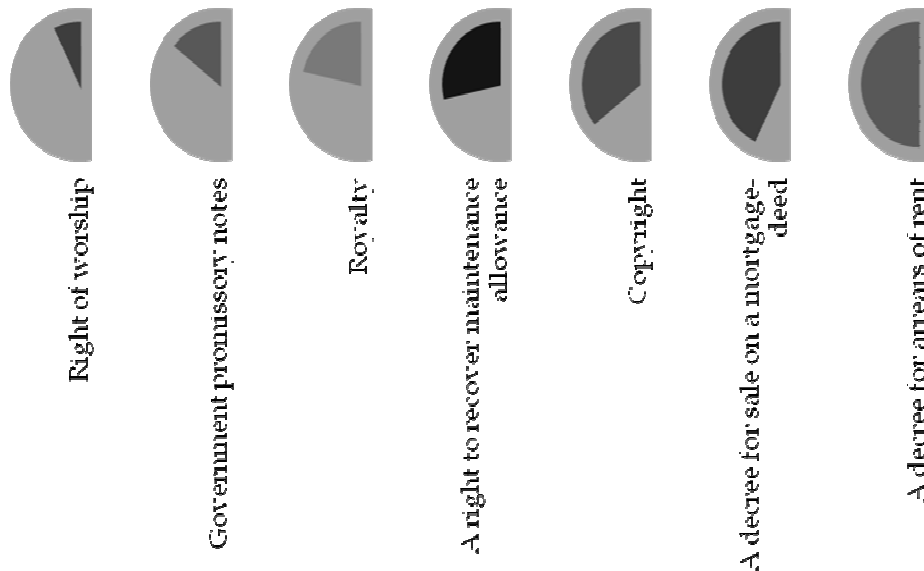


*The distinction between moveable and immoveable property was explained in the case of Sukry Kurdepa v. Goondakull, (1872) 6 Mad. H.C. 71, by Holloway J. as moveability may be defined to be a capacity in a thing of suffering alteration. Immoveability for such alteration e.g., a piece of land in all circumstances is immoveable. If a thing cannot change its place without injury to the quality it is immoveable. Certain things e.g. trees attached to the ground are so long as they are so attached, immoveable when the severance has been effected they become moveable.*

**The following have been recognised as immoveable property:**

Right to collect rents of immoveable property	A right to way	A right to collect dues from fair on a piece of land	Hereditary offices
The equity of redemption	The interest of mortgagee	Right to collect lac from trees	A right of ferry
A right of fishery	Right to receive future rents and profits of land	Reversion in property leased	A factory

The following have been held not to be immovable property:



## RULES RELATING TO TRANSFER OF PROPERTY (WHETHER MOVEABLE OR IMMOVABLE)

According to Section 5 of the Transfer of Property Act, the term “transfer of property” means an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself, and one or more other living persons and “to transfer property” is to perform such an act. In this section, “living person” includes a company or association or body of individuals whether incorporated or not. But the general provisions of the Act as to transfer do not effect the special provisions of the Companies Act, 1956.

To effect a transfer, property must be in existence. The word “transfer” is defined with reference to the word “convey”. The fundamental rule is that a transfer cannot be affected in any way not prescribed by the Act.

The first point to note is that transfer *inter vivos* (i.e., between living persons) alone is contemplated by the Act. A transfer by means of a will is not a transfer according to the Act, because it is not a transfer between two living persons. Section 5 also says that the transfer may be “in present or in future”. The words in present or in future qualify the words ‘conveys’, and not the word ‘property’. A transfer of property not in existence operates as a contract to be performed in future which may be specially enforced as soon as the property comes into existence (*Jugalkishore v. Ram Cotton Company*, (1955) 1 SCR 1369).

Further Section 6 (h) provides that no transfer can be made in so far as it is opposed to the nature of the interest attached thereby or for an unlawful object or consideration or to a person legally disqualified to be a transferee.

## WHO CAN TRANSFER THE PROPERTY?

According to Section 7 of the Transfer of Property Act, every person who is competent to contract and entitled to transferable property, or authorised to dispose of property is competent to transfer such property. Hence, every person competent to contract and having ownership can transfer property. According to Indian Contract Act, a person is competent to contract when he is a major and of sound mind and is not disqualified from contracting by any law to which he is subject. But a minor can be a transferee as there is nothing in the

Transfer of Property Act to disqualify a person, who is a minor to be a transferee. Thus, a mortgage can be validly executed in favour of a minor who has paid the consideration (*Hari Mohan v. Mohini*, 22 C.W.C. 130, *Raghava v. Srinivasa*, (1917) 60 Mad. 308). Persons who are authorised to transfer property can also transfer property validly. Although a minor is not competent to be a transferor yet a transfer to a minor is valid. However, there are exceptions to this:

If a person holds himself out as the owner with the consent of the owner i.e. doctrine of holding out or if a person represents to be the owner i.e. doctrine of feeding the grant by estoppel.

## **SUBJECT MATTER OF TRANSFER**

Section 6 of the Transfer of Property Act says that property of any kind may be transferred except as provided by this Act or any other law for the time being in force. The words "property of any kind" indicate that transferability is the general rule and the right to property includes the right to transfer the property to another person. Property of any kind excludes from its purview the future property. A transfer of future property can only operate as a contract which may be specifically performed when the property comes into existence.

### ***Exceptions to the general rule of transferability made by other laws***

Certain restrictions are placed by Hindu law and Mohammedan law on the transfer of property.

## **FORMALITIES OF TRANSFER**

Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration. Section 54 lays down the mode of transfer of immoveable property. Such transfer, in the case of *tangible* immoveable property of the value of one hundred rupees and upwards, or in the case of a *reversion* or other *intangible* thing, can be made only by a registered instrument.

In the case of *tangible* immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

The *tangible* property means a property which can be touched physically and hence, capable of physical dealing.

The *intangible* property means something in abstract, either capable of being touched or perceived and yet standing in relation to a certain thing.

'*Reversion*' means the bundle of rights remaining with the lessor after the execution of a lease of a certain immoveable property.

When a transfer is effected in writing, the person who signs the document professing to transfer the property is called the executant. Execution consists in affixing his signature to the document to the effect that he is transferring the property. An illiterate person who cannot write may direct some literate person to sign it on his behalf and in his presence and the illiterate person may put his thumb impression.

### **(i) Attestation**

Attestation is an important formality in connection with the execution of transfer. "Attest" means to testify a fact, to bear witness to a fact. Attestation, in relation to a document, signifies the fact of authentication of the signature of the executant of that document by the attestator by putting down his own signature on the document in testimony of the fact of its execution. All transfers do not require attestation. For example, a sale or a lease does not require attestation. But a mortgage or a gift requires that a mortgage deed or a gift deed must be attested by two or more witnesses.

Attestation is valid and complete when two witnesses sign the instrument. According to the definition given in

the Transfer of Property Act (Section 3), the following essentials are required for a valid attestation:

- (a) There must be at least two or more witnesses;
- (b) Each witness must see (a) the executant's sign or affix his mark to the instrument, or (b) some other person sign the instrument in the presence and by the direction of the executant, or (c) receive from the executant a personal acknowledgement of his signature or mark or of the signature of such other person; and
- (c) Each witness must sign the instrument, (i.e. document), in the presence of the executant.

It is not necessary that both attesting witnesses should be present at the same time. The instrument may be attested after its execution by each of the attestators at different times. Attestation cannot take place before the execution of the deed. The Act does not insist on any particular form of attestation. The attesting witness may not be described as such on the face of the document (*Yakub v. Kalzurkan*, 52 Bombay 203). However, the attesting witness must have put his signature *antmus attestandi*, i.e., with intention to attest. Thus, where a Registrar or an identifying witness puts his signature on the document he cannot be regarded as an attesting witness unless it is duly proved that he signed with the necessary intention to attest.

### **(ii) Registration**

Registration is an essential legal formality to effect a valid transfer in certain cases. The advantage of registering a document is that any person who deals with the property would be bound by the rights that are created in earlier registered document.

### **Illustration**

A executes a mortgage on property X and gets it registered. Subsequently he sells property X to B, B is bound by the right of the mortgagee over the property X. Thus, whether B knows actually or not that there was a mortgage the fact that the earlier document was registered is a notice to B and B takes property, subject to the rights of the mortgagee. Therefore, if a document of transfer relating to immoveable property is required by the law to be and has been effected by registered instrument, the persons who deal with the property subsequently are deemed in the eye of law as having knowledge of the such registered instrument from the date of its registration.

### **(iii) Notice**

Notice, may be actual or constructive. If a person knows about a fact, he has an actual notice. But, in certain circumstances law treats a man who ought to have known a fact even though he did not in fact know it. This is called constructive notice.

The equitable doctrine of notice is recognised in various Sections of this Act. For instance in Section 39 of the Act, where a transfer is made of property out of which a person has a right to receive maintenance, the transferee takes subject to that right if he had notice of it, but not otherwise. Similarly under Section 40 if A conveys to C property, which he had by a previous contract agreed to sell to B, then B can enforce the contract against C, if C had notice of it, but not otherwise. If C had notice of the prior contract, he purchases with knowledge that it was unconscionable of A to sell to him, and it is therefore, unconscionable of him to buy.

A person is deemed in the eye of law to have constructive notice of a fact when (i) but for willful absentation from an enquiry or search which he ought reasonably to have made; or (ii) gross negligence on his part, he would have known it. Constructive notice arises from an irrefutable presumption of notice. In law such a presumption will arise when (i) there is a willful absentation on the part of a person to make necessary enquiries regarding the existence of certain facts, or (ii) he showed gross negligence in the matter.

The words “wilful absentation” suggest want of *bona fide* in respect of particular transaction (*Joshua v. Alliance Bank*, 22 Cal. 185). Thus, a person who refuses to receive a registered letter is, deemed to have constructive notice of its contents.

Similarly, if a person proposes to sell his property to X who, at the same time knows that rents due in respect of the property are paid by the tenants to a third person Y, X will be fixed with notice of the rights of Y (*Mernt v. Luck* (1902) 1 Ch. 429).

In so far as gross negligence is concerned, it does not mean a mere carelessness but means carelessness of such an aggravated nature as to indicate mental indifference to obvious risks. For example, if A buys property from B and does not care to ask whether any amount by way of municipal tax is due on that property and if the municipal corporation asks him to pay the arrears of tax, then B is responsible, and if he does not pay, then the arrears of tax may be made a charge on the property.

#### *Other Illustrations*

- (a) Where a purchaser was informed that the title deeds were in the possession of a bank for safe custody and yet failed to make any enquiry in the bank. It was held that he was guilty of gross negligence and must be deemed to have notice of the rights of the bank which has the custody of the title deeds (*Imperial Bank of India v. Rai Gyand*, 1 A 283).
- (b) Where a person abstained from making further enquiries about the right of a person and did not cause a search, to be made in the office of the Sub-Registrar to ascertain if there was any encumbrance over the property, his omission must be held to be wilful or grossly negligent and he would be said to have notice of the prior encumbrances (*Rangappa Goundan v. Marapa Goundan*, AIR (1958) Madras 515).

The three Explanations to the definition of notice in Section 3, further mention certain circumstances wherein statutorily presumption of knowledge arises. These circumstances relate to the fact of registration (Explanation-I, Explanation-II) actual possession and notice to an agent (Explanation-III).

## **RESTRAINT ON TRANSFERS OR RULE AGAINST INALIENABILITY**

Section 10 of the Act says that when property is transferred, the transferee should not be restrained absolutely from alienating the property. One may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property. Suppose, B gives property to A and his heirs adding a condition that if the property is alienated it should revert to B. This condition is invalid and the transferee can ignore such condition. The transfer takes effect and is valid, and the condition not to alienate the property is void.

### ***Examples of absolute restraint***

Suppose, A gives to B property worth only 2,000 rupees and adds a condition that B should sell property for ₹50,000 and not below that amount, this condition will at once become invalid for no one will buy the property which is only worth ₹2,000 for Rs. 50,000. Similarly, A gives to B property worth ₹50,000 and stipulates that if B wants to sell the property he should sell it to C only for Rs. 1,000. This again will operate as an absolute restraint. In *Rosher v. Rosher*, (1884) 26, Ch. D. 801, the testator gave his estate to his son and added a condition that if his son wanted to sell the property he should first give an option to the testator’s wife who should be able to buy for £ 3,000. The market value of the property when the testator died was £ 15,000. It was held by the Court that the condition which compelled the son to sell the property for £ 3,000 was void. In *Trichinpoly Varthaga Sangum v. Shunmoga Sunderam*, (1939) Madras 954, there was a partition between a Hindu father and his five sons. The deed of partition provided that if any one of the sons wanted to sell his



share, he should not sell it to a stranger but to one of his brothers who should have the option to buy for a sum not exceeding ₹1,000. It was held by the Court that the condition absolutely prevented the son from selling the property to any one for good value. In this case the market value of the property of the son was far greater than ₹1,000. Hence, the condition was declared invalid.

### ***Partial restraint valid***

Though absolute restraints are bad in law, partial restraints are valid. If there are conditions which restrain the transferee not to alienate the property outside the family, it has been held by the Courts that they are partial restraints. For example, whenever there are conditions in a family settlement whereby the members are not allowed to sell their shares to a stranger, such conditions are valid.

But it is not permissible to restrict the alienation to a particular time. Such a restriction is not partial but an absolute restraint and as such invalid.

### ***When absolute restraint valid?***

There are two exceptions to the rule that absolute restraints are void. Firstly, in the case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest. Such conditions are valid. The reason why such an exception is made in the case of a lease is that the lessor may have confidence in the lessee but may not have the same confidence in some other person. So, if the lessor puts a condition restraining the lessee from transferring the property to someone, the condition is valid.

The second exception is made in respect of a woman who is not a Hindu, Buddhist or Muslim. In such a case, a condition to the effect that she shall not have power during her marriage to transfer the property is valid.

### ***Restraint on enjoyment***

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The section lays down that where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property.

### ***Illustrations***

- (a) A sells his house to B and adds a condition that B only should reside in that house, the condition is invalid. This is subject to the exception that, if a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.
- (b) A has properties X and Y. He sells property Y to B and puts a condition that B should not construct on property Y more than one storey so that A's property X which he retains should have good light and free air.

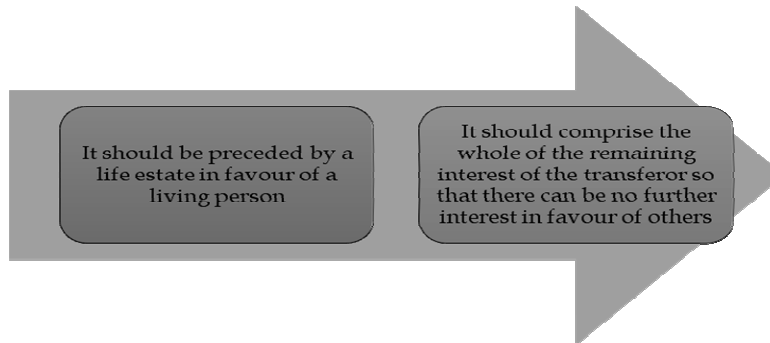
Thus, it is clear in the above illustration that the condition which is imposed by A is for the benefit of another property which he retains. Such a condition is valid.

Section 12 also makes the transfer void if a property is transferred to any person adding a condition that if such person becomes insolvent he ceases to hold that property. Such a condition is not recognised as valid in law. Again, this is subject to the exception that if a landlord leases his property he can impose a condition on the lessee that if the lessee becomes insolvent the lease should come to an end.

## **TRANSFER FOR BENEFIT OF UNBORN PERSON**

Section 13 of the Transfer of Property Act lays down that where on a transfer of property, an interest therein

is created for the benefit of a person not in existence at the date of transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property. Thus if a property is given to an unborn person, two conditions should be satisfied:



### **Illustration**

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

### **CONDITIONAL TRANSFER**

When an interest is created on the transfer of property but is made to depend on the fulfillment of a condition by the transferee, the transfer is known as a conditional transfer. Such a transfer may be subject to a condition precedent or a condition subsequent. If the interest is made to accrue on the fulfillment of a condition, the condition is said to be condition precedent. For instance, A agrees to sell his land to B if B marries C. This is a condition precedent. The condition precedent will be allowed to operate only if it is not hit by the provisions of Section 25 of the Act. Section 25 in the first place, says that, the condition must not be impossible to fulfil. For example, A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void. Secondly, the condition must not be forbidden by law. Thirdly, it should not be of such a nature that if permitted it would defeat the provisions of any law. For instance, A transfers Rs. 500 to B on condition that he shall murder C. The transfer is void. Fourthly, it should not be fraudulent. For example, X gives a false receipt to Y on behalf of his principal in consideration of transfer of land. The transfer would be void. Fifthly, the condition should not be such as to cause injury to the person or property of another. And lastly the condition should not be immoral or opposed to public policy. Thus, an agreement to give a son or daughter in adoption for a consideration is opposed to public policy as trafficking in children is forbidden by law.

If the condition is not hit by any of the above provisions, it is valid. Still the law does not insist on its literal fulfilment. It is sufficient if it is substantially complied with. Thus, where A transfers, Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries with the consent of C and D only as E has died earlier. B is deemed to have fulfilled the condition.

A transfer may also be made subject to a contingency which may or may not occur. Thus, an interest may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

This is known as condition subsequent. Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event. For example, A transfers a farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm. Similarly, if A transfers a farm to B provided that B shall not go to England within three years after the date of transfer, the interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Now you will notice the distinction between condition precedent and condition subsequent. In condition precedent, the condition comes before the interest; whereas in condition subsequent, the interest is created before the condition. The one precedes the vesting of right and the other follows the vesting. In condition precedent, the vesting of right is delayed until the happening of an event. In condition subsequent, there is no postponement of vesting of right though it is to be destroyed or divested by reason of non-fulfilment of condition. There are certain situations where the law says that either the transfer will take effect on the fulfillment of a condition or will not take effect at all.

Again, if a transfer is made to defeat or delay the rights of a creditor, the transfer may be declared invalid by the creditor. In some cases, if property is transferred during the period when parties are litigating in a Court over a piece of property, then the transfer is not valid, or even if there is a transfer, it is subject to the rights that are created in the Court's decree. All these circumstances are given in the Transfer of Property Act e.g., doctrine of election, doctrine of fraudulent transfers and doctrine of *Lis pendens*.

## DOCTRINE OF ELECTION

Section 35 of the Transfer of Property Act deals with what is called doctrine of election. Suppose, a property is given to you and in the same deed of gift you are asked to transfer something belonging to you to another person. If you want to take the property you should transfer your property to someone else, otherwise you cannot take the property which is transferred to you by some one. Election may be defined as "the choosing between two rights where there is a clear intention that both were not intended to be enjoyed.

The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument. It is, therefore, a branch of a general rule that no one may approbate and reprobate (*Copper v. Copper* (1874) H.L. 53). However doctrine of election could not be applied to deprive a person of his statutory right to appear invoking extraordinary jurisdiction of the Supreme Court under Article 136, (*PR Deshpande v. MB Haribatti* (1995 (2) Scale 804 SC).

### Illustration

A transfers to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C.

Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election. You must elect either to take under the instrument, in which case you will have to fulfil the condition and bear the burden imposed upon you or you must elect against the instrument, in which case neither the benefit nor the burden will come to you. The doctrine is based on the principle that "a donee shall not be allowed to approbate and reprobate and that if he approbates, he shall do all in his power to confirm the instrument which he approbates" (*Cavendish v. Decre* 31 C.D. 466).

In case, the person upon whom benefit is conferred rejects it, the property which was attempted to be transferred to him will revert to the transferor and it is he who will compensate the disappointed person. If the

transferor dies before the person upon whom the benefit is conferred and he rejects the transfer, then the representatives of the transferor will have to satisfy the disappointed person out of the property which was the subject of transfer.

### **Explanation of the above principle**

A transfers his property worth ₹1,000 and by the same instrument asks B to transfer his property worth ₹500 to C. Here, if B does not accept, he will not take A's property and the property will revert to A. If A is alive, it is for him to give some property to C. But if A dies before B has made his election then the heirs of A have to compensate C from A's property to the extent of ₹500. (You will note that B's property worth ₹500 was intended by A to be transferred to C).

The question of Election arises only when a transfer is made by the same document. If the transferor makes a gift of property by one deed and by another asks the donee to part with his own property then there is no question of election.

### **Illustration**

A transfers his land to B by a document. A by another document transfers B's property to C. In this case B can retain the property given to him and refuse to transfer his property to C as the two transfers do not form part of the same document.

Further, the doctrine of election is applicable if the benefit is given directly. A person taking no benefit directly under a transaction but deriving a benefit under it indirectly need not elect.

### **Illustration**

A transfers his property to B's son and by the same instrument transfer B's property to C. In this case B need not to elect and can keep his property. His son can have his gift.

There is, however, an exception to the doctrine of election. That is, if the transferor gives two benefits to a person and one particular benefit is in lieu of an item of property belonging to that person which the transferor has asked to transfer to a third-party then if the person elects to retain his property, he can retain the other benefit.

### **Illustration**

Under A's marriage settlement, his wife is entitled, if she survives him to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of ₹200 p.m. during her life, in lieu of her interest in the estate of Sultanpur, which estates he bequeaths to his son. A also gives his wife a legacy of ₹1,000. After the death of A, his widow elects to take what she is entitled to take under the marriage settlement (i.e., the enjoyment of estate of Sultanpur). In this case, the wife has to forfeit the claim of ₹200 which her husband has given to her. But she can claim other benefit i.e., ₹1,000.

Election may be express or implied by conduct.

### **Illustration**

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer.

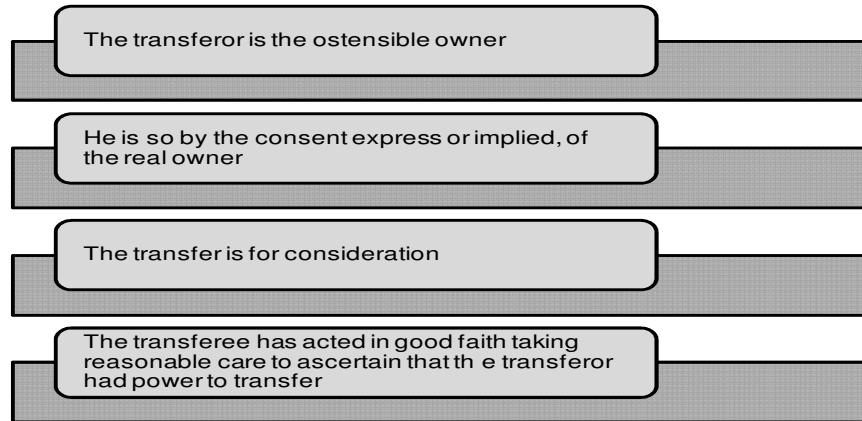
In case of disability, the condition shall be postponed until the disability ceases, or until the election is made by some competent authority.

## **TRANSFER BY OSTENSIBLE OWNER OR DOCTRINE OF HOLDING OUT**

Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be

voidable on the ground that the transferor was not authorised to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. (Section 41)

The following conditions are necessary for the application of Section 41:



If any one of these elements is absent, the transferee is not entitled to the protection of this section.

This Section is a statutory application of the law of estoppel. The section makes an exception to the rule that a person cannot confer a better title than he has. An ostensible owner is one who has all the *indicia* of ownership without being the real owner.

### Illustrations

- (a) A made a gift of property to B but continued in possession of the gifted property. He purported to exercise a power of revocation and then transferred the property to the defendant. The gift, however, was not revocable as it was an unconditional gift. B seeks to recover possession from the defendant. The defendant invoked protection under Section 41.

In the given example, the donor is not an ‘ostensible owner’ holding the property with the consent of the real owner. The defendant cannot, therefore, invoke the protection of Section 41.

- (b) The manager of a joint Hindu family consisting of some minor members alienated the ancestral house to P without any necessity and the alienee transferred it to the defendants. The minors challenged the alienation. The defendants sought protection under Section 41.

Here Section 41 has no application for “P was not the ostensible owner of the ancestral family house with the consent, express or, implied, of the persons interested in the said ancestral house in as much as the plaintiff, who had an interest in the said house, did not and could not by reason of the disability of infancy give their consent”.

### DOCTRINE OF FEEDING THE GRANT BY ESTOPPEL

Where, a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. (Section 43)

Nothing in this Section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

*Essentials:* In order to invoke this section, the transferee must prove that:

There was a representation, fraudulent or erroneous

It was to the effect that the transferor is entitled to transfer the immovable property

The transferor is found to have subsequently acquired the interest which he professed to transfer

The transfer of property was for consideration

The transferee has not rescinded the contract

The transferee acted in good-faith for consideration and without notice of the rights under the prior transfer

### **Illustration**

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields, Z does not belong to A, it having been retained by B on the partition, but on B's dying, A as heir obtains Z. C, not having rescinded the contract of sale may require A to deliver Z to him. Thus, where a grantor has purported to grant an interest in land which he did not at that time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee or as it usually expressed, feeds the estoppel.

### **DOCTRINE OF FRAUDULENT TRANSFER**

Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer. A debtor in order to defeat or delay the rights of a creditor, may transfer his property to some person, who may be his relative or a friend. The law does not allow this. Section 53 embodies the principle. It states:

“Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.”

Thus, where an owner of the property contracts a debt and then transfers his property to someone so that the creditor cannot proceed against the property to realise his debt, such a transfer is voidable at the option of the creditor. The transfer is valid so long as the creditor does not challenge it in a Court of law and gets a declaration that the transfer is invalid. A suit instituted by a creditor to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transfer or shall be instituted on behalf of, or for the benefit of all the creditors. Once the creditor sues the debtor and says that the debtor has the intention to deceive him, the transfer can be declared invalid by the Court. The creditor has to satisfy the Court that there was an intention on the part of the debtor to defeat his rights. If he does not prove this, then the creditor will fail and the transfer is valid. The question arises as to when we can say that the transferor has the necessary intention to defeat the claim of the creditor. This can be gathered from the surrounding

circumstances. Suppose a man takes a loan from the creditor. He does not pay the loan. Then the creditor sues him in a Court to get back his debt. On seeing this the debtor transfers his property to a friend of his or some other person who simply holds the property on behalf of the transferor. Again, the debtor may make a gift of his property to his wife or sell it to a friend who will afterwards retransfer the same to the transferor. Under these circumstances, we can easily say that the debtor's intention was to prevent the creditor from taking the property by a suit in the Court and to realise his debt.

But suppose the debtor has several creditors and he transfers his property to one of his creditors in satisfaction of his whole debt to him. Is this also a fraudulent transfer? The answer is No. For a mere preference of one creditor over the others is not fraudulent under the Section, even if the whole property is so transferred and nothing is left for the other creditors. But the other creditors may file a petition in the Court within three months of the transfer praying that the debtor be declared insolvent. If the debtor is adjudicated an insolvent, their interest will be protected and the transfer will be declared as fraudulent preference. The transfer will be set aside and the property will be distributed among all the creditors.

However, under Section 53(2) the rights of a transferee in good-faith and for consideration are protected. It says nothing shall affect or impair the rights of a transferee in good-faith and for consideration.

## DOCTRINE OF PART-PERFORMANCE

Lastly, we may also discuss briefly the doctrine of part-performance which is embodied in Section 53A of the Transfer of Property Act.

A contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligations. As registration has not been effected A, the transferor, seeks to evict B from the land. Can he do so? No, B will not be allowed to suffer simply because the formality of registration has not been through. The legislature grants some relief to such a transferee under Section 53A, which embodies the doctrine of part-performance.

*The rule did not exist on the statute book before 1929. Section 53A, was inserted by an amendment to the Act in 1929. Followings are the essential conditions for the operation of the doctrine of part-performance according to Section 53A.*

1. *There must be a contract to transfer immoveable property.*
2. *It must be for consideration.*
3. *The contract should be in writing and signed by the transferor himself or on his behalf.*
4. *The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.*
5. *The transferee should have taken the possession of the property in part performance of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.*
6. *The transferee must have fulfilled or be ready to fulfill his part of the obligation under the contract.*

If all the abovementioned conditions are satisfied, then, the transferor and the persons claiming under him are debarred from exercising any right in relation to the property other than the rights expressly provided by the terms of the contract notwithstanding the fact that the instrument of transfer has not been registered or complete in the manner prescribed therefor by the law for time being in force. It should be noted that Section 53A does not confer any positive right on the transferee. It only prohibits exercise of the right of ownership in

relation to the property in order to evict the transferee from the property because legal requirements have not been satisfied.

However, the doctrine of part-performance will not affect the right of a subsequent transferee for consideration without notice of the earlier contract and of its being partly performed.



***The right conferred by this section is a right only available to a defendant to protect his possession. This section does not create a title on the defendant. It merely operates as a bar to the plaintiff asserting his title. It is limited to cases where the transferee had taken possession, and against whom the transferor is debarred from enforcing any right other than that expressly provided by the contract. The section imposes a bar on the transferor. When the conditions mentioned in the sections are fulfilled, it debars him from enforcing against the transferee any right or interest expressly provided by the contract. So far as the transferee is concerned, the section confers a right on him to the extent it imposes a bar on the transferor (Delhi Motor Co. v. Basurkas, (1968) SCR 720).***

The English rules as to what acts constitute part-performance have been generally followed in India. These rules are as follows:

- (1) An act of part-performance must be an act done in performance of the contract. An act introductory to and previous to the agreement, cannot therefore, be act of part-performance.
- (2) The acts relied upon must be unequivocally and referable to no other contract than that alleged.
- (3) An act of part-performance must be the act of the party seeking to avail himself of the equity.

## PROPERTIES WHICH CANNOT BE TRANSFERRED

Section 6 of this Act contains some exceptions to the general rule that property of any kind may be transferred. Consequently, the following properties cannot be transferred, namely:

- (a) the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.
- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
- (e) A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.
- (f) A mere right to sue cannot be transferred.
- (g) A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable.
- (h) Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred.

### (a) Chance of an heir apparent or 'Spes Successionis'

In this clause possibilities referred are bare or naked possibilities and not coupled with an interest such as



contingent remainders or future interest-also known as right of *spes successionis* which cannot be the subject to transfer.

When a person is the owner of property, the property is in existence and it is in his possession. This he may transfer. But if property is neither in existence nor is the person the owner of the property then it cannot be transferred. For example, if a person is intending to buy certain property but, he has no interest in that property, he cannot transfer it unless the property comes to his hands, i.e., unless he becomes the owner of the property after buying it. But if a person obtains certain consideration and agrees to sell the property of which he is not the owner, then on becoming the actual owner of the property he has to transfer the property as there was a contract between him and the person who has agreed to buy the property. This transfer operates on a contract to be performed when the property comes into the hands of the person who has agreed to transfer. But where a person wants to make a gift of the property which is to come in his hands in future, he cannot transfer it because a gift is voluntary transfer without any consideration. Thus a gift of future property is void. Similarly, the chance of a heir apparent succeeding to the estate of a deceased person cannot be transferred. Suppose A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has only a hope expectancy that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

#### **Illustrations:**

(a) Suppose A, a Hindu who has separate property, dies leaving a widow W and a brother L, L's succession to the property is dependent upon two factors, viz., (i) his surviving the widow, W, and (ii) W leaving the property intact. L has only a bare chance of succession to the property left by A. This is *spes successionis*, and therefore, cannot be transferred (*Amrit Narayana v. Gyan Singh*, (1918) 45 Cal. 690).

(b) A transfers to B for valuable consideration his reversionary interest in a property. When A succeeds to the property, B sues him for possession of the same. B will not succeed as the reversionary interest is a *spes successionis* and non-transferable. So the transfer is void and B's suit for possession fails.

#### **(b) Right of re-entry**

The right which the lessor has against the lessee for breach of an express condition which provides that on its breach the lessor may re-enter is called the right of re-entry. For instance, if A leases his property to B and adds a condition that if B sub-lets the leased land, A will have the right to re-enter, i.e., the lease will terminate if the lessee breaks the condition by subletting to a third person. Thus, right of re-entry being a right for the personal benefit of any party cannot exist for the benefit of a person who has no personal interest in the land. For example, A grants his land by way of lease to B, a limited liability company on condition that the land should revert to A from B if the company goes into liquidation. This is a mere right in favour of A and this right A cannot transfer to anyone as this is a personal right which can be exercised by A only. But if A transfers the whole of his interest in the land including the right of re-entry to C, there the right to re-entry is a legal incident of property and can be validly transferred along with the property.

#### **(c) Transfer of easement**

An easement is a right enjoyed by the owner of land over the land of another: such as, right of way, right of light, right of support, right to a flow of air or water. Section 4 of the Easements Act defines an easement as a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of the land, to do and continue to do something or to prevent and to continue to prevent something being done in or upon or in respect of certain other and not his own land. An easement includes a right to enjoy a profit out of the land of another. An easement exists for the accommodation and better enjoyment of the land to which it is annexed. The land owned by the possessor of the land is known as *dominant tenement* and the land over

which the right is enjoyed is known as the *servient* tenement. As an easement confers no proprietary right on its owner, it cannot be transferred apart from the land itself. For example, the right of certain villagers to bath in another's tank cannot be transferred. Similarly if A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if he transfers the house itself to C, the easement is also transferred to C.

It may be noted, however, that the prohibition is only with regard to transfer of an existing easement. The law does not prohibit the grant or creation of new easement (*Bhagwan Sahai v. Narsing*, (1909) 31 ALL. 612; *Satyanarayana v. Lakshamaya* 5 H.L.J. 56 or the extension of an easement by release in favour of the owner of servient tenement).

#### *(d) Restricted interest or personal interest*

An interest restricted in enjoyment to the owner personally is by its very nature not transferable unless the restriction is void under Section 10. Examples of such restricted interest or property are the following:

- (i) The right of pre-emption given under the Mohammedan Law.
- (ii) The office of a Shebait of a Temple or mohunt of a mutt or mutuwalli of a wakf.
- (iii) Emoluments attached to a priestly office.
- (iv) Service tenures.

#### *(e) Right to future maintenance*

This again is a personal right in the property which the law says that it cannot be transferred. The right of a Hindu widow to maintenance is a personal right which cannot be transferred. Under the law the arrears of past maintenance can be transferred, but not the right to future maintenance.

#### *(f) Mere right to sue and actionable claim*

A 'mere right to sue' apart from the interest from which such right accrues cannot be assigned. The 'right to sue' is a personal right annexed to the ownership of property and cannot be *severed*, from it. It is based on the principle of public policy to prevent multiplicity of suits; the object is mainly to prevent the abuse resulting from trafficking in litigation.

The use of the word "mere" is significant. The question in every case is whether the subject-matter of transfer is property with an incidental remedy for its recovery or is a 'mere' right to 'sue'. Where property is transferred along with a right to recover damages or compensation in respect of the property, the assignment is not hit by clause (4) of Section 6 of the T.P. Act.

A mere right to sue cannot be transferred. The right refers to a right to damages arising both out of contracts as well as torts. For example, A commits an assault on B, B can file a suit to obtain damages; but B cannot assign the right to C and allow him to obtain damages. In contract also, the rule is the same. If A breaks a contract which he has entered into with B, B can bring action for damages, but B cannot transfer this right to C to recover damages.

There is clear distinction between an actionable claim and a mere right to sue. An actionable claim is property and the assignee has a right to sue to enforce the claim.

As already noted a right to recover an unascertained amount of damages resulting from breach of contract or tort is a mere right to sue. If, however, one has a right to recover an ascertained and definite debt, he may transfer it because it is an actionable claim. Thus, suppose A is indebted to B for Rs. 2,000 and B transfers the right to recover the debt of C, the transfer is void. A beneficial interest in specific moveable property is

also an actionable claim. It has been held that the right to claim the benefit of an executory contract constitutes a beneficial interest in moveable property (*Jaffer Meher Ali v. Budge Budge Jute Mills*, (1900) 33 Cal. 702).

After breach of a contract for the sale of goods nothing is left but a right to sue for damages which cannot be transferred. But before breach the benefit of an executing contract for the sale of goods may generally be transferred and the buyer has the right to sue for the goods.

*(g) Transfer of public office and salaries, stipends, etc.*

It is against public policy for a public officer to transfer the salary of his office, for the salary is given for the purpose of upholding its dignity and the proper performance of its duties. Civil and military pensions are not transferable. A pension retains its character as long as it is unpaid and is in the hands of Government, but as soon as it is paid to the pensioner or his legal representatives, it can be transferred. Since these allowances, pensions and stipends are given on personal basis, the law does not allow these types of property to be transferred.

## **RULE AGAINST PERPETUITY**

Section 14 of the Act provides that no transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration for that period, and to whom, if he attains full age, the interest created is to belong.

The rule against perpetuity is based on the general principle that the liberty of alienation shall not be exercised to its own destruction and that all contrivances shall be void which tend to create a perpetuity or place property forever out of the reach of the exercise of the power of alienation. Perpetuity has been described as “exemptions from intermission or ceasing”. This has been said to be “odious in law, destructive to the commonwealth, and an impediment to commence, but preventing the wholesome circulation of property”.

A perpetuity in the primary sense of the word, “is a disposition which makes property inalienable for an indefinite period” (Jarman on Wills, 8th ed., vol. 1, P. 284). Section 14 of the Act adopted with certain modifications the English rule against perpetuities which is enunciated by Jarman as “Subject to the exceptions to be presently mentioned, no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards”. Section 14 of the Act fixes the perpetuity period as: Life (or Lives) living at the time of transfer and actual minority of the then unborn ultimate transferee.

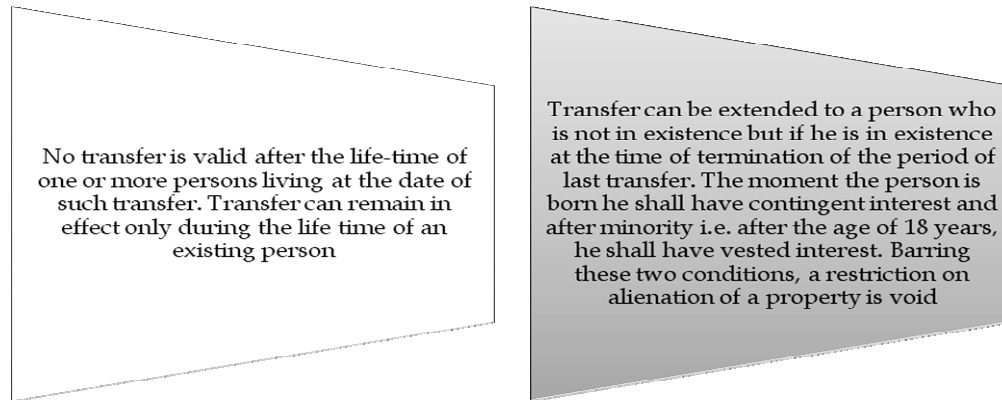
Any number of successive estates can be created between the transferees who are living persons e.g. A transfer may be made to A for life and then to B for life and then to C for life and so on, provided that A, B and C are all living persons at the date of the transfer. But if the ultimate beneficiary is some one who is not in existence at the date of the transfer, the whole residue of the estate should be transferred to him. If he is born before the termination of the last prior estate, he takes a vested interest at birth and takes possession on the termination of the last prior estate but if he is not born till the termination of the last prior estate, the transfer to him fails.

Further, the rule is not that vested interest is created at the birth of the beneficiary but that vested interest cannot be delayed in any case beyond his minority. Therefore, the rule against perpetuity is that the minority of the ultimate beneficiary is the latest period at which an estate can be made to vest.

In India minority terminates at the end of 18 years.

The rule against perpetuities applies to both moveable and immoveable property.

Thus, the rule against perpetuity contains two propositions, i.e.:



However, Section 18 provides an exception to the above rule of perpetuity, where the transfer of property is for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

#### *Effect of a transfer on failure of prior interest*

Further, where by reason of any rules or the rules contained in Sections 13 and 14, interest created for the benefit of a person or class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect or upon failure of such prior interests also fail (Section 16). For example, property is transferred to A for life then to his unborn son B for life and then to C, who is living at the date of transfer, absolutely. Here B is given only a life interest. So the transfer to B is invalid under Section 13. The subsequent transfer to C absolutely is also invalid, because according to Section 16, if a prior transfer fails, the subsequent transfer will also fail.

No transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at date on such transfer, and the minority of some person who shall be in existence on the expiration of that period, to whom, if he attains full age, the interest created is to belong.

The policy of the law has been to prevent property being tied up for ever. The vesting cannot be postponed beyond the life time of any person living at the date of transfer. For example, if an estate is given to a living person A for life and then to the unborn son of A, the son of A must be in existence on or before the date of the expiry of the life estate in favour of A. The vesting of absolute interest in favour of an unborn person may be postponed until he attains majority. For example, an estate may be transferred to A, living person, and after his death to his unborn son when he attains the age of 18. Such transfer would not be violative of the rule against perpetuity.

#### **ACCUMULATION OF INCOME**

Section 17 does not allow accumulation of income from the land for an unlimited period without the income being enjoyed by owner of the property. The law allows accumulation of income for a certain period only. The period for which such accumulation is valid is :

- (a) the life of the transferor, or

(b) eighteen years from the date of transfer.

Any direction to accumulate the income beyond the period mentioned above is void except where it is for:

- (i) the payment of the debts of the transferor or any other person taking any interest under the transferor,
- (ii) portions for children or any other person taking any interest in the property under the transfer, and
- (iii) for the preservation and maintenance of the property transferred.

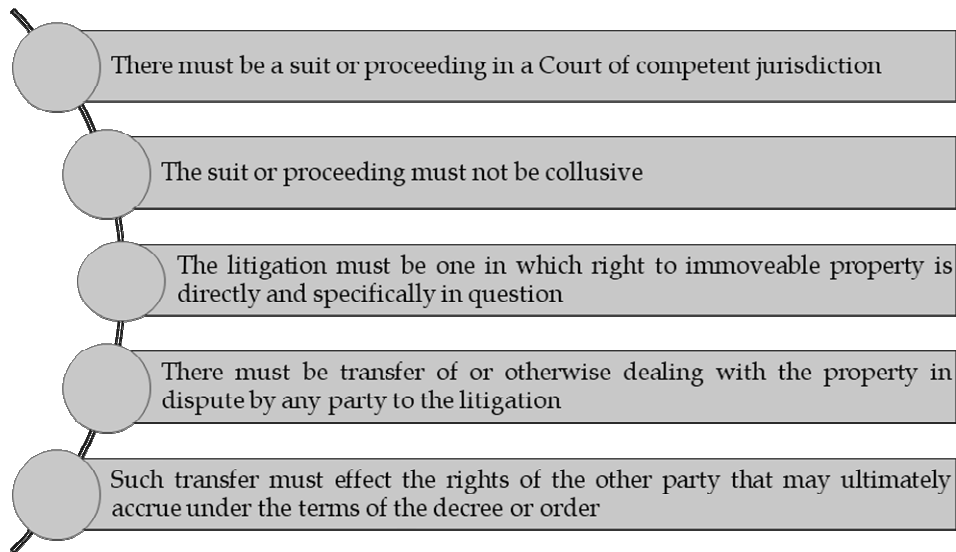
### DOCTRINE OF *LIS PENDENS*

*Lis* means dispute, *Lis pendens* means a pending suit, action, petition or the like. Section 52 of the T.P. Act incorporates the doctrine of *Lis pendens*. It states that during the pendency of a suit in a Court of Law, property which is subject to a litigation cannot be transferred. When we say that property cannot be transferred what we mean in this context is that property may be transferred but this transfer is subject to the rights that are created by a Court's decree. For example, A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favour. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.

Section 52 lays down the Indian rule of *Lis pendens* being the legislative expression of the Maxim- "*ut lite pendente nihil innovetur*" "During litigation nothing new should be introduced".

### Essentials

In order to constitute a *Lis pendens*, the following elements must be present:



The rule is based on the doctrine of expediency i.e., the necessity for final adjudication. A plea of *lis pendens* will be allowed to be raised even though the point is not taken in the pleadings or raised as an issue.

When an application to sue in *forma pauperis* is admitted, the suit is pending from the time of presentation of the application to the Court but not if it is rejected.

A suit in foreign Court cannot operate as *lis pendens*. The doctrine of *lis pendens* does not apply to

moveables. It is the essence of the rule that a right to immoveable property is directly and specifically in question in the suit. The doctrine is not applicable in favour of a third-party.

### **Effect**

If the parties to the litigation, are completely prevented from transferring the property in litigation, it would cause unnecessary delay and hardship, as they would have to wait till the final disposal of the case. So, Section 53 creates a limitation over the transfer by making it subject to the result of the litigation. The effect of this doctrine is not to invalidate or avoid the transfer, or to prevent the vesting of title in the transfer, but to make it subject to the decision of the case, and the rule would operate even if the transferee *pendente lite* had no notice of the pending suit or proceeding at the time of the transfer.

## **PROVISIONS RELATING TO SPECIFIC TRANSFERS**

The Act expressly provides for special types of transfers such as sale, exchange, gift, mortgage and lease.

These are as follows:

In a sale, exchange and gift, there is a transfer of the ownership of property but mortgage is a transfer of an interest in specific immoveable property and lease is a transfer of the right to enjoy immoveable property.

### **1. Sale**

*Under Section 54 of the T.P. Act, "sale" has been defined as a transfer of ownership in exchange for a price paid or promised or part paid and part-promised.*

### **Essentials**

- (a) The seller must be a person competent to transfer. The buyer must be any person who is not disqualified to be the transferee under Section 6(h)(3).
- (b) The subject matter is transferable property.
- (c) There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.
- (d) It must be an exchange for a price paid or promised or part paid and part promised.
- (e) There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

### **Mode of transfer by sale**

Sale of an immoveable property can be effected,

- (a) Where such property is tangible (i) by a registered instrument if it is of the value of Rs. 100 and upwards, and (ii) by a registered instrument or by delivery of property when it is less than Rs. 100 in value, and
- (b) Where the property is tangible or a reversion, only by a registered instrument.

### **Contract for sale**

A contract for the sale of immoveable property differs from a contract for the sale of goods in that the Court will grant specific performance of it unless special reasons to the contrary are shown.

The rights and liabilities of a seller and buyer are dealt with in Section 55 of the Transfer of Property Act.

## 2. Exchange

Sections 118 to 121 of the Transfer of Property Act, 1882 deal with "Exchanges".



*When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".*

### Essentials

- (i) The person making the exchange must be competent to contract.
- (ii) There must be mutual consent.
- (iii) There is a mutual transfer of ownership though things and interests may not be identical.
- (iv) Neither party must have paid money only.

This Section applies to both moveable and immoveable property.

### Mode of exchange

A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.

## 3. Gift

The provisions relating to "Gifts" have been stipulated under Sections 122 to 128 of the Act.

Section 122 of the Transfer of Property Act defines "gift" as follows:



"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee.

Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

### Essentials

1. There must be a transfer of ownership.
2. The subject matter of gift must be a certain existing moveable or immoveable property.
3. The transfer must be made voluntarily.
4. It must be done without consideration.
5. There must be acceptance by or on behalf of the donee, and such acceptance must be made during the lifetime of the donor and while he is capable of giving.

There are two parties to the gift: donor and donee. The donor must be a person competent to transfer; whereas the donee may be any person. The gift can be made to any one, to an incompetent person or even to a juridical person. The essence of a gift is that it is a gratuitous transfer.

According to Section 123, a gift of immoveable property must be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. A gift of moveable property may be made by a registered instrument or by delivery of property. Where the donee is already in possession of the moveable property, as no future delivery is possible, the donor may make a declaration of the gift in his favour. For example, where a piece of furniture or a television set belonging to the donor is lying with a friend of his, the

donor may simply declare that he makes a gift of the furniture or the television set and the gift is complete. The declaration must be clear and the donee must accept the gift.

A gift of immoveable property, as said above, must be effected by registration. Where a gift in favour of someone is registered but it is not accepted by the donee, the gift is incomplete. Suppose, a document is executed by the donor who makes a gift of immoveable property and the deeds are delivered to donee, and the donee accepts the gifts but the document is not registered. Will the gift be valid? It has been held by the Courts that the gift is valid. While registration is a necessary formality for the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. The donee in such a case can ask the donor to complete the gift by registration. Thus, the most essential thing for the validity of a gift is its acceptance. If the gift is accepted but not registered it is a valid gift. The Privy Council in *Kalyan Sundram v. Kumarappa*, A.I.R. 1925 P.C. 42, decided that after acceptance of the deed of gift and before registration, the donor cannot revoke the gift. The gift which is accepted by the donee, will take effect from the date of the execution of the document by the donor, even though it is registered at a later date.

If the deed of gift is executed but never communicated to the intended donee and remains in the possession of the donor undelivered, it cannot be compulsorily registered at the instance of the donee. The reason is that the donee did not accept the gift, the donor can at any time before such acceptance revoke the gift. But once a gift is accepted by the donee, the donor cannot revoke it. A gift may, however, be revoked if it is brought about by a fraud or misrepresentation or undue influence.

The other essential characteristic of a gift is that it cannot be revoked at the will and pleasure of the grantor. A revocable gift is one which may be revoked by the donor at any time. Its revocation would depend upon the mere will or pleasure of the donor. Such a gift is void. But on the other hand, if the condition is one which does not depend on the will or pleasure of the donor, the gift can be revoked on the happening of such condition.

### Illustrations

- (a) A gives a field to B, reserving to himself, with B's assent, the rights to take back the field in case B and his descendents die before A, B dies without descendents during A's lifetime. A may take back the field.
- (b) A gives a lakh of rupees to B, reserving to himself with B's assent the right to take back at leisure Rs. 10,000 out of one lakh. The gift holds goods as to Rs. 90,000 but is void as to Rs. 10,000 which continues to belong to A.

A gift which comes into existence on the fulfilment of a condition, that is to say, a gift which is subject to a condition precedent is also valid. A condition precedent, as already explained in this study dealing with vested interest and contingent interest, is one which must be fulfilled before the transfer takes effect. But the condition attached to the gift should not be illegal or immoral. For instance, a gift to A on condition that he murders B is not valid.

A gift comprising both of existing property and future property is void as to the latter. For example, A makes a gift of his house and also makes a gift of the additions that he is likely to make in future. Here the gift of the house is valid but the gift of the additions that are yet to be made is invalid.

*Onerous gift:* Lastly reference may also be made to what is known as an onerous gift. It may be that several things are transferred as a gift by single transaction. Whereas some of them are really beneficial the others convey burdensome obligations. The result is that the benefit which it confers is more than counter balanced by the burden it places. For instance, A makes a gift of shares in the companies X and Y. X is prosperous



but heavy calls are expected in respect of shares in Y company. The gift is onerous. The rule as laid down in Section 127 is that the donee takes nothing by the gift unless he accepts it fully. Where the gift is in the form of two or more independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the other.

The rules pertaining to gifts in the Transfer of Property Act do not apply to the gifts by Mohammedans. If a gift is made by a Mohammedan, its validity has to be judged according to Muslim law and not according to the Transfer of Property Act.

#### 4. Leases



(i) *Meaning and nature of lease:* According to Section 105, a "lease" of immoveable property is a transfer of a right to enjoy property. Since it is a transfer to enjoy and use the property, possession is always given to the transferee. The lease of immoveable property must be made for a certain period. For example, you may give a lease of property for a definite number of years, or for life, or even permanently.

#### Essentials

The essentials of a lease are:

- (1) It is a transfer of a right to enjoy immoveable property;
- (2) Such transfer is for a certain time or perpetuity;
- (3) It is made for consideration which is either premium or rent or both;
- (4) The transfer must be accepted by the transferee.

The transferor is called the lessor, the transferee is called the lessee, the price is called premium and the money, share, service or any other thing of value to be so rendered is called the rent.

The parties to the lease (i.e. lessor and lessee), must be competent to make and to take the lease respectively.

(ii) *Lease and licence:* A lease should be distinguished from a licence. A licence is a right to do or continue to do in or upon the immoveable property of the grantor, something which would, in the absence of such a right, be unlawful.

A licence does not transfer any interest in the property and the licensee has no right to possession. A licence can be revoked by the grantor at any time, whereas a lease cannot be revoked. If, I sell the fruits of my garden to you, you are given permission or licence to enter my garden and take away the fruits. A lease involves a transfer of interest followed by possession of the property for a specified period. The real test is the intention of the parties.

If the document creates an interest in the property, it is a lease but if it only permits another to make use of the property of which the legal possession continues with the owner, it is a licence because it does not create any interest in that property (*Associated Hotel of India v. R.N. Kapoor*, A.I.R. (1956) S.C. 1962).

The question is not of words but of substance and the label which the parties choose to put upon the transaction though relevant is not decisive.

(iii) *Formalities:* According to Section 107, a lease from year to year or for any term exceeding one year can be made only by a registered document. If a lease is for a term below one year, it can be made by an oral agreement. If a lease is created by oral agreement, it must be accompanied by delivery of possession. If the

lease is for a year or more, it must be effected by a registered document. If after the registration, the lessor does not give possession, the lessee can sue for possession.

(iv) *Types of tenancies:* Following are the various types of tenancies:

- (a) *Tenancy from year to year:* A tenancy from year to year may be made by a grant of land from year to year. If the tenancy is for a year to start with but after the expiration of one year the lessee continues to be in possession and pays the rent to the landlord, the tenancy is regarded as a year-to-year tenancy. If, in case of a tenancy for a period more than a year the landlord wants to terminate or end the lease, he has to give a six-month's notice to the lessee to quit. In case of a tenancy from month to month, a fifteen days notice to quit is necessary. The monthly tenancy may be created either by contract or may be presumed from the nature of the tenancy to be one, from month to month.
- (b) *Tenancy-at-will:* Tenancy-at-will is a tenancy recognised by law. This comes into existence where a tenant holds over with the consent is let into occupation. We have stated above that if the tenant continues to be in possession after the expiration of tenancy and pays the rent to the landlord, the tenancy may be one from year to year or from month to month. During a period when the tenant is in possession after expiry of the period, if the tenant stays with the consent of the landlord till such time as further period is fixed or a fresh contract is made, the tenant is called a tenant-at-will. The landlord will decide for what further period shall the tenancy be given. 'A tenancy-at-will is implied when a person is in possession by the consent of the owner and is not held in view of any tenancy for a certain time. The tenancy-at-will does not mean that the landlord has to give a proper notice to quit. The tenant-at-will cannot sublet during that period because no valid contract for further extension in his favour has been made. The death of the landlord or tenant determines the tenancy, i.e., the tenancy comes to an end.
- (c) *A tenancy by sufferance:* This is a tenancy which is created by fiction of law. If a tenant continues to be in possession after the determination of the period of the lease without the consent of the landlord, he becomes a tenant by sufferance. A tenant-at-will is in possession with the consent of the landlord, whereas a tenant by sufferance is in possession without his permission after the term of the lease comes to an end. This type of tenant is not regarded as a trespasser because the tenant had in his favour a valid lease to start with. No notice is necessary to such a tenant for eviction. This tenant is not responsible for rent. He is liable to pay compensation for use and occupation of the land.

(v) *Requirements of a valid notice:* In order that a notice to quit is valid it must be a proper notice. The notice must convey the intention to terminate the tenancy as a whole and must specify the date on which the tenancy would expire. As mentioned earlier, if the lease is a lease from month to month, 15 days, notice is required. If it is from year to year 6 months' notice is required. A lease of the moveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year. The notice should expire with the end of the period of the tenancy. If it is a lease from month to month and the notice is given by the landlord, the tenant should be asked to quit at the end of the month of the tenancy. The landlord cannot ask his tenant to quit at any time before the expiry of a month or a year of the tenancy.

(vi) *Determination of leases:* Section 111 of the Transfer of Property Act spells out the various contingencies in which a lease comes to an end. A lease is determined, i.e., comes to an end in the following ways:

- (1) *By efflux of time or lapse of time:* A lease for a definite period, such as a lease for a year, or for a term of years, expires on the last day of the term and the lessor or any person entitled to get back

the property may enter without notice or any other formality. Since a lease is a transfer of interest in the property, if during the period for which a lease is valid, the lessee dies, the heirs of the lessee can continue the lease till the expiry of the period.

- (2) *By the happening of a special event:* When a lease is granted subject to the happening of an event, it comes to an end when the event takes place. Thus, if B grants lease to A for life, it comes to an end on the death of A. Similarly, if a lease is granted for the duration of the war, it comes to an end when the war ends. Where the interest of the lessor is limited, the lease comes, to an end when he loses the interest or where he does not have any power to grant a lease. For example, a tenant for life can grant a lease only to last during his life time. It comes to an end on his death.
- (3) *Merger:* A lease comes to an end when the lessee buys the property of the lessor or when the lessee takes the lessor's interest by succession. Here the right of the lessee merges in that of the lessor. Naturally, the lessee becomes the owner of the property after he acquires it. So there will be no more a lease.
- (4) *By surrender:* A lease may come to an end by surrender. Surrender may be either express or implied. Express surrender arises when the lessee yields up his interest under a lease by mutual consent. Implied surrender occurs, as follows :- if during the subsistence of the lease, a new lease is granted to the tenant to commence at once in substitution for the existing lease, it operates as a surrender of the old lease. For example, a lessee, accepts to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease comes to an end. Similarly, when the landlord reserves possession without any objection on the tenant's part, there is a surrender by implication. Mere non-payment of rent does not amount to surrender.
- (5) *By forfeiture:* A lease also comes to an end by forfeiture. A forfeiture occurs when there is breach of a condition in a lease contract by the lessee. Under the Transfer of Property Act, forfeiture occurs in the following circumstances—the first case in which forfeiture occurs is the case when the lessee breaks an express condition which may be of various types such as, if the lessee does not pay the rent regularly, or if the lessee becomes insolvent, or where the lessee sublets the property to another person. In all such cases there will be a forfeiture. But the condition that the lessee breaks must be an express condition which must have been incorporated in the contract of lease. Then only the lessor can re-enter the leased property and claim that the lease shall be forfeited.

In the case of a forfeiture due to default in payment of the rent, if the lessor sues the lessee to quit, the Court can direct the lessee to pay the rent or arrears of rent and continue the lease. But in a breach of any other condition, such as the breach of a condition preventing the lessee from subletting the property, the Court will not help the lessee if he breaks the condition. He will incur forfeiture. A breach of condition by the lessee gives an option to the lessor to bring the lease to an end. But if he does not exercise the option the lease will continue validly. The lessee, however, cannot on breaking the condition, take advantage of his wrong and terminate the lease.

The second case of forfeiture occurs when the tenant denies the title of the landlord and claims that somebody else or he himself is the owner of the property. In order that a denial of the landlord's title should work as a forfeiture of the lease, three things are necessary:

- (a) the tenant must set up title either in himself or in a third-party;
- (b) the denial must be direct and not casual;
- (c) it must be made known to the landlord.

(vii) *Duties of the Lessor:* Following are some of the duties of the lessor:

- (a) The lessor is bound to disclose to the lessee any material defect in the property with reference to its intended use of which the lessor is and the lessee is not aware. This rule applies only to physical defects of the property such as the condition and the nature of the property leased. You will note that the lessor is not bound to disclose whether or not he has title to the property.
  - (b) The next duty of the lessor is to put the lessee in possession of the property. A lease is a transfer of possession the consideration being rent and, therefore, it follows that the landlord cannot recover the rent unless he has delivered possession to the tenant. If a contract of lease has been executed and the lessor does not give possession of the property to the lessee, the lessee can sue the lessor for possession.
  - (c) The next duty that is cast on the lessor is what is usually called covenant for quiet enjoyment. The covenant, that is the right to undisturbed possession, so long as the lessee pays the rent, presupposes possession and, therefore, no action can be brought on this covenant unless the lessee has first obtained possession. The covenant for possession gives the lessee the right to obtain possession; the covenant for quiet enjoyment gives the lessee a right to continue in such possession. If the lessee's possession is disturbed, he can sue for damages or, in case a part of the leased property is taken possession of either by the lessor or by any third-party; the lessee can hold a part of the leased property and pay a proportionate rent.
- (viii) *Duties of the lessee:* The lessee has the following duties:
- (a) The lessee is bound to disclose to the lessor any fact as to nature or extent of the interest that the lessee is about to take, of which the lessee is, and the lessor is not aware and which materially increases the value of such interest.
  - (b) The lessee is bound to pay or tender at the proper time and place, the premium or rent to the lessor or his agent in this behalf. We have already seen that in case the lessee does not pay the rent, he may incur forfeiture of the tenancy. The liability to pay the rent commences from the date the tenant is put into possession.
  - (c) The next duty of the lessee is that he uses the property as a person of ordinary prudence would make use of. But he shall not permit another person to use the property for purposes other than that for which it was leased.
  - (d) He should not do any act which is destructive of or permanently injurious to the property.
  - (e) The lessee must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purpose. If he wants to erect certain fixtures or chattel on the leased property, it must be done without causing any damage to the property. Before the termination of the lease, he can remove all the things attached to the earth. If permanent fixtures are to be made, the lessee must obtain the consent of the landlord.
  - (f) If the lessee comes to know of any proceedings by way of suit to recover the property of the lessor, the lessee should immediately inform the lessor. Since, the tenant is in possession of the property he is the person who is not likely to know of any encroachment on the landlord's property and he should therefore inform the landlord.
  - (g) The lessee should hand over the property at the end of the lease.
- (ix) *Rights of the lessee:* The lessee enjoys the following rights:
- (a) If during the continuance of the lease any accession is made to the property, such accession is

deemed to be comprised in the lease, the lessee has a right to enjoy the accretions of the leased property.

- (b) Where, under the contract, the landlord has agreed to repair the property, the lessee can carry out the repairs and deduct the expenses from the rent if the landlord fails to do so.
- (c) If the lessee has made payment which the lessor is bound by law to pay such as payment of Government revenues or municipal taxes on the property, the lessee can deduct the amount from the rent and pay the balance to the lessor. He can even take interest on the amount he has paid.
- (d) The lessee has a right to remove the fixtures he has erected-during the term of the lease.
- (e) If, due to no fault of his, the lease comes to an end (i.e., when the lease is of uncertain duration), the lessee or his legal representatives are entitled to all the crops planted or grown by the lessee. The lessee or his representatives have got a right to come and carry away the crops, etc., which are growing on the land. If the lease is of a definite period, such a right cannot be claimed, particularly, when lessee has committed a fault, e.g., where he has committed a breach of a condition entailing forfeiture.
- (f) The lessee may avoid the lease, if property is wholly or partly destroyed by tempest, flood, or fire so as to make it impossible to continue the lease for the purpose for which it was let.
- (g) The lessee has right to transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property. We have also noticed that the lessee's rights are transferable.

### 5. Actionable Claims

"Actionable claim" has been dealt with under Sections 130 to 137 of the Act.

- (i) *Definition:* "Actionable claim" is defined in Section 3 of the Transfer of Property Act as follows:

A claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Actionable claims are claims, to unsecured debts. If a debt is secured by the mortgage of immoveable property it is not an actionable claim, because the Section clearly excludes such a debt. A debt is a liquidated money obligation which is usually recoverable by a suit. To create a debt, first of all, there must be a liquidated or definite sum which is actually due. For example, arrears of rent due. The term debt may also include a sum of money which is due in the sense that it exists, but is not actually payable until a later date. For example, A borrows money from B on the 1st of January and promises to repay on March 15, the amount is not payable till the 15th of March, but certainly it is a debt and it is an accruing debt. Another essential of an actionable claim is that it is not in possession of a person and the person can claim such a debt by bringing an action in a Court of law.

The Section also says that it must be a claim to any debt which the Civil Courts recognise as affording grounds for relief to the person who claims it.

Illustrations of actionable claims:

- (i) Arrears of rent accrual constitute a 'debt' so it is an actionable claim (*Sheu Gobind Singh v. Gauri Prasad*, AIR 1925 Pat. 310).

- (ii) Provident Fund that is standing to the credit of a member of the Provident Fund.
- (iii) Money due under the Insurance Policy.
- (iv) A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in moveable property not in possession (*Thakardas v. Vishindas*).

#### *Non-actionable claims*

- (i) Debentures are secured debts and therefore not regarded as actionable claims.
- (ii) **Copy right though a beneficial interest in immoveable property is not an actionable claim since the owner has actual or constructive possession of the same (*Savitri Devi v. Dwarka Bhatya*, (1939) All 305).**

Again, an actionable claim includes a beneficial interest in the moveable property not in possession. Now, a benefit of a contract for the purchase of goods is a beneficial interest in moveable property.

## **6. Mortgages**

Sections 58 to 104 of the Act deal with "Mortgages".

### *Definition and nature of mortgage:*

According to Section 58 of the Transfer of Property Act, a "mortgage" is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee. The principal money and interest the payment of which is secured for the time being are called the mortgage money and the instrument by which the transfer is effected is called a mortgage deed.

### *Essentials of a mortgage:*

- (1) *Transfer of interest:* The first thing to note is that a mortgage is a transfer of interest in the specific immoveable property. The mortgagor as an owner of the property is possessed of all the interests in it, and when he mortgages the property to secure a loan, he only parts with an interest in that property in favour of the mortgagee. After mortgage, the interest of the mortgagor is reduced by the interest which has been transferred to the mortgagee. His ownership has become less for the time being by the interest which he has parted with in favour of the mortgagee. If the mortgagor transfers this property, the transferee gets it subject to the right of the mortgagor to recover from it what is due to him, i.e., the principal plus interest.
- (2) *Specific immoveable property:* The second point is that the property must be specifically mentioned in the mortgage deed. Where, for instance, the mortgagor stated "all of my property" in the mortgage deed, it was held by the Court that this was not a mortgage. The reason why the immoveable property must be distinctly and specifically mentioned in the mortgage deed is that, in case the mortgagor fails to repay the loan the Court is in a position to grant a decree for the sale of any particular property in a suit by the mortgagee.
- (3) *To secure the payment of a loan:* Another characteristic of a mortgage is that the transaction is for the purpose of securing the payment of a loan for the performance of an obligation which may give

rise to pecuniary liability. It may be for the purpose of obtaining a loan, or if a loan has already been granted to secure the repayment of such loan. There is thus a debt and the relationship between the mortgagor and the mortgagee is that of debtor and creditor. When A borrows 100 bags of paddy and further quantity by way of interest, it is mortgage transaction for the performance of an obligation.

Where, however, a person borrows money and agrees with the creditor that till the debt is repaid he will not alienate his property, the transaction does not amount to a mortgage. Here the person merely says that he will not transfer his property till he has repaid the debt; he does not transfer any interest in the property to the creditor. In sale as distinguished from a mortgage, all the interest or rights of ownership are transferred to the purchaser. In a mortgage, as stated earlier, only part of the interests are transferred to the mortgagee, some of them remaining vested in the mortgagor.

To sum up, it may be stated that there are three outstanding characteristics of a mortgage:

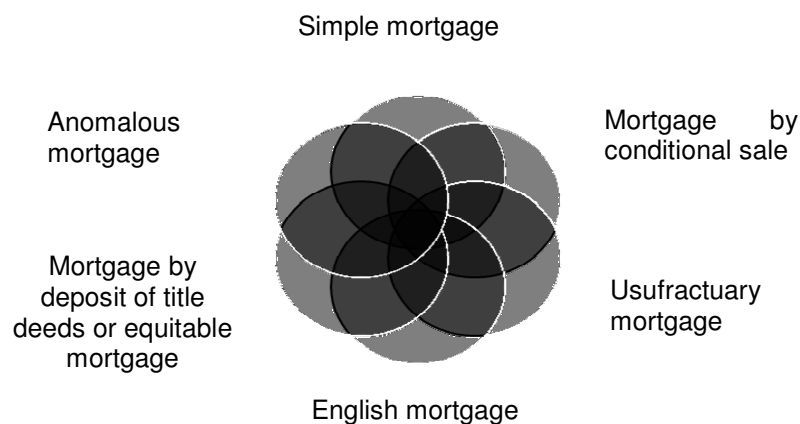
- (a) the mortgagee's interest in the property mortgaged terminates upon the performance of the obligation secured by the Mortgage.
- (b) the mortgagor has a right of foreclosure upon the mortgagor's failure to perform.
- (c) the mortgagor has a right to redeem or regain the property on repayment of the debt or performance of the obligation.

*Form of a mortgage contract:*

According to Section 59, where the principal money secured is Rs. 100 or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument or by delivery of property. It should be noted that a mortgage is not a mere contract but it is the *Conveyance of Interest* in the mortgaged property and as soon as the mortgage deed is registered an interest in the property vests in the mortgagee.

***Kinds of mortgages:***

There are in all six kinds of mortgages in immoveable property, namely



**(a) Simple mortgage**

In a simple mortgage, the mortgagor binds himself personally to pay the debt and agrees in the event of his failure to pay the mortgage money, the mortgagee shall have the right to cause the property to be applied so far as may be necessary by means of a decree for the sale of property. If the mortgaged property is not sufficient to discharge the debt, the mortgagee can bring a personal action against the mortgagor and obtain a decree which, like any other money decree, can be executed against other properties of the mortgagor. In simple mortgage, no right of possession or foreclosure is available to the mortgagee.

**(b) Mortgage by conditional sale**

In this type of mortgage, the property is mortgaged with a condition super added that in the event of a failure by the debtor to repay the debt at the stipulated time, the transaction should be regarded a sale, and in case the loan is repaid at the stipulated time, the sale shall be invalid, or on condition that on such payment being made the buyer shall transfer the property to the seller.

Thus, for all practical purposes, this type of mortgage is ostensible sale of the mortgaged property with a condition for re-purchase by the mortgagor by repaying the loan. It will be noted that the mortgagor transfers the property with the following three conditions:

- (a) If the loan is repaid, the sale becomes void.
- (b) If the loan is not repaid at the stipulated time, the sale will become absolute and binding.
- (c) When the debt has been repaid at the stipulated time, the mortgagee shall re-transfer the property to the mortgagor.

In case of mortgage by conditional sale, there is no personal covenant. That is unlike in the case of a simple mortgage, the mortgagor in this case does not bind himself personally to repay the debt. The mortgagee is not given the possession of the property in this type of mortgage. This is also the position in the case of a simple mortgage. Again, in a mortgage by conditional sale, the mortgagee's remedy is 'foreclosure', that is he becomes the owner of the property in default of payment of the debt by the mortgagor, he has to institute a regular suit in a Court of law to "foreclose" the mortgage. To "foreclose" means to debar the mortgagor from redeeming the property forever.

**(c) Usufructuary mortgage**

Section 58(d) defines a "usufructuary mortgage" as "where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage. It is also called a mortgage with possession.

Thus in this type of mortgage the mortgagor has to deliver possession of the property to the mortgagee. If the possession is not given, the mortgagee can sue for possession. The mere fact that possession has not been delivered will not alter the nature of the transaction. In *Pratap Bahadur v. Gajadhar*, 24 All 521, it was agreed that the mortgagee will put the mortgagor in possession of a village on a certain date and to pay interest till possession was delivered. It was held that mortgage was an usufructuary mortgage. The mortgagee is authorised to retain possession and receive rents, etc., until he recovers the whole debt and the interest. The usufructuary mortgagee has to look only to the profits that arise out of the property for realising his debt; there is no personal liability on the part of the mortgagor. Similarly, the mortgagee has no right to foreclose the mortgage or to sue for sale.

A mortgage may be regarded as usufructuary even though the entire debt is not to be paid out of the profits of the property. Therefore, a usufructuary mortgage may be either (i) where the entire mortgage money is to



be paid from the profit of the land; or (ii) where only part of the mortgage money is principal or interest amount is to be paid from the profit of the land.

If in a usufructuary mortgage a time is mentioned during which the mortgagee should recover the debt, etc., then after the time is over, the mortgagee should deliver back the property to the mortgagor. He cannot refuse to give back the property, if he has not been able to recover the debt and the interest, etc. A usufructuary mortgagee is supposed to remain in possession of the mortgaged property and manage the same as a person of ordinary prudence would manage subject to the conditions of mortgage agreement. Any loss due to failure on his part would be debited to his account (*Panchanan Sharma v. B.P. Jagnani*, SCALE 1995 (2) 641).

Thus, a usufructuary mortgage has the following characteristics:

1. Possession of property must be delivered to the mortgagee;
2. There is no personal liability on the part of the mortgagor to pay;
3. The mortgagee is entitled to rents and profits in lieu of interest or principal or both; and
4. The mortgagee however is not entitled to foreclose the mortgagor or to sue for sale.

#### *(d) English mortgage*

Section 58(e) states that: "where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee but subject to a proviso that he will retransfer it to the mortgagor upon payment of the money as agreed, the transaction is called an English mortgage".

Here the mortgagor transfers the ownership of the property as security and the mortgagee promises to re-transfer the ownership, if the money is paid within a definite time. There is also a personal covenant as the mortgagor promises to repay within a certain date. In this type of mortgage, there is proviso that if money is repaid the property would be reconveyed. The remedy of the mortgagee is sale of the property to recover the debt. Thus, the essential features of an English mortgage are as under:

1. The mortgagor binds himself to repay the mortgage money on a certain day. In other words, there should be a personal undertaking to pay.
2. The mortgaged property is absolutely transferred to the mortgagee.
3. Such absolute transfer is subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the fixed day.

#### *Distinction between English mortgage and mortgage by conditional sale*

An English mortgage looks like a mortgage by conditional sale but there are obvious differences between the two:

1. In English mortgage there is a personal liability undertaken by the mortgagor to pay the debt. In a mortgage by conditional sale there is no personal covenant (agreement for payment of the mortgage money and mortgagee has his remedy against the mortgaged property only;
2. In English mortgage the ownership in the mortgaged property is absolutely transferred to the creditor (i.e. mortgagee) which however, may be divested on repayment of the loan on the fixed day.

In a mortgage by conditional sale, the mortgagee gets only a qualified ownership which may, however, ripen into an absolute ownership in default of payment of the mortgage money.

#### *(e) Mortgage by deposit of title deeds*

This type of mortgage is called *equitable mortgage* in English law. In this transaction, a person delivers to the

creditor or his agent documents of title of his immoveable property with an intention to create a security, and obtains a loan. The requisites of such a mortgage are (i) a debt, (ii) deposit of title deeds, and (iii) an intention that the deeds shall be security for the debt.

In order that a valid mortgage on an immoveable property should be effected, it must be in writing and attested by two witnesses and the document must be registered. But in case of a mortgage by deposit of title deeds, it need not be registered and an oral agreement between the person and the creditor followed by the delivery of the documents of title to the property is enough. The creditor will have the possession of the documents and he will advance the money at the stipulated rate of interest. In case the mortgagor does not repay the loan, the creditor on the basis of having the title deeds in his possession can sue the debtor to recover the money. This type of mortgage has been recognized due to expediency. Many persons, specially the business people, may need money urgently and they cannot wait till a formal document is written, signed, attested and then registered. So they will simply approach the creditor and hand over the title deeds of their property and borrow money. This avoids delay and other formalities for effecting a valid mortgage.

There must be a clear intention on the part of the person who hands over the title deeds to effect a valid mortgage. In the absence of any intention, the mere holding in possession of the title deeds will not create a valid mortgage.

The term 'documents of title' or title deeds means such documents as will show *prima facie* or apparent title to the property of the person who is borrowing money. Accordingly, in one case it was held that tax receipt was not a document of title to the property on which the tax was paid. What is necessary to deposit is a document which gives him his right to the property and the creditor should insist on the production of this document before he gives money on a pledge of documents.

It should be noted that this type of mortgage can be created only in certain towns and not everywhere in India. The facility to create a valid mortgage is available in the following towns in India: Calcutta, Madras, Bombay, Adoni, Ajmer, Allahabad, Alwar, Bangalore, Bellary, Cochin, Coimbatore, Delhi, Jaipur, Jodhpur, Kanpur, Rajahmundry, Udaipur, Vellore, Ellora, Pali, Bhilwara, Bikaner, Kakinada, Narayanganj, Mysore, and Madurai. Though this type of mortgage is limited to specific cities it is at par with any other legal mortgage (*K.J. Nathan v. S.V. Maruthi Rao*, A.I.R. 1965 S.C. 443).

Title deeds should be delivered in these areas, the property of the person may be situated elsewhere. If the deposit of title deeds has taken place in *any other town*, it will not be a valid mortgage. Similarly, if the property is situated in any one of the towns mentioned above, but the deposit of title deeds is made in other towns or areas then again it will not be a valid mortgage.

#### (f) *Anomalous mortgage*

Section 58(g) of the Transfer of Property Act provides that "a mortgage which is not a simple mortgage, a mortgage by conditional sale, usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage".

Thus, an anomalous mortgage is a combination of various other mortgages, for example, a usufructuary mortgage may be created and the mortgagee shall have the right of sale. You have already noticed that in a usufructuary mortgage only possession is given to the mortgagee and there is no right of sale. But in an anomalous mortgage the right of sale along with the possession of the property may be given. You have also seen that in the case of usufructuary mortgage, there is no personal liability on the part of a mortgagor but if the mortgagor assumes personal liability to pay the mortgage money, it will be an anomalous mortgage.

Again, a mortgagee may be given possession of the property for a fixed period with a condition that in case the debt is not discharged at the expiry of the period mentioned, the mortgage shall be regarded as a mortgage by conditional sale. In this case, the mortgage has got a right of "foreclosure" and after the expiry

of the period if the debt is not paid, the mortgagee will become the owner of the property.

Two other terms in common use in connection with mortgage may be considered here. These terms are (i) Sub-mortgage; and (ii) Puisne mortgage.

*Sub-mortgage:*

Where the mortgagee transfers by mortgage his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage. For example, where A mortgages his house to B for Rs. 10,000 and B mortgages his mortgagee right to C for Rs. 8,000. B creates a sub-mortgage.

*Puisne mortgage:*

Where the mortgagor, having mortgaged his property, mortgages it to another person to secure another loan, the second mortgage is called a puisne mortgage. For example, where A mortgages his house worth ₹ one lakh to B for ₹40,000 and mortgages the same house to C for a further sum of ₹30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage. C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of ₹40,000 plus interest.

*Rights of mortgagor:*

By mortgaging the property the mortgagor does not cease to be its owner, he only transfers an interest in it. The law, therefore, grants him the following rights:

- (a) *Right of redemption:* The first and the most important right of the mortgagor is the right to redeem i.e., take back the mortgaged property by paying the mortgage money at any time after the stipulated date for repayment. Section 60 of the Act provides that any time after the principal amount has become due, the mortgagor has a right to redeem the property. Although the Act gives him the right to redeem “any time” after their debt has become due, it enjoins upon the mortgagor the obligation to exercise this right (i) before the right is extinguished by the Act of parties or by a decree of Court, or (ii) before it is barred by the Limitation Act. According to the Law of Limitation the, mortgagor can redeem the property within 60 years after the money has become due. This right to redeem the property even after the time of payment has elapsed is called the Right of Equity or Redemption. But the *mortgagor is not entitled to redeem before the mortgage money becomes due on the date fixed for repayment of the loan*. His right to redeem arises only when mortgage money becomes due and not before.
- (b) *Right against clog on equity of redemption:* Right of redemption or equity of redemption is the essence of a mortgage, and any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void. Any condition which prevents the mortgagor from redeeming the property is called a “clog” on the equity or right of redemption and is void. The rule of equity that *once a mortgage always a mortgage* prohibits a clog on the right of redemption. In other words, once a transaction is found to be a mortgage, the Court would not permit any condition in a mortgage deed which would prevent or impede redemption or repayment of the loan for which the security was given.
- (c) *Right of partial redemption:* A mortgage, as a rule, being one and indivisible for the debt and every part of it, the mortgagor cannot redeem piecemeal; he must redeem the whole property. But Section 61 of the Act gives a right of partial redemption stating that “a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately or any two or more of such mortgages together.”

*Implied contract by mortgagor:*

The parties are free to enter into any terms they like. Where, however, the contract does not contain all the

terms, Section 65 provides for implied terms as follows:

In the absence of a contract to the contrary, the mortgagor shall be deemed to have contracted with the mortgagee that the:

- (a) mortgagor is entitled to transfer the interest (covenant for title);
- (b) mortgagor will assist the mortgagee to enjoy quiet possession;
- (c) mortgagor will pay public charges in respect of the mortgaged property;
- (d) mortgagor covenants as to payment of the rent due on lease where, the mortgaged property is leased;
- (e) mortgagor covenants as to payment of interest and principal on prior encumbrances, where the mortgage is a second or subsequent encumbrance on the property.

*Rights of mortgagee and his remedies:*

If the mortgagor does not pay the mortgage money, the mortgagee may proceed to recover (i) from the mortgaged property, or (ii) sue for recovery from the mortgagor personally. Thus the mortgagor has two remedies: one against the property and the other against the mortgagor personally.

## 7. Charges

*Meaning of charge:* "Charge" has been defined under Section 100 as follows: "Where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property".

As is evident from the above definition, a charge comes into existence either by the act of parties or by operation of law.

*Charge by act of parties:* When in a transaction for value, both the parties (debtor and creditor) intend that the property existing or future shall be made available as security for the payment of a debt and that the creditor shall have a *present right* to have it made available, there is a charge.

*Charge by Operation of Law:* Charges created by law are those which arise on account of some statutory provisions. They are not created by the voluntary action of parties but arise as a result of some legal obligation.

*Floating charge:* A charge may be floating as well as fixed. A fixed charge is a charge on specific property but a floating charge is an equitable charge on the assets for time being of a going concern. It is peculiar to companies which are able to borrow money without any interference with their assets so long as they are going concern. In other words, it is a charge on a class of the assets of the company, present as well as future. The assets of the company are constantly undergoing a change but the creditors will not normally interfere with the assets of the company unless there is breach of some condition. As Professor Gower says, the assets are liquid and the charge is floating. It is ambulatory and shifting in its nature hovering over and so to speak floating with the property which it is intended to effect. As it does not attach to any specific property, it remains document until it crystallises.

A floating charge has the following characteristics:

1. It is a charge on class of assets both present and future.
2. The class of assets charged is one which in the ordinary course of business would be changing from time to time.
3. It is contemplated by the charge that until some future step is taken by those who are interested in

the charge the company may carry on its business in the ordinary way, i.e., it may use its assets charged in the ordinary course of its business. (Per Roman L.J. in *Reyork Shive Wool Combers Associated Limited*, (1903) 2 Ch. 284) A floating charge is created by debentures on the company's undertaking or its estate, property and effects. It is not necessary that the charge should be on all company's assets. Thus a mortgage of a cinema and of the chattels used in the cinema premises was held to be a floating charge as to the chattles (*National Provisional Bank of England Limited v. Charleb Electric Theatres Limited*, (1916) Ch. 132). Similarly, a floating charge was created by a mortgage of book and other debts which shall become due during the continuance of this security (*Reyork Shive Wool Combers Association, Supra*).

### **Crystallisation of floating charge**

A floating charge becomes fixed or crystallises in the following cases:

1. When the money becomes payable under a condition in the debenture and the debenture holder, (i.e., the creditor) takes some steps to enforce the security;
2. When the company ceases to carry on business; and
3. When the company is being wound-up.

### **8. Distinction between Mortgage and Charge**

Although in a charge, the property is made a security for the payment of the loan, yet the transaction does not amount to mortgage. It is important, therefore to distinguish between a charge and mortgage.

- (a) A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.
- (b) A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties.
- (c) A mortgage deed must be registered and attested by two witnesses, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
- (d) In certain types of mortgage (viz., mortgage by conditional sale and anomalous mortgage) the mortgagor can foreclose the mortgaged property but in charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.
- (e) From the very nature of it, a charge as a general rule, cannot be enforced against a transferee for consideration without notice. But in a mortgage, the transferee of mortgaged property from the mortgagor, can only acquire the remaining interest of the mortgagor, and is therefore, only bound by the mortgage.
- (f) In a charge created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the charge-holder is against the property only. In a mortgage, there can be security as well as personal liability. In fact, the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage.

## **LESSON ROUND-UP**

- The law relating to transfer of property is governed by the Transfer of Property Act, 1882. 'Transfer of Property' means an act by which a living person conveys property, in present or future, to one or more

other living persons, or to himself, and one or more other living persons. 'living person' includes a company or association or body of individuals, whether incorporated or not.

- Every person who is competent to contract and entitled to transferable property, or authorized to dispose of property is competent to transfer such property. Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration. In the case of *tangible* immoveable property of the value of one hundred rupees and upwards, or in the case of a *reversion* or other *intangible* thing, transfer can be made only by a registered instrument. In the case of *tangible* immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
- When property is transferred, the transferee should not be restrained absolutely from alienating the property. One may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property. A transfer may also be made subject to a contingency which may or may not occur. This is known as condition subsequent. Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event.
- Section 35 of the Transfer of Property Act deals with what is called doctrine of election. Election may be defined as "the choosing between two rights where there is a clear intention that both were not intended to be enjoyed". The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument.
- Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. This is called doctrine of Holding Out.
- Doctrine of Feeding the Grant by Estoppel means where, a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.
- Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer. A debtor in order to defeat or delay the rights of a creditor, may transfer his property to some person, who may be his relative or a friend. The law does not allow this.
- The Act does not allow accumulation of income from the land for an unlimited period without the income-being enjoyed by owner of the property. The law allows accumulation of income for a certain period only. The period for which such accumulation is valid is : (a) the life of the transferor, or (b) eighteen years from the date of transfer. Any direction to accumulate the income beyond the period mentioned above is void. However, this is subject to certain exceptions.
- *Lis pendens* means a pending suit, action, petition or the like. Section 52 of the T.P. Act incorporates the doctrine of *Lis pendens*. It states that during the pendency of a suit in a court of law, property which is subject to a litigation cannot be transferred.
- The Act expressly provides for special types of transfers such as sale, exchange, gift, mortgage and lease. In a sale, exchange and gift, there is a transfer of the ownership of property but mortgage is a transfer of an interest in specific immovable property and lease is a transfer of the right to enjoy immoveable property.
- Actionable claims are claims, to unsecured debts. If a debt is secured by the mortgage of immoveable







# Lesson 17

## Real Estate (Regulation and Development) Act, 2016

### LESSON OUTLINE

- Learning objectives
- Objects and reasons
- Salient Features of the Act
- Registration of Real Estate Project
- Real Estate Agents
- Real Estate Regulatory Authority
- Central Advisory Council
- The Real Estate Appellate Tribunal
- Offences, Penalties and Adjudication
- Specimen Agreement for Sale between the Promoter and the Allottee; Due Diligence Reporting
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Real estate sector plays a catalytic role in fulfilling the needs and demand for housing and infrastructure in the country and is an important pillar of the economy. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. It has no sectoral regulator like there are for other specific sectors like insurance, telecom, stock markets etc.

A promoter shall not advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established .

The object of the study is to familiarize the students provisions relating to real estate sector in India.

*Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector.*

## INTRODUCTION

Real estate sector plays a catalytic role in fulfilling the needs and demand for housing and infrastructure in the country and is an important pillar of the economy. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. It has no sectoral regulator like there are for other specific sectors like insurance, telecom, stock markets etc. History is witness to the fact that whenever sectoral regulators like SEBI, IRDAI, TRAI etc have been formed, they have helped in deepening the market and made it more robust. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, since more than a decade the need for regulating the sector was being emphasised in various forums.

In view of the above, Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.

This Act will be put in operation just like the Motor Vehicles Act passed by the Central Government, pursuant to which respective State Governments ("SG") and Union Territories ("UT") are required to notify their own Rules, which would be in the lines of the Central Act and accordingly administer their own State Rules. Accordingly, every SG and UT are to required to promulgate their own Real Estate Rules which would be based on the lines of the central Real Estate (Regulation and Development) Act 2016, and establish a Real Estate Regulatory Authority ("RERA") pursuant to the Rules, which will administer the respective Real Estate Rules of the State or UT. State Governments and UTs were required to notify and enforce RERA by 1st May 2017, which was the deadline set by the the Central Government. But a few State Governments have missed the deadline of 1st May 2017. It is expected that most of the State Governments would meet the second deadline of 31st July 2017, by which the ongoing projects are to be registered with RERA.

### The objects and reasons for which the Act has been framed are:

-  Ensure accountability towards allottees and protect their interest
-  Infuse transparency, ensure fair-play and reduce frauds & delays
-  Introduce professionalism and pan India standardization
-  Establish symmetry of information between the promoter and allottee
-  Imposing certain responsibilities on both promoter and allottees
-  Establish regulatory oversight mechanism to enforce contracts
-  Establish fast-track dispute resolution mechanism
-  Promote good governance in the sector which in turn would create investor confidence

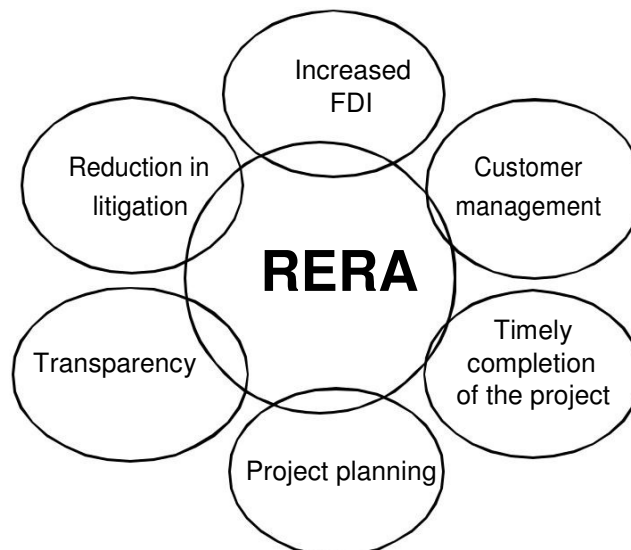
**Chronology of events leading to regulation of real estate sector including both residential and commercial segments**

S.No	Date	Event
1.	May, 2008	Ministry of HUPA first prepared a Concept Paper on regulation of real estate sector and a model law for legislation by States/UTs
2.	2011	Conference of Ministers of Housing suggested a central law for regulation of real estate sector
3.	July, 2011	Ministry of Law & Justice too suggested central legislation for regulation
4.	June, 2013	Union Cabinet approved Real Estate Bill, 2013
5.	August, 2013	Real Estate Bill was introduced in Rajya Sabha and was referred to Standing Committee
6.	February, 2014	Report of Standing Committee was laid on the Tables of both Houses of Parliament
7.	February, 2014	Attorney General upheld validity of central law for regulation of the Sector
8.	April, 2015	Union Cabinet approved official amendments based on recommendations of Standing Committee
9.	May 20, 2015	Matter referred to the Select Committee of Rajya Sabha
10.	July, 2015	Report of Select Committee tabled in Rajya Sabha
11.	December, 2015	incorporating several modifications based on Select Committee report and stakeholder consultations was approved by the Union Cabinet
12.	10 March, 2016	The Real Estate (Regulation & Development) Bill, 2016 passed by Rajya Sabha
13.	15 March, 2016	Lok Sabha passed the Bill as passed by Rajya Sabha
14.	25 March, 2016	President gives assent to the Bill
15.	15 April, 2016	59 Sections of the Act were notified making them effective from May 1, 2016 enabling preparation of Real Estate Rules, setting up of Regulatory Authorities and other infrastructure
16.	28 October, 2016	Real Estate Removal of Difficulties Order
17.	19 April, 2017	Remaining 32 Sections of the Act notified making them effective from May 1st this year requiring registration of projects within three months from tomorrow
18.	1 May, 2017	New era begins for development of real estate sector in an atmosphere of investor confidence

### Salient Features of the Real Estate (Regulation and Development) Act, 2016

- Establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector
- Ensure sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner
- Ensure protect the interest of consumers in the real estate sector
- Establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority (RERA)
- Regulates transactions between buyers and promoters of residential real estate projects
- Establishes state level regulatory authorities called Real Estate Regulatory Authorities (RERAs)
- Residential real estate projects, with some exceptions, need to be registered with RERAs
- Promoters cannot book or offer these projects for sale without registering them. Real estate agents dealing in these projects also need to register with RERAs
- Registration, the promoter must upload details of the project on the website of the RERA. These include the site and layout plan, and schedule for completion of the real estate project
- Amount collected from buyers for a project must be maintained in a separate bank account and must only be used for construction of that project. The state government can alter this amount
- Right to Legal Representation on behalf of client by Company Secretaries or chartered accountants or cost accountants or legal practitioners
- Imposes stringent penalty on promoter, real estate agent and also prescribes imprisonment.

### Advantages of RERA (Real Estate Development and Regulation Act)



RERA has brought in uniformity in definitions for important components of real estate, like, “carpet area”, “common areas” etc which will prevent malpractices like changes in area, specifications etc. Some of the important definitions are reproduced below:

### IMPORTANT DEFINITIONS

**"Advertisement"** means any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot, building or apartment or inviting persons to purchase in any manner such as plot, building or apartment or to make advances or deposits for such purposes;

**"Agreement for sale"** means an agreement entered into between the promoter and the allottee;

**"Allottee"** in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

**"Apartment"** whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;

**"Building"** includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes;

**"Carpet area"** means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

*Explanation.*— the expression "exclusive balcony or verandah area" means the area of the balcony or verandah, as the case may be, which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee; and "exclusive open terrace area" means the area of open terrace which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee;

**"Commencement certificate"** means the commencement certificate or the building permit or the construction permit, by whatever name called issued by the competent authority to allow or permit the promoter to begin development works on an immovable property, as per the sanctioned plan;

**"Common areas"** mean—

- (i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;
- (ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;
- (iii) the common basements, terraces, parks, play areas, open parking areas and common storage spaces;

- (iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;
- (v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;
- (vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;
- (vii) all community and commercial facilities as provided in the real estate project;
- (viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

**"Company"** means a company incorporated and registered under the Companies Act, 2013 and includes,—

- (i) a corporation established by or under any Central Act or State Act;
- (ii) a development authority or any public authority established by the Government in this behalf under any law for the time being in force;

**"Competent authority"** means the local authority or any authority created or established under any law for the time being in force by the appropriate Government which exercises authority over land under its jurisdiction, and has powers to give permission for development of such immovable property;

**"Completion certificate"** means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;

**"Day"** means the working day, in the concerned State or Union territory, as the case may be, notified by the appropriate Government from time to time;

**"Development"** with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes re-development;

**"Development works"** means the external development works and internal development works on immovable property;

**"Estimated cost of real estate project"** means the total cost involved in developing the real estate project and includes the land cost, taxes, cess, development and other charges;

**"External development works"** includes roads and road systems landscaping, water supply, sewerage and drainage systems, electricity supply transformer, sub-station, solid waste management and disposal or any other work which may have to be executed in the periphery of, or outside, a project for its benefit, as may be provided under the local laws;

**"Family"** includes husband, wife, minor son and unmarried daughter wholly dependent on a person;

**"Garage"** means a place within a project having a roof and walls on three sides for parking any vehicle, but does not include an unenclosed or uncovered parking space such as open parking areas;

**"Immovable property"** includes land, buildings, rights of ways, lights or any other benefit arising out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, standing crops or grass;

**"Interest"** means the rates of interest payable by the promoter or the allottee, as the case may be.

*Explanation.*—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the, allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

**"Internal development works"** means roads, footpaths, water supply, sewers, drains, parks, tree planting, street lighting, provision for community buildings and for treatment and disposal of sewage and sullage water, solid waste management and disposal, water conservation, energy management, fire protection and fire safety requirements, social infrastructure such as educational health and other public amenities or any other work in a project for its benefit, as per sanctioned plans;

**"Local authority"** means the Municipal Corporation or Municipality or Panchayats or any other Local Body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction;

**"Occupancy certificate"** means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;

**"Person"** includes,—

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;
- (iv) a firm under the Indian Partnership Act, 1932 or the Limited Liability Partnership Act, 2008, as the case may be;
- (v) a competent authority;
- (vi) an association of persons or a body of individuals whether incorporated or not;
- (vii) a co-operative society registered under any law relating to co-operative societies;
- (viii) any such other entity as the appropriate Government may, by notification, specify in this behalf;

**"Planning area"** means a planning area or a development area or a local planning area or a regional development plan area, by whatever name called, or any other area specified as such by the appropriate Government or any competent authority and includes any area designated by the appropriate Government or the competent authority to be a planning area for future planned development, under the law relating to Town and Country Planning for the time being in force and as revised from time to time;

**"Promoter"** means,—

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

- (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
- (iii) any development authority or any other public body in respect of allottees of—
  - (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
  - (b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or
- (iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its members or in respect of the allottees of such apartments or buildings; or
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
- (vi) such other person who constructs any building or apartment for sale to the general public.

*Explanation.*— where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made there under;

**"Prospectus"** means any document described or issued as a prospectus or any notice, circular, or other document offering for sale or any real estate project or inviting any person to make advances or deposits for such purposes;

**"Real estate agent"** means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called;

**"Real estate project"** means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

**"Sanctioned plan"** means the site plan, building plan, service plan, parking and circulation plan, landscape plan, layout plan, zoning plan and such other plan and includes structural designs, if applicable, permissions such as environment permission and such other permissions, which are approved by the competent authority prior to start of a real estate project;

**'Appropriate Government'**

Section 2(g) of the Act defines 'appropriate Government' to mean as follows:

- (i) for the Union territory without Legislature, the Central Government;



- (ii) for the Union territory of Puducherry, the Union territory Government;
- (iii) for the Union territory of Delhi, the Central Ministry of Urban Development;
- (iv) for the State, the State Government.

### **Responsibilities of the appropriate Government**

- (a) As per section 84 of the Act the appropriate Government is required to notify Rules for the implementation of the Act, within six months of its commencement.
- (b) As per section 20 of the Act the appropriate Government is required to establish the Regulatory Authority within 1 year from its commencement i.e. maximum by 30th April, 2017.
- (c) As per section 20 of the Act the appropriate Government is required to designate an officer (preferably Housing Secretary) as interim Regulatory Authority, until the establishment of a full time Regulatory Authority.
- (d) As per section 43 of the Act the appropriate Government is required to establish the Appellate Tribunal within 1 year from its commencement i.e. maximum by 30th April, 2017.
- (e) As per section 43 of the Act the appropriate Government is required to designate an existing Appellate Tribunal (under any other law in force) to be the Appellate Tribunal, until the establishment of a full time Appellate Tribunal.
- (f) The Chairperson and Members of the Regulatory Authority and the Members of the Appellate Tribunal are required to be appointed based on recommendations of a Selection Committee, thus the appropriate Government is required to constitute the Selection Committee.
- (g) As per section 28 and section 51 the appropriate Government is required to appoint officers and other employees of Regulatory Authority and the Appellate Tribunal. In addition, it is required to identify office space etc. and other infrastructure for its functioning.
- (h) As per section 41 the Central Government (i.e. the Ministry of HUPA) is required to establish the Central Advisory Council.
- (i) As per section 75 the appropriate Government is required to constitute a 'Real Estate Regulatory Fund'.

## **REGISTRATION OF REAL ESTATE PROJECT AND REGISTRATION OF REAL ESTATE AGENTS**

Many developers across India follow a common practice of pre-launching a project without securing requisite approvals for the project from the local authorities, which is termed as "soft launch", "pre-launch" etc. Buyers also lap into this opportunity as they get discounted prices during the pre-launches period. But if it is from a developer who is unscrupulous or a fly by night operator, then it carries a great risk. Hence, to plug this gap, registration of every project with the regulatory authority has been mandatory before it is launched for sale and for registration the basic pre-requisite is that the developer must have all the requisite approvals. Thus the buyer is protected as the project is ring-fenced from the vagaries of non-approvals or delays in approvals which are one of the major causes of delay for the project. The gist of relevant provisions for registration as ascribed in sections 3, 4 and 5 of the Act are stated below:

### **Prior Registration of Real Estate project with Real Estate Regulatory Authority**

A promoter shall not advertise, market, book, sell or offer for sale, or invite persons to purchase in any

manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established.

The projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.

Authority in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made there under, shall apply to such projects from that stage of registration where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

**Projects exempt from the ambit of the Act**

The following projects do not require to be registered under the Act:

1. Area of land does not exceed 500 Sq. Meters
2. No. of apartments does not exceed 8

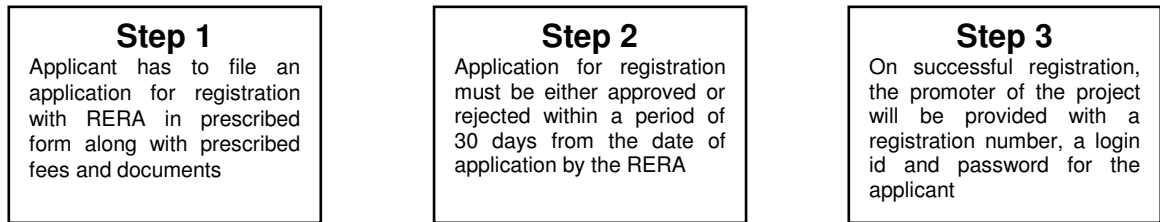
In case of Renovation/ Repair/Re-development

- (a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight, inclusive of all phases;
- (b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

**Application for Registration of real estate projects**

Every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be specified by the regulations made by the Authority.



The promoter shall enclose the following documents along with the application, namely:—

- (a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;
- (b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in

its completion, details of cases pending, details of type of land and payments pending;

- (c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;
- (d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;
- (e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;
- (f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;
- (g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;
- (h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any;
- (i) the number and areas of garage for sale in the project;
- (j) the names and addresses of his real estate agents, if any, for the proposed project;
- (k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;
- (l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:—
  - (A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;
  - (B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;
  - (C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;
  - (D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:

The promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. The amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project.

The promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular

project have been utilised for the project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

The promoter shall take all the pending approvals on time, from the competent authorities and furnished such other documents as may be prescribed by the rules or regulations made under.

The Authority shall operationalise a web based online system for submitting applications for registration of projects within a period of one year from the date of its establishment.

### **Granting of Registration by the Authority**

On receipt of the application, the Authority shall within a period of thirty days-

- (a) grant registration subject to the provisions of the Act and the rules and regulations made thereunder. A registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or
- (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder. Application shall not be rejected unless the applicant has been given an opportunity of being heard in the matter.

If the Authority fails to grant the registration or reject the application, as the case may be, the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified.

The registration granted shall be valid for a period declared by the promoter for completion of the project or phase thereof, as the case may be.

### **Extension of registration**

Delay in handing over of projects by the developer within the stipulated time frame has been a major woe of the buyers and hence has been a major trigger for promulgation of this Act. Hence, at the time of registration, a developer has to specify a time line during which he will complete and handover the project to the buyer. The timeline is very sacrosanct because if he fails to do so within the stated time, then there are rigorous provisions in the Act as prescribed in section 7 & 8 whereby his registration would be revoked and his project would be usurped by the Regulator. Though as per section 6, an extension of registration may be granted at the sole discretion of the regulator due to Force Majeure conditions or if there are reasonable circumstances which merit extension.

The registration granted may be extended by the Authority on an application made by the promoter due to force majeure, in such form and on payment of such fee as may be specified by regulations made by the Authority.

**"Force majeure"** shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

The Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year.

Application for extension of registration shall not be rejected unless the applicant has been given an opportunity of being heard in the matter.

### Revocation of registration

The Authority may, on receipt of a complaint or suomotu in this behalf or on the recommendation of the competent authority, revoke the registration granted, after being satisfied that—

- (a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made there under;
- (b) the promoter violates any of the terms or conditions of the approval given by the competent authority;
- (c) the promoter is involved in any kind of unfair practice or irregularities.

The term "unfair practice means" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

- A. the practice of making any statement, whether in writing or by visible representation which,—
  - (i) falsely represents that the services are of a particular standard or grade;
  - (ii) represents that the promoter has approval or affiliation which such promoter does not have;
  - (iii) makes a false or misleading representation concerning the services;
- B. the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;
  - (a) the promoter indulges in any fraudulent practices.

The registration granted to the promoter shall not be revoked unless the Authority has given to the promoter not less than thirty days' notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.

The Authority may, instead of revoking the registration, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

The Authority, upon the revocation of the registration-

- Debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;
- Facilitate the remaining development works to be carried out in accordance with the provisions of section 8;
- Direct the bank holding the project back account to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;
- To protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

### Obligation of Authority consequent upon lapse of or on revocation of registration (Section 8)

Upon lapse of the registration or on revocation of the registration under the Act, the authority, may consult

the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority.

The direction, decision or order of the Authority shall not take effect until the expiry of the period of appeal provided under the provisions of the Act:

In case of revocation of registration of a project under the Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

### **Registration of real estate agents**

Real estate broking is one of the easiest business in India as there are no specific qualification or experience requirements and also there is no code of practice which sets accountability, transparency and professional benchmarks. Hence, there are thousands of non-professional agents/ brokers in every city operating without any accountability. Hence, to bring in transparency and accountability, agents have also been covered under the ambit of RERA and registration requirement has been mandatory for them as per section 9 of the Act.

Without obtaining registration, real estate agent shall not facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being the part of the real estate project registered, being sold by the promoter in any planning area.

Every real estate agent shall make an application to the Authority for registration in such form, manner, within such time and accompanied by such fee and documents as may be prescribed.

The Authority shall, within such period, in such manner and upon satisfying itself of the fulfilment of such conditions, as may be prescribed—

- (a) grant a single registration to the real estate agent for the entire State of Union territory, as the case may be;
- (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of the Act or the rules or regulations made there under:

Application shall not be rejected unless the applicant has been given an opportunity of being heard in the matter.

Whereon the completion of the period prescribed under the act, if the applicant does not receive any communication about the deficiencies in his application or the rejection of his application, he shall be deemed to have been registered.

Every real estate agent who is registered as per the provisions of this Act or the rules and regulations made there under, shall be granted a registration number by the Authority, which shall be quoted by the real estate agent in every sale facilitated by him under this Act.

Every registration shall be valid for such period as may be prescribed, and shall be renewable for a period in such manner and on payment of such fee as may be prescribed.

Where any real estate agent who has been granted registration under this Act commits breach of any of the conditions thereof or any other terms and conditions specified under this Act or any rules or regulations made there under, or where the Authority is satisfied that such registration has been secured by the real estate agent through misrepresentation or fraud, the Authority may, without prejudice to any other provisions

under this Act, revoke the registration or suspend the same for such period as it thinks fit:

Provided that no such revocation or suspension shall be made by the Authority unless an opportunity of being heard has been given to the real estate agent.

### **Functions of real estate agents**

Every real estate agent which is not registered with the Authority shall not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area. So, firstly they require to register themselves with the authority.

Every real estate agent maintains and preserves such books of account, records and documents as may prescribed.

Every real estate agent not to involve himself in any unfair trade practices, namely:—

- (i) the practice of making any statement, whether orally or in writing or by visible representation which—
  - falsely represents that the services are of a particular standard or grade;
  - represents that the promoter or himself has approval or affiliation which such promoter or himself does not have;
  - makes a false or misleading representation concerning the services;
- (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.

Every real estate agent shall facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building, as the case may be and discharge such other functions as may be prescribed.

### **FUNCTIONS AND DUTIES OF PROMOTER**

The most important duty of the promoter which has been mandated by the Act is to provide complete details of the project so that a layman who does not even know the legal requirements is able to check the legal sanctity of the project. The promoter has also been debarred from advertising and selling his project until he has procured the requisite approvals from the authorities and got his project registered with RERA.

### **Functions and duties of promoter**

The promoter shall, upon receiving his Login Id and password, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project for public viewing, including—

- (a) details of the registration granted by the Authority;
- (b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;
- (c) quarterly up-to-date the list of number of garages booked;
- (d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;
- (e) quarterly up-to-date status of the project; and
- (f) such other information and documents as may be specified by the regulations made by the Authority.

The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

The promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:—

- (A) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;
- (B) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

The promoter shall—

- (a) be responsible for all obligations, responsibilities and functions under the provisions of the Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

- (b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;
- (c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;
- (d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;
- (e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

- (f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;
- (g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges



for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefore by such authority or person;

- (h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;

The promoter may cancel the allotment only in terms of the agreement for sale: However the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.

#### **Obligations of promoter regarding veracity of the advertisement or prospectus**

Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under the Act.

If the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under the Act.

#### **No deposit or advance to be taken by promoter without first entering into agreement for sale**

A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

The agreement for sale shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

### **Adherence to sanctioned plans and project specifications by the promoter**

The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

- (i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

The promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

"minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

- (ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

It may be noted that the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

### **Structural Defect**

In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under the Act.

### **Obligations of promoter in case of transfer of a real estate project to a third party**

The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority:

However such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

The allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

On the transfer or assignment being permitted by the allottees and the authority, the intending promoter shall be required to independently comply with all the pending obligations under the provisions of the Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees:

Any transfer or assignment permitted shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

### **Obligations of promoter regarding insurance of real estate project**

The promoter shall obtain all such insurances as may be notified by the appropriate Government, including but not limited to insurance in respect of —

- (i) title of the land and building as a part of the real estate project; and
- (ii) construction of the real estate project.

The promoter shall be liable to pay the premium and charges in respect of the insurance and shall pay the same before transferring the insurance to the association of the allottees.

The insurance shall stand transferred to the benefit of the allottee or the association of allottees, as the case may be, at the time of promoter entering into an agreement for sale with the allottee. On formation of the association of the allottees, all documents relating to the insurance shall be handed over to the association of the allottees.

### **Transfer of title**

The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws.

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

After obtaining the occupancy certificate and handing over physical possession to the allottees, it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws.

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate.

### Return of amount and compensation

If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

### Functions and duties of promoter

<i>Sl. No.</i>	<i>Obligation/Duty/Section</i>
1.	No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building in any planning area, without registering the real estate project with the Real Estate Regulatory Authority. <b>Section 3(1)</b>
2.	Every promoter shall make an application to the Authority for registration of the real estate project in prescribed form and manner. <b>Section 4(1)</b>
3.	The promoter shall enclose the prescribed documents along with the application. <b>Section 4(2)</b>
4.	The promoter shall also enclose a prescribed declaration along with application. <b>Section 4(2)(I)</b>
5.	The promoter shall keep 70% of the amount received from allottees in a separate bank account in a scheduled bank. <b>Section 4(2)(I)(D)</b>
6.	The promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. <b>Section 4(2)(I)(D)</b>
7.	The promoter shall withdraw the amounts from the separate account after it is certified by an

	engineer, an architect and a chartered accountant in practice and the withdrawal is in proportion to the percentage of completion of the project. <b>Section 4(2)(I)(D)</b>
8.	The promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice. <b>Section 4(2)(I)(D)</b>
9.	The promoter shall furnish a statement of accounts duly certified and signed by auditor verifying that the amounts collected for a particular project have been utilized for the project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project. <b>Section 4(2)(I)(D)</b>
10.	The promoter shall obtain a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project. <b>Section 5(2)</b>
11.	The promoter shall file application for extension of registration in prescribed form and manner before the Authority if the project could not be completed within time due to force majeure. <b>Section 6</b>
12.	The promoter shall comply with anything required by or under the Act or the rules or the regulations. <b>Section 7(1)(a)</b>
13.	The promoter shall not violate any of the terms or conditions of the approval given by the competent authority. <b>Section 7(1)(b)</b>
14.	The promoter shall not be involved in any kind of unfair practice or irregularities. <b>Section 7(1)(c)</b>
15.	The promoter shall respond to the Notice of Revocation, if any, issued by the Authority. <b>Section 7(2)</b>
16.	The promoter shall follow any further terms and condition imposed by Authority permitting the registration to remain in force, instead of revoking the registration under Section 7(1). <b>Section 7(3)</b>
17.	The promoter shall follow the directions issued by the Authority upon revocation of registration, unless right of appeal is exercised. <b>Section 7(4)</b>
17A.	The promoter shall use the services of only registered real estate agents for sale of apartment, plot or building of any registered project. <b>Section 9(1)</b>
18.	The promoter shall create his web page on the website of the Authority and enter all the prescribed details of the proposed project in all the fields for public viewing. <b>Section 11(1)</b>
19.	The promoter shall mention prominently the website address of the Authority in all advertisements or prospectus issued or published. <b>Section 11(2)</b>
20.	The promoter shall be responsible to make available to the allottee, all the prescribed information at the time of the booking and issue of allotment letter. <b>Section 11(3)</b>
21.	The promoter shall be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations. <b>Section 11(4)(a)</b>

22.	The promoter shall be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority. <b>Section 11(4)(b)</b>
23.	The promoter shall be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land. <b>Section 11(4)(c)</b>
24.	The promoter shall be responsible for providing and maintaining the essential services, on reasonable charges. <b>Section 11(4)(d)</b>
25.	The promoter shall enable the formation of an association or society or co-operative society of the allottees. <b>Section 11(4)(e)</b>
26.	The promoter shall execute a registered conveyance deed of the apartment, plot or building in favour of the allottee. <b>Section 11(4)(f)</b>
27.	The promoter shall execute a registered conveyance deed of the undivided proportionate title in the common areas to the association of allottees or competent authority. <b>Section 11(4)(f)</b>
28.	The promoter shall pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees. <b>Section 11(4)(g)</b>
29.	The promoter shall be liable for the cost of any legal proceedings which may be taken up by authority or person for recovery of outstanding outgoings, if not paid by the promoter. <b>Section 11(4)(g) Proviso</b>
30.	The promoter shall not mortgage or create a charge on any apartment, plot or building after execution of an agreement for sale. <b>Section 11(4)(h)</b>
31.	The promoter may cancel the allotment only in terms of the agreement for sale. <b>Section 11(5)</b>
32.	The promoter shall prepare and maintain all details as may be specified, from time to time, by regulations made by the Authority. <b>Section 11(6)</b>
33.	The promoter shall be liable to pay compensation to the allottee where he makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building and sustains any loss or damage by reason of any incorrect, false statement . <b>Section 12</b>
34.	The promoter shall enter into an agreement for sale and register the same before he accepts a sum more than ten per cent of the cost of the apartment, plot, or building. <b>Section 13(1)</b>
35.	The promoter shall ensure that the agreement for sale is in prescribed form and contain specified particulars. <b>Section 13(2)</b>
36.	The promoter shall develop and complete the proposed project in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities. <b>Section 14(1)</b>
37.	The promoter shall not make any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities in any apartment, plot or building without the previous consent of the allottee(s) concerned. <b>Section 14(2)(i)</b>
38.	The promoter shall not make any other alterations or additions in the sanctioned plans, layout

	plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees. <b>Section 14(2)(ii)</b>
39.	The promoter shall be obliged to rectify without further charge, within thirty days, any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development brought to the notice by allottee within a period of five years from the date of handing over possession. <b>Section 14(3)</b>
40.	The promoter shall be responsible to pay to the aggrieved allottees appropriate compensation in prescribed manner if he fails to rectify any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale. <b>Section 14(3)</b>
41.	The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees and without the prior written approval of the Authority. <b>Section 15(1)</b>
42.	The promoter shall obtain all such insurances in respect of title and construction, as may be notified by the appropriate Government. <b>Section 16(1)</b>
43.	The promoter shall be liable to pay the premium and charges in respect of the insurance. <b>Section 16(2)</b>
44.	The promoter shall transfer all benefits of insurance to allottees and/or the association of allottees at the time of promoter entering into an agreement for sale with the allottee. <b>Section 16(3)</b>
45.	The promoter shall hand over all documents relating to the insurance to the association of the allottees on its formation. <b>Section 16(4)</b>
46.	The promoter shall execute a registered conveyance deed in favour of the allottee. <b>Section 17(1)</b>
47.	The promoter shall execute a registered conveyance deed of undivided proportionate title in the common areas to the association of allottees or the competent authority. <b>Section 17(1)</b>
48.	The promoter shall hand over the physical possession of the plot, apartment of building to the allottee. <b>Section 17(1)</b>
49.	The promoter shall handover or physical possession of the common areas to the association of allottees or the competent authority. <b>Section 17(1)</b>
50.	The promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority. <b>Section 17(2)</b>
51.	The promoter shall on demand by the allottees, return the amount received by in respect of that apartment, plot, building with interest and compensation. <b>Section 18(1)</b>
52.	The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land. <b>Section 18(2)</b>
53.	The promoter shall be liable to pay compensation if he fails to discharge any other obligations

	imposed on him under this Act or the rules or regulations. <b>Section 18(3)</b>
54.	The promoter shall be obliged to furnish in writing such information or explanation relating to its Affairs, as the Authority may require from time to time. <b>Section 35(1)</b>
55.	The promoter shall be responsible to comply with any directions issued by the Authority unless he makes an appeal against such directions. <b>Section 37</b>
56.	The promoter shall be liable to pay penalty or interest imposed by the Authority unless he makes an appeal. <b>Section 38(1)</b>
57.	The promoter shall be shall be liable to a penalty, which may extend up to ten per cent. of the estimated cost of the real estate project, if he contravenes provisions of section 3. <b>Section 59(1)</b>
58.	The promoter shall be liable to be punished with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent of the estimated cost of the real estate project, or with both if he does not comply with the orders, decisions or directions issued under Section 3(1). <b>Section 59(2)</b>
59.	The promoter shall be liable to a penalty, which may extend up to five per cent of the estimated cost of the real estate project, if he provides false information or contravenes the provisions of Section 4. <b>Section 60</b>
60.	The promoter shall be liable to a penalty which may extend up to five per cent of the estimated cost of the real estate project, if he contravenes any other provisions of this Act. <b>Section 61</b>
61.	The promoter shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent of the estimated cost of the real estate project, if any promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority. <b>Section 63</b>
62.	The promoter shall be punishable with imprisonment for a term which may extend up to three years or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent of the estimated cost of the real estate project if any promoter, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal. <b>Section 64</b>

## RIGHTS AND DUTIES OF ALLOTTEES

Though the Act is pro-consumer, yet it has struck a balance by specifying the duties of the Allottees. Allottees who do not pay their instalments, maintenance dues in time will also be subjected to the rigours of this Act.

### Rights and duties of allottees

Section 20 provides for the various rights and duties of the allottees.

- (1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in the Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.
- (2) The allottee shall be entitled to know stage-wise time schedule of completion of the project,



including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

- (3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter.
- (4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of the Act or the rules or regulations made thereunder.
- (5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.
- (6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.
- (7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).
- (8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.
- (9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.
- (10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.
- (11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.

## THE REAL ESTATE REGULATORY AUTHORITY

As stated earlier, though this sector has seen unprecedented growth since Independence, it has remained unregulated till now. We have witnessed that whenever a regulator is appointed for a sector, like SEBI, IRDAI, TRAI etc, it widens the sectors. Accordingly, this act mandates that RERA would be established by each of the State and UT for administering the real estate sector in the respective State/UT. A state can have more than one RERA or two states can have the same authority. All States and UTs were to appoint RERA by 1st May 2017 but few States have missed the deadline but it is expected that they will appoint RERA in their respective states by 31st July 2017 as it is the last date by which the ongoing projects have to be registered by the developer with RERA.

### **Establishment and incorporation of Real Estate Regulatory Authority**

The appropriate Government shall establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under the Act.

The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority. Further, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be.

Until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the purposes under the Act. After the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated, shall stand transferred to the Regulatory Authority so established and shall be heard from the stage such applications, complaints or cases are transferred.

The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of the Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

### **Composition of Authority**

The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government.

### **Qualifications of Chairperson and Members of Authority**

The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary, in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration:

It may be noted that a person who is, or has been, in the service of the State Government shall not be appointed as a Chairperson unless such person has held the post of Additional Secretary to the Central Government or any equivalent post in the Central Government or State Government. Further, a person who is, or has been, in the service of the State Government shall not be appointed as a member unless such person has held the post of Secretary to the State Government or any equivalent post in the State Government or Central Government.

### **Term of office of Chairperson and Members**

- (1) The Chairperson and Members shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixty-five years, whichever is earlier and shall not be eligible for re-appointment.
- (2) Before appointing any person as a Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest as is likely to affect prejudicially his functions as such Member.

### Salary and allowances payable to Chairperson and Members

- (1) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed and shall not be varied to their disadvantage during their tenure.
- (2) The Chairperson or a Member, as the case may be, may,—
  - (a) relinquish his office by giving in writing, to the appropriate Government, notice of not less than three months; or
  - (b) be removed from his office in accordance with the provisions of section 26 of this Act.
- (3) Any vacancy caused to the office of the Chairperson or any other Member shall be filled-up within a period of three months from the date on which such vacancy occurs.

### Administrative powers of Chairperson

The Chairperson shall have powers of general superintendence and directions in the conduct of the affairs of Authority and he shall, in addition to presiding over the meetings of the Authority, exercise and discharge such administrative powers and functions of the Authority as may be prescribed.

### Removal of Chairperson and Members from office in certain circumstances

Section 26 deals with Removal of Chairperson and Members from office in certain circumstances. Sub-section(1) states that the appropriate Government may, in accordance with the procedure notified, remove from office the Chairperson or other Members, if the Chairperson or such other Member, as the case may be,—

- (a) has been adjudged as an insolvent; or
- (b) has been convicted of an offence, involving moral turpitude; or
- (c) has become physically or mentally incapable of acting as a Member; or
- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or
- (e) has so abused his position as to render his continuance in office prejudicial to the public interest.

(2) The Chairperson or Member shall not be removed from his office on the ground specified under clause (d) or clause (e) of sub-section (1) except by an order made by the appropriate Government after an inquiry made by a Judge of the High Court in which such Chairperson or Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

### Restrictions on Chairperson or Members on employment after cessation of office

The Chairperson or a Member, ceasing to hold office as such, shall not—

- (a) accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office:

However nothing contained in this clause shall apply to any employment under the appropriate Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or provincial Act or a Government Company, as defined under clause (45) of section 2 of the Companies Act, 2013, which is not a promoter as per the provisions of the Act;

- (b) act, for or on behalf of any person or organisation in connection with any specific proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the

Chairperson or such Member had, before cessation of office, acted for or provided advice to the Authority;

- (c) give advice to any person using information which was obtained in his capacity as the Chairperson or a Member and being unavailable to or not being able to be made available to the public;
- (d) enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he had direct and significant official dealings during his term of office as such.

The Chairperson and Members shall not communicate or reveal to any person any matter which has been brought under his consideration or known to him while acting as such.

### **Officers and other employees of Authority**

The appropriate Government may, in consultation with the Authority appoint such officers and employees as it considers necessary for the efficient discharge of their functions under the Act who would discharge their functions under the general superintendence of the Chairperson.

The salary and allowances payable to, and the other terms and conditions of service of, the officers and of the employees of the Authority appointed shall be such as may be prescribed.

### **Meetings of Authority**

- (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.
- (2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.
- (3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.
- (4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application:

However where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

### **Filing of complaints with the Authority or the adjudicating officer**

Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of the Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

It may be noted that "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

### **Functions of Authority for promotion of real estate sector**

The Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government of the competent authority, as the case may be, on,—

- protection of interest of the allottees, promoter and real estate agent;
- creation of a single window system for ensuring time bound project approvals and clearances for timely completion of the project;
- creation of a transparent and robust grievance redressal mechanism against acts of omission and commission of competent authorities and their officials;
- measures to encourage investment in the real estate sector including measures to increase financial assistance to affordable housing segment;
- measures to encourage construction of environmentally sustainable and affordable housing, promoting standardisation and use of appropriate construction materials, fixtures, fittings and construction techniques;
- measures to encourage grading of projects on various parameters of development including grading of promoters;
- measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations;
- measures to facilitate digitization of land records and system towards conclusive property titles with title guarantee;
- to render advice to the appropriate Government in matters relating to the development of real estate sector;
- any other issue that the Authority may think necessary for the promotion of the real estate sector.

### **Advocacy and awareness measures**

The appropriate Government may, while formulating a policy on real estate sector (including review of laws related to real estate sector) or any other matter, make a reference to the Authority for its opinion on possible effect, of such policy or law on real estate sector and on the receipt of such a reference, the Authority shall within a period of sixty days of making such reference, give its opinion to the appropriate Government which may thereafter take further action as it deems fit.

The opinion given by the Authority shall not be binding upon the appropriate Government in formulating such policy or laws.

The Authority shall take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.

### **Functions of Authority**

The functions of the Authority shall include—

- to register and regulate real estate projects and real estate agents registered under the Act;
- to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;
- to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;
- to maintain a database, on its website, for public viewing, and enter the names and photographs of

real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;

- to fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;
- to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the Act and the rules and regulations made thereunder;
- to ensure compliance of its regulations or orders or directions made in exercise of its powers under the Act;
- to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of the Act.

### **Powers of Authority to call for information, conduct investigation**

Where the Authority considers it expedient to do so, on a complaint or suomotu, relating to the Act or the rules of regulations made thereunder, it may, by order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.

Notwithstanding anything contained in any other law for the time being in force, while exercising the powers, the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:—

- (i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;
- (ii) summoning and enforcing the attendance of persons and examining them on oath;
- (iii) issuing commissions for the examination of witnesses or documents;
- (iv) any other matter which may be prescribed.

### **Power to issue interim orders**

Where during an inquiry, the Authority is satisfied that an act in contravention of the Act, or the rules and regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority may, by order, restrain any promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where the Authority deems it necessary.

### **Powers of Authority to issue directions**

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

### **Powers of Authority**

- (1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.
- (2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

- (3) Where an issue is raised relating to agreement, action, omission, practice or procedure that—
- (a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or
  - (b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.

### Rectification of orders

The Authority may, at any time within a period of two years from the date of the order made under the Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

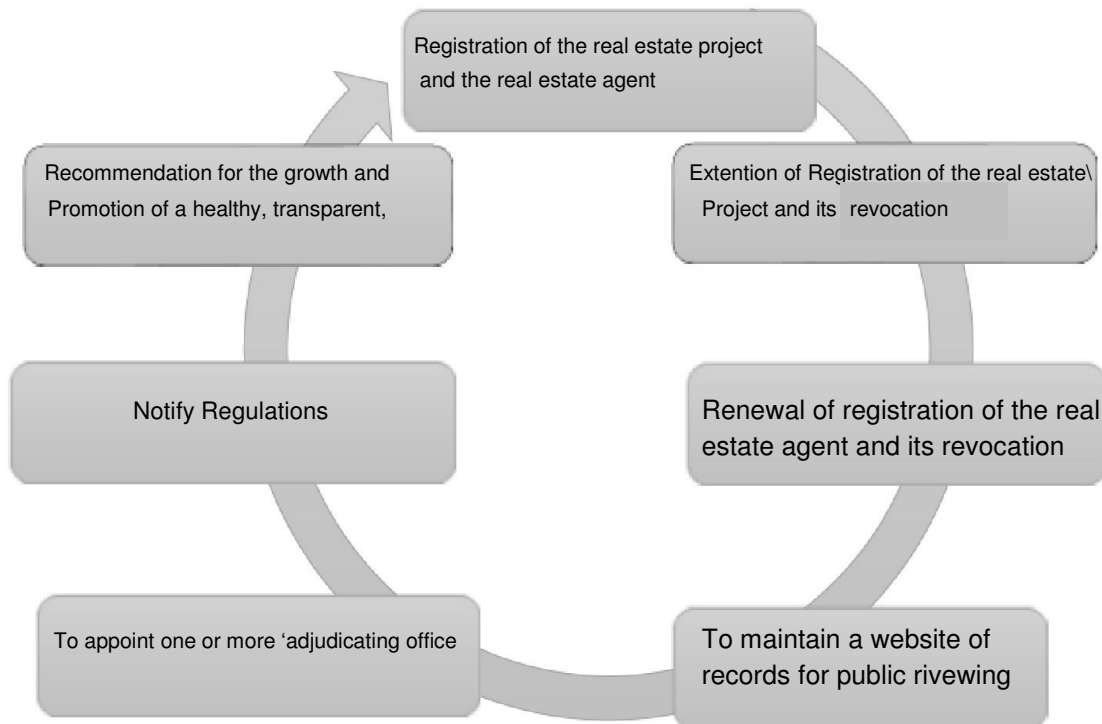
It may be noted that no such amendment shall be made in respect of any order against which an appeal has been preferred under the Act:

### Recovery of interest or penalty or compensation and enforcement of order, etc.

If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.

### Responsibilities of the 'Regulatory Authority'



## CENTRAL ADVISORY COUNCIL

### Establishment of Central Advisory Council

- (1) The Central Government may, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Advisory Council.
- (2) The Minister to the Government of India in charge of the Ministry of the Central Government dealing with Housing shall be the ex officio Chairperson of the Central Advisory Council.
- (3) The Central Advisory Council shall consist of representatives of the Ministry of Finance, Ministry of Industry and Commerce, Ministry of Urban Development, Ministry of Consumer Affairs, Ministry of Corporate Affairs, Ministry of Law and Justice, NitiAayog, National Housing Bank, Housing and Urban Development Corporation, five representatives of State Governments to be selected by rotation, five representatives of the Real Estate Regulatory Authorities to be selected by rotation, and any other Central Government department as notified.
- (4) The Central Advisory Council shall also consist of not more than ten members to represent the interests of real estate industry, consumers, real estate agents, construction labourers, non-governmental organisations and academic and research bodies in the real estate sector.

### Functions of Central Advisory Council

The Central Advisory Council is required to advise the Central Government on matters relating to implementation of the Act, questions of policy, protection of consumer interest, foster growth and development of the real estate sector, and other matters as may be assigned to it by the Central Government.

## THE REAL ESTATE APPELLATE TRIBUNAL

Real Estate Appellate Tribunal (REAT) is to be formed by appropriate government to ensure faster resolution of disputes. Parties aggrieved by the RERA order can appeal before REAT and REAT has to adjudicate such cases within 60 days. Civil Courts have been prevented from exercising jurisdiction on such matters. If any of the parties is not satisfied with the REAT order they can file an appeal against the REAT order to the High Court within 60 days.

### Establishment of Real Estate Appellate Tribunal

- (1) The appropriate Government shall, establish an Appellate Tribunal to be known as the — (name of the State/Union territory) Real Estate Appellate Tribunal.
- (2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.
- (3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.
- (4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal.
- (5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under the Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter.

It may be noted that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent. of the penalty,



or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

"Person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

### **Application for settlement of disputes and appeals to Appellate Tribunal**

Section 44 of the Act deals with Application for settlement of disputes and appeals to Appellate Tribunal. It provides that:

The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.

Every appeal made to the Appellate Tribunal shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the appropriate Government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed.

The Appellate Tribunal may entertain any appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filling it within that period.

On receipt of an appeal, the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders, including interim orders, as it thinks fit.

The Appellate Tribunal shall send a copy of every order made by it to the parties and to the Authority or the adjudicating officer, as the case may be.

The appeal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of sixty days from the date of receipt of appeal:

Provided that where any such appeal could not be disposed of within the said period of sixty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within that period.

The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.

### **Composition of Appellate Tribunal**

The Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member

### **Qualifications for appointment of Chairperson and Members**

A person shall not be qualified for appointment as the Chairperson or a Member of the Appellate Tribunal unless he,—

- (a) in the case of Chairperson, is or has been a Judge of a High Court; and
- (b) in the case of a Judicial Member he has held a judicial office in the territory of India for at least fifteen years or has been a member of the Indian Legal Service and has held the post of Additional Secretary of that service or any equivalent post, or has been an advocate for at least twenty years with experience in dealing with real estate matters; and

- (c) in the case of a Technical or Administrative Member, he is a person who is well-versed in the field of urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, public affairs or administration and possesses experience of at least twenty years in the field or who has held the post in the Central Government, or a State Government equivalent to the post of Additional Secretary to the Government of India or an equivalent post in the Central Government or an equivalent post in the State Government.

The Chairperson of the Appellate Tribunal shall be appointed by the appropriate Government in consultation with the Chief Justice of High Court or his nominee.

The judicial Members and Technical or Administrative Members of the Appellate Tribunal shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department handling Housing and the Law Secretary and in such manner as may be prescribed.

### **Term of office of Chairperson and Members**

- (1) The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall hold office, as such for a term not exceeding five years from the date on which he enters upon his office, but shall not be eligible for re-appointment:

It may be noted that in case a person, who is or has been a Judge of a High Court, has been appointed as Chairperson of the Tribunal, he shall not hold office after he has attained the age of sixty-seven years.

However no Judicial Member or Technical or Administrative Member shall hold office after he has attained the age of sixty-five years.

- (2) Before appointing any person as Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest, as is likely to affect prejudicially his functions as such member.

### **Restrictions on Chairperson or Judicial Member or Technical or Administrative Member on employment after cessation of office**

The Chairperson or Judicial Member or Technical or Administrative Member, ceasing to hold office as such shall not:—

- (a) Accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office:

Provided that nothing contained in this clause shall apply to any employment under the appropriate Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or provincial Act or a Government Company as defined under clause (45) of section 2 of the Companies Act, 2013, which is not a promoter as per the provisions of the Act;

- (b) act, for or on behalf of any person or organisation in connection with any specific proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the Chairperson or Judicial Member or Technical or Administrative Member had, before cessation of office, acted for or provided advice to the Authority;
- (c) give advice to any person using information which was obtained in his capacity as the Chairperson or Judicial Member or Technical or Administrative Member and being unavailable to or not being

able to be made available to the public;

- (d) enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he had direct and significant official dealings during his term of office as such.

The Chairperson or Judicial Member or Technical or Administrative Member shall not communicate or reveal to any person any matter which has been brought under his consideration or known to him while acting as such.

### Powers of Tribunal

- (1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice.
- (2) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure.
- (3) The Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.
- (4) The Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:—
  - (a) summoning and enforcing the attendance of any person and examining him on oath;
  - (b) requiring the discovery and production of documents;
  - (c) receiving evidence on affidavits;
  - (d) issuing commissions for the examinations of witnesses or documents;
  - (e) reviewing its decisions;
  - (f) dismissing an application for default or directing it ex parte; and
  - (g) any other matter which may be prescribed.
- (5) All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 for the purposes of section 196 of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

### Right to legal representation

Section 56 deals with Right to legal representation. It provides that

The applicant or appellant may either appear in person or authorise one or more chartered accountants or **company secretaries** or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

*Explanation.*—For the purposes of this section,—

- (a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

- (b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

**Orders passed by Appellate Tribunal to be executable as a decree**

Every order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.

The Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by the court.

**Appeal to High Court**

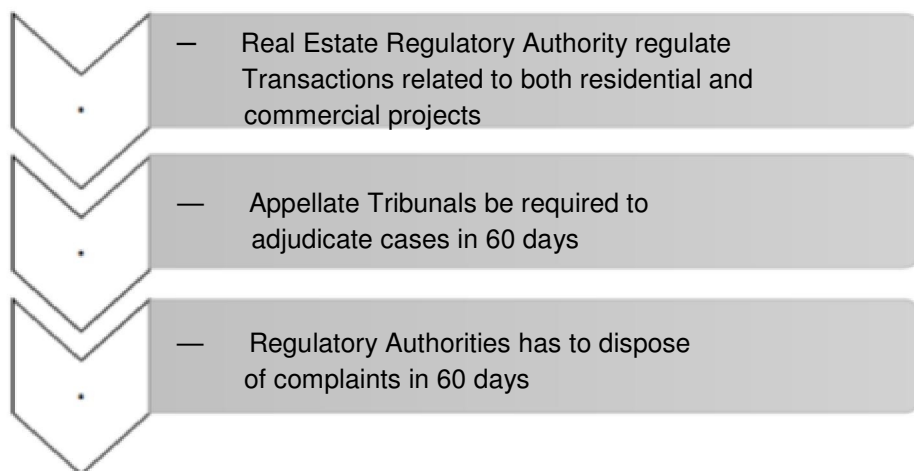
Any person aggrieved by any decision or order of the Appellate Tribunal may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908.

The High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

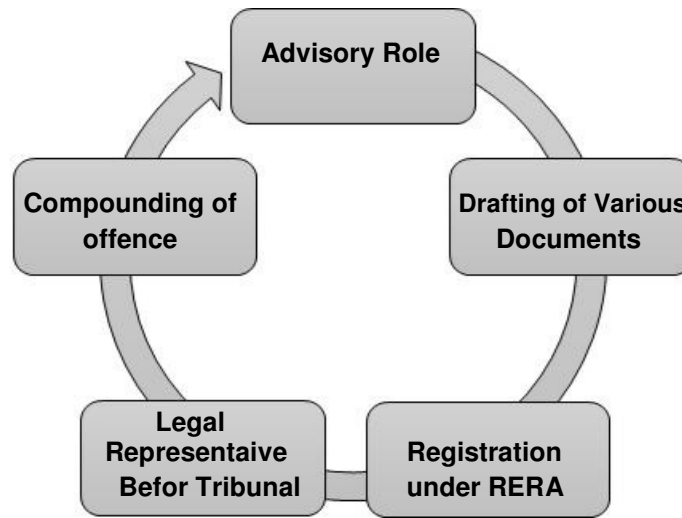
*Explanation.*— "High Court" means the High Court of a State or Union territory where the real estate project is situated.

No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

**Real Estate Regulatory Authority and Appellate Tribunal**



## ROLE OF COMPANY SECRETARIES



India is witnessing a phenomenal growth and expansion in the corporate sector. The growing demand for specialists in almost every sphere of the corporate functions has led to emergence of professionals who can perform specialized skills with near perfection in their respective fields. A company secretary is one such professional who is responsible for efficient management of the corporate sector. He ensures compliance of various company legislations and advises directors on statutory requirements of the company. Apart from carrying out these functions, he also looks after finance, accounts, legal, secretarial, personnel and administrative functions in private as well as public sectors.

The Companies Act, 2013 confers a special status to Company Secretary as the key managerial personnel and has bracketed him along with Managing Director (MD) or Chief Executive Officer (CEO) or Manager, Whole-time director(s) or Chief Financial Officer (CFO). Every listed company and every other public company having a paid up share capital of ten crore rupees or more has to appoint a whole time Key Managerial Personnel. Whole time Company Secretary is also required to be appointed in other companies which have a paid up share capital of five crore rupees or more.

Almost every kind of organization whose affairs are conducted by boards, councils or other corporate structures, be it a company, trust, association, federation, authority, commission or the like find it useful to appoint a person who holds the qualification of Company Secretaryship in key administrative position. Practising Company Secretaries have been authorized to issue Certificate regarding compliance of conditions of Corporate Governance. Practising Company Secretaries have also been recognized to appear before various Tribunals such as NCLT, NCLAT, Securities Appellate Tribunal, Competition Commission of India, Telecom Disputes Settlement and Appellate Tribunal, Consumer Forums, Tax Tribunals etc. Reserve Bank of India has also recognized the Practising Company Secretaries to undertake Diligence Report for Banks.

The rapid Change in Indian Legislative has brought about a sea change in the role and profile of a company secretary. They are now being seen as corporate development planners. Besides embarking upon traditional areas of practice, Company Secretaries in Practice are increasingly required to advise and guide on legal aspects of business which intimately concern areas such as registration under RERA, production, drafting of various documents, sales, marketing and administration for identifying expansion opportunities, issuing due diligence or comfort certificate, arranging foreign collaborations, amalgamations, mergers, acquisition,

takeovers, setting up of subsidiaries and joint ventures within and outside India etc. The new opportunities offered by the growing capital markets and financial services have greatly contributed to the development of the practice side of the profession.

### **Company Secretaries - One Stop Professional Advisory Services for Real Estate Projects**

Company Secretaries holding Certificate of Practice by becoming an expert in the act can indulge in providing advice in respect of:

- Financial Advisory Services
- Various applicable provision particular on real estate project
- Registration and extension procedure of real estate project with competent authority
- Various obligation, functions and duties of promoter in a real estate project
- Penal Provisions under the Act
- Funding Options for Real Estate Project
- Taxation aspects for Real Estate Project
- Legal & Regulatory Compliances

### **Company Secretaries – As a Legal Representative**

As per Section 56 of the Act, a Company Secretary holding certificate of practice can appear before Appellate Tribunal or a Regulatory Authority or Adjudicating Officer on behalf of applicant or appellant as the case may be.

Hence a Company Secretary holding certificate of practice can –

- Represent a person (promoter) before any real estate regulatory authority for registration of real estate project,
- Represent a person before real estate appellate tribunal.
- Represent a person before any other competent authority for any other purpose under Real Estate (Regulation and Development) Act, 2016.

## **OFFENCES, PENALTIES AND ADJUDICATION**

### **Punishment prescribed for non-registration of a project under the Act**

As per section 59, where under the Act, it is obligatory for the promoter to register a project with the Authority, and the promoter fails to do the same, he shall be liable to a penalty upto ten percent of the estimated cost of the real estate project.

However, in case the promoter consistently defaults or does not comply with the directions orders of the Authority as regards registration of the project with the Authority, he shall be liable to additional fine of ten percent of the estimated cost of the real estate project or imprisonment upto 3 years or both.

### **Penalty for contravention of section 4(Application for registration of real estate projects)**

If any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty which may extend up to five per cent of the estimated cost of the real estate project, as determined by the Authority.

**Penalty for contravention of other provisions of the Act**

If any promoter contravenes any other provisions of the Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.

**Penalty for non-registration and contravention under sections 9 and 10**

If any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10 he shall be liable to a penalty of ten thousand rupees for every day during which such default continues, which may cumulatively extend up to five per cent of the cost of plot, apartment or buildings, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.

**Penalty for failure to comply with orders of Authority by promoter**

If any promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of the real estate project as determined by the Authority.

**Penalty for failure to comply with orders of Appellate Tribunal by promoter**

If any promoter, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to three years or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of the real estate project, or with both.

**Penalty for failure to comply with orders of Authority by real estate agent**

If any real estate agent, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated and as determined by the Authority.

**Penalty for failure to comply with orders of Appellate Tribunal by real estate agent**

If any real estate agent, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated, or with both.

**Penalty for failure to comply with orders of Authority by allottee**

If any allottee, who fails to comply with, or contravenes any of the orders, decisions or directions of the Authority he shall be liable to a penalty for the period during which such default continues, which may cumulatively extend up to five per cent. of the plot, apartment or building cost, as the case may be, as determined by the Authority.

**Penalty for failure to comply with orders of Appellate Tribunal by allottee**

If any allottee, who fails to comply with, or contravenes any of the orders or directions of the Appellate Tribunal, as the case may be, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to

ten per cent of the plot, apartment or building cost, as the case may be, or with both.

### **Offences by companies**

Where an Offence under the Act has been committed by a company, every person who, at the time, the offence was committed was in charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly -

However nothing contained in this sub-section, shall render any such person liable to any punishment under the Act if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Where an offence under the Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.-*

- (a) "company" means any body corporate and includes a firm, or other association of individuals; and
- (b) "director" in relation to a firm, means a partner in the firm.

### **Compounding of offences**

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, if any person is punished with imprisonment under the Act, the punishment may, either before or after the institution of the prosecution, be compounded by the court on such terms and conditions and on payment of such sums as may be prescribed.

However the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded.

### **Power to adjudicate**

For the purpose of adjudging compensation under sections 12, 14, 18 and section 19 (Section 12 deals with obligations of promoter regarding veracity of the advertisement or prospectus, Section 14 deals with Adherence to sanctioned plans and project specifications by the promoter, Section 18 deals with Return of amount and compensation, Section 19 deals with Rights and duties of allottees), the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard.

Any person whose complaint in respect of matters covered under section(s) 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of the Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

The application for adjudging compensation shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application. Where any such application could not be disposed of within the said period of sixty days, the adjudicating



officer shall record his reasons in writing for not disposing of the application within that period.

While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections i.e., sections 12, 14, 18 and section 19, he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.

### **Bar of jurisdiction**

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the Adjudicating officer or the Appellate Tribunal is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

### **SPECIMEN AGREEMENT FOR SALE TO BE EXECUTED BETWEEN THE PROMOTER AND THE ALLOTTEE**

This Agreement for Sale ("Agreement") executed on this \_\_\_ (Date) day of \_\_\_\_\_ (Month), 20\_\_\_\_,

#### ***By and Between***

#### ***[If the promoter is a company]***

\_\_\_\_\_, (CIN no. \_\_\_\_\_), a company incorporated under the provisions of the Companies Act, [1956 or 2013, as the case may be], having its registered office at \_\_\_\_\_ and its corporate office at \_\_\_\_\_ (PAN \_\_\_\_\_), represented by its authorized signatory \_\_\_\_\_ (Aadhar no. \_\_\_\_\_) authorized vide board resolution dated \_\_\_\_\_ hereinafter referred to as the "Promoter" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include its successor-in-interest, and permitted assigns).

[OR]

#### ***[If the promoter is a Partnership firm]***

\_\_\_\_\_, a partnership firm registered under the Indian Partnership Act, 1932, having its principal place of business at \_\_\_\_\_, (PAN \_\_\_\_\_), represented by its authorized Partner \_\_\_\_\_, (Aadhar no. \_\_\_\_\_) authorized vide \_\_\_\_\_, hereinafter referred to as the "Promoter" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include the partners or partner for the time being of the said firm, the survivor or survivors of them and their heirs, executors and administrators of the last surviving partner and his/her/their assigns).

[OR]

#### ***[If the promoter is an Individual]***

Mr. / Ms. \_\_\_\_\_, (Aadhar no. \_\_\_\_\_) son / daughter of \_\_\_\_\_, aged about \_\_\_\_\_, residing at \_\_\_\_\_, (PAN \_\_\_\_\_), hereinafter called the "**Promoter**" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include his/her heirs, executors, administrators, successors-in-interest and permitted assigns).

AND

***[If the Allottee is a company]***

\_\_\_\_\_, (CIN no. \_\_\_\_\_) a company incorporated under the provisions of the Companies Act, [1956 or 2013, as the case may be], having its registered office at \_\_\_\_\_, (PAN \_\_\_\_\_), represented by its authorized signatory, \_\_\_\_\_, (Aadhar no. \_\_\_\_\_) duly authorized vide board resolution dated \_\_\_\_\_, hereinafter referred to as the "Allottee" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include its successor-in-interest, and permitted assigns).

[OR]

***[If the Allottee is a Partnership]***

\_\_\_\_\_, a partnership firm registered under the Indian Partnership Act, 1932, having its principal place of business at \_\_\_\_\_, (PAN \_\_\_\_\_), represented by its authorized partner, \_\_\_\_\_, (Aadhar no. \_\_\_\_\_) authorized vide \_\_\_\_\_, hereinafter referred to as the "Allottee" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include the partners or partner for the time being of the said firm, the survivor or survivors of them and their heirs, executors and administrators of the last surviving partner and his/her/their assigns).

[OR]

***[If the Allottee is an Individual]***

Mr. / Ms. \_\_\_\_\_, (Aadhar no. \_\_\_\_\_) son / daughter of \_\_\_\_\_, aged about \_\_\_\_\_, residing at \_\_\_\_\_, (PAN \_\_\_\_\_), hereinafter called the "Allottee" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include his/her heirs, executors, administrators, successors-in-interest and permitted assigns).

[OR]

***[If the Allottee is a HUF]***

Mr. \_\_\_\_\_, (Aadhar no. \_\_\_\_\_) son of \_\_\_\_\_ aged about \_\_\_\_\_ for self and as the Karta of the Hindu Joint Mitakshara Family known as \_\_\_\_\_ HUF, having its place of business / residence at \_\_\_\_\_, (PAN \_\_\_\_\_), hereinafter referred to as the "Allottee" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean and the members or member for the time being of the said HUF, and their respective heirs, executors, administrators and permitted assigns).

[Please insert details of other allottee(s), in case of more than one allottee]

The Promoter and Allottee shall hereinafter collectively be referred to as the "Parties" and individually as a "Party".

**DEFINITIONS**

For the purpose of this Agreement for Sale, unless the context otherwise requires,-

- (a) "Act" means the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

- (b) “appropriate Government” means the Central Government;
- (c) “Rules” means the Real Estate (Regulation and Development) (General) Rules, 2016 made under the Real Estate(Regulation and Development) Act, 2016;
- (d) “Regulations” means the Regulations made under the Real Estate (Regulation and Development Act, 2016;
- (e) “section” means a section of the Act.

**WHEREAS**

A. The Promoter is the absolute and lawful owner of [khasra nos./ survey nos.] [Please insert land details as per local laws] \_\_\_\_\_ totally admeasuring \_\_\_\_\_ square meters situated at \_\_\_\_\_ in Tehsil & District \_\_\_\_\_ (“**Said Land**”) vide sale deed(s) dated \_\_\_\_\_ registered as documents no. \_\_\_\_\_ at the office of theSub-Registrar;

[OR]

\_\_\_\_\_ (“Owner”) is the absolute and lawful owner of [khasra nos./ survey nos.] [Please insert land details as per local laws] \_\_\_\_\_ totally admeasuring \_\_\_\_\_ square meters situated at \_\_\_\_\_ in Tehsil & District \_\_\_\_\_ (“**Said Land**”) vide sale deed(s) dated \_\_\_\_\_ registered as documents no. \_\_\_\_\_ at the office of the Sub-Registrar. The Owner and the Promoter have entered into a [collaboration /development / joint development] agreement dated \_\_\_\_\_ registered as document no. \_\_\_\_\_ at theoffice of the Sub-Registrar;

B. The Said Land is earmarked for the purpose of building a [commercial/residential/ any other purpose] project, comprising \_\_\_\_\_ multistoried apartment buildings and [insert any other components of the Projects] and the said project shall be known as ‘ \_\_\_\_\_ ’ (“**Project**”);

[OR]

(C) The Said Land is earmarked for the purpose of plotted development of a [commercial/residential/any other purpose] project, comprising \_\_\_\_\_ plots and [insert any other components of the Projects] and the said project shall be known as ‘ \_\_\_\_\_ ’ (“**Project**”):

Provided that where land is earmarked for any institutional development the same shall be used for those purposes only and no commercial/residential development shall be permitted unless it is a part of the plan approved by the competent authority;

(C) The Promoter is fully competent to enter into this Agreement and all the legal formalities with respect to the right, title and interest of the Promoter regarding the Said Land on which Project is to be constructed have been completed;

(D) The \_\_\_\_\_ [Please insert the name of the concerned competent authority] has granted the commencement certificate to develop the Project vide approval dated \_\_\_\_\_ bearing registration no. \_\_\_\_\_;

(E) The Promoter has obtained the final layout plan, sanctioned plan, specifications and approvals for the Project and also for the apartment, plot or building, as the case may be, from \_\_\_\_\_ [Please insert the name of the concerned competent authority]. The Promoter agrees and undertakes that it shall not make any changes to these approved plans except in strict compliance with section 14 of the Act and other laws as

applicable;

- (F) The Promoter has registered the Project under the provisions of the Act with the \_\_\_\_\_ (Name of Union Territory) Real Estate Regulatory Authority at \_\_\_\_\_ on \_\_\_\_\_ under registration no. \_\_\_\_\_;
- (G) The Allottee had applied for an apartment in the Project vide application no. \_\_\_\_\_ dated \_\_\_\_\_ and has been allotted apartment no. \_\_\_\_\_ having carpet area of \_\_\_\_\_ square feet, type \_\_\_\_\_, on \_\_\_\_\_ floor in [tower/block/building] no. \_\_\_\_\_ ("Building") along with garage/covered parking no. \_\_\_\_\_ admeasuring \_\_\_\_\_ square feet in the \_\_\_\_\_ [Please insert the location of the garage/covered parking], as permissible under the applicable law and of pro rata share in the common areas ("**Common Areas**") as defined under clause (n) of Section 2 of the Act (hereinafter referred to as the "Apartment" more particularly described in **Schedule A** and the floor plan of the apartment is annexed hereto and marked as **Schedule B**);

[OR]

The Allottee had applied for a plot in the Project vide application no. \_\_\_\_\_ dated \_\_\_\_\_ and has been allotted plot no. \_\_\_\_\_ having area of \_\_\_\_\_ square feet and plot for garage/covered parking admeasuring \_\_\_\_\_ square feet (*if applicable*) in the \_\_\_\_\_ [Please insert the location of the garage/covered parking], as permissible under the applicable law and of pro rata share in the common areas ("**Common Areas**") as defined under clause (n) of Section 2 of the Act (hereinafter referred to as the "Plot" more particularly described in **Schedule A**);

- (H) The Parties have gone through all the terms and conditions set out in this Agreement and understood the mutual rights and obligations detailed herein;
- (I) \_\_\_\_\_ [Please enter any additional disclosures/ details];
- (J) The Parties hereby confirm that they are signing this Agreement with full knowledge of all the laws, rules, regulations, notifications, etc., applicable to the Project;
- (K) The Parties, relying on the confirmations, representations and assurances of each other to faithfully abide by all the terms, conditions and stipulations contained in this Agreement and all applicable laws, are now willing to enter into this Agreement on the terms and conditions appearing hereinafter;
- (L) In accordance with the terms and conditions set out in this Agreement and as mutually agreed upon by and between the Parties, the Promoter hereby agrees to sell and the Allottee hereby agrees to purchase the [Apartment/Plot] and the garage/covered parking (if applicable) as specified in para G.

**NOW THEREFORE**, in consideration of the mutual representations, covenants, assurances, promises and agreements contained herein and other good and valuable consideration, the Parties agree as follows:

1. TERMS:

- 1.1 Subject to the terms and conditions as detailed in this Agreement, the Promoter agrees to sell to the Allottee and the Allottee hereby agrees to purchase, the [Apartment/Plot] as specified in para G.
- 1.2 The Total Price for the [Apartment/Plot] based on the carpet area is Rs. \_\_\_\_\_  
 (Rupees \_\_\_\_\_ only ("Total Price") (Give break up and description):  
 Block/Building/Tower no. \_\_\_\_\_ Rate of Apartment per square feet\*  
 Apartment no. \_\_\_\_\_

Type \_\_\_\_\_

Floor \_\_\_\_\_

Total price (in rupees) \_\_\_\_\_

\*Provide break up of the amounts such as cost of apartment, cost of exclusive balcony or verandah areas, cost of exclusive open terrace areas, proportionate cost of common areas, preferential location charges, taxes, maintenance charges as per para 11 etc., if/as applicable.

[AND] [if/as applicable]

Garage/Covered parking – 1 Price for 1

Garage/Covered parking – 2 Price for 2

Total price (in rupees) \_\_\_\_\_

[OR]

Plot no. \_\_\_\_\_ Rate of Plot per square feet\*

Type \_\_\_\_\_

Total price (in rupees) \_\_\_\_\_

\*Provide break up of the amounts such as cost of plot, proportionate cost of common areas, taxes, maintenance charges as per para 11 etc., if/as applicable.

[AND] [if/as applicable]

Garage/Covered parking – 1 Price for 1

Garage/Covered parking – 2 Price for 2

Total price (in rupees) \_\_\_\_\_

*Explanation:*

- (i) The Total Price above includes the booking amount paid by the allottee to the Promoter towards the [Apartment/Plot];
- (ii) The Total Price above includes Taxes (consisting of tax paid or payable by the Promoter by way of Value Added Tax, Service Tax, and Cess or any other similar taxes which may be levied, in connection with the construction of the Project payable by the Promoter, by whatever name called) up to the date of handing over the possession of the apartment/plot to the allottee and the project to the association of allottees or the competent authority, as the case may be, after obtaining the completion certificate:

Provided that in case there is any change / modification in the taxes, the subsequent amount payable by the allottee to the promoter shall be increased/reduced based on such change / modification:

Provided further that if there is any increase in the taxes after the expiry of the scheduled date of completion of the project as per registration with the Authority, which shall include the extension of registration, if any, granted to the said project by the Authority, as per the Act, the same shall not be charged from the allottee;

- (iii) The Promoter shall periodically intimate in writing to the Allottee, the amount payable as stated in (i) above and the Allottee shall make payment demanded by the Promoter within the time and

in the manner specified therein. In addition, the Promoter shall provide to the Allottee the details of the taxes paid or demanded along with the acts/rules/notifications together with dates from which such taxes/levies etc. have been imposed or become effective;

- (iv) The Total Price of [Apartment/Plot] includes recovery of price of land, construction of [not only the Apartment but also] the Common Areas, internal development charges, external development charges, taxes, cost of providing electric wiring, electrical connectivity to the apartment, lift, water line and plumbing, finishing with paint, marbles, tiles, doors, windows, fire detection and firefighting equipment in the common areas, maintenance charges as per para 11 etc. and includes cost for providing all other facilities, amenities and specifications to be provided within the [Apartment/Plot] and the Project.
- 1.3 The Total Price is escalation-free, save and except increases which the Allottee hereby agrees to pay, due to increase on account of development charges payable to the competent authority and/or any other increase in charges which may be levied or imposed by the competent authority from time to time. The Promoter undertakes and agrees that while raising a demand on the Allottee for increase in development charges, cost/charges imposed by the competent authorities, the Promoter shall enclose the said notification/order/rule/regulation to that effect along with the demand letter being issued to the Allottee, which shall only be applicable on subsequent payments. Provided that if there is any new imposition or increase of any development charges after the expiry of the scheduled date of completion of the project as per registration with the Authority, which shall include the extension of registration, if any, granted to the said project by the Authority, as per the Act, the same shall not be charged from the allottee.
  - 1.4 The Allottee(s) shall make the payment as per the payment plan set out in Schedule C ("Payment Plan").
  - 1.5 The Promoter may allow, in its sole discretion, a rebate for early payments of installments payable by the Allottee by discounting such early payments @ \_\_\_\_\_% per annum for the period by which the respective installment has been preponed. The provision for allowing rebate and such rate of rebate shall not be subject to any revision/withdrawal, once granted to an Allottee by the Promoter.
  - 1.6 It is agreed that the Promoter shall not make any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described herein at Schedule 'D' and Schedule 'E' (which shall be in conformity with the advertisement, prospectus etc., on the basis of which sale is effected) in respect of the apartment, plot or building, as the case may be, without the previous written consent of the Allottee as per the provisions of the Act. Provided that the Promoter may make such minor additions or alterations as may be required by the Allottee, or such minor changes or alterations as per the provisions of the Act.
  - 1.7 [*Applicable in case of an apartment*] The Promoter shall confirm to the final carpet area that has been allotted to the Allottee after the construction of the Building is complete and the occupancy certificate is granted by the competent authority, by furnishing details of the changes, if any, in the carpet area. The total price payable for the carpet area shall be recalculated upon confirmation by the Promoter. If there is reduction in the carpet area then the Promoter shall refund the excess money paid by Allottee within forty-five days with annual interest at the rate prescribed in the Rules, from the date when such an excess amount was paid by the Allottee. If there is any increase in the carpet area, which is not more than three percent of the carpet area of the apartment, allotted to Allottee, the Promoter may demand that from the Allottee as per the next milestone of the Payment Plan as provided in Schedule C. All these monetary adjustments shall be made at the same rate per square feet as agreed in para 1.2 of this Agreement.

- 1.8 The Promoter agrees and acknowledges, the Allottee shall have the right to the [Apartment/Plot] as mentioned below:
- (i) The Allottee shall have exclusive ownership of the [Apartment/Plot];
  - (ii) The Allottee shall also have undivided proportionate share in the Common Areas. Since the share / interest of Allottee in the Common Areas is undivided and cannot be divided or separated, the Allottee shall use the Common Areas along with other occupants, maintenance staff etc., without causing any inconvenience or hindrance to them. It is clarified that the promoter shall hand over the common areas to the association of allottees after duly obtaining the completion certificate from the competent authority as provided in the Act;
  - (iii) That the computation of the price of the [Apartment/Plot] includes recovery of price of land, construction of [not only the Apartment but also] the Common Areas, internal development charges, external development charges, taxes, cost of providing electric wiring, electrical connectivity to the apartment, lift, water line and plumbing, finishing with paint, marbles, tiles, doors, windows, fire detection and firefighting equipment in the common areas, maintenance charges as per para 11 etc. and includes cost for providing all other facilities, amenities and specifications to be provided within the [Apartment/Plot] and the Project;
  - (iv) The Allottee has the right to visit the project site to assess the extent of development of the project and his apartment/plot, as the case may be.
- 1.9 It is made clear by the Promoter and the Allottee agrees that the [Apartment/ Plot] along with \_\_\_\_\_ garage/covered parking shall be treated as a single indivisible unit for all purposes. It is agreed that the Project is an independent, self-contained Project covering the said Land and is not a part of any other project or zone and shall not form a part of and/or linked/combined with any other project in its vicinity or otherwise except for the purpose of integration of infrastructure for the benefit of the Allottee. It is clarified that Project's facilities and amenities shall be available only for use and enjoyment of the Allottees of the Project.
- 1.10 The Promoter agrees to pay all outgoings before transferring the physical possession of the apartment to the Allottees, which it has collected from the Allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project). If the Promoter fails to pay all or any of the outgoings collected by it from the Allottees or any liability, mortgage loan and interest thereon before transferring the apartment to the Allottees, the Promoter agrees to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person.
- 1.11 The Allottee has paid a sum of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ only) as booking amount being part payment towards the Total Price of the [Apartment/ Plot] at the time of application the receipt of which the Promoter hereby acknowledges and the Allottee hereby agrees to pay the remaining price of the [Apartment/Plot] as prescribed in the Payment Plan [Schedule C] as may be demanded by the Promoter within the time and in the manner specified therein:

Provided that if the allottee delays in payment towards any amount which is payable, he shall be liable to pay interest at the rate prescribed in the Rules.

## 2. Mode of Payment

Subject to the terms of the Agreement and the Promoter abiding by the construction milestones, the

Allottee shall make all payments, on written demand by the Promoter, within the stipulated time as mentioned in the Payment Plan

[Schedule C] through A/c Payee cheque/demand draft/bankers cheque or online payment (as applicable) in favour of ' \_\_\_\_\_ ' payable at \_\_\_\_\_.

### 3. Compliance of Laws Relating to Remittances

- 3.1 The Allottee, if resident outside India, shall be solely responsible for complying with the necessary formalities as laid down in Foreign Exchange Management Act, 1999, Reserve Bank of India Act, 1934 and the Rules and Regulations made thereunder or any statutory amendment(s) modification(s) made thereof and all other applicable laws including that of remittance of payment acquisition/ sale/transfer of immovable properties in India etc. and provide the Promoter with such permission, approvals which would enable the Promoter to fulfill its obligations under this Agreement. Any refund, transfer of security, if provided in terms of the Agreement shall be made in accordance with the provisions of Foreign Exchange Management Act, 1999 or the statutory enactments or amendments thereof and the Rules and Regulations of the Reserve Bank of India or any other applicable law. The Allottee understands and agrees that in the event of any failure on his/her part to comply with the applicable guidelines issued by the Reserve Bank of India, he/she may be liable for any action under the Foreign Exchange Management Act, 1999 or other laws as applicable, as amended from time to time.
- 3.2 The Promoter accepts no responsibility in regard to matters specified in para 3.1 above. The Allottee shall keep the Promoter fully indemnified and harmless in this regard. Whenever there is any change in the residential status of the Allottee subsequent to the signing of this Agreement, it shall be the sole responsibility of the Allottee to intimate the same in writing to the Promoter immediately and comply with necessary formalities if any under the applicable laws. The Promoter shall not be responsible towards any third party making payment/remittances on behalf of any Allottee and such third party shall not have any right in the application/allotment of the said apartment applied for herein in any way and the Promoter shall be issuing the payment receipts in favour of the Allottee only.

### 4. Adjustment/Appropriation of Payments

The Allottee authorizes the Promoter to adjust/appropriate all payments made by him/her under any head(s) of dues against lawful outstanding of the allottee against the [Apartment/Plot], if any, in his/her name and the Allottee undertakes not to object/demand/direct the Promoter to adjust his payments in any manner.

### 5. Time is Essence

The Promoter shall abide by the time schedule for completing the project as disclosed at the time of registration of the project with the Authority and towards handing over the [Apartment/Plot] to the Allottee and the common areas to the association of allottees or the competent authority, as the case may be.

### 6. Construction of the Project/Apartment

The Allottee has seen the proposed layout plan, specifications, amenities and facilities of the [Apartment/Plot] and accepted the floor plan, payment plan and the specifications, amenities and facilities [annexed along with this Agreement] which has been approved by the competent authority, as represented by the Promoter. The Promoter shall develop the Project in accordance with the said layout plans, floor plans and specifications, amenities and facilities. Subject to the terms in this



Agreement, the Promoter undertakes to strictly abide by such plans approved by the competent Authorities and shall also strictly abide by the bye-laws, FAR and density norms and provisions prescribed by the \_\_\_\_\_ [Please insert the relevant State laws] and shall not have an option to make any variation /alteration / modification in such plans, other than in the manner provided under the Act, and breach of this term by the Promoter shall constitute a material breach of the Agreement.

## 7. Possession of the Apartment/Plot:

- 7.1 Schedule for possession of the said [Apartment/Plot] - The Promoter agrees and understands that timely delivery of possession of the [Apartment/Plot] to the allottee and the common areas to the association of allottees or the competent authority, as the case may be, is the essence of the Agreement. The Promoter assures to hand over possession of the [Apartment/Plot] along with ready and complete common areas with all specifications, amenities and facilities of the project in place on \_\_\_\_\_, unless there is delay or failure due to war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project ("Force Majeure"). If, however, the completion of the Project is delayed due to the Force Majeure conditions then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the [Apartment/Plot], provided that such Force Majeure conditions are not of a nature which make it impossible for the contract to be implemented. The Allottee agrees and confirms that, in the event it becomes impossible for the Promoter to implement the project due to Force Majeure conditions, then this allotment shall stand terminated and the Promoter shall refund to the Allottee the entire amount received by the Promoter from the allotment within 45 days from that date. The promoter shall intimate the allottee about such termination at least thirty days prior to such termination. After refund of the money paid by the Allottee, the Allottee agrees that he/ she shall not have any rights, claims etc. against the Promoter and that the Promoter shall be released and discharged from all its obligations and liabilities under this Agreement.
- 7.2 Procedure for taking possession - The Promoter, upon obtaining the occupancy certificate\* from the competent authority shall offer in writing the possession of the [Apartment/Plot], to the Allottee in terms of this Agreement to be taken within two months from the date of issue of occupancy certificate. [Provided that, in the absence of local law, the conveyance deed in favour of the allottee shall be carried out by the promoter within 3 months from the date of issue of occupancy certificate]. The Promoter agrees and undertakes to indemnify the Allottee in case of failure of fulfillment of any of the provisions, formalities, documentation on part of the Promoter. The Allottee, after taking possession, agree(s) to pay the maintenance charges as determined by the Promoter/association of allottees, as the case may be after the issuance of the completion certificate for the project. The promoter shall hand over the occupancy certificate of the apartment/plot, as the case may be, to the allottee at the time of conveyance of the same.
- 7.3 *Failure of Allottee to take Possession of [Apartment/Plot]* - Upon receiving a written intimation from the Promoter as per para 7.2, the Allottee shall take possession of the [Apartment/Plot] from the Promoter by executing necessary indemnities, undertakings and such other documentation as prescribed in this Agreement, and the Promoter shall give possession of the [Apartment/Plot] to the allottee. In case the Allottee fails to take possession within the time provided in para 7.2, such Allottee shall continue to be liable to pay maintenance charges as specified in para 7.2.
- 7.4 *Possession by the Allottee* - After obtaining the occupancy certificate and handing over physical possession of the [Apartment/Plot] to the Allottees, it shall be the responsibility of the Promoter to

hand over the necessary documents and plans, including common areas, to the association of Allottees or the competent authority, as the case may be, as per the local laws. [Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of allottees or the competent authority, as the case may be, within thirty days after obtaining the completion certificate].

- 7.5 *Cancellation by Allottee* – The Allottee shall have the right to cancel/withdraw his allotment in the Project as provided in the Act:

Provided that where the allottee proposes to cancel/withdraw from the project without any fault of the promoter, the promoter herein is entitled to forfeit the booking amount paid for the allotment. The balance amount of money paid by the allottee shall be returned by the promoter to the allottee within 45 days of such cancellation.

- 7.6 *Compensation* – The Promoter shall compensate the Allottee in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under the Act and the claim for interest and compensation under this provision shall not be barred by limitation provided under any law for the time being in force.

Except for occurrence of a Force Majeure event, if the promoter fails to complete or is unable to give possession of the [Apartment/Plot] (i) in accordance with the terms of this Agreement, duly completed by the date specified in para 7.1; or (ii) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act; or for any other reason; the Promoter shall be liable, on demand to the allottees, in case the Allottee wishes to withdraw from the Project, without prejudice to any other remedy available, to return the total amount received by him in respect of the [Apartment/Plot], with interest at the rate prescribed in the Rules including compensation in the manner as provided under the Act within forty-five days of it becoming due. Provided that where if the Allottee does not intend to withdraw from the Project, the Promoter shall pay the Allottee interest at the rate prescribed in the Rules for every month of delay, till the handing over of the possession of the [Apartment/Plot], which shall be paid by the promoter to the allottee within forty-five days of it becoming due.

## **8. Representations and Warranties of the Promoter**

The Promoter hereby represents and warrants to the Allottee as follows:

- (i) The [Promoter] has absolute, clear and marketable title with respect to the said Land; the requisite rights to carry out development upon the said Land and absolute, actual, physical and legal possession of the said Land for the Project;
- (ii) The Promoter has lawful rights and requisite approvals from the competent Authorities to carry out development of the Project;
- (iii) There are no encumbrances upon the said Land or the Project; [in case there are any encumbrances on the land provide details of such encumbrances including any rights, title, interest and name of party in or over such land]
- (iv) There are no litigations pending before any Court of law or Authority with respect to the said Land, Project or the [Apartment/Plot];
- (v) All approvals, licenses and permits issued by the competent authorities with respect to the Project, said Land and [Apartment/Plot] are valid and subsisting and have been obtained by following due process of law. Further, the Promoter has been and shall, at all times, remain to be in compliance with all applicable laws in relation to the Project, said Land, Building and

[Apartment/Plot] and common areas;

- (iv) The Promoter has the right to enter into this Agreement and has not committed or omitted to perform any act or thing, whereby the right, title and interest of the Allottee created herein, may prejudicially be affected;
- (vii) The Promoter has not entered into any agreement for sale and/or development agreement or any other agreement / arrangement with any person or party with respect to the said Land, including the Project and the said [Apartment/Plot] which will, in any manner, affect the rights of Allottee under this Agreement;
- (viii) The Promoter confirms that the Promoter is not restricted in any manner whatsoever from selling the said [Apartment/Plot] to the Allottee in the manner contemplated in this Agreement;
- (ix) At the time of execution of the conveyance deed the Promoter shall handover lawful, vacant, peaceful, physical possession of the [Apartment/ Plot] to the Allottee and the common areas to the association of allottees or the competent authority, as the case may be;
- (x) The Schedule Property is not the subject matter of any HUF and that no part thereof is owned by any minor and/or no minor has any right, title and claim over the Schedule Property;
- (xi) The Promoter has duly paid and shall continue to pay and discharge all governmental dues, rates, charges and taxes and other monies, levies, impositions, premiums, damages and/or penalties and other outgoings, whatsoever, payable with respect to the said project to the competent Authorities till the completion certificate has been issued and possession of apartment, plot or building, as the case may be, along with common areas (equipped with all the specifications, amenities and facilities) has been handed over to the allottee and the association of allottees or the competent authority, as the case may be;
- (xii) No notice from the Government or any other local body or authority or any legislative enactment, government ordinance, order, notification (including any notice for acquisition or requisition of the said property) has been received by or served upon the Promoter in respect of the said Land and/ or the Project.

## **9. Events of Defaults and Consequences:**

- 9.1 Subject to the Force Majeure clause, the Promoter shall be considered under a condition of Default, in the following events:
- (i) Promoter fails to provide ready to move in possession of the [Apartment/ Plot] to the Allottee within the time period specified in para 7.1 or fails to complete the project within the stipulated time disclosed at the time of registration of the project with the Authority. For the purpose of this para, 'ready to move in possession' shall mean that the apartment shall be in a habitable condition which is complete in all respects including the provision of all specifications, amenities and facilities, as agreed to between the parties, and for which occupation certificate and completion certificate, as the case may be, has been issued by the competent authority;
  - (ii) Discontinuance of the Promoter's business as a developer on account of suspension or revocation of his registration under the provisions of the Act or the rules or regulations made thereunder.
- 9.2 In case of Default by Promoter under the conditions listed above, Allottee is entitled to the following:
- (i) Stop making further payments to Promoter as demanded by the Promoter. If the Allottee stops making payments, the Promoter shall correct the situation by completing the construction

milestones and only thereafter the Allottee be required to make the next payment without any interest; or

- (ii) The Allottee shall have the option of terminating the Agreement in which case the Promoter shall be liable to refund the entire money paid by the Allottee under any head whatsoever towards the purchase of the apartment, along with interest at the rate prescribed in the Rules within forty-five days of receiving the termination notice:

Provided that where an Allottee does not intend to withdraw from the project or terminate the Agreement, he shall be paid, by the promoter, interest at the rate prescribed in the Rules, for every month of delay till the handing over of the possession of the [Apartment/Plot], which shall be paid by the promoter to the allottee within forty-five days of it becoming due.

9.3 The Allottee shall be considered under a condition of Default, on the occurrence of the following events:

- (i) In case the Allottee fails to make payments for \_\_\_\_ consecutive demands made by the Promoter as per the Payment Plan annexed hereto, despite having been issued notice in that regard the allottee shall be liable to pay interest to the promoter on the unpaid amount at the rate prescribed in the Rules;
- (ii) In case of Default by Allottee under the condition listed above continues for a period beyond \_\_\_\_ consecutive months after notice from the Promoter in this regard, the Promoter may cancel the allotment of the [Apartment/ Plot] in favour of the Allottee and refund the money paid to him by the allottee by deducting the booking amount and the interest liabilities and this Agreement shall thereupon stand terminated. Provided that the promoter shall intimate the allottee about such termination at least thirty days prior to such termination.

#### **10. Conveyance of the Said Apartment**

The Promoter, on receipt of Total Price of the [Apartment/Plot] as per para 1.2 under the Agreement from the Allottee, shall execute a conveyance deed and convey the title of the [Apartment/Plot] together with proportionate indivisible share in the Common Areas within 3 months from the date of issuance of the occupancy certificate and the completion certificate, as the case may be, to the allottee. [Provided that, in the absence of local law, the conveyance deed in favour of the allottee shall be carried out by the promoter within 3 months from the date of issue of occupancy certificate]. However, in case the Allottee fails to deposit the stamp duty and/or registration charges within the period mentioned in the notice, the Allottee authorizes the Promoter to withhold registration of the conveyance deed in his/her favour till payment of stamp duty and registration charges to the Promoter is made by the Allottee.

#### **11. Maintenance of the Said Building/Apartment/Project**

The Promoter shall be responsible to provide and maintain essential services in the Project till the taking over of the maintenance of the project by the association of allottees upon the issuance of the completion certificate of the project. The cost of such maintenance has been included in the Total Price of the [Apartment/ Plot].

#### **12. Defect Liability**

It is agreed that in case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the Promoter as per the agreement for sale relating to such development is brought to the notice of the Promoter within a period of 5 (five) years by the Allottee from the date of handing over possession, it shall be the duty of the Promoter to rectify such

defects without further charge, within 30 (thirty) days, and in the event of Promoter's failure to rectify such defects within such time, the aggrieved Allottees shall be entitled to receive appropriate compensation in the manner as provided under the Act.

### **13. Right to Enter the Apartment for Repairs**

The Promoter/maintenance agency/association of allottees shall have rights of unrestricted access of all Common Areas, garages/covered parking and parking spaces for providing necessary maintenance services and the Allottee agrees to permit the association of allottees and/or maintenance agency to enter into the [Apartment/Plot] or any part thereof, after due notice and during the normal working hours, unless the circumstances warrant otherwise, with a view to set right any defect.

### **14. Usage**

Use of Basement and Service Areas: The basement(s) and service areas, if any, as located within the \_\_\_\_\_ (project name), shall be earmarked for purposes such as parking spaces and services including but not limited to electric sub-station, transformer, DG set rooms, underground water tanks, pump rooms, maintenance and service rooms, fire fighting pumps and equipment's etc. and other permitted uses as per sanctioned plans. The Allottee shall not be permitted to use the services areas and the basements in any manner whatsoever, other than those earmarked as parking spaces, and the same shall be reserved for use by the association of allottees formed by the Allottees for rendering maintenance services.

### **15. General Compliance with Respect to the Apartment**

- 15.1 Subject to para 12 above, the Allottee shall, after taking possession, be solely responsible to maintain the [Apartment/Plot] at his/her own cost, in good repair and condition and shall not do or suffer to be done anything in or to the Building, or the [Apartment/Plot], or the staircases, lifts, common passages, corridors, circulation areas, atrium or the compound which may be in violation of any laws or rules of any authority or change or alter or make additions to the [Apartment/Plot] and keep the [Apartment/Plot], its walls and partitions, sewers, drains, pipe and appurtenances thereto or belonging thereto, in good and tenable repair and maintain the same in a fit and proper condition and ensure that the support, shelter etc. of the Building is not in any way damaged or jeopardized.
- 15.2 The Allottee further undertakes, assures and guarantees that he/she would not put any sign-board / name-plate, neon light, publicity material or advertisement material etc. on the face / facade of the Building or anywhere on the exterior of the Project, buildings therein or Common Areas. The Allottees shall also not change the colour scheme of the outer walls or painting of the exterior side of the windows or carry out any change in the exterior elevation or design. Further the Allottee shall not store any hazardous or combustible goods in the [Apartment/Plot] or place any heavy material in the common passages or staircase of the Building. The Allottee shall also not remove any wall, including the outer and load bearing wall of the [Apartment/Plot].
- 15.3 The Allottee shall plan and distribute its electrical load in conformity with the electrical systems installed by the Promoter and thereafter the association of allottees and/or maintenance agency appointed by association of allottees. The Allottee shall be responsible for any loss or damages arising out of breach of any of the aforesaid conditions.

### **16. Compliance of Laws, Notifications etc. by Parties**

The Parties are entering into this Agreement for the allotment of a [Apartment/ Plot] with the full

knowledge of all laws, rules, regulations, notifications applicable to the project.

**17. Additional Constructions**

The Promoter undertakes that it has no right to make additions or to put up additional structure(s) anywhere in the Project after the building plan, layout plan, sanction plan and specifications, amenities and facilities has been approved by the competent authority(ies) and disclosed, except for as provided in the Act.

**18. Promoter shall not Mortgage or Create a Charge**

After the Promoter executes this Agreement he shall not mortgage or create a charge on the [Apartment/Plot/Building] and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, such mortgage or charge shall not affect the right and interest of the Allottee who has taken or agreed to take such [Apartment/Plot/ Building].

**19. Apartment Ownership Act (of the Relevant State)**

The Promoter has assured the Allottees that the project in its entirety is in accordance with the provisions of the \_\_\_\_\_

[Please insert the name of the state Apartment Ownership Act ]. The Promoter showing compliance of various laws/regulations as applicable in\_\_\_\_\_.

**20. Binding Effect**

Forwarding this Agreement to the Allottee by the Promoter does not create a binding obligation on the part of the Promoter or the Allottee until, firstly, the Allottee signs and delivers this Agreement with all the schedules along with the payments due as stipulated in the Payment Plan within 30 (thirty) days from the date of receipt by the Allottee and secondly, appears for registration of the same before the concerned Sub-Registrar \_\_\_\_\_ (specify the address of the Sub-Registrar) as and when intimated by the Promoter. If the Allottee(s) fails to execute and deliver to the Promoter this Agreement within 30 (thirty) days from the date of its receipt by the Allottee and/or appear before the Sub-Registrar for its registration as and when intimated by the Promoter, then the Promoter shall serve a notice to the Allottee for rectifying the default, which if not rectified within 30 (thirty) days from the date of its receipt by the Allottee, application of the Allottee shall be treated as cancelled and all sums deposited by the Allottee in connection therewith including the booking amount shall be returned to the Allottee without any interest or compensation whatsoever.

**21. Entire Agreement**

This Agreement, along with its schedules, constitutes the entire Agreement between the Parties with respect to the subject matter hereof and supersedes any and all understandings, any other agreements, allotment letter, correspondences, arrangements whether written or oral, if any, between the Parties in regard to the said apartment/plot/building, as the case may be.

**22. Right to Amend**

This Agreement may only be amended through written consent of the Parties.

**23. Provisions of this Agreement Applicable on Allottee/Subsequent Allottees**

It is clearly understood and so agreed by and between the Parties hereto that all the provisions

contained herein and the obligations arising hereunder in respect of the [Apartment/Plot] and the Project shall equally be applicable to and enforceable against and by any subsequent Allottees of the [Apartment/ Plot], in case of a transfer, as the said obligations go along with the [Apartment/ Plot] for all intents and purposes.

**24. Waiver not a Limitation to Enforce**

- 24.1 The Promoter may, at its sole option and discretion, without prejudice to its rights as set out in this Agreement, waive the breach by the Allottee in not making payments as per the Payment Plan [Annexure C] including waiving the payment of interest for delayed payment. It is made clear and so agreed by the Allottee that exercise of discretion by the Promoter in the case of one Allottee shall not be construed to be a precedent and /or binding on the Promoter to exercise such discretion in the case of other Allottees.
- 24.2 Failure on the part of the Parties to enforce at any time or for any period of time the provisions hereof shall not be construed to be a waiver of any provisions or of the right thereafter to enforce each and every provision.

**25. Severability**

If any provision of this Agreement shall be determined to be void or unenforceable under the Act or the Rules and Regulations made thereunder or under other applicable laws, such provisions of the Agreement shall be deemed amended or deleted in so far as reasonably inconsistent with the purpose of this Agreement and to the extent necessary to conform to Act or the Rules or Regulations made thereunder or the applicable law, as the case may be, and the remaining provisions of this Agreement shall remain valid and enforceable as applicable at the time of execution of this Agreement.

**26. Method of Calculation of Proportionate Share wherever referred to in the Agreement**

Wherever in this Agreement it is stipulated that the Allottee has to make any payment, in common with other Allottee(s) in Project, the same shall be the proportion which the carpet area of the [Apartment/Plot] bears to the total carpet area of all the [Apartments/Plots] in the Project.

**27. Further Assurances**

Both Parties agree that they shall execute, acknowledge and deliver to the other such instruments and take such other actions, in additions to the instruments and actions specifically provided for herein, as may be reasonably required in order to effectuate the provisions of this Agreement or of any transaction contemplated herein or to confirm or perfect any right to be created or transferred hereunder or pursuant to any such transaction.

**28. Place of Execution**

The execution of this Agreement shall be complete only upon its execution by the Promoter through its authorized signatory at the Promoter's Office, or at some other place, which may be mutually agreed between the Promoter and the Allottee, in \_\_\_\_\_ after the Agreement is duly executed by the Allottee and the Promoter or simultaneously with the execution the said Agreement shall be registered at the office of the Sub-Registrar at \_\_\_\_\_

(specify the address of the Sub-Registrar). Hence this Agreement shall be deemed to have been executed at \_\_\_\_\_.

**29. Notices**

That all notices to be served on the Allottee and the Promoter as contemplated by this Agreement shall be deemed to have been duly served if sent to the Allottee or the Promoter by Registered Post at their respective addresses specified below:

\_\_\_\_\_ Name of Allottee  
\_\_\_\_\_ (Allottee Address) M/s \_\_\_\_\_ Promoter name  
\_\_\_\_\_ (Promoter Address)

It shall be the duty of the Allottee and the Promoter to inform each other of any change in address subsequent to the execution of this Agreement in the above address by Registered Post failing which all communications and letters posted at the above address shall be deemed to have been received by the promoter or the Allottee, as the case may be.

**30. Joint Allottees**

That in case there are Joint Allottees all communications shall be sent by the Promoter to the Allottee whose name appears first and at the address given by him/her which shall for all intents and purposes to consider as properly served on all the Allottees.

**31. Savings**

Any application letter, allotment letter, agreement, or any other document signed by the allottee, in respect of the apartment, plot or building, as the case may be, prior to the execution and registration of this Agreement for Sale for such apartment, plot or building, as the case may be, shall not be construed to limit the rights and interests of the allottee under the Agreement for Sale or under the Act or the rules or the regulations made thereunder.

**32. Governing Law**

That the rights and obligations of the parties under or arising out of this Agreement shall be construed and enforced in accordance with the Act and the Rules and Regulations made thereunder including other applicable laws of India for the time being in force.

**33. Dispute Resolution**

All or any disputes arising out or touching upon or in relation to the terms and conditions of this Agreement, including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties, shall be settled amicably by mutual discussion, failing which the same shall be settled through the adjudicating officer appointed under the Act.

[Please insert any other terms and conditions as per the contractual understanding between the parties, however, please ensure that such additional terms and conditions are not in derogation of or inconsistent with the terms and conditions set out above or the Act and the Rules and Regulations made thereunder.]

IN WITNESS WHEREOF parties hereinabove named have set their respective hands and signed this Agreement for Sale at \_\_\_\_\_

(city/town name) in the presence of attesting witness, signing as such on the day first above written.



**Signed and Delivered by the within Named**

Allottee: (including joint buyers)

(1) Signature \_\_\_\_\_  
Name \_\_\_\_\_  
Address \_\_\_\_\_

Please affix  
photograph  
and sign  
across the  
photograph

(2) Signature \_\_\_\_\_  
Name \_\_\_\_\_  
Address \_\_\_\_\_

Please affix  
photograph  
and sign  
across the  
photograph

**Signed and Delivered by the within Named**

Promoter:

(1) Signature (Authorised Signatory) \_\_\_\_\_  
Name \_\_\_\_\_  
Address \_\_\_\_\_

Please affix  
photograph  
and sign  
across the  
photograph

At \_\_\_\_\_ on \_\_\_\_\_ in the presence of:

WITNESSES:

1. Signature \_\_\_\_\_  
Name \_\_\_\_\_  
Address \_\_\_\_\_  
2. Signature \_\_\_\_\_  
Name \_\_\_\_\_  
Address \_\_\_\_\_

**SCHEDULE 'A'** – PLEASE INSERT DESCRIPTION OF THE [APARTMENT/PLOT] AND THE GARAGE/COVERED PARKING (IF APPLICABLE) ALONG WITH BOUNDARIES IN ALL FOUR DIRECTIONS

**SCHEDULE 'B'** – FLOOR PLAN OF THE APARTMENT

**SCHEDULE 'C'** – PAYMENT PLAN

**SCHEDULE 'D'** – SPECIFICATIONS, AMENITIES, FACILITIES (WHICH ARE PART OF THE APARTMENT/PLOT)

SCHEDULE 'E' – SPECIFICATIONS, AMENITIES, FACILITIES (WHICH ARE PART OF THE PROJECT)

[The 'Schedules' to this Agreement for Sale shall be as agreed to between the Parties]

## LESSON ROUND-UP

- Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.
- Carpet area means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.
- Real estate project means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.
- A promoter shall not advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established .
- The appropriate Government shall establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under the Act.
- The Central Advisory Council is required to advise the Central Government on matters relating to implementation of the Act, questions of policy, protection of consumer interest, foster growth and development of the real estate sector, and other matters as may be assigned to it by the Central Government.
- Real Estate Appellate Tribunal (REAT) is to be formed by appropriate government to ensure faster resolution of disputes. Parties aggrieved by the RERA order can appeal before REAT and REAT has to adjudicate such cases within 60 days. Civil Courts have been prevented from exercising jurisdiction on such matters.
- As per Section 56 of the Act, a Company Secretary holding certificate of practice can appear before Appellate Tribunal or a Regulatory Authority or Adjudicating Officer on behalf of applicant or appellants as the case may be.

## SELF TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Who is the 'appropriate Government' as per the Act?
2. What is the difference between the term 'common area' and 'carpet area'?
3. What is the definition of 'real estate project'? Does the term 'project' connote a 'real estate project'?
4. What are the disclosures to be made on the website of the Regulatory Authority?
5. What are the rights and duties of the allottees under the Act?

# Lesson 18

## The Benami Transactions (Prohibition) Act, 1988

### LESSON OUTLINE

- Learning objectives
- Benami Property
- Benami Transaction
- Prohibition of Benami Transaction
- Authority, Adjudication of Benami property
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

The Benami Transactions (Prohibition) Act, 1988 provides that (a) all the properties held benami shall be subject to acquisition by such authority in such manner and after following such procedure as may be prescribed; (b) no amount shall be payable for the acquisition of any property held benami; (c) the purchase of property by any person in the name of his wife or unmarried daughter for their benefit would not be benami transaction; (d) the securities held by a depository as registered owner under the provisions of the Depositories Act, 1996 or participant as an agent of a depository would not be benami transactions.

Any person enters into any benami transaction shall be punishable with rigorous imprisonment.

*The Benami Transactions (Prohibition) Act, 1988 was enacted to prohibit benami transactions and the right to recover property held benami.*

## INTRODUCTION

The Benami Transactions (Prohibition) Act, 1988 was enacted to prohibit benami transactions and the right to recover property held benami. The said Act, inter alia, provides that—(a) all the properties held benami shall be subject to acquisition by such authority in such manner and after following such procedure as may be prescribed; (b) no amount shall be payable for the acquisition of any property held benami; (c) the purchase of property by any person in the name of his wife or unmarried daughter for their benefit would not be benami transaction; (d) the securities held by a depository as registered owner under the provisions of the Depositories Act, 1996 or participant as an agent of a depository would not be benami transactions.

During the administration of the Benami Transactions (Prohibition) Act, 1988, it was found that the provisions of the aforesaid Act are inadequate to deal with benami transactions as the Act does not—(i) contain any specific provision for vesting of confiscated property with Central Government; (ii) have any provision for an appellate mechanism against an action taken by the authorities under the Act, while barring the jurisdiction of a civil court; (iii) confer the powers of the civil court upon the authorities for its implementation; and (iv) provide for adequate enabling rule making powers.

In view of the circumstances stated above, comprehensive amendments to the Benami Transactions (Prohibition) Act, 1988 has become necessary in order to prohibit holding property in benami and restrict right to recover or transfer property held benami and also to provide a mechanism and procedure for confiscation of property held benami. It is, therefore, felt necessary to bring comprehensive amendments to the Benami Transactions (Prohibition) Act, 1988 to deal with benami transactions.

With a view to providing effective regime for prohibition of benami transactions, the Benami Transactions (Prohibition) Act, 1988 was amended through the Benami Transactions (Prohibition) Amended Act, 2016. The amended law empowers the specified authorities to provisionally attach benami properties which can eventually be confiscated. Besides, if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

The legislation is also intended to effectively prohibit benami transactions and consequently prevent circumvention of law through unfair practices. It empowers the Government to confiscate benami property by following due procedure. It therefore promotes equity across all citizens. However, those who declare their benami properties under income declaration scheme will get immunity under the Benami Act.

The Benami Transactions (Prohibition) Amendment Act, 2016 received the assent of the President on the 10th August, 2016 and came into effect from 1st November, 2016.

### ***The Salient Features of the Benami Transactions (Prohibition) Act, 1988 are as under:***

It defines a benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami

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It provides the consequences of entering into a prohibited benami transactions

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It lays down the procedure for determination and related penal consequences in the case of a prohibited benami transaction

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It also provides that the powers of civil court shall be available to authorities under the said Act

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Miscellaneous Provisions have been provided for service of notice, protection of action taken in good faith, etc.

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Central Government empowers to make rules for the implementation of the provisions of the Bill

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It enables the Central Government in consultation with the Chief Justice of the High Court to designate one or more Courts of Session as Special Court or Special Courts for the purpose of the Bill

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It provides penalty for entering into benami transactions and for furnishing any false documents in any proceeding under the Bill

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It provides for transfer of any suit or proceeding in respect of a benami transaction pending in any court (other than High Court) or Tribunal or before any authority to the Appellate Tribunal

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## Important Definitions

### "Attachment"

Attachment means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under the Act. [Section 2(5)]

### "Benami Property"

Benami Property means any property which is the subject matter of a benami transaction and also includes the proceeds from such property. [Section 2(8)]

### "Benami Transaction"

As per Section 2 (9) of the benami transaction means-

(A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—
  - (i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;
  - (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;
  - (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

- (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

*Explanation.*—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,—

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
- (ii) stamp duty on such transaction or arrangement has been paid; and
- (iii) the contract has been registered.

**"Benamidar"**

Benamidar means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.[Section 2(10)]

**"Beneficial Owner"**

"Beneficial Owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.[Section 2(10)]

**"Fair Market Value"**

Fair market value in relation to a property, means— (i) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and (ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed.[Section 2(16)]

**"Firm"**

Firm shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008.[Section 2(17)]

**"Partner"**

Partnershall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932, and shall include,—

- (a) any person who, being a minor, has been admitted to the benefits of partnership; and

- (b) a partner of a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008.[Section 2(22)]

### **"Partnership"**

Partnership shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932, and shall include a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008. [Section 2(23)]

### **"Person"**

Person shall include—

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;
- (iv) a firm;
- (v) an association of persons or a body of individuals, whether incorporated or not;
- (vi) every artificial juridical person, not falling under sub-clauses (i) to (v).[Section 2(23)]

### **"Property"**

Property means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property. [Section 2(26)]

### **"Transfer"**

Transfer includes sale, purchase or any other form of transfer of right, title, possession or lien. [Section 2(26)]

## **Prohibition of benami transactions-**

As per Section 3 of the Act, no person shall enter into any benami transaction. Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

Where any person enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall be punishable in accordance with the provisions contained in Chapter VII.

Chapter VII deals with offences and prosecution. It provides that if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

## **Prohibition of the right to recover property held benami**

Section 4(1) provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

Further, Section 4(2) provides that no defense based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

### **Property held benami liable to confiscation**

As per section 5 of the Act any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.

### **Prohibition on re-transfer of property by benamidar**

Section 6 provides that a person, being a benamidar shall not re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

Where any property is re-transferred in contravention of the above the transaction of such property shall be deemed to be null and void.

Above provisions shall not apply to a transfer made in accordance with the provisions of section 190 of the Finance Act, 2016.

### **Notice and attachment of property involved in benami transaction**

Section 24 relates to notice and attachment of property involved in benami transaction. Sub-section (1) of this section provides that where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to such person to show cause within such time as may be specified in the notice why the property should not be treated as benami property. Sub-section (2) of this section provides that a copy of the notice may also be served upon such other person who is a beneficial owner.

Sub-section (3) of this section provides that where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate such property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally such property in the manner as may be prescribed, for a period not exceeding ninety days from the date of issue of notice under sub-section (1).

Sub-section (4) of this section provides that the Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under sub-section (1), -

(a) where the provisional attachment has been made under sub-section (3), -

- (i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or (ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made under sub-section (3), -

- (i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order made by the Adjudicating Authority under sub-clause (3) of section 26; or (ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.



Sub-section (5) of this section provides that where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-clause (i) of clause (a) of sub-section (4) or passes an order provisionally attaching the property under sub-clause (i) of clause (b) of that sub-section, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

It may be noted that Initiating Officer means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961.

### **Manner of service of notice**

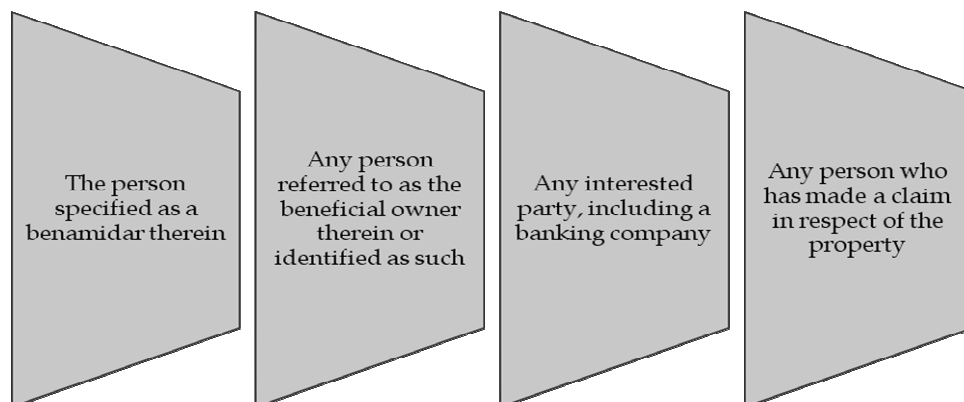
Section 25 deals with the manner of service of notice. Sub-section (1) of this section provides that a notice under sub-clause (1) of section 24 may be served on the person named therein either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908.

Sub-section (2) of this section provides that any notice referred to above may be addressed---

- (i) in case of an individual, to such individual ;
- (ii) in the case of a firm, to the managing partner or the manager of the firm;
- (iii) in the case of a Hindu undivided family, to karta or any member of such family;
- (iv) in the case of a company, to the principal officer thereof;
- (v) in the case of any other association or body of individuals, to the principal officer or any member thereof;
- (vi) in the case of any other person (not being an individual), to the person who manages or controls his affairs.

### **Adjudication of benami property**

Section 26 relates to adjudication of benami property. Sub-section (1) of this section provides that on receipt of a reference under sub-section (5) of section 24, the Adjudicating Authority shall issue notice, to furnish such documents, particulars or evidence as is considered necessary on a date to be specified therein, on the following persons:-



However, the Adjudicating Authority shall issue notice within a period of thirty days from the date on which a reference has been received. Further, the notice shall provide a period of time of not less than thirty days to the person to whom such notice is issued to furnish the information sought.

Sub-section (2) of this section provides that where such property is held jointly by more than one person, the Adjudicating Authority shall make endeavours to serve notice to all persons holding such property. However, where the notice is served on one of the aforesaid persons the service of notice shall not be invalid on the ground that the said notice was not served to all the persons holding the property.

Sub-section (3) of this section provides that the Adjudicating Authority shall, after considering the reply, if any, to the notice issued under sub-section(1);making or causing to be made such inquiries and calling for such reports or evidence as it deems fit; and taking into account all relevant materials, provide an opportunity of being heard to the person specified as a benamidar therein, the Initiating Officer, and any other person who claims to be the owner of such property. Thereafter, the Adjudicating Authority shall pass an order holding the property not to be a benami property and revoking the attachment order; or holding the property to be a benami property and confirming the attachment order in all other cases.

Sub-section (4) of this section provides that where the Adjudicating Authority is satisfied that some part of the properties in respect of which reference has been made to him is benami property, but is not able to specifically identify such part, he shall record a finding to the best of his judgment as to which part or properties is held benami.

Sub-section (5) of this section provides that where in the course of proceedings before it, the Adjudicating Authority has reason to believe that a property, other than a property referred to him by the Initiating Officer is benami property, it shall provisionally attach the property and the property shall be deemed to be a property referred to it on the date of receipt of the reference under sub-section (5) of section 24.

Sub-section (6) of this section provides that the Adjudicating Authority may, at any stage of the proceedings, either on the application of any party, or suo moto, strike out the name of any party improperly joined or add the name of any person whose presence before the Adjudicating Authority may be necessary to enable it to adjudicate upon and settle all the questions involved in the reference.

Sub-section (7) of this section provides that no order under sub-section (3) shall be passed after the expiry of one year from the end of the month in which the reference under section 24 was received.

As per section 7 of the Act, the Central Government shall, by notification, appoint one or more Adjudicating Authorities to exercise jurisdiction, powers and authority conferred by or under this Act. An Adjudicating Authority shall consist of a Chairperson and at least two other Members.

### **Confiscation and vesting of benami property**

Section 27 deals with confiscation and vesting of benami property. Sub-section (1) of this section provides that where an order is passed in respect of any property under sub-section (3) of section 26 holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property. However, where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46. Further, confiscation of the property shall be made in accordance with such procedure as may be prescribed.

Sub-section (2) of this section provides that the above shall not apply to a property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under sub-section (1) of section 24 without his having knowledge of the benami transaction.

Sub-section (3) of this section provides that where an order of confiscation has been made, all the rights and title in such property shall vest absolutely in the Central Government free of all

encumbrances and no compensation shall be payable in respect of such confiscation.

Sub-section (4) of this section provides that any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.

Sub-section (5) of this section provides that where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

### **Management of properties confiscated-**

Section 28 relates to management of properties confiscated under this Act. Sub-section (1) of this section provides that the Administrator shall have the power to receive and manage the property, in relation to which an order of confiscation under sub-section (1) of section 27 has been made, in such manner and subject to such conditions, as may be prescribed.

Sub-section (2) of this section provides that the Central Government may, by order published in the Official Gazette, notify as many of its officers as it thinks fit, to perform the functions of Administrators.

Sub-section (3) of this section provides that the Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under sub-section (3) of section 27 in such manner and subject to such conditions as may be prescribed.

### **Possession of the property**

Section 29 relates to possession of the property. Sub-section (1) of this section provides that where an order of confiscation in respect of a property under subsection (1) of section 27 has been made, the Administrator shall proceed to take the possession of such property.

Sub-section (2) of this section provides that the Administrator shall, -

(a) by notice in writing, order within seven days of the date of the service of notice any person, who may be in possession of the benami property, to surrender or deliver possession thereof to the Administrator or any other person duly authorised in writing by him in this behalf;

(b) in the event of non-compliance of the order referred to in clause (a), or if in his opinion, taking over of immediate possession is warranted, for the purpose of forcibly taking over possession, requisition the service of any police officer to assist him and it shall be the duty such officer to comply with the requisition.

It may be noted that Administrator" means an Income-tax Officer as defined in clause (25) of section 2 of the Income-tax Act, 1961

### **Appellate Tribunal**

Chapter V deals with the provisions relating to the Appellate Tribunal. Section 30 deals with establishment of Appellate Tribunal. The said section seeks to provide that the Central Government shall, by notification, establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority and the authorities under this Act.

Section 40 lays down the procedure and powers of Appellate Tribunal. Subsection (1) of this section provides that the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

## Appeal to High Court

Section 49 relates to appeal to High Court. Sub-section (1) of this section provides that any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

Sub-section (2) of this section provides that the High Court may entertain any appeal after the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period specified in sub-section (1).

Sub-section (3) of this section provides that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

Sub-section (4) of this section provides that the appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Sub-section (5) of this section provides that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

Sub-section (6) of this section provides that the High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

Sub-section (7) of this section provides that the High Court may determine any issue which — (a) has not been determined by the Appellate Tribunal; or (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

Sub-section (8) of this section provides that save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

## Special Courts

Section 50 relates to Special Courts. Sub-section (1) of this section provides that the Central Government, in consultation with the Chief Justice of the High Court, shall for trial of an offence punishable under this Act, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.

Sub-section (2) of this section provides that while trying an offence under this Act, a Special Court shall also try an offence other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

Sub-section (3) of this section provides that the Special Court shall not take cognizance of any offence punishable under this Act except upon a complaint in writing made by - (i) the authority; or (ii) any officer of the Central Government or State Government authorised in writing by that Government by a general or special order made in this behalf.

Sub-section (4) of this section provides that every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made by the Special Court to conclude the trial within six months from the date of filing of the complaint.

## Offences and Prosecution

Chapter VII deals with the provisions relating to offences and prosecution. Section 53 relates to penalty for benami transaction. Sub-section (1) of this section provides that where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into such benami transaction, shall be guilty of the offence of benami transaction.

Sub-section (2) of this section provides that whoever is found guilty of the offence of benami transaction referred to above shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent. of the fair market value of the property.

Section 54 relates to penalty for false information. This section provides that any person who is required to furnish information under this Act knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine which may extend to ten per cent. of the fair market value of the property.

Section 55 relates to previous sanction. This section provides that no prosecution shall be instituted against any person in respect of any offence under sections 53 or section 54 without the previous sanction of the Board.

## Offences by Companies

Section 62 relates to consequences in case of offences by companies. Subsection (1) of this section provides that where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Sub-section (2) of this section provides that nothing contained in subsection (1) of this section shall render any person liable to punishment, if he proves that the contravention took place without his knowledge.

Sub-section (3) of this section provides that notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

It may be noted that for the purpose of section 62, a “Company” means a body corporate, and includes

- (i) A firm; and
- (ii) An association of persons or a body of individuals whether incorporated or not; and

“Director”, in relation to—

- (i) A firm, means a partner in the firm;



# Lesson 19

## Prevention of Money Laundering

### LESSON OUTLINE

- Learning Objectives
- Concept of money laundering
- Money laundering process
- Impact of money laundering on economic development
- Global initiatives for prevention of money laundering
- FAFT Recommendation
- Overview of Prevention of Money Laundering Act, 2002
- Adjudication and Adjudicating Authority
- Obligation of Banking Companies, Financial Institutions and Intermediary
- Summon, searches, seizures etc
- Retention of Property
- Retention of Record
- Appellate Tribunal
- Special Court
- KYC Guidelines
- KYC Policy
- Power of Central Government
- Agreement with foreign countries
- Attachment of property
- Lesson Round-up
- Self Test Questions

### LEARNING OBJECTIVES

The globalization process driven by advancements in communications and information technology, have made the international system more interactive, integrated, interrelated, and interconnected. This dynamic has unleashed the floodgates of opportunities for criminals to expand, widen and deepen their reach, become more sophisticated in their operations, and intensify their level and pace of transactions.

Because of the opportunities and needs created by the global dimension of business, crimes such as fraud, counterfeiting, corruption and embezzlement have opportunities to shift from individual or family ambit to more organized and competitive global structures.

The problem of money-laundering is no longer restricted to the geo political boundaries of any country. It is a global menace that cannot be contained by any nation alone. In view of this, India has become a member of the Financial Action Task Force and Asia Pacific Group on money-laundering, which are committed to the effective implementation and enforcement of internationally accepted standards against money-laundering and the financing of terrorism.

The Prevention of Money-laundering Act, 2002 addresses the international obligations under the Political Declaration and Global Programme of Action adopted by the General Assembly of the United Nations to prevent money laundering. The Act was amended in the year 2005, 2009 and 2012 to remove the difficulties arisen in implementation of the Act. Therefore, it is essential for the students to be familiar with the law relating to Prevention of Money-laundering Act, 2002.

*The Prevention of Money-laundering Act, 2002 enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.*

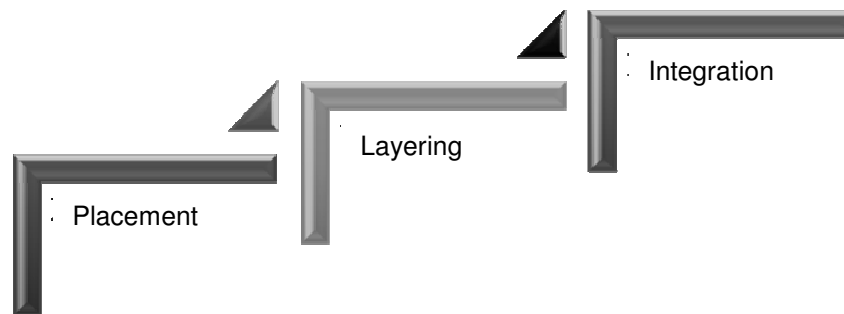
## INTRODUCTION

Money laundering is the processing of criminal proceeds to disguise its illegal origin. Terrorism, illegal arms sales, financial crimes, smuggling, and the activities of organised crime, including drug trafficking and prostitution rings, generate huge sums. Embezzlement, insider trading, bribery and computer fraud also produce large profits and create an incentive to legitimise the ill-gotten gains through money laundering. When a criminal activity generates substantial profits, the individual or group involved in such activities route the funds to safe heavens by disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention.

Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.

### Process of Money Laundering

The process of money laundering can be classified into three stages, namely, placement, layering and integration.



In the initial or placement stage of money laundering, the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments that are later collected and deposited into accounts at another location.

After the funds are entered into the financial system, the layering takes place. In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source. The funds might be channeled through the purchase and sale of investment instruments, or the launderer might simply wire the funds through a series of accounts at various banks across the globe.

After successful processing of criminal profits through the first two phases of the money laundering process, the launderer moves them to integration. In this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.

### Impact of Money Laundering on Development

Economies with growing or developing financial centers, but inadequate controls are particularly vulnerable to money laundering, as against the established financial center countries, which implement comprehensive anti-money laundering regimes. The gaps in a national anti-money laundering system are exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures. As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime.



In times of decelerating growth, an infusion of hard currency can bolster a country's foreign reserves; ease the hardship associated with budget tightening policies and moderate foreign indebtedness. While these are short-term benefits associated with an inflow of criminal monies, the long-term effects are mostly negative. One difference between official borrowing and laundered funds is that the former can be controlled by Government, whereas the funds owned by criminals escape the governments ability to control and regulate the economy.

The possible social, economic and political effects of money laundering, if left unchecked or dealt with ineffectively, are serious. Through the process of money laundering, organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. Thus, the economic and political influence of criminal organisations can weaken the social fabric, ethical standards and ultimately the democratic institutions of society.

### ***What is the connection of money laundering with society at large?***

*The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments.*

*The economic and political influence of criminal organisations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society. In countries transitioning to democratic systems, this criminal influence can undermine the transition. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.*



## **Prevention of Money Laundering – Global Initiatives**

Since money laundering is an international phenomenon, transnational co-operation is of critical importance in the fight against this menace. A number of initiatives have been taken to deal with the problem at international level. In this context, the United Nations or the Bank for International Settlements, took some initiatives in 1980s to address the problem of money laundering. However, with the creation of the Financial Action Task Force (FATF) in 1989, regional groupings, such as the European Union, Council of Europe, and organisation of American States also established anti- money laundering standards for their member countries.

The major international agreements addressing money laundering include the United Nations Convention against Illicit Trafficking in Drugs and Psychotropic Substances (the Vienna Convention) and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. The role of financial institutions in preventing and detecting money laundering has also been the subject of pronouncements by the Basle Committee on Banking Regulation Supervisory Practices, the European Union and the International Organization of Securities Commissions.

### **The Vienna Convention**

The first major initiative in the prevention of money laundering was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in December 1988 (popularly known as Vienna Convention). This convention laid the groundwork for efforts to combat money laundering by obliging the member states to criminalize the laundering of money from drug trafficking. It promotes international cooperation in investigations and makes extradition between member states applicable to money laundering.

The convention also establishes the principle that domestic bank secrecy provisions should not interfere with international criminal investigations.

### **Council of Europe Convention**

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, 1990 establishes a common policy on money laundering. It sets out a common definition of money laundering and common measures for dealing with it. The Convention lays down the principles for international cooperation among the member states, which may also include states outside the Council of Europe. This convention came into force in September 1993. One of the purposes of the convention is to facilitate international cooperation as regards investigative assistance, search, seizure and confiscation of the proceeds of all types of criminality, particularly serious crimes, such as, drug offences, arms dealing, terrorist offences etc. and other offences which generate large profits.

### **European Union Money Laundering Directive**

In response to the new opportunities for money laundering opened up by the liberalization of capital movements and cross-border financial services in the European Union, the Council of the European Communities in June, 1991 issued a directive on the Prevention of Use of the Financial System for the Purpose of Money Laundering. The directive requires member states to outlaw money laundering. The member states have been put under obligation to require financial institutions to establish and maintain internal systems to prevent laundering, to obtain the identification of customers with whom they enter into transaction of more than a particular amount and to keep proper records for at least five years. The financial institutions are also required to report suspicious transactions and ensure that such reporting does not result in liability for the institution or its employees.

### **Basle Committee's Statement of Principles**

In December 1988 the Basle Committee on Banking Regulation Supervisory Practices issued a statement of principles to be complied by the international banks of member states. These principles include identifying customers, avoiding suspicious transactions, and cooperating with law enforcement agencies. The statement aims at encouraging the banking sector to adopt common position in order to ensure that banks are not used to hide or launder funds acquired through criminal activities.

#### Resolution of the International Organization of Securities Commissions

The International Organization of Securities Commissions (IOSCO) adopted, in October 1992, a resolution encouraging its members to take necessary steps to combat money laundering in securities and futures markets.

### **The Financial Action Task Force (FATF)**

The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

The FATF has developed a series of Recommendations that are recognised as the international standard for combating of money laundering and the financing of terrorism and proliferation of weapons of mass destruction. They form the basis for a co-ordinated response to these threats to the integrity of the financial

system and help ensure a level playing field. First issued in 1990, the FATF Recommendations were revised in 1996, 2001, 2003 and in 2012 to ensure that they remain up to date and relevant, and they are intended to be of universal application.

The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In collaboration with other international stakeholders, the FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.

### History of the FATF

In response to mounting concern over money laundering, the Financial Action Task Force on Money Laundering (FATF) was established by the G-7 Summit that was held in Paris in 1989. Recognising the threat posed to the banking system and to financial institutions, the G-7 Heads of State or Government and President of the European Commission convened the Task Force from the G-7 member States, the European Commission and eight other countries.

### FATF Recommendations

The Task Force was given the responsibility of examining money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering. In April 1990, less than one year after its creation, the FATF issued a report containing a set of Forty Recommendations, which were intended to provide a comprehensive plan of action needed to fight against money laundering.

In 2001, the development of standards in the fight against terrorist financing was added to the mission of the FATF. In October 2001 the FATF issued the *Eight Special Recommendations* to deal with the issue of terrorist financing. The continued evolution of money laundering techniques led the FATF to revise the FATF standards comprehensively in June 2003. In October 2004 the FATF published a Ninth Special Recommendations, further strengthening the agreed international standards for combating money laundering and terrorist financing - the *40+9 Recommendations*.

In February 2012, the FATF completed a thorough review of its standards and published the revised FATF Recommendations. This revision is intended to strengthen global safeguards and further protect the integrity of the financial system by providing governments with stronger tools to take action against financial crime. They have been expanded to deal with new threats such as the financing of proliferation of weapons of mass destruction, and to be clearer on transparency and tougher on corruption. The 9 Special Recommendations on terrorist financing have been fully integrated with the measures against money laundering. This has resulted in a stronger and clearer set of standards.

### United Nations Global Programme Against Money Laundering

Office of the Drug Control and Crime Prevention implement this programme against Money Laundering with a view to increase the effectiveness of international action against money laundering through comprehensive technical cooperation services offered to Governments. The programme encompasses following three areas of activities, providing various means to states and institutions in their efforts to effectively combat money laundering:

- (i) Technical cooperation is the main task of the Programme. It encompasses activities of creating awareness, institution building and training.

- (ii) The research and analysis aims at offering States Key Information to better understand the phenomenon of money laundering and to enable the international community to devise more efficient and effective countermeasure strategies.
- (iii) The commitment to support the establishment of financial investigation services for raising the overall effectiveness of law enforcement measures.

The implementation of the Global Programme against Money Laundering is carried out in the spirit of cooperation with other international, regional and national organizations and institutions.

### ***What influence does money laundering have on economic development?***

*Launderers are continuously looking for new routes for laundering their funds. Economies with growing or developing financial centres, but inadequate controls are particularly vulnerable as established financial centre countries implement comprehensive anti-money laundering regimes.*

*Differences between national anti-money laundering systems will be exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures.*

*Some might argue that developing economies cannot afford to be too selective about the sources of capital they attract. But postponing action is dangerous. The more it is deferred, the more entrenched organised crime can become.*

*As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime. Fighting money laundering and terrorist financing is therefore a part of creating a business friendly environment which is a precondition for lasting economic development.*



## **Prevention of Money Laundering – Indian Initiatives**

In view of an urgent need for the enactment of a comprehensive legislation for preventing money-laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the Prevention of Money-Laundering Bill 1998 was introduced in the Parliament on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to Lok Sabha. After incorporating the recommendations of the Standing Committee, the Government introduced the Prevention of Money Laundering Bill 1999 in the Parliament on October 29, 1999. The Bill received the assent of the President and became Prevention of Money Laundering Act, 2002 on 17th January 2003. The Act has come in force with effect from July 1, 2005. The Act was last amended in the year 2009, 2012.

## **Prevention of Money Laundering Act, 2002**

### **Scheme of the Act**

The Prevention of Money Laundering Act, 2002 consists of ten chapters containing 75 sections and one Schedule divided into five parts. Chapter I containing section 1 and 2 deals with short title, extent and commencement and definitions. Chapter II containing sections 3 and 4 provides for offences and punishment for money laundering. Chapter III (Section 5-11) provides for attachment, adjudication and confiscation and

Chapter IV (Sections 12-15) deals with obligations of banking companies, financial institutions and intermediaries. Chapter V (Sections 16-24) relates to Summons, Searches and Seizures etc.

The Act provides for establishment of Appellate Tribunal and thus sections 25-42 under Chapter VI provides for composition, procedure, power, jurisdiction etc. of the Appellate Tribunal. Chapter VII (Sections 43-47) deals with Special Courts, and Chapter VIII (Sections 48-54) provides for various authorities under the Act, their appointment, powers, jurisdiction etc. Chapter IX (Sections 55-61) deals with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Chapter X containing Sections 62-75 deals with miscellaneous provisions including punishment for, vexatious search, false information etc., cognizance of offences, and offences by companies, among others.

## Major Provisions of the Act

### Definitions

Section 2 of the Act defines various terms used in the Act. Some of the important definitions are given below:

#### Attachment

Sub-section 1(d) defines attachment as to mean prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III.

#### Proceeds of Crime

Section 2(1)(u) defines the term 'proceeds of crime as to mean any property derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.

#### Property

The term 'property used in sub-section 1(v) of Section 2 means any property or assets of every description, whether, corporeal or incorporeal, movable or immovable, tangible or intangible and includes, deeds and instruments evidencing title to, or interest in such property or assets wherever located.

#### Intermediary

The term intermediary under sub-section 1(n) of Section 2 has been defined as to mean a stock broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment advisor, and any other intermediary associated with securities market and registered under Section 12 of the SEBI Act, 1992.

#### Investigation

Sub-section 2(1)(na) defines investigation to include all the proceedings under the Act conducted by the Director or by an authority authorized by the Central Government under this Act for the collection of evidence.

#### Money Laundering

Section 3 of the Act states that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it is an untainted property shall be guilty of offence of money laundering.

Section 4 provides that any person who commits the offence of money laundering shall be punishable with

rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and also liable to fine. However, where the proceeds of crime involved in money laundering relates to any offence specified under the Narcotic Drugs and Psychotropic Substances Act, the punishment may extend to rigorous imprisonment for ten years.

### **Attachment of property involved in money laundering**

Where the Director or any officer not below the rank of Deputy Director authorised by him, has reason to believe on the basis of material in his possession that any person is in possession of any proceeds of money laundering; such person has been charged of having committed a scheduled offence and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, such officer may by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in the manner provided in the Second Schedule of the Income-tax Act, 1961.

Every order of attachment shall cease to have effect after the expiry of ninety days from the date of the order or on the date of the order made by the Administrating Officer finding the person interested is not prevented from the enjoyment of property attached. 'Person interested in relation to any immovable property includes all persons claiming or entitled to claim any interest in the property. The Director or any other officer who provisionally attaches any property shall, within a period of 30 days from such attachment file a complaint, stating the facts of such attachment before the Adjudicating Authority.

### **Adjudicating Authority**

Section 6 empowers the Central Government to appoint, by notification, one or more persons not below the rank of Joint Secretary to the Government of India as Adjudicating Authority to exercise the jurisdiction, powers and authority conferred on or under the Act.

### **Adjudication**

Section 8 dealing with the adjudication provides that on receipt of a complaint from the Director or any other officer who provisionally attaches any property or an application made by such officer for retention of seized record or property, the Adjudicating Authority may, on reason to believe that any person has committed an offence of money laundering, serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached or seized, the evidence on which he relies and other relevant information and particulars and show cause why all or any of such property should not be declared to be the properties involved in money laundering and confiscated by the Central Government. Where a notice specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person. Similar notice is required to be served on all persons when such property is held jointly by more than one person.

### **Vesting of Property in Central Government**

Section 9 provides that an order of confiscation made, in respect of any property of a person, vests in the Central Government all the rights and title in such property free from all encumbrances. The Adjudicating Authority after giving an opportunity of being heard to any other person interested in the property attached or seized is of the opinion that any encumbrances on the property or lease hold interest has been created with a view to defeat the provisions of the Act, it may, by order declare such encumbrances or lease hold interest to be void and thereupon the property shall vest in the Central Government free from such encumbrances or lease hold. However, this provision shall not discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages.

### **Obligation of Banking Companies, Financial Institutions and Intermediaries**

Chapter IV of the Act deals with obligations of Banking companies, financial institutions and intermediaries. Section 12 requires every banking company, financial institution and intermediary to maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place within a month. These informations are required to be furnished to the Director within such time as may be prescribed. Banks and financial institutions are required to verify and maintain the records of the identity of all its clients, in such manner as may be prescribed. The records as mentioned above are required to be maintained for a period of ten years from the date of cessation of the transactions between the clients and the banking company, financial institution or intermediary.

Section 13 states that the Director may, either on his own motion, or on an application made by any authority, officer, or person, call for records of all transactions and make such inquiry or cause such inquiry to be made, as he thinks fit. In the course of any inquiry, if the Director finds that a banking company, financial institution or an intermediary or any of its officers has failed to maintain or retain records in accordance with the provisions of the Act, he may, by an order, levy a fine on such banking company, financial institution or intermediary which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.

Section 15 empowers the Central Government to prescribe, in consultation with the Reserve Bank of India, the procedure and the manner of maintaining and furnishing information for the purpose of implementation of the provisions of the Act.

### **Summon, Searches and Seizures, etc.**

Section 16 empowers an authority to enter, on having reason to believe that an offence under Section 3 has been committed, any place within the limits of the area assigned to him or in respect of which he is authorised. Section 16(3) requires such authority to place marks of identification on the records inspected by him and make or cause to be made extracts or copies therefrom, make an inventory of any property checked or verified by him and record the statement of any person present in the place which may be useful for, or relevant to, any proceedings under the Act.

Section 18 of the Act deals with search of persons and provides that if an authority authorised in this behalf by the Central Government by general or special order has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

### **Retention of Property**

Section 20 of the Act deals with retention of property. As per Sub-section (1) provides that where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be.

(2) The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for purposes of adjudication under section 8, forward a copy of the

order along with the material in his possession, referred to in sub-section (1), to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) On the expiry of the period specified in sub-section (1), the property shall be returned to the person from whom such property was seized or whose property was ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period.

(4) The Adjudicating Authority, before authorising the retention or continuation of freezing of such property beyond the period specified in sub-section (1), shall satisfy himself that the property is prima facie involved in money-laundering and the property is required for the purposes of adjudication under section 8.

(5) After passing the order of confiscation under sub-section (5) or sub-section (7) of section 8, the Court or the Adjudicating Authority, as the case may be, shall direct the release of all property other than the property involved in money-laundering to the person from whom such property was seized or the persons entitled to receive it.

(6) Where an order releasing the property has been made by the Court under sub-section (6) of section 8 or by the Adjudicating Authority under section 58B or sub-section (2A) of section 60, the Director or any officer authorised by him in this behalf may withhold the release of any such property for a period of ninety days from the date of such order, if he is of the opinion that such property is relevant for the appeal proceedings under the Act.

### **Retention of records**

Section 21 deals with retention of records. Section 21(1) states that where any records have been seized, under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the Investigating Officer or any other officer authorised by the Director in this behalf has reason to believe that any of such records are required to be retained for any inquiry under this Act, such records may if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such records were seized or frozen, as the case may be.

(2) The person, from whom records seized or frozen, shall be entitled to obtain copies of records.

(3) On the expiry of the period specified under sub-section (1), the records shall be returned to the person from whom such records were seized or whose records were ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such records beyond the said period.

(4) The Adjudicating Authority, before authorising the retention or continuation of freezing of such records beyond the period specified in sub-section (1), shall satisfy himself that the records are required for the purposes of adjudication under section 8.

(5) After passing of an order of confiscation under sub-section (5) or subsection (7) of section 8, the Adjudicating Authority shall direct the release of the records to the person from whom such records were seized.

(6) Where an order releasing the records has been made by the Court under subsection (6) of section 8 or by the Adjudicating Authority under section 58B or subsection (2A) of section 60, the Director or any officer authorised by him in this behalf may withhold the release of any such record for a period of ninety days from the date of such order, if he is of the opinion that such record is relevant for the appeal proceedings under the Act.



### **Presumption in Inter-connected Transactions**

Section 23 of the Act deals with presumption in inter-connected transactions and provides that where money laundering involves two or more transactions and one or more such transactions is or are proved to be involved in money laundering, then for the purposes of adjudication or confiscation under Section 8, it shall be presumed that the remaining transactions form part of such interconnected transactions, unless otherwise proved to the satisfaction of the Adjudicating Authority.

### **Appellate Tribunal**

Chapter VI of the Act deals with Appellate Tribunal. Section 25 empowers the Central Government, to establish an Appellate Tribunal to hear appeals against the orders of Adjudicating Authority and other authorities under the Act.

### **Special Courts**

Sections 43 to 47 of the Act deal with provisions relating to Special Courts. Section 43(1) empowers the Central Government to designate, in consultation with the Chief Justice of the High Court, one or more Courts of Session as Special Courts or Court for such area or areas or for such case or class or group of cases as may be specified in the notification, for trial of offence punishable under Section 4.

### **Offences Triable by Special Courts**

Section 44(1) provides that the offence punishable under Section 4, shall be triable only by the Special Court constituted for the area in which the offence has been committed or a special court may, upon a complaint made by an authority authorised in this behalf take cognizance of the offence for which the accused is committed to it for trial.

### **Offences to be cognizable and Non-bailable**

Section 45 declares every offence punishable under the Act to be cognizable. It provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, a person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall not be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release; and where the Public Prosecutor opposes the application, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while in bail.

However the special court shall not take cognizance of any offence punishable under Section 4, except upon a complaint in writing made by (i) the Director or (ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or special order made by that Government.

Sub-section 1A inserted by Prevention of Money Laundering (Amendment) Act, 2005 provides that notwithstanding anything contained in Code of Criminal Procedure, 1973 or any other provision of this Act, no police officer shall investigate into an offence under this Act, unless specifically authorized, by the Central Government by a general or special order, and subject to such conditions as may be prescribed.

### **Power of Central Government to Issue Directions**

Section 52 empowers the Central Government to issue, from time to time, such orders, instructions and directions to the authorities as it may deem fit for the proper administration of this Act. The authorities and all other persons employed in execution of the Act have been put under obligation to observe and follow such orders, instructions and directions of the Central Government. However, no such orders, instructions or

directions shall be issued so as to require any authority to decide a particular case in a particular manner or interfere with the discretion of the Adjudicating Authority in exercise of his functions.

### **Agreement with Foreign Countries**

Section 56 empowers the Central Government to enter into an agreement with the Government of any country for enforcing the provisions of the Act and also for exchange of information for the prevention of any offence under the this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under the Act.

### **Assistance to a Contracting State in Certain Cases**

Section 58 provides that, where a letter of request is received by the Central Government, from a court or authority in a contracting State requesting for investigation into an offence or proceedings under the Act and forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority as it thinks fit for execution of such request in accordance with the provisions of the Act or as the case may be, any other law for the time being in force. Section 58A empowering Special Court to release the property.

### **Reciprocal Arrangements for Processes and Assistance for Transfer of Accused Persons**

Section 59(1) prescribes that where Special Court, in relation to an offence punishable under Section 4 desires that a summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other thing, or to produce a document or other things or to produce it; or a search warrant issued by it, shall be served or executed at any place in any contracting state, it shall send such summons or warrant in duplicate in such form, to such court, Judge or Magistrate through such authorities as the Central Government may by notification, specify in that behalf and that court, Judge or Magistrate, as the case may be, shall cause the same to be executed.

Sub-Section (2) stipulates that where a Special Court, in relation to an offence punishable under Section 4 has received for service or execution, summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other things or to produce it; or a search warrant; issued by a court, Judge or Magistrate in a contracting State, it shall cause the same to be served or executed as if it were a summon or warrant received by it from another court in the said territories for service or execution within its jurisdiction. Where a warrant of arrest has been executed, the person arrested shall, so far as possible be dealt with in accordance with the procedure specified under Section 19 and where a search warrant has been executed, the things found in the search shall so far as possible be dealt with in accordance with the procedure specified under Section 17 or 18.

However, where a summon or search warrant received from a contracting state has been executed, the documents or other things produced or things found in the search shall be forwarded to the court issuing the summon or search warrant through such authority as the Central Government may by notification specify in this behalf.

### **Attachment, Seizure and Confiscation of Property, etc.**

Section 60(1) provides that where the Director has made an order for attachment of any property under Section 5 or where Adjudicating Authority has made an order confirming such attachment or confiscation of any property under Section 8 and such property is suspected to be in a contracting state, the Special Court on an application by the Director or the Administrator appointed under Section 10(1) as the case may be, may issue a letter of request to a court or an authority in the contracting state for execution of such order.

Section 60(2) prescribes that when a letter of request is received by the Central Government from a court or an authority in a contracting state requesting attachment or confiscation of the property in India derived or

obtained directly or indirectly, by any person from the commission of an offence under Section 3 committed in that contracting state, the Central Government may forward such letter of request to the Director as it thinks fit, for execution in accordance with the provisions of the Act. Sub-Section (3) stipulates that the Director shall on receipt of a letter of request under Section 58 or Section 59 direct any authority under the Act to take all steps necessary for tracing and identifying such property.

### **(KYC) Norms/ (AML) Measures/ (CFT) Guidelines – Anti Money Laundering Standards**

RBI issued Master Circular on Know Your Customer (KYC) norms/Anti-Money Laundering (AML) standards/Combating of Financing of Terrorism (CFT)/Obligation of banks under Prevention of Money Laundering Act, (PMLA), 2002 and Banks were advised to follow certain customer identification procedure for opening of accounts and monitoring transactions of a suspicious nature for the purpose of reporting it to appropriate authority. These 'Know Your Customer' guidelines have been revisited in the context of the Recommendations made by the Financial Action Task Force (FATF) on Anti Money Laundering (AML) standards and on Combating Financing of Terrorism (CFT). Banks have been advised to ensure that a proper policy framework on 'Know Your Customer' and Anti-Money Laundering measures with the approval of the Board is formulated and put in place.

### **The objective of KYC Norms/ AML Measures/ CFT Guidelines**

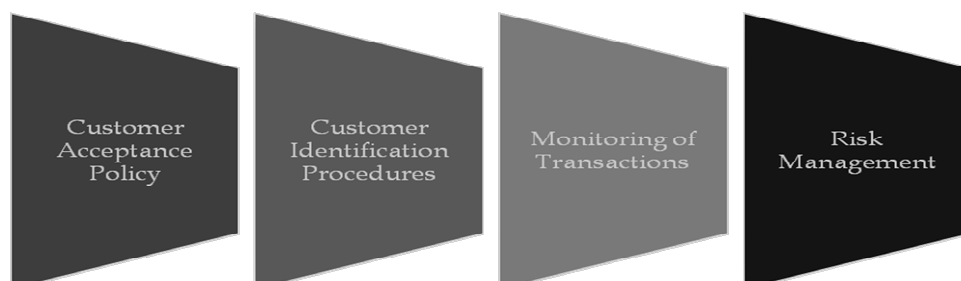
The objective of Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Measures/Combating of Financing of Terrorism (CFT) guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently.

### **Obligation of Banks**

- Banks should keep in mind that the information collected from the customer for the purpose of opening of account is to be treated as confidential and details thereof are not to be divulged for cross selling or any other like purposes. Banks should, therefore, ensure that information sought from the customer is relevant to the perceived risk, is not intrusive, and is in conformity with the guidelines issued in this regard. Any other information from the customer should be sought separately with his/her consent and after opening the account.
- Banks should ensure that any remittance of funds by way of demand draft, mail/telegraphic transfer or any other mode and issue of travellers'cheques for value of Rupees fifty thousand and above is effected by debit to the customer's account or against cheques and not against cash payment.
- Banks should ensure that the provisions of Foreign Contribution (Regulation) Act, 1976 as amended from time to time, wherever applicable are strictly adhered to.

### **KYC Policy**

Banks should frame their KYC policies incorporating the following four key elements:



**For the purpose of KYC policy, a ‘Customer’ is defined as:**

- a person or entity that maintains an account and/or has a business relationship with the bank;
- one on whose behalf the account is maintained (i.e. the beneficial owner);
- beneficiaries of transactions conducted by professional intermediaries, such as Stock Brokers, Chartered Accountants, Solicitors etc. as permitted under the law, and
- any person or entity connected with a financial transaction which can pose significant reputational or other risks to the bank, say, a wire transfer or issue of a high value demand draft as a single transaction.

**Introduction of New Technologies – Credit cards/debit cards/ smart cards/gift cards**

Banks should pay special attention to any money laundering threats that may arise from new or developing technologies including internet banking that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes. Many banks are engaged in the business of issuing a variety of Electronic Cards that are used by customers for buying goods and services, drawing cash from ATMs, and can be used for electronic transfer of funds. Banks are required to ensure full compliance with all KYC/AML/CFT guidelines issued from time to time, in respect of add-on/ supplementary cardholders also. Further, marketing of credit cards is generally done through the services of agents. Banks should ensure that appropriate KYC procedures are duly applied before issuing the cards to the customers. It is also desirable that agents are also subjected to KYC measures.

**Information to be preserved**

Banks are required to maintain all necessary information in respect of transactions to permit reconstruction of individual transaction, including the following information:

- (a) the nature of the transactions;
- (b) the amount of the transaction and the currency in which it was denominated;
- (c) the date on which the transaction was conducted; and
- (d) the parties to the transaction

**Maintenance and Preservation of record**

- (a) Banks are required to maintain the records containing information of all transactions. Banks should take appropriate steps to evolve a system for proper maintenance and preservation of account information in a manner that allows data to be retrieved easily and quickly whenever required or when requested by the competent authorities.
- (b) Banks should ensure that records pertaining to the identification of the customer and his address (e.g. copies of documents like passports, identity cards, driving licenses, PAN card, utility bills etc.) obtained while opening the account and during the course of business relationship, are properly preserved. The identification records and transaction data should be made available to the competent authorities upon request.
- (c) Banks have been advised to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. It is further clarified that the background including all documents/office records/memorandums pertaining to such transactions and purpose thereof should, as far as possible, be examined and the

findings at branch as well as Principal Officer level should be properly recorded. Such records and related documents should be made available to help auditors in their day-to-day work relating to scrutiny of transactions and also to Reserve Bank/other relevant authorities.

### Reporting to Financial Intelligence Unit – India

In terms of the PMLA Rules, banks are required to report information relating to cash and suspicious transactions and all transactions involving receipts by non-profit organisations of value more than rupees ten lakh or its equivalent in foreign currency to the Director, Financial Intelligence Unit-India (FIU-IND) in respect of transactions.

### Freezing of Assets under Section 51A of Unlawful Activities (Prevention) Act, 1967

The Unlawful Activities (Prevention) Act, 1967 (UAPA) has been amended by the Unlawful Activities (Prevention) Amendment Act, 2012. Government has issued an Order dated August 27, 2009 detailing the procedure for implementation of Section 51A of the Unlawful Activities (Prevention) Act, 1967 relating to the purposes of prevention of, and for coping with terrorist activities. In terms of Section 51A, the Central Government is empowered to freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities Listed in the Schedule to the Order, or any other person engaged in or suspected to be engaged in terrorism and prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of the individuals or entities Listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism.

## LESSON ROUND-UP

- Money laundering is the processing of criminal proceeds to disguise its illegal origin.
- The process of money laundering can be classified into three stages, namely, placement, layering and integration.
- The Prevention of Money-laundering Act, 2002 was enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.
- The Act also addresses the international obligations under the Political Declaration and Global Programme of Action adopted by the General Assembly of the United Nations to prevent money laundering.
- The Act contains provisions pertaining to offences and punishment for money laundering, attachment, adjudication and confiscation, obligations of banking companies, financial institutions and intermediaries, Summons, Searches and Seizures etc.
- The Act states that whoever, acquires, owns, possesses, or transfers any proceeds of crime or knowingly enters into any transaction which is related to proceeds of crime directly or indirectly or conceals or aids in the concealment of the proceeds of crime, shall be guilty of offence of money laundering.
- Every banking company, financial institution and intermediary is required to maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place within a month.
- The objective of Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Measures/Combating of Financing of Terrorism (CFT) guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently.



# Lesson 20

## Indian Contract Act, 1872

### LESSON OUTLINE

- Learning Objective
- Meaning and Nature of contract
- Agreement
- Essential elements of a valid contract
- Flaws in Contract
- Agreement that restrained of Trade
- Wagering Agreement
- Void Agreement
- Quantum Meruit
- Restitution
- Contingent Contract
- Quasi Contract
- Contract of Indemnity Guarantee
- Remedies for Breach
- Contract of Bailment and Pledge
- Law of Agency
- Del Credere Agent
- Termination of Agency
- When termination takes effect
- Joint Venture Agreements
- E-Contract
- Lesson round up
- Self test questions.

### LEARNING OBJECTIVES

A contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others. A contract is an agreement creating and defining obligations between the parties.

The Indian Contract Act, 1872 regulates all the transactions of a company. It lays down the general principles relating to the formation and enforceability of contracts; rules governing the provisions of an agreement and offer; the various types of contracts including those of indemnity and guarantee, bailment and pledge and agency. It also contains provisions pertaining to breach of a contract.

The Law of Contract constitutes the most important branch of Mercantile or Commercial Law. It affects everybody, more so, trade, commerce and industry. It may be said that the contract is the foundation of the civilized world. Therefore, it is essential for the students to be familiar with the law relating to Contract.

“Every agreement and promise enforceable at law is a contract”.

—Sir Fredrick Pollock

“A contract is an agreement creating and defining obligations between the parties “.

—Salmond

## Meaning and Nature of Contract

The law relating to contract is governed by the Indian Contract Act, 1872. The Act came into force on the first day of September, 1872. The preamble to the Act says that it is an Act “to define and amend certain parts of the law relating to contract”. It extends to the whole of India except the State of Jammu and Kashmir. The Act is by no means exhaustive on the law of contract. It does not deal with all the branches of the law of contract. Thus, contracts relating to partnership, sale of goods, negotiable instruments, insurance etc. are dealt with by separate Acts.

The Indian Contract Act mostly deals with the general principles and rules governing contracts. The Act is divisible into two parts. The first part (Section 1-75) deals with the general principles of the law of contract, and therefore applies to all contracts irrespective of their nature. The second part (Sections 124-238) deals with certain special kinds of contracts, namely contracts of Indemnity and Guarantee, Bailment, Pledge, and Agency.

The Indian Contract Act has defined contract in Section 2(h) as “an agreement enforceable by law”.

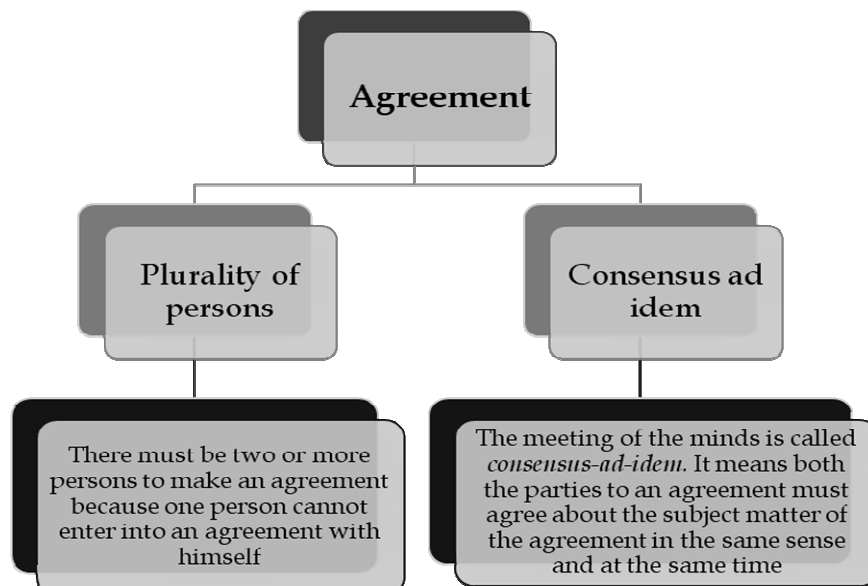
These definitions indicate that a contract essentially consists of two distinct parts. First, there must be an agreement. Secondly, such an agreement must be enforceable by law. To be enforceable, an agreement must be coupled with an obligation.

A contract therefore, is a combination of the two elements: (1) an agreement and (2) an obligation.

## Agreement

An agreement gives birth to a contract. As per Section 2(e) of the Indian Contract Act “every promise and every set of promises, forming the consideration for each other, is an agreement. It is evident from the definition given above that an agreement is based on a promise. What is a promise? According to Section 2(b) of the Indian Contract Act “when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise. An agreement, therefore, comes into existence when one party makes a proposal or offer to the other party and that other party signifies his assent thereto. In nutshell, an agreement is the sum total of offer and acceptance.”

An analysis of the definition given above reveals the following characteristics of an agreement:





## Obligation

An obligation is the legal duty to do or abstain from doing what one has promised to do or abstain from doing. A contractual obligation arises from a bargain between the parties to the agreement who are called the promisor and the promisee. Section 2(b) says that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; and a proposal when accepted becomes a promise. In broad sense, therefore, a contract is an exchange of promises by two or more persons, resulting in an obligation to do or abstain from doing a particular act, where such obligation is recognised and enforced by law.

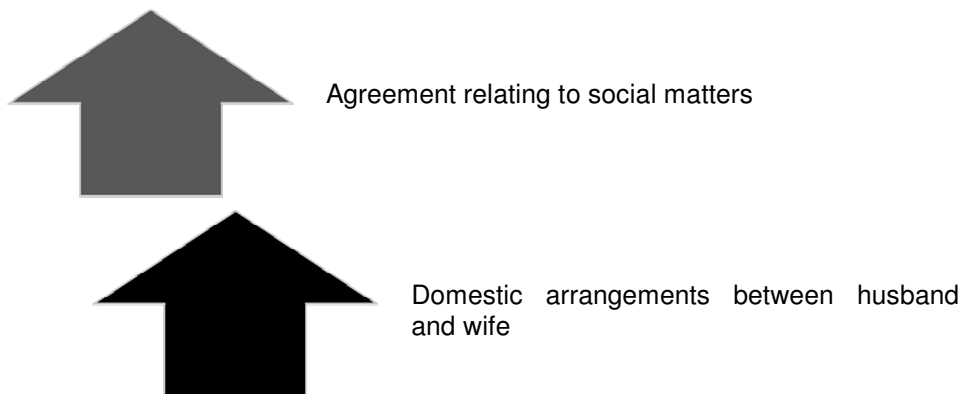
## Rights and Obligations

Where parties have made a binding contract, they have created rights and obligations between themselves. The contractual rights and obligations are correlative, e.g., A agrees with B to sell his car for Rs. 10,000 to him. In this example, the following rights and obligations have been created:

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

## Agreements which are not Contracts

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



- (a) *Agreements relating to social matters*: An agreement between two persons to go together to the cinema, or for a walk, does not create a legal obligation on their part to abide by it. Similarly, if I promise to take you for a dinner and break that promise, I do not expect to be liable to legal penalties. There cannot be any offer and acceptance to hospitality.
- (b) *Domestic arrangements between husband and wife*: In *Balfour v. Balfour* (1919) 2 KB 571, a husband working in Ceylone, had agreed in writing to pay a housekeeping allowance to his wife living in England. On receiving information that she was unfaithful to him, he stopped the allowance. Held, he was entitled to do so. This was a mere domestic arrangement with no intention to create legally binding relations. Therefore, there was no contract.

Three consequences follow from the above discussion:

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

## ESSENTIAL ELEMENTS OF A VALID CONTRACT

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

The essential elements of a valid contract are:

- (i) An offer or proposal by one party and acceptance of that offer by another party resulting in an *agreement—consensus-ad-idem*.
- (ii) An intention to create legal relations or an intent to have legal consequences.
- (iii) The agreement is supported by a lawful consideration.
- (iv) The parties to the contract are legally capable of contracting.
- (v) Genuine consent between the parties.
- (vi) The object and consideration of the contract is legal and is not opposed to public policy.
- (vii) The terms of the contract are certain.
- (viii) The agreement is capable of being performed i.e., it is not impossible of being performed.

Therefore, to form a valid contract there must be (1) an agreement, (2) based on the genuine consent of the parties, (3) supported by a lawful consideration, (4) made for a lawful object, and (iv) between the competent parties.

### (a) Offer or Proposal and Acceptance

One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance. Thus, when one party (the offeror) makes a definite proposal to another party (the offeree) and the offeree accepts it in its entirety and without any qualification, there is a meeting of the minds of the parties and a contract comes into being, assuming that all other elements are also present.

### What is an Offer or a Proposal?

A proposal is also termed as an offer. The word ‘proposal’ is synonymous with the English word “offer”. An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in return for a promise, act or forbearance. Section 2(a) of the Indian Contract Act defines proposal or offer as “when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal”. The person making the proposal or offer is called the *proposer or offeror* and the person to whom the proposal is made is called the *offeree*.

## Rules Governing Offers

A valid offer must comply with the following rules:

- (a) An offer must be clear, definite, complete and final. It must not be vague. For example, a promise to pay an increased price for a horse if it proves lucky to promisor, is too vague and is not binding.
- (b) An offer must be communicated to the offeree. An offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the same.
- (c) The communication of an offer may be made by express words-oral or written-or it may be implied by conduct. A offers his car to B for ₹10,000. It is an express offer. A bus plying on a definite route goes along the street. This is an implied offer on the part of the owners of the bus to carry passengers at the scheduled fares for the various stages.
- (d) The communication of the offer may be general or specific. Where an offer is made to a specific person it is called specific offer and it can be accepted only by that person. But when an offer is addressed to an uncertain body of individuals i.e. the world at large, it is a general offer and can be accepted by any member of the general public by fulfilling the condition laid down in the offer. The leading case on the subject is *Carlill v. Carbolic Smoke Ball Co.* The company offered by advertisement, a reward of ₹100 to anyone who contacted influenza after using their smoke ball in the specified manner. Mrs. Carlill did use smoke ball in the specified manner, but was attacked by influenza. She claimed the reward and it was held that she could recover the reward as general offer can be accepted by anybody. Since this offer is of a continuing nature, more than one person can accept it and can even claim the reward. But if the offer of reward is for seeking some information or seeking the restoration of missing thing, then the offer can be accepted by one individual who does it first of all. The condition is that the claimant must have prior knowledge of the reward before doing that act or providing that information.

*Example:* A advertises in the newspapers that he will pay rupees one thousand to anyone who brings to him his lost son. B without knowing of this reward finds A's lost son and restore him to A. In this case since B did not know of the reward, he cannot claim it from A even though he finds A's lost son and brings him to A.

In India also, in the case of *HarbhajanLal v. HarcharanLal* (AIR 1925 All. 539), the same rule was applied. In this case, a young boy ran away from his fathers home. The father issued a pamphlet offering a reward of ₹500 to anybody who would bring the boy home. The plaintiff saw the boy at a railway station and sent a telegram to the boys father. It was held that the handbill was an offer open to the world at large and was capable to acceptance by any person who fulfilled the conditions contained in the offer. The plaintiff substantially performed the conditions and was entitled to the reward offered.

## An Offer must be Distinguished from

- (a) *An invitation to treat or an invitation to make an offer:* e.g., an auctioneers request for bids (which are offered by the bidders), the display of goods in a shop window with prices marked upon them, or the display of priced goods in a self- service store or a shopkeepers catalogue of prices are invitations to an offer.
- (b) *A mere statement of intention:* e.g., an announcement of a coming auction sale. Thus, a person who attended the advertised place of auction could not sue for breach of contract if the auction was cancelled (*Harris v. Nickerson* (1873) L.R. 8 QB 286).
- (c) *A mere communication of information in the course of negotiation:* e.g., a statement of the price at which one is prepared to consider negotiating the sale of piece of land (*Harvey v. Facey* (1893) A.C. 552).

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

### **Lapse of Offer**

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

- (a) it is not accepted within the specified time (if any) or after a reasonable time, if none is specified.
- (b) it is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, e.g., by sending a letter by mail when early reply was requested;
- (c) the offeree rejects it by distinct refusal to accept it;
- (d) either the offeror or the offeree dies before acceptance;
- (e) the acceptor fails to fulfill a condition precedent to an acceptance.
- (f) the offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror.

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

An offer may be revoked by the offeror at any time before acceptance.

Like any offer, revocation must be communicated to the offeree, as it does not take effect until it is actually communicated to the offeree. Before its actual communication, the offeree, may accept the offer and create a binding contract. The revocation must reach the offeree before he sends out the acceptance.

An offer to keep open for a specified time (option) is not binding unless it is supported by consideration.

### **Acceptance**

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. Under Section 2(b) of the Contract Act when a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise..

### **Rules Governing Acceptance**

- (a) Acceptance may be express i.e. by words spoken or written or implied from the conduct of the parties.
- (b) If a particular method of acceptance is prescribed, the offer must be accepted in the prescribed manner.
- (c) Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.
- (d) A counter offer or conditional acceptance operates as a rejection of the offer and causes it to lapse, e.g., where a horse is offered for Rs. 1,000 and the offeree counter-offers Rs. 990, the offer lapses by rejection.
- (e) Acceptance must be communicated to the offeror, for acceptance is complete the moment it is communicated. Where the offeree merely intended to accept but does not communicate his intention to the offeror, there is no contract. Mere mental acceptance is not enough.
- (f) Mere silence on the part of the offeree does not amount to acceptance.

Ordinarily, the offeror cannot frame his offer in such a way as to make the silence or inaction of the

offeree as an acceptance. In other words, the offeror can prescribe the mode of acceptance but not the mode of rejection.

- (g) If the offer is one which is to be accepted by being acted upon, no communication of acceptance to the offeror is necessary, unless communication is stipulated for in the offer itself.

Thus, if a reward is offered for finding a lost dog, the offer is accepted by finding the dog after reading about the offer, and it is unnecessary before beginning to search for the dog to give notice of acceptance to the offeror.

- (h) Acceptance must be given within a reasonable time and before the offer lapses or is revoked. An offer becomes irrevocable by acceptance.

An acceptance never precedes an offer. There can be no acceptance of an offer which is not communicated. Similarly, performance of conditions of an offer without the knowledge of the specific offer, is no acceptance. Thus in *Lalman Shukla v. GauriDutt* (1913), where a servant brought the boy without knowing of the reward, he was held not entitled to reward because he did not know about the offer.

### Standing Offers

Where a person offers to another to supply specific goods, up to a stated quantity or in any quantity which may be required, at a certain rate, during a fixed period, he makes a standing offer. Thus, a tender to supply goods as and when required, amounts to a standing offer.

A standing offer or a tender is of the nature of a continuing offer. An acceptance of such an offer merely amounts to intimation that the offer will be considered to remain open during the period specified and that it will be accepted from time to time by placing order for specified quantities. Each successive order given, while the offer remains in force, is an acceptance of the standing offer as to the quantity ordered, and creates a separate contract. It does not bind either party unless and until such orders are given.

Where P tendered to supply goods to L upto a certain amount and over a certain period, L's order did not come up to the amount expected and P sued for breach of contract *Held*: Each order made was a separate contract and P was bound to fulfill orders made, but there was no obligation on L to make any order to all (*Percival Ltd. v. L.C.C.* (1918)).

### Tickets

Tickets purchased for entrance into places of amusement, or tickets issued by railways or bus companies, clock-room tickets, and many other contracts set out in printed documents contain numerous terms, of many of which the party receiving the ticket or document is ignorant. If a passenger on a railway train receives a ticket on the face of which is printed "this ticket is issued subject to the notices, regulations and conditions contained in the current time-tables of the railway", the regulations and conditions referred to are deemed to be communicated to him and he is bound by them whether or not he has read them. He is bound even if he is illiterate and unable to read them. But it is important that the notice of the conditions is contemporaneous with the making of the contract and not after the contract has been made.

### Contracts by Post

Contracts by post are subject to the same rules as others, but because of their importance, these are stated below separately:

- (a) An offer by post may be accepted by post, unless the offeror indicates anything to the contrary.

- (b) An offer is made only when it actually reaches the offeree and not before, i.e., when the letter containing the offer is delivered to the offeree.
- (c) An acceptance is made as far as the offeror is concerned, as soon as the letter containing the acceptance is posted, to offerors correct address; it binds the offeror, but not the acceptor.

An acceptance binds the acceptor only when the letter containing the acceptance reaches the offeror. The result is that the acceptor can revoke his acceptance before it reaches the offeror.

- (d) An offer may be revoked before the letter containing the acceptance is posted. An acceptance can be revoked before it reaches the offeror.

### **Contracts over the Telephone**

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

### **(b) Intention to Create Legal Relations**

The second essential element of a valid contract is that there must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. If there is no such intention on the part of the parties, there is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship. As such they are not contracts.

A proposal or an offer is made with a view to obtain the assent to the other party and when that other party expresses his willingness to the act or abstinence proposed, he accepts the offer and a contract is made between the two. But both offer and acceptance must be made with the intention of creating legal relations between the parties. The test of intention is objective. The Courts seek to give effect to the presumed intention of the parties. Where necessary, the Court would look into the conduct of the parties, for much can be inferred from the conduct. The Court is not concerned with the mental intention of the parties, but rather with what a reasonable man would say, was the intention of the parties, having regard to all the circumstances of the case.

For example, if two persons agree to assist each other by rendering advice, in the pursuit of virtue, science or art, it cannot be regarded as a contract. In commercial and business agreements, the presumption is usually that the parties intended to create legal relations. But this presumption is rebuttable which means that it must be shown that the parties did not intend to be legally bound.

### **(c) Consideration**

#### **Need for Consideration**

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

It is only when a promise is made for something in return from the promisee, that such promise can be enforced by law against the promisor. This something in return is the consideration for the promise.

### Definition of Consideration

Sir Fredrick Pollock has defined consideration “as an act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought”.

It is “some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other” (*Currie v. Misa* (1875) L.R. 10 Ex. 153).

Section 2(d) of the Indian Contract Act, 1872 defines consideration thus: “when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise”.

The fundamental principle that consideration is essential in every contract, is laid down by both the definitions but there are some important points of difference in respect of the nature and extent of consideration and parties to it under the two systems:

- (a) *Consideration at the desire of the promisor:* Section 2(d) of the Act begins with the statement that consideration must move at the desire or request of the promisor. This means that whatever is done must have been done at the desire of the promisor and not voluntarily or not at the desire of a third party. If A rushes to B’s help whose house is on fire, there is no consideration but a voluntary act. But if A goes to B’s help at B’s request, there is good consideration as B did not wish to do the act gratuitously.
- (b) *Consideration may move from the promisee or any other person:* In English law, consideration must move from the promisee, so that a stranger to the consideration cannot sue on the contract. A person seeking to enforce a simple contract must prove in court that he himself has given the consideration in return for the promise he is seeking to enforce.

In Indian law, however, consideration may move from the promisee or any other person, so that a stranger to the consideration may maintain a suit. In *Chinnaya v. Ramaya*, (1882) 4 Mad. 137, a lady by a deed of gift made over certain property to her daughter directing her to pay an annuity to the donor’s brother as had been done by the donor herself before she gifted the property. On the same day, her daughter executed in writing in favour of the donor’s brother agreeing to pay the annuity. Afterwards the donee (the daughter) declined to fulfil her promise to pay her uncle saying that no consideration had moved from him. The Court, however, held that the uncle could sue even though no part of the consideration received by his niece moved from him. The consideration from her mother was sufficient consideration.

### Privity of Contract

A stranger to a contract cannot sue both under the English and Indian law for want of privity of contract. The following illustration explains this point.

In *Dunlop Pneumatic Tyre Co. v. Selfridge Ltd.* (1915) A.C. 847, D supplied tyres to a wholesaler X, on condition that any retailer to whom X re-supplied the tyres should promise X, not to sell them to the public below D’s list price. X supplied tyres to S upon this condition, but nevertheless S sold the tyres below the list price. Held: There was a contract between D and X and a contract between X and S. Therefore, D could not obtain damages from S, as D had not given any consideration for S’s promise to X nor was he party to the contract between D and X.

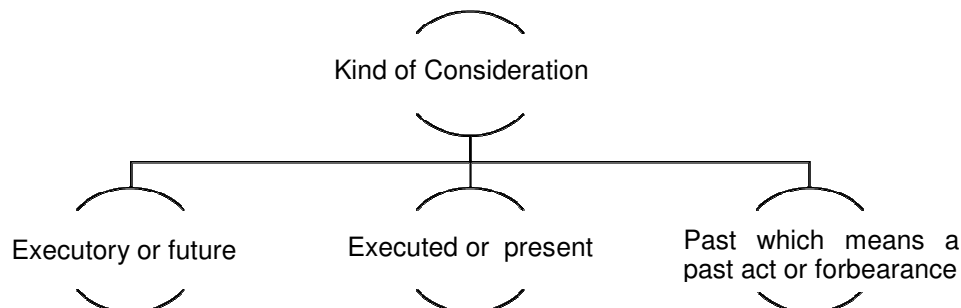
Thus, a person who is not a party to a contract cannot sue upon it even though the contract is for his benefit. A, who is indebted to B, sells his property to C, and C the purchaser of the property, promises to pay off the debt to B. In case C fails to pay B, B has no right to sue C for there is no privity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

The leading English case on the point is *Tweddle v. Atkinson* (1861) 1B and Section 393. In this case, the father of a boy and the father of a girl who was to be married to the boy, agreed that each of them shall pay a sum of money to the boy who was to take up the new responsibilities of married life. After the demise of both the contracting parties, the boy (the husband) sued the executors of his father-in-law upon the agreement between his father-in-law and his father. *Held*: the suit was not maintainable as the boy was not a party to the contract.

*Exception to the doctrine of privity of contract*: Both the Indian law and the English law recognize certain exceptions to the rule that a stranger to a contract cannot sue on the contract. In the following cases, a person who is not a party to a contract can enforce the contract:

- (i) A beneficiary under an agreement to create a trust can sue upon the agreement, though not a party to it, for the enforcement of the trust so as to get the trust executed for his benefit. In *Khawaja Muhammad v. Hussaini Begum*, (1910) 32 All. 410, it was held that where a Mohammedan lady sued her father-in-law to recover arrears of allowance payable to her by him under an agreement between him and her own father in consideration of her marriage, she could enforce the promise in her favour in so far as she was a beneficiary under the agreement to make a settlement in her favour, and she was claiming as beneficiary under such settlement.
- (ii) An assignee under an assignment made by the parties, or by the operation of law (e.g. in case of death or insolvency), can sue upon the contract for the enforcement of his rights, title and interest. But a mere nominee (i.e., the person for whose benefit another has insured his own life) cannot sue on the policy because the nominee is not an assignee.
- (iii) In cases of family arrangements or settlements between male members of a Hindu family which provide for the maintenance or expenses for marriages of female members, the latter though not parties to the contract, possess an actual beneficial right which place them in the position of beneficiaries under the contract, and can therefore, sue.
- (iv) In case of acknowledgement of liability, e.g., where A receives money from B for paying to C, and admits to C the receipt of that amount, then A constitutes himself as the agent of C.
- (v) Whenever the promisor is by his own conduct estopped from denying his liability to perform the promise, the person who is not a party to the contract can sue upon it to make the promisor liable.
- (vi) In cases where a person makes a promise to an individual for the benefit of third party and creates a charge on certain immovable property for the purpose, the third party can enforce the promise though, he is stranger to the contract.

## Kinds of Consideration





Consideration may be:

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

According to English law, a consideration may be executory or executed but never past. The English law is that past consideration is no consideration. *The Indian law recognizes all the above three kinds of consideration.*

### Rules Governing Consideration

- (a) Every simple contract must be supported by valuable consideration otherwise it is formally void subject to some exceptions.
- (b) Consideration may be an act of abstinence or promise.
- (c) There must be mutuality i.e., each party must do or agree to do something. A gratuitous promise as in the case of subscription for charity, is not enforceable. For example, where A promises to subscribe ₹5,000 for the repair of a temple, and then refuses to pay, no action can be taken against him.
- (d) Consideration must be real, and not vague, indefinite, or illusory, e.g., a son's promise to "stop being a nuisance" to his father, being vague, is no consideration.
- (e) Although consideration must have some value, it need not be adequate i.e., a full return for the promise. Section 25 (Exp. II) clearly provides that "an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate". It is upon the parties to fix their own prices. For example, where A voluntarily agreed to sell his motor car for ₹500 to B, it became a valid contract despite the inadequacy of the consideration.
- (f) Consideration must be lawful, e.g., it must not be some illegal act such as paying someone to commit a crime. If the consideration is unlawful, the agreement is void.
- (g) Consideration must be something more than the promisee is already bound to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration. For example, if a seaman deserts his ship so breaking his contract of service and is induced to return to his duty by the promise for extra wages, he cannot later sue for the extra wages since he has only done what he had already contracted for: *Stilk v. Myrick* (1809).

### When Consideration not Necessary

The general rule is that an agreement made without consideration is void. But Section 25 of the Indian

Contract Act lays down certain exceptions which make a promise without consideration valid and binding. Thus, an agreement without consideration is valid:

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

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

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

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

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

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

### Illustrations

A, for natural love and affection, promises to give his son B ₹10,000. A put his promise to B into writing and registered it. This is a contract.

A registered agreement between a husband and his wife to pay his earnings to her is a valid contract, as it is in writing, is registered, is between parties standing in near relation, and is for love and affection (*Poonoo Bibi v. FyazBuksh*, (1874) 15 Bom L.R. 57).

But where a husband by a registered document, after referring to quarrels and disagreement between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence, it was held that the promise was unenforceable, as it was not made for love and affection (*Rajlucky Deb v. Bhootnath*(1900) 4 C.W.N. 488).

### Whether Gratuitous Promise can be Enforced

A gratuitous promise to subscribe to a charitable cause cannot be enforced, but if the promisee is put to some detriment as a result of his acting on the faith of the promise and the promisor knew the purpose and also knew that on the faith of the subscription an obligation might be incurred, the promisor would be bound by promise (*KedarNath v. Gorie Mohan* 64).

It may be noted that it is not necessary that the promisor should benefit by the consideration, it is sufficient if the promisee does some act from which a third person is benefited and he would not have done that act but for the promise of the promisor.

For example, Y requests X for loan, who agrees to give loan to Y if S gives guarantee of repayment of the loan. S gives such a guarantee of repayment by Y. Thereupon X gives loan to Y. Here S will be promisor and X the promisee, but from X's action, benefit is derived by Y and not by S. X would not have given the loan to Y had S not given the guarantee of repayment of loan. Thus, the benefit conferred on Y by X at the request of S is a sufficient consideration on the part of X as against the promise of S to repay the loan. Alternatively, it may be said that the detriment which X suffered by giving loan to Y at the request of S is sufficient consideration on the part of X in respect of the promise of S to repay the loan.

Consideration therefore, is some detriment to the promisee or some benefit to the promisor. Detriment to one person and benefit to the other are the same things looked from two angles. Ordinarily a promisor is not bound by his promise, unless some consideration is offered by the promisee.

### Terms Must be Certain

It follows from what has been explained in relation to offer, acceptance and consideration that to be binding, an agreement must result in a contract. That is to say, the parties must agree on the terms of their contract. They must make their intentions clear in their contract. The Court will not enforce a contract the terms of which are uncertain. Thus, an agreement to agree in the future (*a contract to make a contract*) will not constitute a binding contract e.g., a promise to pay an actress a salary to be "*mutually agreed between us*" is not a contract since the salary is not yet agreed: *Loftus v. Roberts* (1902).

Similarly, where the terms of a final agreement are too vague, the contract will fail for uncertainty. Hence, the terms must be definite or capable of being made definite without further agreement of the parties.

The legal maxim, therefore, is "*a contract to contract is not a contract*". If you agree "subject to contract" or "subject to agreement", the contract does not come into existence, for there is no definite or unqualified acceptance.

### Resume

Thus, a contract is always based upon:

- (i) Agreement (*consensus ad idem*) an unqualified acceptance of a definite offer;
- (ii) An intent to create legal obligations; and
- (iii) Consideration.

### FLAWS IN CONTRACT

There may be the circumstances under which a contract made under these rules may still be bad, because there is a flaw, vice or error somewhere. As a result of such a flaw, the apparent agreement is not a real agreement.

Where there is no real agreement, the law has three remedies:

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

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

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

#### (a) Void Agreement

A void agreement is one which is destitute of all legal effects. It cannot be enforced and confers no rights on

either party. It is really not a contract at all, it is non-existent. Technically the words 'void contract' are a contradiction in terms. But the expression provides a useful label for describing the situation that arises when a 'contract' is claimed but in fact does not exist. For example, a minors contract is void.

### (b) Voidable Contract

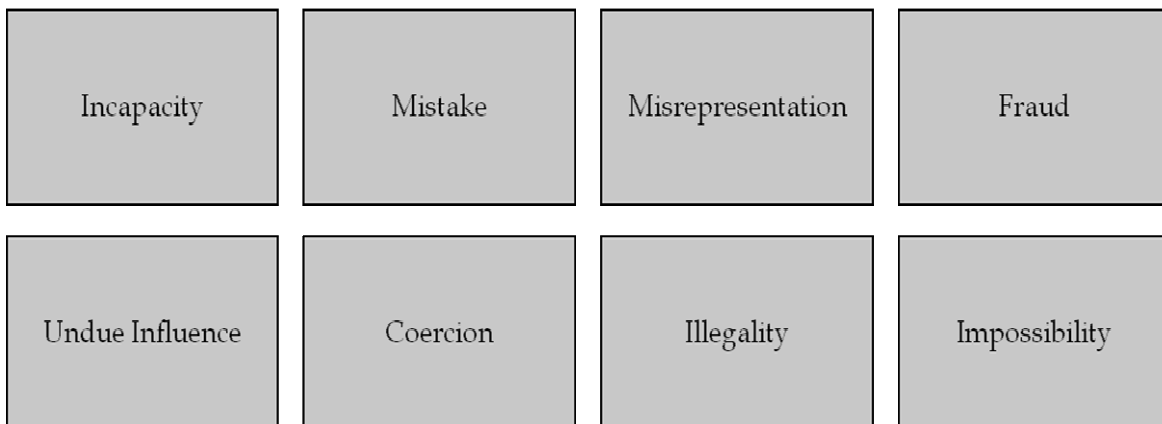
A voidable contract is one which a party can put to an end. He can exercise his option, if his consent was not free. The contract will, however be binding, if he does not exercise his option to avoid it within a reasonable time. The consent of a party is not free and so he is entitled to avoid the contract, if he has given his cosent due to misrepresentation, fraud, coercion or undue influence.

### (c) Illegal Agreement

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

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

The chief flaws in contract are:



### (i) Flaw in Capacity —Capacity and Persons

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

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

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

These persons are not competent to contract. Section 11 provides that every “person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject”. A valid agreement requires that both the parties should understand the legal implications of their conduct. Thus, both must have a mature mind. The legal yardstick to measure maturity according to the law of contract is, that both should be major and of sound mind and if not, the law would presume that the maturity of their mind has not reached to the extent of visualising the pros and cons of their acts, hence, a bar on minors and lunatics competency to contract.

The contractual capacity of a corporation depends on the manner in which it was created.

### Minor's Contract

According to the Indian Majority Act, 1875, a minor is a person, male or female, who has not completed the age of 18 years. In case a guardian has been appointed to the minor or where the minor is under the guardianship of the Court of Wards, the person continues to be a minor until he completes his age of 21 years. According to the Indian Contract Act, no person is competent to enter into a contract who is not of the age of majority. It was finally laid down by the Privy Council in the leading case of *Mohori Bibi v. Dharmodas Ghose*, (1903) 30 Cal. 539, that a minor has no capacity to contract and minors contract is absolutely void. In this case, X, a minor borrowed Rs. 20,000 from Y, a money lender. As a security for the money advanced, X executed a mortgage in Y's favour. When sued by Y, the Court held that the contract by X was void and he cannot be compelled to repay the amount advanced by him.

Indian Courts have applied this decision to those cases where the minor has incurred any liability or where the liabilities on both sides are outstanding. In such cases, the minor is not liable. But if the minor has carried out his part of the contract, then, the Courts have held, that he can proceed against the other party. The rationale is to protect minors interest. According to the Transfer of Property Act, a minor cannot transfer property but he can be a transferee (person accepting a transfer). This statutory provision is an illustration of the above principle.

The following points must be kept in mind with respect to minors contract:

- (a) A minor's contract is altogether void in law, and a minor cannot bind himself by a contract. If the minor has obtained any benefit, such as money on a mortgage, he cannot be asked to repay, nor can his mortgaged property be made liable to pay.
- (b) Since the contract is void *ab initio*, it cannot be ratified by the minor on attaining the age of majority.
- (c) Estoppel is an important principle of the law of evidence. To explain, suppose X makes a statement to Y and intends that the latter should believe and act upon it. Later on, X cannot resile from this statement and make a new one.

In other words, X will be estopped from denying his previous statement. But a minor can always plead minority and is not estopped from doing so even where he had produced a loan or entered into some other contract by falsely representing that he was of full age, when in reality he was a minor.

But where the loan was obtained by fraudulent representation by the minor or some property was sold by him and the transactions are set aside as being void, the Court may direct the minor to restore the property to the other party.

For example, a minor fraudulently overstates his age and takes delivery of a motor car after executing a promissory note in favour of the trader for its price. The minor cannot be compelled to pay the amount to the promissory note, but the Court on equitable grounds may order the minor to

return the car to the trader, if it is still with the minor.

Thus, according to Section 33 of the Specific Relief Act, 1963 the Court may, if the minor has received any benefit under the agreement from the other party require him to restore, so far as may be such benefit to the other party, to the extent to which he or his estate has been benefited thereby.

- (d) A minor's estate is liable to pay a reasonable price for necessaries supplied to him or to anyone whom the minor is bound to support (Section 68 of the Act).

The necessaries supplied must be according to the position and status in life of the minor and must be things which the minor actually needs. The following have also been held as necessaries in India.

Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy; costs incurred in defending him in a prosecution; and money advanced to a Hindu minor to meet his marriage expenses have been held to be necessaries.

- (e) An agreement by a minor being void, the Court will never direct specific performance of the contract.
- (f) A minor can be an agent, but he cannot be a principal nor can he be a partner. He can, however, be admitted to the benefits of a partnership.
- (g) Since a minor is never personally liable, he cannot be adjudicated as an insolvent.
- (h) An agreement by a parent or guardian entered into on behalf of the minor is binding on him provided it is for his benefit or is for legal necessity. For, the guardian of a minor, may enter into contract for marriage on behalf of the minor, and such a contract would be good in law and an action for its breach would lie, if the contract is for the benefit of the minor (*Rose Fernandez v. Joseph Gonsalves*, 48 Bom. L. R. 673) e.g., if the parties are of the community among whom it is customary for parents to contract marriage for their children. The contract of apprenticeship is also binding.

However, it has been held that an agreement for service, entered into by a father on behalf of his daughter who is a minor, is not enforceable at law (*Raj Rani v. PremAdib*, (1948) 51 Bom. L.R. 256).

## **Lunatics Agreement (Section 2)**

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

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

A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgement as to its effect on his interests cannot contract whilst such delirium or state of drunkenness lasts. A person under the influence of hypnotism is temporarily of unsound mind. Mental decay brought by old age or disease also comes within the definition.

Agreement by persons of unsound mind are void. But for necessaries supplied to a lunatic or to any member of his family, the lunatics estate, if any, will be liable. There is no personal liability incurred by the lunatic.

If a contract entered into by a lunatic or person of unsound mind is for his benefit, it can be enforced (for the benefit) against the other party but not vice-versa (*Jugal Kishore v. Cheddu*, (1903) 1 All. L.J 43).

### Persons Disqualified from Entering into Contract

Some statutes disqualify certain persons governed by them, to enter into a contract. For example, Oudh Land Revenue Act provides that where a person in Oudh is declared as a 'disqualified proprietor under the Act, he is incompetent to alienate his property.

### Alien Enemies

A person who is not an Indian citizen is an alien. An alien may be either an alien friend or a foreigner whose sovereign or State is at peace with India, has usually contractual capacity of an Indian citizen. On the declaration of war between his country and India he becomes an alien enemy. A contract with an alien enemy becomes unenforceable on the outbreak of war.

For the purposes of civil rights, an Indian citizen of the subject of a neutral state who is *voluntarily* resident in hostile territory or is carrying on business there is an alien enemy. Trading with an alien enemy is considered illegal, being against public policy.

### Foreign Sovereigns and Ambassadors

Foreign sovereigns and accredited representatives of foreign states, i.e., Ambassadors, High Commissioners, enjoy a special privilege in that they cannot be sued in Indian Courts, unless they voluntarily submit to the jurisdiction of the Indian Courts. Foreign Sovereign Governments can enter into contracts through agents residing in India. In such cases the agent becomes personally responsible for the performance of the contracts.

### Professional Persons

In England, barristers-at law are prohibited by the etiquette of their profession from suing for their fees. So also are the Fellow and Members of the Royal College of Physicians and Surgeons. But they can sue and be sued for all claims other than their professional fees. In India, there is no such disability and a barrister, who is in the position of an advocate with liberty both to act and plead, has a right to contract and to sue for his fees (*Nihal Chand v. Dilawar Khan*, 1933 All. L.R. 417).

### Corporations

A corporation is an artificial person created by law, e.g., a company registered under the Companies Act, public bodies created by statute, such as Municipal Corporation of Delhi. A corporation exists only in contemplation of law and has no physical shape or form.

The Indian Contract Act does not speak about the capacity of a corporation to enter into a contract. But if properly incorporated, it has a right to enter into a contract. It can sue and can be sued in its own name. There are some contracts into which a corporation cannot enter without its seal, and others not at all. A company, for instance, cannot contract to marry. Further, its capacity and powers to contract are limited by its charter or memorandum of association. Any contract beyond such power is ultra vires and void.

### Married Women

In India there is no difference between a man and a woman regarding contractual capacity. A woman married or single can enter into contracts in the same ways as a man. She can deal with her property in any manner she likes, provided, of course, she is a major and is of sound mind.

Under the English law, before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, a husband was responsible for his wife's contracts but since 1935 this liability no longer arises unless the wife is acting as the husband's agent. Now, therefore, even in England a married woman has full contractual capacity, and can sue and be sued in her own name.

### **Flaw in Consent**

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

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

### **(ii) Mistake (Sections 20 and 21)**

The law believes that contracts are made to be performed. The whole structure of business depends on this as the businessmen depend on the validity of contracts. Accordingly, the law says that it will not aid any one to evade consequences on the plea that he was mistaken.

On the other hand, the law also realises that mistakes do occur, and that these mistakes are so fundamental that there may be no contract at all. If the law recognises mistake in contract, the mistake will render the contract void.

### **Effect of Mistake**

A mistake in the nature of miscalculation or error of judgement by one or both the parties has no effect on the validity of the contract. For example, if A pays an excessive price for goods under a mistake as to their true value, the contract is binding on him (*Leaf v. International Galleries* (1950) 1 All E.R. 693).

Therefore, mistake must be a "vital operative mistake", i.e. it must be a mistake of fact which is fundamental to contract.

To be operative so as to render the contract void, the mistake must be:

- (a) of fact, and not of law or opinion;
- (b) the fact must be essential to agreement, i.e., so fundamental as to negative the agreement; and
- (c) must be on the part of both the parties.

Thus, where both the parties to an agreement are under a mistake as to a matter of fact essential to agreement, the agreement is void (Section 20). Such a mistake prevents the formation of any contract at all and the Court will declare it void. For example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain though neither party was aware of the fact. The agreement is void.

### **Mistake of Law and Mistake of Fact**

Mistakes are of two kinds: (i) mistake of law, and (ii) mistake of fact. If there is a mistake of law of the land,



the contract is binding because everyone is deemed to have knowledge of law of the land and ignorance of law is no excuse (*ignorantia juris non-excusat*).

But mistake of foreign law and mistake of private rights are treated as mistakes of fact and are excusable.

The law of a foreign country is to be proved in Indian Courts as ordinary facts. So mistake of foreign law makes the contract void. Similarly, if a contract is made in ignorance of private right of a party, it would be void, e.g., where A buys property which already belongs to him.

### **Mutual or Unilateral Mistake**

Mistake must be mutual or bilateral, i.e., it must be on the part of both parties. A unilateral mistake, i.e., mistake on the part of only one party, is generally of no effect unless (i) it concerns some fundamental fact and (ii) the other party is aware of the mistake. For this reason, error of judgement on the part of one of the parties has no effect and the contract will be valid.

### **Mutual or Common Mistake as to Subject-matter**

A contract is void when the parties to it assume that a certain state of things exist which does not actually exist or in their ignorance the contract means one thing to one and another thing to the other, and they contract subject to that assumption or under that ignorance. There is a mistake on the part of both the parties. Such a mistake may relate to the existence of the subject matter, its identity, quantity or quality.

- (a) *Mistake as to existence of the subject matter*: Where both parties believe the subject matter of the contract to be in existence but in fact, it is not in existence at the time of making the contract, there is mistake and the contract is void.

In *Couturier v. Hastie* (1856), there was a contract to buy cargo described as shipped from port A to port B and believed to be at sea which in fact got lost earlier unknown to the parties and hence not in existence at the time of the contract. Held, the contract was void due to the parties mistake.

- (b) *Mistake as to identity of the subject matter*: Where the parties are not in agreement to the identity of the subject matter, i.e., one means one thing and the other means another thing, the contract is void; there is no *consensus ad idem*.

In *Raffles v. Wichelhhaks* (1864), A agreed to buy from B a cargo of cotton to arrive “ex Peerless from Bombay”. There were two ships called “Peerless” sailing from Bombay, one arriving in October and the other in December. A meant the earlier ship and B the latter. Held, the contract was void for mistake.

- (c) *Mistake as to quantity of the subject matter*: There may be a mistake as to quantity or extent of the subject matter which will render the contract void even if the mistake was caused by the negligence of a third-party.

In *Henkel v. Pape* (1870), P wrote to H inquiring the price of rifles and suggested that he might buy as many as fifty. On receipt of a reply he wired send three rifles. Due to the mistake of the telegraph clerk the message transmitted to H was send the rifles. H despatched 50 rifles. Held, there was no contract between the parties.

- (d) *Mistake as to quality of the subject-matter or promise*: Mistake as to quality raises difficult questions. If the mistake is on the part of both the parties the contract is void. But if the mistake is only on the part of one party difficulty arises.

The general rule is that a party to a contract does not owe any duty to the other party to disclose all the facts in his possession during negotiations. Even if he knows that the other party is ignorant of or under

some misapprehension as to an important fact, he is under no obligation to enlighten him. Each party must protect his own interests unaided. In contract of sale of goods, this rule is summed up in the maxim *caveat emptor* (Let the buyer beware.) The seller is under no duty to reveal the defects of his goods to the buyer, subject to certain conditions.

### **Unilateral Mistake as to Nature of the Contract**

The general rule is that a person who signs an instrument is bound by its terms even if he has not read it. But a person who signs a document under a fundamental mistake as to its nature (not merely as to its contents) may have it avoided provided the mistake was due to either-

- (a) the blindness, illiteracy, or senility of the person signing, or
- (b) a trick or fraudulent misrepresentation as to the nature of the document.

### **Unilateral Mistake as to the Identity of the Person Contracted With**

It is a rule of law that if a person intends to contract with A, B cannot give himself any right under it. Hence, when a contract is made in which personalities of the contracting parties are or may be of importance, no other person can interpose and adopt the contract. For example, where M intends to contract only with A but enters into contract with B believing him to be A, the contract is vitiated by mistake as there is no *consensus ad idem*.

Mistake as to the identity of the person with whom the contract is made will operate to nullify the contract only if:

- (i) the identity is for material importance to the contracts; and
- (ii) the mistake is known to the other person, i.e., he knows that it is not intended that he should become a party to the contract.

In *Cundy v. Lindsay* [(1878) 3 A.C. 459, one Blenkarn posing as a reputed trader Blankiron, placed an order for some goods with M/s Lindsay and Co. The company, thought that it is dealing with Blankiron and supplied the goods. Blenkarn sold the goods to Cundy and did not pay to Lindsay. The latter sued Cundy. The Court held that there was no contract between Lindsay and Blenkarn and therefore Cundy has no title to the goods.

### **(iii) Misrepresentation(Section 18)**

The term “misrepresentation” is ordinarily used to connote both “innocent misrepresentation” and “dishonest misrepresentation”. Misrepresentation may, therefore, be either (i) Innocent misrepresentation, or (ii) Wilful misrepresentation with *intent to deceive* and is called fraud.

### **Innocent Misrepresentation**

If a person makes a representation believing what he says is true he commits innocent misrepresentation. Thus, any false representation, which is made with an honest belief in its truth is innocent. The effect of innocent misrepresentation is that the party misled by it can avoid the contract, but cannot sue for damages in the normal circumstances.

But in order to avoid a contract on the ground of misrepresentation, it is necessary to prove that:

- (i) there was a representation or assertion,
- (ii) such assertion induced the party aggrieved to enter into the contract.
- (iii) the assertion related to a matter of fact ( and not of law as ignorance of law is no excuse).

- (iv) the statement was not a mere opinion or hearsay, or commendation (i.e., reasonable praise). For example an advertisement saying, "washes whiter than the whitest".
- (v) the statement which has become or turned out to be untrue, was made with an honest belief in its truth.

### **Damages for Innocent Misrepresentation**

Generally the injured party can only avoid the contract and cannot get damages for innocent misrepresentation. But in the following cases, damages are obtainable:

- (i) From a promoter or director who makes innocent misrepresentation in a company prospectus inviting the public to subscribe for the shares in the company;
- (ii) Against an agent who commits a breach of warranty of authority;
- (iii) From a person who (at the Courts discretion) is estopped from denying a statement he has made where he made a positive statement intending that it should be relied upon and the innocent party did rely upon it and thereby suffered damages;
- (iv) Negligent representation made by one person to another between whom a confidential relationship, like that of a solicitor and client exists.

### **(iv) Wilful Misrepresentation or Fraud (Section 17)**

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

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

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

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

### **Contracts Uberrimae Fidei**

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

#### **Contracts *uberrimae fidei* are:**

- (a) *Contract of insurance of all kinds*: The assured must disclose to the insurer all material facts and

whatever he states must be correct and truthful.

- (b) *Company prospectus*: When a company invites the public to subscribe for its shares, it is under statutory obligation to disclose truthfully the various matters set out in the Companies Act. Any person responsible for non-disclosure of any of these matters is liable to damages. Also, the contract to buy shares is voidable where there is a material false statement or non-disclosure in the prospectus.
- (c) *Contract for the sale of land*: The vendor is under a duty to the purchaser to show good title to the land he has contracted to sell.
- (d) *Contracts of family arrangements*: When the members of a family make agreements or arrangements for the settlement of family property, each member of the family must make full disclosure of every material fact within his knowledge.

### **Difference between Fraud and Innocent Misrepresentation**

1. Fraud implies an intent to deceive, which is lacking if it is innocent misrepresentation.
2. In case of misrepresentation and fraudulent silence, the defendant can take a good plea that the plaintiff had the means of discovering the truth with ordinary diligence. This argument is not available if there is fraud (Section 19- exception).
3. In misrepresentation the plaintiff can avoid or rescind the contract. In fraud, the plaintiff can claim damages as well.
4. If there is fraud, it may lead to prosecution for an offence of cheating under the Indian Penal Code.

### **(v) Coercion**

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

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

### **(vi) Undue Influence**

Under Section 16 of the Indian Contract Act, 1872, a contract is said to be produced by undue influence “where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other”.

The elements of undue influence are (i) a dominant position, and (ii) the use of it to obtain an unfair advantage. The words “unfair advantage” do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. In the words of Lord Kingston, “the principle applies to every case where influence is acquired and abused where confidence is reposed and

betrayed”.

Sub-section (2) of Section 16 provides that a person is deemed to be in a position to dominate the will of another—

- (a) Where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other, e.g., minor and guardian; trustee and beneficiary; solicitor and client. There is, however, no presumption of undue influence in the relation of creditor and debtor, husband and wife (unless the wife is a *parda-nishin* woman) and landlord and tenant. In these cases the party has to prove that undue influence has been exercised on him, there being no presumption as to existence of undue influence.
- (b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress e.g., doctor and patient.

### Illustration

A, having advanced money to his son B, during his minority, upon B's coming of age obtains, by misuse of parental influence a bond upon B for a greater amount than the sum due in respect of the advance. A employs undue influence.

A, a man enfeebled by disease or age is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

A parent stands in a fiduciary relation towards his child and any transaction between them by which any benefit is procured by the parent to himself or to a third party, at the expense of the child will be viewed with jealousy by Courts of Equity and the burden will be on the parent or third-party claiming the benefit of showing that the child while entering into the transaction had independent advice, that he thoroughly understood the nature of transaction and that he was removed from all undue influence when the gift was made (*Marim Bibi v. Cassim Ebrahim* (1939) 184 I.C. 171 (1939) A.I.R. 278).

Where there is a presumption of undue influence, the presumption can be rebutted by showing that

- (i) full disclosure of all material facts was made,
- (ii) the consideration was adequate, and
- (iii) the weaker party was in receipt of independent legal advice.

### Transaction with *parda-nishin* women

The expression '*parda-nishin*' denotes complete seclusion. Thus, a woman who goes to a Court and gives evidence, who fixes rents with tenants and collects rents, who communicates when necessary, in matters of business, with men other than members of her own family, could not be regarded as a *parda-nishin* woman (*Ismail Musafee v. Hafiz Boo* (1906) 33 Cal. LR 773 and 33 I.A. 86). The principles to be applied to transactions with *parda-nishin* woman are founded on *equity and good conscience* and accordingly a person who contracts with *parda-nishin* woman has to prove that no undue influence was used and that she had free and independent advice, fully understood the contents of the contract and exercised her free will. "The law throws around her a special cloak of protection" (*Kali Baksh v. Ram Gopal* (1914) L.R. 41 I.A. 23, 28-29, 36 All 81, 89).

*Unconscionable transactions:* An unconscionable transaction is one which makes an exorbitant profit of the others distress by a person who is in a dominant position. Merely the fact that the rate of interest is very high in a money lending transaction shall not make it unconscionable. But if the rate of interest is very exorbitant

and the Court regards the transaction unconscionable, the burden of proving that no undue influence was exercised lies on the creditor. It has been held that urgent need of money on the part of the borrower does not itself place the lender in a position to dominate his will within the meaning of this Section (*Sunder Koerv. Rai Sham Krishen* (1907) 34 Cal. 150, C.R. 34 I.A. 9).

### (vii) Legality of Object

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

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

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

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

### Illustration

- (i) X, Y and Z enter into an agreement for the division among them of gains acquired by them by fraud. The agreement is void as its object is unlawful.
- (ii) X promises to obtain for Y an employment in the Government service and Y promises to pay Rs. 1,500 to X. The agreement is void, as the consideration for it is unlawful.
- (iii) X promises to Y to drop a prosecution which he has instituted against Y for robbery, and Y promises to restore the value of the things taken. The agreement is void as its object is unlawful.
- (iv) A who is B's *mukhtr* promises to exercise his influence, as such, with B in favour of C and C promises to pay Rs. 1,000 to A. The agreement is void because it is immoral.
- (v) An agreement by the proprietors of a newspaper to indemnify the printers against claims arising from libels printed in the newspaper is void as it implies or involves injury to the person of another.

### Void and Illegal Contracts

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

### Consequence of Illegal Agreements

- (i) an illegal agreement is entirely void;

- (ii) no action can be brought by a party to an illegal agreement. The maxim is “*Ex turpi cause non-oritur action*” - from an evil cause, no action arises;
- (iii) money paid or property transferred under an illegal agreement cannot be recovered. The maxim is *in parti delicto potierest condition defendeties*- In cases of equal guilt, more powerful is the condition of the defendant;
- (iv) where an agreement consist of two parts, one part legal and other illegal, and the legal parts is separable from the illegal one, then the Court will enforce the legal one. If the legal and the illegal parts cannot be separated the whole agreement is illegal; and
- (v) any agreement which is collateral to an illegal agreement is also tainted with illegality and is treated as being illegal, even though it would have been lawful by itself (*Film Pratapchand v. Firm Kotri Re.* AIR (1975) S.C. 1223).

**Exception to General Rule of no Recovery of Money or Property**

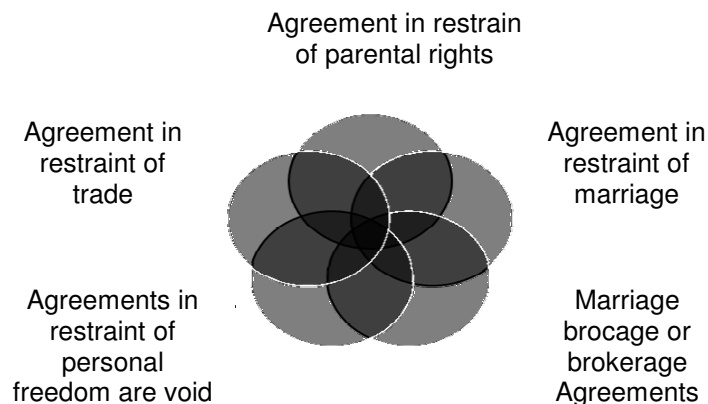
In the following cases, a party to an illegal agreement may sue to recover money paid or property transferred:

- (a) Where the transfer is not in *pari delicto* (equally guilty) with the defendant, i.e. the transferee. For example, where A is induced to enter into an illegal agreement by the fraud of B, A may recover the money paid if he did not know that the contract was illegal.
- (b) If the plaintiff can frame a cause of action entirely dependent of the contract.
- (c) Where a substantial part of the illegal transaction has not been carried out and the plaintiff is truly and genuinely repentant. (*Bigos v. Bonstead*(1951), All E.R. 92).

**Agreements Void as being Opposed to Public Policy**

The head public policy covers a wide range of topics. Agreements may offend public policy by tending to the prejudice of the State in times of war, by tending to the abuse of justice or by trying to impose unreasonable and inconvenient restrictions on the free choice of individuals in marriage, or their liberty to exercise lawful trade or calling. The doctrine of public policy is a branch of Common Law and like any other branch of Common Law it is governed by the precedents [*Gherulal Parakh v. MahadeodasMaiya* (1959) 2 S.C.R. (Suppl.) 406; AIR 1959 S.C. 781]. The doctrine of public policy is not to be extended beyond the classes of cases already covered by it and no Court can invent a new head of public policy [*Lord Halsbury, Janson v. Driefontien Consolidated Mines* (1902) A.C. 484, 491]. It has been said by the House of Lords that public policy is always an unsafe and treacherous ground for legal decisions. Even if it is possible for Courts to evolve a new head of public policy, it should be done under extraordinary circumstances giving rise to incontestable harm to the society.

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



- (a) *Agreement in restraint of parental rights*: An agreement by which a party deprives himself of the custody of his child is void.
- (b) *Agreement in restraint of marriage*: An agreement not to marry at all or not to marry any particular person or class of persons is void as it is in restraint of marriage.
- (c) *Marriage brokerage or brokerage Agreements*: An agreement to procure marriage for reward is void. Where a purohit (priest) was promised Rs. 200 in consideration of procuring a wife for the defendant, the promise was held void as opposed to public policy, and the purohit could not recover the promised sum.
- (d) *Agreements in restraint of personal freedom are void*: Where a man agreed with his money lender not to change his residence, or his employment or to part with any of his property or to incur any obligation on credit without the consent of the money lender, it was held that the agreement was void.
- (e) *Agreement in restraint of trade*: An agreement in restraint of trade is one which seeks to restrict a person from freely exercising his trade or profession.

### AGREEMENTS IN RESTRAINT OF TRADE VOID

Section 27 of the Indian Contract Act states that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is, to that extent, void.

This Section is not happily worded and has been criticised by many authors. It appears from the wording that every kind of restraint, whether total or partial falls within the prohibition of this Section. In English law the Courts have held that if a restraint is reasonable, it will be valid. Leading case on this point is *Nordenfelt v. Maxim Nordenfelt Guns Co.*, (1894) A.C. 535. N was an inventor and a manufacturer of guns and ammunition. He sold his world-wide business to M and promised not to manufacture guns anywhere in the world for 25 years. The House of Lords held that the restraint was reasonable as it was no more than is necessary for the protection of the company, the contract was binding. Whether a restraint is reasonable or not depends upon the facts of each case.

Our courts are not consistent on the point whether reasonable restraints are permitted or not. In *Madhub Chunder v. RaCoomar*(1874) 14 Bang. L.R. 76, A paid Rs. 900 to B's workman. B undertook to stop his business in a particular locality in Calcutta. He did not keep his promise. A's suit for the sum was dismissed since the agreement was void under Section 27. The reasonableness or otherwise of the restraint was not discussed. However, if a restrictive meaning is adopted, most of the ordinary mercantile agreements may be hit. Thus, the Courts have held that if the restraint is one which is really necessary for the carrying on business, the same is not prohibited. In *Mackenzie v. Sitarmiah*, (1891) 15 Mad. 79, A agreed to sell to B all the salt he manufactured and B agreed to buy such salt. A further agreed not to sell salt to third-parties. The Court held that the agreement was valid.

Other type of restraints is personal covenants between an employer and his employee whereby the latter agrees not to compete with the former or serve with any of his competitors after employment. This issue came before the Supreme Court in *Niranjan Shanker Golikari v. The Century Spinning and Manufacturing Co. Ltd.*, AIR 1967 S.C. 1098. In this case N entered into a bond with the company to serve for a period of five years. In case, N leaves his job earlier and joins elsewhere with company's competitor within five years, he was liable for damages. N was imparted the necessary training but he left the job and joined another company. The former employer instituted a suit against N. The Supreme Court, held that the restraint was necessary for the protection of the company's interests and not such as the Court would refuse to enforce.

In other case, it has been reiterated that the restriction should be reasonable taking into account the facts



and circumstances of the case. In *Superintendence Company of India Ltd. v. Krishna Murgai* [(1981) 2 SCC 246], the Supreme Court laid down that a restraint beyond the term of service would be void and the only ground on which it can be justified is by showing it is necessary for the protection of the employers goodwill.

The words “to the extent” in Section 27 make it clear that if in an agreement there are some covenants which are prohibited whereas the others are not and if the two parts can be separated then only those covenants which operate as restraint of trade would be void and not whole of the agreement itself. To illustrate, in *Brahmputra Tea Co. Ltd. v. Scarth* (1885) I.L.R. Cal. 545, the employee agreed with the employer firstly, not to compete with latter after leaving the job and, secondly, not to injure employer’s interest during employment. The Court held that the first condition is a restraint of trade but the second is binding.

### When Contracts in Restraint of Trade Valid

*Prima facie* every restraint of trade is void, but certain exceptions to this general rule are recognised. If a partial and reasonable restraint falls under any of the following exceptions, the contract will be enforceable:

- (a) *Sale of goodwill*: Where the seller of the goodwill of a business undertakes not to compete with the purchaser of the goodwill, the contract is enforceable provided the restraint appears to be reasonable as to territorial limits and the length of time.
- (b) *Partners agreements*: Section 11(2) of the Indian Partnership Act permits contracts between partners to provide that a partner shall not carry on any business other than that of the firm while he is a partner.
- (c) Section 36(2) and Section 54 of the Indian Partnership Act provide that a partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within specified period or within specified limits. The agreement shall be binding if the restrictions are reasonable.

*Trade Combinations*: An agreement, the object of which is to regulate business and not to restrain it is valid. Thus, an agreement in the nature of a business combination between traders or manufactures e.g. not to sell their goods below a certain price, to pool profits or output and to divide the same in an agreed proportion does not amount to a restraint of trade and is perfectly valid (*Fraser & Co. v. Laxmi Narain*, (1931) 63 All 316).

*Negative stipulations in service agreements*: An agreement of service by which a person binds himself during the term of the agreement not to take service with anyone else is not in restraint of lawful profession and is valid.

## WAGERING AGREEMENTS

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

The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature that is to say, if the event turns out one way A will lose; but if it turns out the other way he will win (*Thacker v. Hardy*, (1878) 4 OBD 685).

### Wagering Agreements Void

In India except Mumbai, wagering agreements are void. In Mumbai, wagering agreements have been

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

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

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

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

## VOID AGREEMENTS

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

- (a) Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract - Section 11;
- (b) Agreement made under a mistake of fact, material to the agreement on the part of the both the parties - Section 20.
- (c) An agreement of which the consideration or object is unlawful - Section 23.
- (d) If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void - Section 24.
- (e) An agreement made without consideration subject to three exceptions provided to Section 25.
- (f) An agreement in restraint of marriage - Section 26.
- (g) An agreement in restraint of trade - Section 27.
- (h) An agreement in restraint of legal proceedings - Section 28.
- (i) Agreements, the meaning of which is not certain, or capable of being made certain - Section 29.
- (j) Agreement by way of wager- Section 30.
- (k) An agreement to enter into an agreement in the future.
- (l) An agreement to do an act impossible in itself - Section 56(1)

## When contract becomes void

An agreement not enforceable by law is void *ab initio* - Section 2(g).

A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable - Section 2(j)

A contract becomes void when, by reason of some event which the promisor could not prevent, the performance of the contract becomes impossible, e.g., by destruction of the subject-matter of the contract after the formation of the contract.

A contract becomes void by reason of subsequent illegality. A in India agrees to supply goods to B in Pakistan. After the formation of the contract war breaks out between India and Pakistan and the supply of goods to Pakistan is prohibited by legislation. The contract becomes void.

A contingent contract to do or not do to anything if an uncertain future event happens becomes void if the event becomes impossible.

Where a contract is voidable at the option of the aggrieved party, the contract becomes void when the option is exercised by him.

## RESTITUTION

When a contract becomes void, it is not to be performed by either party. But if any party has received any benefit under such a contract from the other party he must restore it or make compensation for it to the other party. A agrees to sell to B after 6 months a certain quantity of gold and receives ₹500 as advance. Soon after the agreement, private sales of gold are prohibited by law. The contract becomes void and A must return the sum of ₹500 to B.

Restitution is also provided for by Section 65 where an agreement is discovered to be void. A pays ₹500 in consideration of B's promising to marry, C, A's daughter. C is dead at the time of the promise. The agreement is discovered to be void and B must pay back ₹500.

But there is no restitution where the parties are wholly incompetent to contract, e.g., where one of the parties is a minor. The minor cannot be asked to restore the benefit, e.g., a minor borrowed ₹1,000 from B, he cannot be asked to pay back ₹1,000 to B because the contract is void (*Mohori Bibis case*).

## CONTINGENT CONTRACT (Section 31)

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

Contract of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

## Rules regarding contingent contracts

The following rules are contained in Section 32-36:

- (a) Contracts contingent upon the happening of a future uncertain event cannot be enforced by law unless and until that event has happened. If the event becomes impossible, the contract becomes void - Section 32.
  - (i) A makes a contract to buy B's house if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
  - (ii) A contracts to pay B a sum of money when B marries C, C dies without being married to B. The contract becomes void.

- (b) Contracts contingent upon the non-happening of an uncertain future event can be enforced when the happening of that event becomes impossible and not before - Section 33.

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

- (c) If a contract is contingent upon how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time or otherwise than under further contingencies - Section 34.

A agrees to pay B Rs. 1,000 if B marries C. C marries D. The marriage of B to C must now be considered impossible although it is possible that D may die and C may afterwards marry B.

- (d) Contracts contingent on the happening of an event within a fixed time become void if, at the expiration of the time, such event has not happened, or if, before the time fixed, such event becomes impossible - Section 35.

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

- (e) Contracts contingent upon the non-happening of an event within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or before the time fixed has expired, if it becomes certain that such event will not happen - Section 35

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

- (f) Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not known to the parties to the agreement at the time when it is made - Section 36.

A agrees to pay Rs. 1,000 to B if two straight lines should enclose a space. The agreement is void.

## **CERTAIN RELATIONS RESEMBLING THOSE OF CONTRACT (QUASI CONTRACTS)**

### **Nature of Quasi-Contracts**

A valid contract must contain certain essential elements, such as offer and acceptance, capacity to contract, consideration and free consent. But sometimes the law implies a promise imposing obligations on one party and conferring right in favour of the other even when there is no offer, no acceptance, no *consensus ad idem*, and in fact, there is neither agreement nor promise. Such cases are not contracts in the strict sense, but the Court recognises them as relations resembling those of contracts and enforces them as if they were contracts, hence the term quasi- contracts (i.e., resembling a contract).

A quasi-contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth, it is not a contract at all. It is an obligation which the law creates, in the absence of any agreement, when any person is in the possession of other persons money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which in justice and fairness belongs to another. It is the duty and not an agreement or intention which defines it. A very simple illustration is money paid under mistake. Equity demands that such money must be paid back.

### **Quasi-Contracts or Implied Contracts under the Indian Contract Act**

The following types of quasi-contracts have been dealt within the Indian Contract Act—

- (a) Necessaries supplied to person incapable of contracting or to anyone whom he is illegally bound to support - Section 68.
- (b) Suit for money had and received - Section 69 and 72.
- (c) *Quantum Meruit*
- (d) Obligations of a finder of goods - Section 71.
- (e) Obligation of person enjoying benefit of a non-gratuitous act - Section 70

### Necessaries

Contracts by minors and persons of unsound mind are void. However, Section 68 of the Indian Contract Act provides that their estates are liable to reimburse the trader, who supplies them with necessaries of life.

### Suit for money had and received

The right to file a suit for the recovery of money may arise

- (a) *Where the plaintiff paid money to the defendant* (i) under a mistake, (ii) in pursuance of a contract the consideration for which has failed, or (iii) under coercion, oppression, extortion or other such means.

A debtor may recover, from a creditor the amount of an over-payment made to him by mistake. The mistake may be mistake of fact or a mistake of law.

- (b) *Payment to third-party of money which another is bound to pay.* For example, where A's goods are wrongfully attached in order to realise arrears of Government revenue due by B, and A pays the amount to save his goods from being sold, he is entitled to recover the amount from B.
- (c) *Money obtained by defendant from third-parties.* For example, where an agent has obtained a secret commission or a fraudulent payment from a third-party, the principle can recover the amount from the agent.

### Quantum Meruit

The expression "*Quantum Meruit*" literally means "as much as earned" or reasonable remuneration. It is used where a person claims reasonable remuneration for the services rendered by him when there was no express promise to pay the definite remuneration, Thus, the law implies reasonable compensation for the services rendered by a party if there are circumstances showing that these are to be paid for.

The general rule is that where a party to a contract has not fully performed what the contract demands as a condition of payment, he cannot sue for payment for that which he has done. The contract has to be indivisible and the payment can be demanded only on the completion of the contract.

But where one party who has performed part of his contract is prevented by the other from completing it, he may sue on a *quantum meruit*, for the value of what he has done.

The claim on a *quantum meruit* arises when one party abandons the contract, or accepts the work done by another under a void contract.

The party in default may also sue on a "*quantum meruit*" for what he has done if the contract is divisible and the other party has had the benefit of the part which has been performed. But if the contract is not divisible, the party at fault cannot claim the value of what he has done.

### Obligations of finder of lost goods

The liability of a finder of goods belonging to someone else is that of a bailee. This means that he must take as much care of the goods as a man of ordinary prudence would take of his own goods of the same kind. So far as the real owner of the goods is concerned, the finder is only a bailee and must not appropriate the goods to his own use. If the owner is traced, he must return the goods to him. The finder is entitled to get the reward that may have been offered by the owner and also any expenses he may have incurred in protecting and preserving the property.

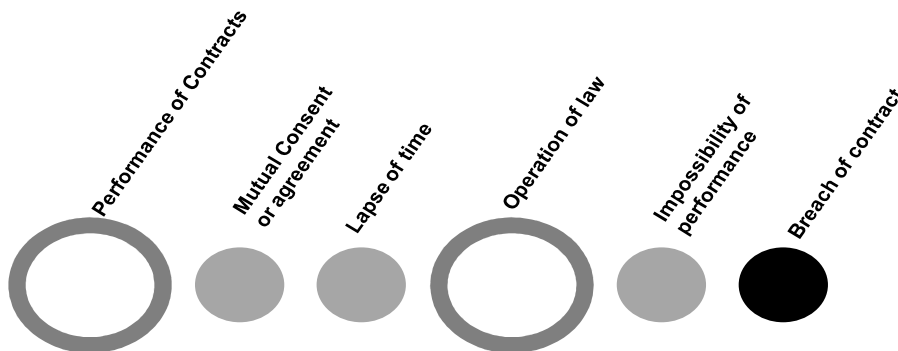
### Obligation of a person enjoying benefit of non-gratuitous act

Section 70 of the Indian Contract Act provides that where a person lawfully does something for another person or delivers anything to him without any intention of doing so gratuitously and the other person accepts and enjoys the benefit thereof, the latter must compensate the former or restore to him the thing so delivered. For example, when one of the two joint tenants pays the whole rent to the landlord, he is entitled to compensation from his co-tenant, or if A, a tradesman, leaves goods at B's house by mistake and B treats the goods as his own, he is bound to pay A for them.

## DISCHARGE OR TERMINATION OF CONTRACTS

A contract is said to be discharged or terminated when the rights and obligations arising out of a contract are extinguished.

Contracts may be discharged or terminated by any of the following modes:



### (a) Performance of Contracts (Section 37)

Section 37 of the Act provides that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provision of the Indian Contract Act, or any other law. In case of death of the promisor before performance, the representatives of the promisor are bound to perform the promise *unless a contrary intention appears from the contract*.

#### Illustration

X promises to deliver a horse to Y on a certain day on payment of Rs 1,000. X dies before that day. X's representatives are bound to deliver the horse to Y and Y is bound to pay Rs. 1,000 to X's representatives.

### Tender of Performance (Section 38)

In case of some contracts, it is sometimes sufficient if the promisor performs his side of the contract. Then, if

the performance is rejected, the promisor is discharged from further liability and may sue for the breach of contract if he so wishes. This is called discharge by tender.

To be valid, a tender must fulfil the following conditions

- (a) it must be unconditional;
- (b) it must be made at a proper time and place;
- (c) it must be made under circumstances enabling the other party to ascertain that the party by whom it is made is able and willing then and there to do the whole of what he is bound, to do by his promise;
- (d) if the tender relates to delivery of goods, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver;
- (e) tender made to one of the several joint promisees has the same effect as a tender to all of them.

### Who can demand performance?

Generally speaking, a stranger to contract cannot sue and the person who can demand performance is the party to whom the promise is made. But an assignee of the rights and benefits under a contract may demand performance by the promisor, in the same way as the assignor, (i.e., the promisee) could have demanded.

### Effect of refusal of party to perform wholly

Section 39 provides that when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract unless he had signified by words or conduct his acquiescence in its continuance.

### Illustration

- (a) X, a singer enters into a contract with Y, the manager of a theatre to sing at his theatres two nights in every week during the next two months, and Y engaged to pay her Rs. 100 for each night's performance. On the sixth night X wilfully absents herself from the theatre. Y is at liberty to put an end to the contract.
- (b) If in the above illustration, with the assent of Y, X sings on the seventh night, Y is presumed to have signified his acquiescence in the continuance of the contract and cannot put an end to it; but is entitled to compensation for the damages sustained by him through X's failure to sing on the sixth night.

### By whom contract must be performed

Under Section 40 of the Act, if it appears from the nature of the case that it was the intention of the parties to a contract that it should be performed by the promisor himself such promise must be performed by the promisor himself. In other cases, the promisor or his representative may employ a competent person to perform it.

### Illustration

- (a) X promises to pay Rs. 1,000 to Y. X may either personally pay the money to Y or cause it to be paid to Y by another. If X dies before making payment, his representatives must perform the promise or employ some proper person to do so.
- (b) X promises to paint a picture for Y. X must personally perform the promise.

### Devolution of Joint Liabilities

Under Section 42 of the Indian Contract Act, where two or more persons have made a joint promise then,

*unless a contrary intention appears* from the contract all such persons should perform the promise. If any one of them dies, his representatives jointly with the survivor or survivors should perform. After the death of the last survivor, the representatives of all jointly must fulfil the promise.

Under Section 43 of the Indian Contract Act when two or more persons made a joint promise, the promisee may, in the *absence of an express agreement* to the contrary compel any one or more of such joint promisors to perform the whole of the promise. Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise *unless a contrary intention appears from the contract*. If any one of two or more promisors make default in such contribution, the remaining joint promisors should bear the loss arising from such default in equal share.

### Illustrations

- (a) X, Y and Z jointly promise to pay ₹6,000 to A. A may compel either X or Y or Z to pay the amount.
- (b) In the above example imagine, Z is compelled to pay the whole amount; X is insolvent but his assets are sufficient to pay one-half of his debts. Z is entitled to receive ₹1,000 from X's estate and ₹2,500 from Y.
- (c) X, Y and Z make a joint promise to pay ₹5,000 to A, Z is unable to pay any amount and X is compelled to pay the whole. X is entitled to receive ₹2,500 from Y.

Under Section 44 of the Act, where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor(s); neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

### Devolution of Joint Rights

A promise may be made to two or more persons. The promisees are called joint promisees. For example, X may give a promise to repay Rs. 1,000 given by Y and Z jointly. In such case, *in the absence of a contrary intention*, the right to claim, performance rests with Y and Z. If Y dies, Y's representative jointly with Z may, demand performance. If Z also dies, the representatives of Y and Z may demand jointly performance from X.

### Assignment

The promisee may assign rights and benefits of contract and the assignee will be entitled to demand performance by the promisor. But the assignment to be complete and effectual, must be made by an instrument in writing.

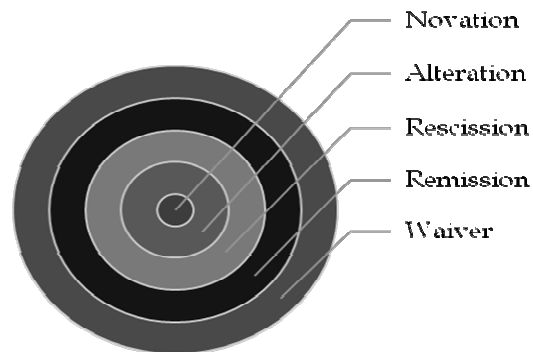
An obligation or liability under a contract cannot be assigned. For example, if A owes B Rs. 500 and A transfers the liability to C i.e. asks C to pay the sum to B, this would not bind B, and B may not consent to this arrangement, as he may know nothing of C's solvency. But if B consents to accept performance by C, there is a substitution of new contract and the old contract is discharged and all rights and liabilities under it are extinguished. This is technically called *novation*.

### (b) Discharge by Mutual Agreement or Consent (Sections 62 and 63)

A contract may be discharged by the agreement of all parties to the contract, or by waiver or release by the party entitled to performance.

The methods stipulated under Sections 62 and 63 of the Indian Contract Act for discharging a contract by mutual consent are:





*Novation* — when a new contract is substituted for existing contract either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.

*Alteration* — change in one or more of the material terms of a contract.

*Rescission* — by agreement between the parties at any time before it is discharged by performance or in some other way.

*Remission* — acceptance of a lesser sum than what was contracted for or a lesser fulfilment of the promise made.

*Waiver* — deliberate abandonment or giving up of a right which a party is entitled to under a contract, where upon the other party to the contract is released from his obligation.

### **(c) Discharge by Lapses of Time**

The Limitation Act, in certain circumstance, affords a good defence to suits for breach of contract, and infact terminates the contract by depriving the party of his remedy to law. For example, where a debtor has failed to repay the loan on the stipulated date, the creditor must file the suit against him within three years of the default. If the limitation period of three years expires and he takes no action he will be barred from his remedy and the other party is discharged of his liability to perform.

### **(d) Discharge by Operation of the Law**

Discharge under this head may take place as follows:

- (a) *By merger*: When the parties embody the inferior contract in a superior contract.
- (b) *By the unauthorised alteration of items of a written document*: Where a party to a written contract makes any material alteration without knowledge and consent of the other, the contract can be avoided by the other party.
- (c) *By insolvency*: The Insolvency Act provides for discharge of contracts under particular circumstances. For example, where the Court passes an order discharging the insolvent, this order exonerates or discharges him from liabilities on all debts incurred previous to his adjudication.

### **(e) Discharge by Impossibility or Frustration (Section 56)**

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

Sometimes subsequent impossibility (i.e. where the impossibility supervenes after the contract has been made) renders the performance of a contract unlawful and stands discharged; as for example, where a singer contracts to sing and becomes too ill to do so, the contract becomes void. In this connection, para 2 of Section 56 provides that a contract to do an act, which after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

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

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

### **Discharge by Supervening Impossibility**

A contract will be discharged by subsequent or supervening impossibility in any of the following ways:

- (a) Where the subject-matter of the contract is destroyed without the fault of the parties, the contract is discharged.
- (b) When a contract is entered into on the basis of the continued existence of a certain state of affairs, the contract is discharged if the state of things changes or ceases to exist.
- (c) Where the personal qualifications of a party is the basis of the contract, the contract is discharged by the death or physical disablement of that party.

### **Discharge by Supervening Illegality**

A contract which is contrary to law at the time of its formation is void. But if, after the making of the contract, owing to alteration of the law or the act of some person armed with statutory authority the performance of the contract becomes impossible, the contract is discharged. This is so because the performance of the promise is prevented or prohibited by a subsequent change in the law. A enters into contract with B for cutting trees. By a statutory provision cutting of trees is prohibited except under a licence and the same is refused to A. The contract is discharged.

### **Cases in which there is no supervening impossibility**

In the following cases contracts are not discharged on the ground of supervening impossibility—

- (a) *Difficulty of performance*: The mere fact that performance is more difficult or expensive than the

parties anticipated does not discharge the duty to perform.

- (b) *Commercial impossibilities* do not discharge the contract. A contract is not discharged merely because expectation of higher profits is not realised.
- (c) Strikes, lockouts and civil disturbance like riots do not terminate contracts unless there is a clause in the contract providing for non-performance in such cases.

Supervening impossibility or illegality is known as frustration under English Law.

### **(f) Discharge by Breach**

Where the promisor neither performs his contract nor does he tender performance, or where the performance is defective, there is a breach of contract. The breach of contract may be (i) actual; or (ii) anticipatory. The actual breach may take place either at the time the performance is due, or when actually performing the contract. Anticipatory breach means a breach before the time for the performance has arrived. This may also take place in two ways – by the promisor doing an act which makes the performance of his promise impossible or by the promisor in some other way showing his intention not to perform it.

### **Anticipatory Breach of Contract**

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

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

In *Hochester v. De La Tour* (1853) E.R. 922, A hired B in April to act as a courier commencing employment from 1st June, but wrote to B in May repudiating the agreement, B sued A for breach of contract immediately after repudiation. A contended that there could not be breach of contract before June 1. *Held*, B was immediately entitled to sue and need not wait till 1st June, for his right of action to accrue.

In *Avery v. Bowden* (1856) 116 E.R. 1122, A hired B's ship to carry a cargo from Russia. Later on B repudiated the contract. A delayed taking action hoping B would change his mind before the performance date. War broke out between Russia and Britain before the performance date frustrating the contract. *Held*, A lost his right to sue B for damages by his delay.

In *Frost v. Knight* (1872) L.R. 7 Ex. 111, the law on the subject of anticipatory breach was summed up as follows:

“The promisee if he pleases may treat the notice of intention as inoperative and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.”

## REMEDIES FOR BREACH

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

### (i) Remedies for Breach of Contract

In case of breach of contract, the injured party may:

- (a) Rescind the contract and refuse further performance of the contract;
- (b) Sue for damages;
- (c) Sue for specific performance;
- (d) Sue for an injunction to restrain the breach of a negative term; and
- (e) Sue on *quantum meruit*

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

### (ii) Damages for Breach of Contract

Under Section 73 of the Indian Contract Act, when a contract has been broken, a party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage, caused to him thereby, *which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract to be likely to result from the breach of it.* Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

The foundation of the claim for damages rests in the celebrated case of *Hadley v. Baxendale*, (1854) 9 Ex. 341. The facts of this case were as follows:

There was a breakdown of a shaft in A's mill. He delivered the shaft to B, a common carrier to be taken to a manufacturer to copy and make a new one. A did not make known to B that delay would result in loss of profits. By some neglect on the part of B, the *delivery of the shaft was delayed in transit beyond a reasonable time.* As a result, the mill was idle for a longer period than it would otherwise have been, had there been no such delay. It was held, B was not liable for the loss of profits during the period of delay as the circumstances communicated to A did not show that the delay in the delivery of the shaft would entail loss of profits to the mill. In the course of the judgement it was observed:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such breach of contract

itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both the parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation, the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to damages in that case and of this advantage it would be very unjust to deprive them.”

*Liquidated and Unliquidated damages:* Where the contracting parties agree in advance the amount payable in the event of breach, the sum payable is called *liquidated damages*.

Where the amount of compensation claimed for a breach of contract is left to be assessed by the Court, damages claimed are called *unliquidated damages*.

### **Unliquidated Damages**

Those are of the following kinds:

(a) general or ordinary damages, (b) special damages (c) exemplary or punitive damages, and (d) nominal damages.

### **Ordinary Damages**

These are restricted to pecuniary compensation to put the injured party in the position he would have been had the contract been performed. It is the estimated amount of loss actually incurred. Thus, it applies only to the proximate consequences of the breach of the contract and the remote consequences are not generally regarded. For example, in a contract for the sale of goods, the damages payable would be the difference between the contract price and the price at which the goods are available on the date of the breach.

### **Special Damages**

Special damages are those resulting from a breach of contract under some peculiar circumstances. If at the time of entering into the contract, the party has notice of special circumstances which makes special loss the likely result of the breach in the ordinary course of things, then upon his-breaking the contract and the special loss following this breach, he will be required to make good the special loss. For example, A delivered goods to the Railway Administration to be carried to a place where an exhibition was being held and told the goods clerk that if the goods did not reach the destination on the stipulated date he would suffer a special loss. The goods reached late. He was entitled to claim special damages.

### **Exemplary Damages**

These damages are awarded to punish the defendant and are not, as a rule, granted in case of breach of contract. In two cases, however, the court may award such damages, viz.,

- (i) breach of promise to marry; and
- (ii) wrongful dishonour of a customerscheque by the banker.

In a breach of promise to marry, the amount of the damages will depend upon the extent of injury to the partys feelings. In the bankers case, the smaller the amount of the chequedishonoured, larger will be

damages as the credit of the customer would be injured in a far greater measure, if a cheque for a small amount is wrongfully dishonoured.

### **Nominal Damages**

Nominal damages consist of a small token award, e.g., a rupee of even 25 paise, where there has been an infringement of contractual rights, but no actual loss has been suffered. These damages are awarded to establish the right to decree for breach of contract.

### **Liquidated Damages and Penalty**

Where the contracting parties fix at the time of contract the amount of damages that would be payable in case of breach, in English law, the question may arise whether the term amounts to “liquidated damages” or a “penalty”? The Courts in England usually give effect to liquidated damages, but they always relieve against penalty.

The test of the two is that where the amount fixed is a genuine pre-estimate of the loss in case of breach, it is liquidated damages and will be allowed. If the amount fixed is without any regard to probable loss, but is intended to frighten the party and to prevent him from committing breach, it is a penalty and will not be allowed.

In Indian law, there is no such difference between liquidated damages and penalty. Section 74 provides for “reasonable compensation” upto the stipulated amount whether it is by way of liquidated damages or penalty. For example, A borrows Rs. 500 from B and promises to pay Rs. 1,000 if he fails to repay Rs. 500 on the stipulated date. On A’s failure to repay on the given date, B is entitled to recover from A such compensation, not exceeding Rs. 1,000 as the Court may consider reasonable. (*Union of India v. Raman Iron Foundry*, AIR 1974 SC 1265).

### **(iii) Specific Performance**

It means the actual carrying out by the parties of their contract, and in proper cases the Court will insist upon the parties carrying out this agreement. Where a party fails to perform the contract, the Court may, at its discretion, order the defendant to carry out his undertaking according to the terms of the contract. A decree for specific performance may be granted in addition to or instead of damages.

Specific performance is usually granted in contracts connected with land, e.g., purchase of a particular plot or house, or to take debentures in a company. In case of sale of goods, it will only be granted if the goods are unique and cannot be purchased in the market, e.g., a particular race horse, or one of special value to the party suing by reason of personal or family association, e.g., an heirloom.

Specific performance will not be ordered:

- (a) where monetary compensation is an adequate remedy;
- (b) where the Court cannot supervise the execution of the contract, e.g., a building contract;
- (c) where the contract is for personal service; and
- (d) where one of the parties is a minor.

### **(iv) Injunction**

An injunction, is an order of a Court restraining a person from doing a particular act. It is a mode of securing the specific performance of a negative term of the contract, (i.e., where he is doing something which he

promises not to do), the Court may in its discretion issue an order to the defendant restraining him from doing what he promised not to do. Injunction may be prohibitory or mandatory. In prohibitory, the Court restrains the commission of a wrongful act whereas in mandatory, it restrains continuance of a wrongful commission.

In *Lumley v. Wagner* (1852) 90 R.R. 125. W agreed to sing at L's theatre and nowhere else. W, in breach of contract with L entered into a contract to sing for Z. *Held*, although W could not be compelled to sing at L's theatre, yet she could be restrained by injunction from singing for Z.

## CONTRACT OF INDEMNITY AND GUARANTEE (Sections 124 to 147)

### Meaning of Indemnity

A contract of indemnity is a contract by which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person (Section 124). For example, A contracts to indemnify B against the consequence of any proceedings which C may take against B in respect of a certain sum of 300 rupees. This is a contract of indemnity. The contract of indemnity may be express or implied. The later may be inferred from the circumstances of a particular case, e.g., an act done by A at the request of B. If A incurs any expenses, he can recover the same from B.

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

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

### Rights of Indemnity Holder when Sued

Under Section 125, the promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

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

### Meaning of Contract of Guarantee

A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in

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

### **Illustration**

A advances a loan of Rs. 5,000 to B and C promises to A that if B does not repay the loan, C will do so. This is a contract of guarantee. Here B is the principal debtor, A is the creditor and C is the surety or guarantor.

Like a contract of indemnity, a guarantee must also satisfy all the essential elements of a valid contract. There is, however, a special feature with regard to consideration in a contract of guarantee. The consideration received by the principal debtor is sufficient for surety. Section 127 provides that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

### **Illustration**

- (i) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise.
- (ii) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is sufficient consideration for C's promise.

### **Distinction between Indemnity and Guarantee**

A contract of indemnity differs from a contract of guarantee in the following ways:

- (a) In a contract of indemnity there are only two parties: the indemnifier and the indemnified. In a contract of guarantee, there are three parties; the surety, the principal debtor and the creditor.
- (b) In a contract of indemnity, the liability of the indemnifier is primary. In a contract of guarantee, the liability of the surety is secondary. The surety is liable only if the principal debtor makes a default, the primary liability being that of the principal debtor.
- (c) The indemnifier need not necessarily act at the request of the debtor; the surety gives guarantee only at the request of the principal debtor.
- (d) In the case of a guarantee, there is an existing debt or duty, the performance of which is guaranteed by the surety, whereas in the case of indemnity, the possibility of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.
- (e) The surety, on payment of the debt when the principal debtor has failed to pay is entitled to proceed against the principal debtor in his own right, but the indemnifier cannot sue third-parties in his own name, unless there be assignment. He must sue in the name of the indemnified.

### **Extent of Surety's Liability**

The liability of the surety is co-extensive with that of the principal debtor unless the contract otherwise provides (Section 128). A creditor is not bound to proceed against the principal debtor. He can sue the surety without suing the principal debtor. As soon as the debtor has made default in payment of the debt, the surety is immediately liable. But until default, the creditor cannot call upon the surety to pay. In this sense, the nature of the surety's liability is secondary.



### Illustration

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

Section 128 only explains the quantum of a surety's obligation when terms of the contract do not limit it. Conversely it doesn't follow that the surety can never be liable when the principal debtor cannot be held liable. Thus, a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former, and was avoided by the former. Where the agreement between the principal debtor and creditor is void as for example in the case of minority of principal debtor, the surety is liable as a principal debtor; for in such cases the contract of the so-called surety is not collateral, but a principal contract (*Kashiba v. Shripat* (1894) 19 Bom. 697).

### Kinds of Guarantees

A contract of guarantee may be for an existing debt, or for a future debt. It may be a specific guarantee, or it may be a continuing guarantee. A specific guarantee is given for a single debt and comes to an end when the debt guaranteed has been paid.

A continuing guarantee is one which extends to a series of transactions (Section 129). The liability of surety in case of a continuing guarantee extends to all the transactions contemplated until the revocation of the guarantee. As for instance, S, in consideration that C will employ P in collecting the rents of C's Zamindari, promises C to be responsible to the amount of Rs. 5,000 for the due collection and payment by P of these rents. This is a continuing guarantee.

### Revocation of Continuing Guarantee

A continuing guarantee is revoked in the following circumstances:

- (a) *By notice of revocation by the surety* (Section 130): The notice operates to revoke the surety's liability as regards future transactions. He continues to be liable for transactions entered into prior to the notice (*Offord v. Davies* (1862) 6 L.T.S. 79).
- (b) *By the death of the surety*: The death of the surety operates, in the absence of contract (*Lloyds v. Harper* (188) 16 Ch. D. 290) as a revocation of a continuing guarantee, so far as regards future transactions (Section 131). But for all the transactions made before his death, the surety's estate will be liable.

### Rights of Surety

A surety has certain rights against the creditor, (Section 141) the principal debtor (Sections 140 and 145) and the co-securities (Sections 146 and 147). Those are—

- (a) *Surety's rights against the creditor*: Under Section 141 a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security.
- (b) *Rights against the principal debtor*: After discharging the debt, the surety steps into the shoes of the creditor or is subrogated to all the rights of the creditor against the principal debtor. He can then sue the principal debtor for the amount paid by him to the creditor on the debtors default; he becomes a creditor of the principal debtor for what he has paid.

In some circumstances, the surety may get certain rights even before payment. The surety has remedies against the principal debtor before payment and after payment. In *Mamta Ghose v. United Industrial Bank* (AIR 1987 Cal. 180) where the principal debtor, after finding that the debt became due, started disposing of his properties to prevent seizure by surety, the Court granted an injunction to the surety restraining the principal debtor from doing so. The surety can compel the debtor, after debt has become due to exonerate him from his liability by paying the debt.

- (c) *Surety's rights gains co-sureties*: When a surety has paid more than his share of debt to the creditor, he has a right of contribution from the co-securities who are equally bound to pay with him. A, B and C are sureties to D for the sum of Rs. 3,000 lent to E who makes default in payment. A, B and C are liable, as between themselves to pay Rs. 1,000 each. If any one of them has to pay more than Rs. 1,000 he can claim contribution from the other two to reduce his payment to only Rs. 1,000. If one of them becomes insolvent, the other two shall have to contribute the unpaid amount equally.

### Discharge of Surety

A surety may be discharged from liability under the following circumstances:

- (a) By notice of revocation in case of a continuing guarantee as regards future transaction (Section 130.)
- (b) By the death of the surety as regards future transactions, in a continuing guarantee in the absence of a contract to the contrary (Section 131).
- (c) Any variation in the terms of the contract between the creditor and the principal debtor, without the consent of the surety, discharges the surety as regards all transactions taking place after the variation (Section 133).
- (d) A surety will be discharged if the creditor releases the principal debtor, or acts or makes an omission which results in the discharge of the principal debtor (Section 134). But where the creditor fails to sue the principal debtor within the limitation period, the surety is not discharged.
- (e) Where the creditor, without the consent of the surety, makes an arrangement with the principal debtor for composition, or promises to give time or not to sue him, the surety will be discharged (Section 135).
- (f) If the creditor does any act which is against the rights of the surety, or omits to do an act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged (Section 139).
- (g) If the creditor loses or parts with any security which at the time of the contract the debtor had given in favour of the creditor, the surety is discharged to the extent of the value of the security, unless the surety consented to the release of such security by creditor in favour of the debtor. It is immaterial whether the surety was or is aware of such security or not (Section 141).

## CONTRACT OF BAILMENT AND PLEDGE

### (a) Bailment

A bailment is a transaction whereby one person delivers goods to another person for some purpose, upon a contract that they are, when the purpose is accomplished to be returned or otherwise disposed of according to the directions of the person delivering them (Section 148). The person who delivers the goods is called the *bailor* and the person to whom they are delivered is called the *bailee*.

Bailment is a *voluntary delivery of goods for a temporary purpose* on the understanding that *they are to be*

*returned in specie* in the same or altered form. The ownership of the goods remains with the bailor, the bailee getting only the possession. Delivery of goods may be actual or constructive, e.g., where the key of a godown is handed over to another person, it amounts to delivery of goods in the godown.

### Gratuitous Bailment

A gratuitous bailment is one in which neither the bailor nor the bailee is entitled to any remuneration. Such a bailment may be for the exclusive benefit of the bailor, e.g., when A leaves his dog with a neighbour to be looked after in A's absence on a holiday. It may again be for exclusive benefit of the bailee, e.g., where you lend your book to a friend of yours for a week. In neither case any charge is made.

A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).

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

### Bailment for Reward

This is for the mutual benefit of both the bailor and the bailee. For example, A lets out a motor-car for hire to B. A is the bailor and receives the hire charges and B is the bailee and gets the use of the car. Where, A hands over his goods to B, a carrier for carriage at a price, A is the bailor who enjoys the benefit of carriage and B is the bailee who receives a remuneration for carrying the goods.

### Duties of Bailee

The bailee owes the following duties in respect of the goods bailed to him:

- (a) The bailee must take as much care of the goods bailed to him as a man of ordinary prudence would take under similar circumstances of his own goods of the same bulk, quality and value as the goods bailed (Section 151). If he takes this much care he will not be liable for any loss, destruction or deterioration of the goods bailed (Section 152). The *degree of care required from the bailee is the same whether the bailment is for reward or gratuitous*.

Of course, the bailee may agree to take special care of the goods, e.g., he may agree to keep the property safe from all perils and answers for accidents or thefts. But even such a bailee will not be liable for loss happening by *an act of God* or by public enemies.

- (b) The bailee is under a duty not to use the goods in an unauthorised manner or for unauthorised purpose (Section 153). If he does so, the bailor can terminate the bailment and claim damages for any loss or damage caused by the unauthorised used (Section 154).
- (c) He must keep the goods bailed to him separate from his own goods (Sections 155-157).

If the bailee without the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in production to their respective shares, in the mixture thus produced. If the bailee without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expenses of separation, and any damages arising from the mixture.

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

- (d) He must not set up an adverse title to the goods.
- (e) It is the duty of the bailee to return the goods without demand on the expiry of the time fixed or when the purpose is accomplished (Section 160). If he fails to return them, he shall be liable for any loss, destruction or deterioration of the goods even without negligence on his part (Section 161).
- (f) In the absence of any contract to the contrary, the bailee must return to the bailor any increase, or profits which may have accrued from the goods bailed; for example, when A leaves a cow in the custody of B to be taken care of and the cow gets a calf, B is bound to deliver the cow as well as the calf to A (Section 163).

### **Bailees Particular Lien (Section 170)**

Where the goods are bailed for a particular purpose and the bailee in due performance of bailment, expands his skill and labour, he has in the absence of an agreement to the contrary a lien on the goods, i.e., the bailee can retain the goods until his charges in respect of labour and skill used on the goods are paid by the bailor. A gives a piece of cloth to B, a tailor, for making it into a suit, B promises to have the suit ready for delivery within a fortnight, B has the suit ready for delivery. He has a right to retain the suit until he is paid his dues. The section expresses the Common Law principle that if a man has an article delivered to him on the improvement of which he has to bestow trouble and expenses, he has a right to detain it until his demand is paid.

The right of lien arises only where labour and skill have been used so as to confer an additional value on the article.

### **Particular and General Lien**

Lien is of two kinds: Particular lien and General lien. A particular lien is one which is available only against that property of which the skill and labour have been exercised. A bailee's lien is a particular lien.

A *general lien* is a right to detain any property belonging to the other and in the possession of the person trying to exercise the lien in respect of any payment lawfully due to him.

Thus, a general lien is the right to retain the property of another for a general balance of accounts but a particular lien is a right to retain only for a charge on account of labour employed or expenses bestowed upon the identical property detained.

The right of general lien is expressly given by Section 171 of the Indian Contract Act to bankers, factors, warehousers, attorneys of High Court and policy-brokers, provided there is no agreement to the contrary.

### **Duties of bailor**

The bailor has the following duties:

- (a) The bailor must disclose all the known faults in the goods; and if he fails to do that, he will be liable for any damage resulting directly from the faults (Section 150). For example, A delivers to B, a carrier, some explosive in a case, but does not warn B. The case is handled without extraordinary care necessary for such articles and explodes. A is liable for all the resulting damage to men and other goods.

In the case of bailment for hire, a still greater responsibility is placed on the bailor. He will be liable

even if he did not know of the defects (Section 150). A hires a carriage of B. The carriage is unsafe though B does not know this. A is injured. B is responsible to A for the injury.

- (b) It is the duty of the bailor to pay any extraordinary expenses incurred by the bailee. For example, if a horse is lent for a journey, the expense of feeding the horse would, of course, subject to any special agreement be borne by the bailee. If however the horse becomes ill and expenses have been incurred on its treatment, the bailor shall have to pay these expenses (Section 158).
- (c) The bailor is bound to indemnify the bailee for any cost or costs which the bailee may incur because of the defective title of the bailor of the goods bailed (Section 164).

### Termination of bailment

Where the bailee wrongfully uses or dispose of the goods bailed, the bailor may determine the bailment (Section 153.)

As soon as the period of bailment expires or the object of the bailment has been achieved, the bailment comes to an end, and the bailee must return the goods to the bailor (Section 160). Bailment is terminated when the subject matter of bailment is destroyed or by reason of change in its nature, becomes incapable of use for the purpose of bailment.

A gratuitous bailment can be terminated by the bailor at any time, even before the agreed time, subject to the limitation that where termination before the agreed period causes loss in excess of benefit, the bailor must compensate the bailee (Section 159).

A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162).

### Finder of Lost Goods

The position of a finder of lost goods is exactly that of a bailee. The rights of a finder are that he can sue the owner for any reward that might have been offered, and may retain the goods until he receives the reward. But where the owner has offered no reward, the finder has only a particular lien and can detain the goods until he receives compensation for the troubles and expenses incurred in preserving the property for finding out the true owner. But he cannot file a suit for the recovery of the compensation [Section 168].

Thus, as against the true owner, the finder of goods in a public or quasi public place is only a bailee; he keeps the article in trust for the real owner. As against every-one else, the property in the goods vests in the finder on his taking possession of it.

The finder has a right to sell the property—

- (a) where the owner cannot with reasonable diligence be found, or
- (b) when found, he refuses to pay the lawful charges of the finder and—
  - (i) if the thing is in danger of perishing or losing greater part of its value, or
  - (ii) when the lawful charges of the finder for the preservation of goods and the finding out of the owner amounts to two-thirds of the value of the thing (Section 169).

### Carrier as Bailee

A common carrier undertakes to carry goods of all persons who are willing to pay his usual or reasonable rates. He further undertakes to carry them safely, and make good all losses, unless they are caused by act of

God or public enemies. Carriers by land including railways and carriers by inland navigation, are common carriers. Carriers by Sea for hire are not common carriers and they can limit their liability. Railways in India are now common carriers.

*Inn-keepers:* The liability of a hotel keeper is governed by Sections 151 and 152 of the Contract Act and is that of an ordinary bailee with regard to the property of the guests.

C stayed in a room in a hotel. The hotel-keeper knew that the room was in an insecure condition. While C was dining in the dining room, some articles were stolen from his room. It was held that the hotel-keeper was liable as he should have taken reasonable steps to rectify the insecure condition of the rooms (*Jan & San v. Caneron* (1922) 44 All. 735).

## **(b) Pledge**

Pledge or pawn is a contract whereby an article is deposited with a lender of money or promisee as security for the repayment of a loan or performance of a *promise*. The bailor or depositor is called the Pawnor and the bailee or deposittee the “Pawnee” (Section 172). Since pledge is a branch of bailment, the pawnee is bound to take reasonable care of the goods pledged with him. Any kind of goods, valuables, documents or securities may be pledged. The Government securities, e.g., promissory notes must, however, be pledged by endorsement and delivery.

The following are the essential ingredients of a pledge:

- (i) The property pledged should be delivered to the pawnee.
- (ii) Delivery should be in pursuance of a contract.
- (iii) Delivery should be for the purpose of security.
- (iv) Delivery should be upon a condition to return.

## **Rights of the Pawnee**

No property in goods pawned passes to the pawnee, but the pawnee gets a “special property to retain possession even against the true owner until the payment of the debt, interest on the debt, and any other expense incurred in respect of the possession or for preservation of the goods pledged” (Section 173). The pawnee must return the goods to the pawnor on the tender of all that is due to him. The pawnee cannot confer a good title upon a *bona fide* purchaser for value.

Should the pawnor make a default in payment of the debt or performance of the promise at the stipulated time, the pawnee may-

- (i) file a suit for the recovery of the amount due to him while retaining the goods pledged as collateral security; or
- (ii) sue for the sale of the goods and the realisation of money due to him; or
- (iii) himself sell the goods pawned, after giving reasonable notice to the pawnor, sue for the deficiency, if any, after the sale.

If the sale is made in execution of a decree, the pawnee may buy the goods at the sale. But he cannot sell them to himself in a sale made by himself under (iii) above. If after sale of the goods, there is surplus, the pawnee must pay it to the pawnor (Section 176).

### Rights of Pawnor

On default by pawnor to repay on the stipulated date, the pawnee may sell the goods after giving reasonable notice to the pawnor. If the pawnee makes an unauthorised sale without giving notice to the pawnor, the pawnor has the following rights—

- (i) He can file a suit for redemption of goods by depositing the money treating the sale as if it had never taken place; or
- (ii) He can ask for damages on the ground of conversion.

### Pledge by Non-owners

Ordinarily, the owner of the goods would pledge them to secure a loan but the law permits under certain circumstances a pledge by a person who is not the owner but is in possession of the goods. Thus, a valid pledge may be created by the following non-owners.

- (a) *A mercantile agent*: Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, is as valid as if he were expressly authorised by the owner of the goods to make the same. But the pledge is valid only if the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not the authority to pledge (Section 178).
- (b) *Pledge by seller or buyer in possession after sale*: A seller, left in possession of goods sold, is no more the owner, but pledge by him will be valid, provided the pawnee acted in good faith and had no notice of the sale of goods to the buyer (Section 30 of The Sale of Goods Act 1930).
- (c) *Pledge where pawnor having limited interest*: When the pawnor is not the owner of the goods but has a limited interest in the goods which he pawns, e.g., he is a mortgagee or he has a lien with respect of these goods, the pledge will be valid to the extent of such interest.
- (d) *Pledge by co-owner in possession*: One of the several co-owners of goods in possession thereof with the assent of the other co-owners may create a valid pledge of the goods.
- (e) *Pledge by person in possession under a voidable contract*: A person may obtain possession under a contract which is voidable at the option of the lawful owner on the ground of misrepresentation, fraud, etc. The person in possession may pledge the goods before the contract is avoided by the other party (Section 178A).

## LAW OF AGENCY

### Definition of Agent (Section 182)

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

### Creation of Agency

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

- (a) *Express Agency*: A contract of agency may be made orally or in writing. The usual form of written contract of agency is the Power of Attorney, which gives him the authority to act on behalf of his

principal in accordance with the terms and conditions therein. In an agency created to transfer immovable property, the power of attorney must be registered. A power of attorney may be general, giving several powers to the agent, or special, giving authority to the agent for transacting a single act.

- (b) *Implied Agency*: Implied agency may arise by conduct, situation of parties or necessity of the case.
- (i) *Agency by Estoppel* (Section 237): Estoppel arises when you are precluded from denying the truth of anything which you have represented as a fact, although it is not a fact. Thus, where P allows third-parties to believe that A is acting as his authorised agent, he will be estopped from denying the agency if such third-parties relying on it make a contract with A even when A had no authority at all.
- (ii) *Wife as agent*: Where a husband and wife are living together, the wife is presumed to have her husbands authority to pledge his credit for the purchase of necessaries of life suitable to their standard of living. But the husband will not be liable if he shows that (i) he had expressly warned the trademan not to supply goods on credit to his wife; or (ii) he had expressly forbidden the wife to pledge his credit; or (iii) his wife was already sufficiently supplied with the articles in question; or (iv) she was supplied with a sufficient allowance.

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

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

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

- (iv) *Agency by ratification* (Sections 169-200): Where a person having no authority purports to act as agent, or a duly appointed agent exceeds his authority, the principal is not bound by the contract supposedly based on his behalf. But the principal may ratify the agents transaction and so accept liability. In this way an agency by ratification arises. This is also known as *ex post facto agency*—agency arising after the event. The effect of ratification is to render the contract binding on the principal as if the agent had been authorised before hand. Also ratification relates back to the original making of the contract so that the agency is taken to have come into existence from the moment the agent first acted, and not from the date the principal ratified it. Ratification is effective only if the following conditions are satisfied—
- (a) The agent must expressly contract as agent for a principal who is in existence and competent to contract.
- (b) The principal must be competent to contract not only at the time the agent acted, but also when he ratified the agents act.
- (c) The principal at the time of ratification has full knowledge of the material facts, and must ratify the whole contract, within a reasonable time.
- (d) Ratification cannot be made so as to subject a third-party to damages, or terminate any right or interest of a third person.
- (e) Only lawful acts can be ratified.



## Classes of Agents

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

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

## Sub-Agent

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

As between themselves, the relation of sub-agent and original agent is that of agent and the principal. A sub-agent is bound by all the duties of the original agent. The sub-agent is not directly responsible to the principal except for fraud and wilful wrong. The sub-agent is responsible to the original agent. The original agent is responsible to the principal for the acts of the sub-agent. As regards third persons, the principal is represented by sub-agent and he is bound and responsible for all the acts of sub-agent as if he were an agent originally appointed by the principal.

## Mercantile Agents

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

## Factors

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

## Brokers

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

## Del Credere Agent

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

## Auctioneers

An auctioneer is an agent who sells goods by auction, i.e., to the highest bidder in public competition. He has no authority to warrant his principals title to the goods. He is an agent for the seller but after the goods have been knocked down he is agent for the buyer also for the purpose of evidence that the sale has taken place.

## Partners

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

## Bankers

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

## Duties of the Agent

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

- (a) An agent must act within the scope of the authority conferred upon him and carry out strictly the instructions of the principal (Section 211).
- (b) in the absence of express instructions, he must follow the custom prevailing in the same kind of business at the place where the agent conducts the business (Section 211).
- (c) He must do the work with reasonable skill and diligence whereby the nature of his profession, the agent purports to have special skill, he must exercise the skill which is expected from the members of the profession (Section 212).
- (d) He must disclose promptly any material information coming to his knowledge which is likely to influence the principal in the making of the contract.
- (e) He must not disclose confidential information entrusted to him by his principal (Section 213).
- (f) He must not allow his interest to conflict with his duty, e.g., he must not compete with his principal (Section 215).
- (g) The agent must keep true accounts and must be prepared on reasonable notice to render an account.
- (h) He must not make any secret profit; he must disclose any extra profit that he may make.

Where an agent is discovered taking secret bribe, etc., the principal is entitled to (i) dismiss the agent without notice, (ii) recover the amount of secret profit, and (iii) refuse to pay the agent his remuneration. He may repudiate the contract, if the third-party is involved in secret profit and also recover damages.

- (i) An agent must not delegate his authority to sub-agent. A sub-agent is a person employed by and acting under the control of the original agent in the business of agency (Section 191). This rule is based on the principle: *Delegatus non-potest delegare* — a delegate cannot further delegate (Section 190).

But there are exceptions to this rule and the agent may delegate (i) where delegation is allowed by

the principal, (ii) where the trade custom or usage sanctions delegation, (iii) where delegation is essential for proper performance, (iv) where an emergency renders it imperative, (v) where nature of the work is purely ministerial, and (vi) where the principal knows that the agent intends to delegate.

### Rights of Agents

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

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

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

### Extent of Agent's Authority

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

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

### Responsibilities of Principal to Third-parties

The effect of a contract made by an agent varies according to the circumstances under which the agent contracted. There are three circumstances in which an agent may contract, namely—

- (i) the agent acts for a named principal;
- (ii) the agent acts for an undisclosed principal; and
- (iii) the agent acts for a concealed principal.

(a) *Disclosed principal*: Where the agent contracts as agent for a named principal, he generally incurs neither rights nor liabilities under the contract, and drops out as soon as it is made. The contract is made between the principal and the third-party and it is between these two that rights and obligations are created. The legal effect is the same as if the principal had contracted directly with the third-party.

The effect is that the principal is bound by all acts of the agent done within the scope of actual, apparent or ostensible authority. This ostensible authority of the agent is important, for the acts of a general agent are binding on the principal if they are within the scope of his apparent authority, although they may be outside the scope of his actual authority. Therefore, a private or secret limitation or restriction of powers of an agent do not bind innocent third-party.

(b) *Undisclosed principal*: Where the agent discloses that he is merely an agent but conceals the identity of his principal, he is not personally liable, as he drops out in normal way. The principal, on being discovered, will be responsible for the contract made by the agent.

(c) *Concealed principal*: Where an agent appears to be contracting on his own behalf, without either contracting as an agent or disclosing the existence of an agency (i.e., he discloses neither the name of the principal nor his existence), he becomes personally liable. The third-party may sue either the principal (when discovered) or the agent or both. If the third-party chooses to sue the principal and not the agent, he must allow the principal the benefit of all payments made by him to the agent on account of the contract before the agency was disclosed. The third-party is also entitled to get the benefit of anything he may have paid to the agent.

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

### **Principal Liable for Agent's Torts (Section 238)**

If an agent commits a tort or other wrong (e.g., misrepresentation or fraud) during his agency, whilst acting within the scope of his actual or apparent authority, the principal is liable. But the agent is also personally liable, and he may be sued also. The principal is liable even if the tort is committed exclusively for the benefit of the agent and against the interests of the principal.

### **Personal Liability of Agent to Third-party**

An agent is personally liable in the following cases:

- (a) Where the agent has agreed to be personally liable to the third-party.
- (b) Where an agent acts for a principal residing abroad.
- (c) When the agent signs a negotiable instrument in his own name without making it clear that he is signing it only as agent.
- (d) When an agent acts for a principal who cannot be sued (e.g., he is minor), the agent is personally liable.
- (e) An agent is liable for breach of warranty of authority. Where a person contracts as agent without any authority there is a breach of warranty of authority. He is liable to the person who has relied on the warranty of authority and has suffered loss.
- (f) Where authority is one coupled with interest or where trade, usage or custom makes the agent personally liable, he will be liable to the third-party.
- (g) He is also liable for his torts committed in the course of agency.

### **Meaning of Authority Coupled with Interest (Section 202)**

An agency is coupled with an interest when the agent has an interest in the authority granted to him or when the agent has an interest in the subject matter with which he is authorised to deal. Where the agent was appointed to enable him to secure some benefit already owed to him by the principal, the agency was coupled with an interest. For example, where a factor had made advances to the principal and is authorised to sell at the best price and recoup the advances made by him or where the agent is authorised to collect money from third-parties and pay himself the debt due by the principal, the agencies are coupled with interest. But a mere arrangement that the agent's remuneration to be paid out of the rents collected by him, it

does not give him any interest in the property and the agency is not the one coupled with an interest. An agency coupled with interest cannot be terminated in the absence of a contract to the contrary to the prejudice of such interest.

The principal laid down in Section 202 applies only if the following conditions are fulfilled:

- (i) The interest of the agent should exist at the time of creation of agency and should not have arisen after the creation of agency.
- (ii) Authority given to the agent must be intended for the protection of the interest of the agent.
- (iii) The interest of the agent in the subject matter must be substantial and not ordinary.
- (iv) The interest of the agent should be over and above his remuneration. Mere prospect of remuneration is not sufficient interest.

### Termination of Agency

An agency comes to an end or terminates—

- (a) By the performance of the contract of agency; (Section 201)
- (b) By an agreement between the principal and the agent;
- (c) By expiration of the period fixed for the contract of agency;
- (d) By the death of the principal or the agent; (Section 201)
- (e) By the insanity of either the principal or the agent; (Section 201)
- (f) By the insolvency of the principal, and in some cases that of the agent; (Section 201)
- (g) Where the principal or agent is an incorporated company, by its dissolution;
- (h) By the destruction of the subject-matter; (Section 56)
- (i) By the renunciation of his authority by the agent; (Section 201)
- (j) By the revocation of authority by the principal. (Section 201)

### When Agency is Irrevocable

Revocation of an agency by the principal is not possible in the following cases:

- (a) Where the authority of agency is one coupled with an interest, even the death or insanity of the principal does not terminate the authority in this case (Section 202).
- (b) When agent has incurred personal liability, the agency becomes irrevocable.
- (c) When the authority has been partly exercised by the agent, it is irrevocable in particular with regard to obligations which arise from acts already done (Section 204).

### When Termination Takes Effect

Termination of an agency takes effect or is complete, as regards the agent when it becomes known to the agent. If the principal revokes the agent's authority, the revocation will take effect when the agent comes to know of it. As regards the third-parties, the termination takes effect when it comes to their knowledge (Section 208). Thus, if an agent whose authority has been terminated to his knowledge, enters into a contract with a third-party who deals with him *bona fide*, the contract will be binding on the principal as against the third-party. The termination of an agent's authority terminates the authority of the sub-agent appointed by the agent (Section 210).

The revocation of agency as regards the agent and as regards the principal takes effect at different points of time. Section 209 charges the agent with duty to protect the principal's interest where the principal dies or becomes of unsound mind. It provides that when an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interest entrusted to him. So it is the duty of the agent to take all steps to protect the interest of his deceased principal on his death.

## **JOINT VENTURE/ FOREIGN COLLABORATION/MULTINATIONAL AGREEMENTS**

International business professionals use the term "modes of entry" to describe the different methods and approaches available to enter markets and conduct business in other countries. One mode of entry is the joint venture where two or more organizations join together in a cooperative effort to further their business goals. The joint venture is one of the most common and effective means of conducting business internationally. The joint venture documents and agreements are critical to the success of the venture. The joint venture agreement forms the basis of the understanding between and among the parties. It is relied upon to ensure that all parties understand their roles, rights, responsibilities, and remedies in the conduct of the venture. Organizations enter into joint ventures in good faith but closely scrutinize the joint venture documents if anything goes awry.

The importance of the documents and the purpose of this part is to cover, step by step, the critical elements to consider and include in joint venture agreements. Equity participation, for example, may or may not be as important as operational control. Technical participation in the venture may or may not be as important as the intellectual property rights that may result from the venture. A key to developing joint venture agreements is to determine goals and objectives in advance and ensure that the interests are reflected in the agreement.

Selection of a good local partner is the key to the success of any joint venture. Personal interviews with a prospective joint venture partner should be supplemented with proper due diligence. Once a partner is selected generally the parties highlighting the basis of the future joint venture agreement sign a memorandum of understanding or a letter of intent. Before signing the joint venture agreement, the terms should be thoroughly discussed to avoid any misunderstanding at a later stage. Negotiations require an understanding of the cultural and legal background of the parties.

It is difficult to prepare a set frame of the terms and conditions. The conditions may differ according to the requirements. While drafting a foreign collaboration agreement, the following factors should be kept in mind:

- Capability of the collaborator and the requirements of the party are clearly indicated.
- Clear definitions of technical terms are given.
- Specify if the product shall be manufactured/sold on exclusive or non-exclusive basis.
- Terms and conditions regarding nature of technical know-how, disclosure of drawings, specifications and other documents, furnishing of technical information in respect of processes with flow charts etc., plant outlay list of equipment, machinery and tool with specification have to be provided.
- Provisions for making available the engineers and/or skilled workers of the collaborator on payment of expenses relating to their stay per diem etc. are given.
- Details regarding specification and quality of the product to be manufactured are given.
- Quality control and trademarks to be used are also specified.

- Responsibility of the collaborator in establishing or maintaining assembly plants should be clearly determined and provided for.
- If sub-contracting of the work is involved, clarify if there would be any restrictions.
- The rate of royalty, mode of calculation and payment etc. Also, make provision as to who will bear the taxes/cess on such payments.
- Use of information and industrial property rights should also be provided for in the agreement.
- A clause on force majeure should be included.
- A clause that the collaborating company has to train the personnel of Indian company within a specified period should be incorporated. The clause should also specify the terms and conditions of such assistance, place of training, period of training and fees payable.
- A comprehensive clause on arbitration containing a clear provision as to the kind of arbitrator and place of arbitration should be included.
- There should be provision in the agreement for payment of interest on delayed payments.

## E-CONTRACT

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

As in every other contract, an electronic contract also requires the following necessary ingredients:

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

## LESSON ROUND-UP

- A contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.
- Every promise and every set of promises, forming the consideration for each other, is an agreement.
- All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

- In law contract There may be the circumstances under which a contract made under these rules may still be bad, because there is a flaw, vice or error somewhere. As a result of such a flaw, the apparent agreement is not a real agreement.
- Section 27 of the Indian Contract Act states that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is, to that extent, void.
- The literal meaning of the word “wager” is a “bet”. Wagering agreements are nothing but ordinary betting agreements.
- An agreement not enforceable by law is void ab initio.
- A contingent contract is a contract to do or not to do something, if some event collateral to such contract, does or does not happen. Contract of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.
- A quasi-contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth, it is not a contract at all. It is an obligation which the law creates, in the absence of any agreement, when any person is in the possession of one persons money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which in justice and fairness belongs to another. It is the duty and not an agreement or intention which defines it.
- A contract is said to be discharged or terminated when the rights and obligations arising out of a contract are extinguished.
- Where a contract is broken, the injured party has several courses of action open to him. The appropriate remedy in any case will depend upon the subject-matter of the contract and the nature of the breach.
- A contract of indemnity is a contract by which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.
- A bailment is a transaction whereby one person delivers goods to another person for some purpose, upon a contract that they are, when the purpose is accomplished to be returned or otherwise disposed of according to the directions of the person delivering them.

### SELF TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define consideration and state its essential features.
2. “No consideration, no contract”. Do you agree?
3. “The essence of every agreement is that there ought to be free consent on both the sides”. Discuss.
4. How does a contract differ from agreements?
5. Write short notes on:
  - (a) Reciprocal promises.
  - (b) Substituted Agent.



# Lesson 21

## Specific Relief Act, 1963

### LESSON OUTLINE

- Introduction
- Scope of the Act
- Who may sue for Specific Performance
- Recovery of Possession of Movable and Unmovable Property
- Rectification of Instruments
- Rescission of Contract
- Declaratory Decree
- Preventive Relief
- Learning objectives
- Lesson Round up
- Self-Test Questions

### LEARNING OBJECTIVES

The Specific Relief Act, 1963 was enacted to define and amend the law relating to certain kinds of specific relief. It contains provisions, inter alia, specific performance of contracts, contracts not specifically enforceable, parties who may obtain and against whom specific performance may be obtained, etc. It also confers wide discretionary powers upon the courts to decree specific performance and to refuse injunction, etc.

The object of the study is to familiarize the students how a party to the contract can get its specific performance and who can sue for specific performance of a contract.

The law relating to specific relief in India is provided in the Specific Relief Act, 1963.

## INTRODUCTION

The law relating to specific relief in India is provided in the Specific Relief Act of 1963. The Specific Relief Act, 1963 was enacted to define and amend the law relating to certain kinds of specific relief.

The expression 'specific relief' means a relief in specie. It is a remedy which aims at the exact fulfillment of an obligation.

## Scope of the Act

The Specific Relief Act, 1963 is not exhaustive. It does not consolidate the whole law on the subject. As the Preamble would indicate, it is an Act "to define and amend the law relating to certain kinds of specific relief". It does not purport to lay down the law relating to specific relief in all its ramifications (AIR 1972 SC 1826)

There are other kinds of specific remedy provided for by other enactments e.g. the Transfer of Property Act deals with the specific remedies available to a mortgagor or mortgagee; the Partnership Act deals with the specific remedies like dissolution and accounts as between partners.

Under the Specific Relief Act, 1963, remedies have been divided as specific relief (Sections 5-35) and preventive relief (Sections 36-42). These are:

- (i) Recovering possession of property (Sections 5-8);
- (ii) Specific performance of contracts (Sections 9-25);
- (iii) Rectification of Instruments (Section 26);
- (iv) Rescission of contracts (Sections 27-30);
- (v) Cancellation of Instruments (Section 31-33);
- (vi) Declaratory decrees (Sections 34-35); and
- (vii) Injunctions (Sections 36-42).

## Who May Sue for Specific Performance

Section 15 lays down that specific performance of a contract may be obtained by (a) any party thereto; (b) the representative in interest or the principal, of any party thereto; provided that where the learning, skill, insolvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party; (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder; (d) where the contract has been entered into by tenant-for-life in due exercise of a power the remainder man; (e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant; (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach; (g) when a company has entered into a contract and subsequently becomes amalgamated with another company the new company which arises out of the amalgamation; (h) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such a contract is warranted by the terms of the incorporation of the company provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Generally, only a party to the contract can get its specific performance. The section gives the list of persons who can sue for specific performance of a contract. The general principle is that in a suit for specific performance of a contract, all the parties to the contract should be parties to the suit and no one else.

### **Contracts which can be specifically enforced**

Section 10 provides the cases in which specific performance of contract is enforceable. It says that except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced (a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done, or (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. The explanation provides that unless and until the contrary is proved, the Court shall presume:

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and (ii) that the breach of a contract to transfer movable property can be so relieved except in the two cases: (a) where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market, and (b) where the property is held by the defendant as the agent or trustee of the plaintiff.

So, under this Section, contracts for sale of patent right, copy right, shares of a company which are not easily available, future property, chattels of special value, etc., are specifically enforceable. In an agreement for sale of agricultural land, the respondent vendor wilfully avoided the execution of sale deed after receiving full sale consideration. Rajasthan High Court held that compensation by way of damages would not be substituted to execution of sale deed. The Court directed the respondents to enforce the specific performance of the agreement (*Ram Karan and others v. Govind Lal and other*, AIR 1999 Raj. 167). In a suit for specific performance of contract of sale of a house, a stranger to the contract cannot seek to be impleaded. That will change the very nature of the suit.

### **Cases in which specific performance of contracts connected with trusts enforceable**

Section 11 lays down that except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust. But if a trustee enters into a contract in excess of his powers then such a contract cannot be specifically enforced.

### **Illustrations**

A contracts with B to paint a picture for B and B agrees to pay Rs. 1000 for the same. The picture is painted. 'B' is entitled to have it delivered to him on payment or tender of Rs. 1,000.

A is a trustee of land with power of lease it for 7 years. He enters into a contract with B to grant a lease of the land for 7 years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of company have power to sell the concern with the sanction of a general meeting of the shareholders, Directors contract to sell it without any such sanction. This contract cannot be specifically enforced.

### **Specific performance of part of a contract**

Section 12 deals with specific performance of a part of a contract. Sub-section (1) lays down the general principle that except as otherwise hereinafter provided in this section, the Court shall not direct the specific

performance of a part of a contract. Sub-sections (2)-(4) lay down the exceptions to this general rule as follows:

(i) Sub-section 2 says that where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of the either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

A contracts to sell B a piece of land consisting of 100 *bighas*. It turns out that 98 *bighas* of the land belongs to A and the two remaining *bighas* to a stranger, who refuses to part with them. The two *bighas* are not necessary for the use or enjoyment of the 98 *bighas*, nor so important for such use or enjoyment that the loss of them may not be made in goods in money. A may be directed at the suit of B to convey to B the 98 *bighas* and to make compensation to him. For not conveying the two remaining *bighas*; B may be directed at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money less the sum awarded as compensation for the deficiency.

(ii) Sub-section 3 lays down that where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either (a) forms a considerable part of the whole, though admitting of compensation in money; or (b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the party (i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement, and (ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

For example, A contracts to sell B a piece of land consisting of 100 *bighas* for Rs. 1,00,000. It turns out that only 50 *bighas* of land belong to A. 50 *bighas* are substantial part of the contract. A cannot demand specific performance of the contract but B can demand specific performance to get 50 *bighas* of land from A by paying the full consideration i.e. Rs. 1,00,000.

(iii) Sub-section 4 lays down that when a part of a contract which taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part. For the purposes of this section, a party to the contract shall be deemed to be unable to perform the whole of his part of it, if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.

Section 13 lays down the rights of a purchaser or lessee against the seller or lessor with no title or imperfect title. It lays down that where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter) has the following rights, namely: (a) if the vendor or lessor has, subsequent to the contract, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest; (b) where the concurrence of other persons is necessary for validating the title, and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence and when conveyance by other person is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance; (c) where the vendor professes to sell unencumbered property but the property is, mortgaged for an amount not

exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee; (d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title, or imperfect title, the defendant has a right to a return of his deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject matter of the contract. Sub-section (2) of Section 13 lays down that the aforesaid provisions of the sections shall also supply, as far as may be to contracts for or hire of movable property.

### **Contracts which cannot be specifically enforced**

Section 14 lays down the contracts which cannot be specifically enforced. They are (a) A contract for the non-performance of which compensation in money is an adequate relief; (b) A contract which runs into such minute and numerous details that the Court cannot enforce specific performance of its material terms or which is dependant upon the personal qualification or volition of the parties or a contract from its nature is such that the Court cannot enforce specific performance; (c) A contract which is in its nature determinable; (d) A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise. Sub-section (2) lays down that save as provided by the Arbitration Act, 1943, no contract to refer present or future difference to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions for the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit.

Sub-section (3) lays down that notwithstanding anything contained in clause (a) or clause (c) or clause (d) of Sub-section (1), the Court may enforce specific performance in the following cases: (a) where the suit is for the enforcement of a contract—(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once; provided that where only a part of the loan has been advanced the vendor is willing to advance the remaining part of the loan in terms of the contract; or (ii) to take up and pay for any debentures of a company; (b) where the suit is for (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business, or (ii) the purchase of a share of a partner of a firm (c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land provided that the following conditions are fulfilled, namely, (i) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work; (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the land on which the building is to be constructed or other work is to be executed.

### **Illustrations**

A contracts to sell and B contracts to buy, one lakh of rupees in the four per cent Central Government loan; the contract may be specifically performed.

A contracts to render personal service to B or A contracts to marry B or A contracts to employ B on personal service or A, an author, contracts with B, a publisher to complete a literary work. B cannot enforce specific performance of these contracts. Not only contract of personal service, but any contract requiring personal skill, knowledge or volition of the parties, for example, to marry, to paint a picture, to complete a literary work or to sing or act at a theatre will not be specifically enforced as such contracts would require a constant and general superintendence as cannot be conveniently undertaken by a Court of Justice.

A and B contract to become partners, the contract is not specifying the duration of the proposed partnership. In such a case the contract cannot be specifically enforced since, either A and B might at once dissolve the partnership (*Scott v. Rayment* (1868) L.R. 7 Eq. 112).

The Court will not decree specific performance of an agreement if it be of such a nature that better justice will be done by leaving the parties to their remedy in damages (*Wilson v. Northampton & Banbury Junction Rly. Co.* (1874) 9 C.H. App. 279).

The very foundation of specific performance of a contract is that an award for damages does not afford the aggrieved party a complete remedy. If in the opinion of the Court damages will be an adequate remedy, specific performance of the contract cannot be decreed (*Ramji Patel v. Rao Kishore*, (1929) P.C. 190).

In such a case pecuniary compensation is equated with the specific performance of the contract. It can be decreed only when the remedy at law is not adequate or is defective. The court may come to the conclusion that the ends of justice will be served better by awarding the damages instead of the specific performance of the contract.

### **A Contract may be specifically enforced:**

- (a) If it is one for non-performance of which the mere payment of money would not be an adequate relief; and
- (b) the contract is otherwise, proper to be specifically enforced. Section 14(1)(b) provides three reasons for refusing specific performance:
  - (i) When a contract runs into minute or numerous details; or
  - (ii) When a contract is dependent upon the personal qualification or volition of the parties; or
  - (iii) When the contract by nature is such that the Court cannot enforce, specific performance of its material terms.

In the same way, contracts of personal service cannot be specifically enforced. These contracts are based upon the personal relations of the parties. They require mutual trust and confidence of the parties. When the contract is for personal service, it requires some skill or talent or of some intellectual pursuit, and in that case a decree for its specific performance cannot be passed by the court, as it will never know if the decree has been truthfully and fully executed. The Court will refuse specific performance of a contract if it is of such a nature that the Court cannot enforce its specific performance.

Under Section 14(1)(c) contracts which are in their nature determinable cannot be specifically enforced.

The Court will not enforce a contract which is in its nature determinable by the defendant. Determinable contract is such a contract where one of the parties can put an end to it. So even if a decree is passed, the defendant by putting an end to the contract, will evade the decree. A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership can not be specifically performed, for if it were so performed, either A or B might at once dissolve the partnership.

### **Recovery of Possession of Movable and Immovable Property**

Sections 5 to 8 deal with recovery of possession of property. Property may either be (i) immovable, or (ii) movable. Sections 5 and 6 deal with recovery of possession of immovable property while Sections 7 and 8 deal with movable property.

### Recovery of possession of specific immovable property

According to Section 5, a person, entitled to the possession of specific immovable property may recover the same in the manner provided by the Code of Civil Procedure, 1908. The word 'person' includes any company or association or body of individuals, whether incorporated or not. The action under Section 5 arises when claim is made on the basis of "title".

### RECOVERY OF POSSESSION OF DISPOSSESSED IMMOVABLE PROPERTY

The Act provides another relief under Section 6 for the recovery of possession of immovable property where the claim is based merely on 'possession'. Section 6 provides that if any person is dispossessed without his consent, of immovable property otherwise than in due course of Law, he or any person claiming through him may be suit recover possession thereof, notwithstanding any other title that may be set up in such a suit. There are two restrictions; no suit under Section 6 shall be brought (i) after the expiry of 6 months from the date of dispossession, or (ii) against the Government. Under Sub-section (3) no appeal or review is allowed of any order of decree passed under this Section. Sub-section (4) allows a person to file a suit to establish his title to such property and recover possession thereof.

The object of these provisions is to discourage people from taking the law into their own hands. The Sections provide a speedy and summary remedy through a medium of Civil Court for restoration of possession to the dispossessed. Section 5 thus provides for a suit for ejectment on the basis of title and Section 6 gives a remedy without establishing title provided the suit is brought within 6 months of the date of possession. The object of Section 6 is to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely providing previous possession and wrongful dispossession without proving title (*Lachman v. Shambu Narain*, ILR (1911) 33 ALL 174). A suit under Section 6 is maintainable between landlords and tenants. Heirs are also entitled to sue for recovery of possession.

### Recovery of specific movable property

A person is entitled to recover the possession of specific movable property in the manner provided by the Code of Civil Procedure, 1908. (Section 7)

*Explanation 1:* A trustee may sue for possession of movable property of which he is a trustee. The term 'trustee' includes every person holding property in trust.

*Explanation 2:* A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

### Illustrations

- (a) A bequeaths land to B for his life, with remainder to C. A dies, B enters on the land, but C, without B's consent, obtains possession of the title deeds, B may recover them from C.
- (b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody (See *Donald v. Suckling* (1866) L.R. 1 Q.B. 585).
- (c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B (*Oliver v. Oliver* (1861) 11 C.B.N.S. 139).
- (d) A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under Section 168 of the Indian Contract Act, 1872.

- (e) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

An action in detinue would lie only for some specific article of movable property capable of being recovered in specie and of being seized and delivered up to the winning party. Section 7 lays down that a person entitled to the possession of specific movable property may recover the same in the manner prescribed by the Civil Procedure Code. A trustee or a person having a special or a temporary right to the present possession may also file a suit under this section.

### **Liability of person in possession, not as owner to deliver to persons entitled to immediate possession**

Section 8 lays down that any person having the possession or control of a particular article of movable property of which he is not the owner, may be compelled specifically, to deliver it to the person entitled to its immediate possession in any of the following four cases:

- (a) When the thing claimed is held by the defendant as the agent or trustee of the plaintiff,
- (b) when the compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed,
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss,
- (d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Unless and until the contrary is proved, the Court shall, in respect of any article of movable property claimed under clause (b) or (c) of this section presume that (i) compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed or as the case may be, and (ii) it would be extremely difficult to ascertain the actual damage caused by its loss.

Thus under this part of the Act, if a person, who has been dispossessed, does not bring a suit under Section 6 of the Specific Relief Act within 6 months, he may still bring a suit for recovery alleging any title to the property. But in this case, the suit may be defeated by the defendant by proving a better title.

### **Illustrations**

- (a) A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B, without A's authority, pledges the furniture to C, and C knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to 'A' for he holds it as A's trustee.
- (b) Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.
- (c) 'A' is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of special character to bear an ascertainable market value. B may be compelled to deliver them to A.

### **PERSONS AGAINST WHOM SPECIFIC PERFORMANCE AVAILABLE**

**Section 15 lays down the parties who can bring an action for specific performance.**

According to Section 19, specific performance of a contract may be enforced against (a) either party thereto, (b) any person claiming under him, by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract, (c) any person claiming under a title which though prior to the contract, and known to the plaintiff, might have been displaced by the defendant, (d) when a company has entered into a contract and subsequently becomes



amalgamated with another company — the new company which arises out of the amalgamation, (e) when the promoters of a company have before its incorporation entered into a contract, for the purpose of the company and such contract is warranted by the terms of the incorporation of the company; provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Clauses (a) and (b) embody the principle that Court will enforce specific performance of a contract not only against either party, thereto, but also against any person claiming under either of the parties, a title arising subsequently to the contract, except a transferee for value who has paid money in good faith and without notice of the original contract.

Examples to clause (c) are voluntary alienness, joint tenants claiming survivorship and remainder man.

### **PERSONS AGAINST WHOM SPECIFIC PERFORMANCE CANNOT BE ENFORCED**

Under Section 16, specific performance of a contract cannot be enforced in favour of a person — (a) who would not be entitled to recover compensation for its breach, or (b) who has become incapable of performing, or violates any essential term of the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract, or (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. The obligation imposed by Section 16 of the Act is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of clause (a), (b) and (c) thereof.

Thus in a suit for specific performance the plaintiff should not only plead and prove the terms of the agreement but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract.

To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. Right from the date of the execution till the date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. *N.P. Thirnganam v. Dr. R Jagan Mohan Rao*, AIR 1996 SC 116, (1995) 5 SCC 115.

The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. The circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same he must fail.

A Court may not, therefore, grant to a plaintiff who has failed to to prove that he has performed or has always been ready and willing to perform his part of the agreement, the specific performance whereof he seeks (See *Ram Awadh v. Achhaibar Dubey*, AIR 2000 SC 860).

The explanation states that for the purpose of clause (c), (i) where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its construction.

Section 17 sets out two more cases where specific performance cannot be enforced in favour of a vendor or lessor. It states that a contract to sell or let any immovable property cannot be specifically enforced in favour of vendor or lessor (a) who knowing himself not to have any title to the property, has contracted to sell or let the property; (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt sub-section (2) lays down that the provisions of Sub-section (1) shall also apply as far as may be, to contracts for the sale or hire of movable property.

According to this Section, a contract to sell or hire property cannot be specifically enforced in favour of a seller or lessor if he had no title to the property. A person who knows that he has no title to the property but still enters into a contract with regard to that property, he cannot have the remedy of specific performance. It is the duty of the vendor to make a reasonable, clear and marketable title about which there must not be any rational doubt.

### Illustration

A without C's authority contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract even though C is willing to confirm it.

### Non-enforcement except with variation

According to Section 18, where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up in the following cases, namely: (a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract; (b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce, (c) where the parties have subsequently to the execution of the contract, varied its terms.

### Illustration

A contracts in writing to let a house to B for a certain term, at the rent of Rs. 100/- per month, putting it first into tenantable repair. The house turns out to be not worth repairing. So with B's consent, A pulls it down and erects a new house in its place. B contracting orally to pay rent at Rs. 120/- per month. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

## DISCRETION OF THE COURT

Sub-section (1) of Section 20 lays down that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary but based on sound and reasonable grounds guided by judicial principles and capable of correction by a Court of appeal. Sub-section (2) lays down that the following are cases in which the Court may properly exercise discretion not to decree specific performance —

Specific performance could have been granted but in the circumstances of the case the Court in its discretion considers that it would be better to award damages instead of specific performance

Though specific performance is refused, plaintiff is entitled to compensation for breach of the contract

If the circumstances are such that specific performance would not be granted; for example, where the plaintiff has disintitiled himself to the specific performance, damages cannot be awarded under Section 21 in lieu of specific performance

*Explanation 1* appended to the Section states that mere inadequacy of consideration, or the more fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b) *Explanation 2* to the Section says that the question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

Sub-section (3) lays down that Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance. Sub-section (4) says that the court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. Specific performance is a discretionary remedy. The Court is not bound to decree specific performance merely because it is lawful to do so. Courts can take into consideration the conduct of the parties and the circumstances attending its execution and may exercise a discretion in granting or withholding a decree for specific performance (*Jethalal v. Bachu*, 47 Bom. 46). However, this discretion is not an arbitrary discretion but one governed by sound principles of equity. It has been held that the court is not bound to grant relief of specific performance even if it is lawful to do so. [*Yellapa Sastri v. Gunda Shankara*, AIR 2010 (NOC) 731 A.P. See also AIR 2008 SC 1786].

### Illustration

In *Dennev-light* (1857) 8 D M & G 774, the Court refused specific performance against a buyer where the land contracted to be purchased was wholly surrounded by land belonging to others over which there was no right of way.

It is to be noted that the word 'mere' has to be given due weight. Specific performance may be refused where inadequacy of consideration is coupled with some other factor not necessarily amounting to fraud, e.g. mistake, or surprise, or unfair advantage taken by the plaintiff of his superior knowledge or bargaining position even though the circumstances do not justify rescission of the contract.

The hardship to be considered is at the time of the contract, unless the hardship has been brought on by the action of the plaintiff. Mere rise in price of the property agreed to be sold is not a ground for refusing a discretionary relief in favour of the purchaser. What has to be considered is the fairness of the contract at the time it was made and the subsequent rise in price is not a matter to be taken into consideration.

### Court's power to award damages in certain cases

Under Section 21 of the Specific Relief Act, the Court is empowered to award compensation in certain cases. Sub-section (1) states that in a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of such performance, Sub-section (2) states that if, in any suit the Court decides that specific performance ought not to be granted but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly. Sub-section 3 lays down that if, in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. Sub-section (4) states that in determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872. Sub-section 5 lays down that no compensation shall be awarded under this Section unless the plaintiff has claimed such compensation in his

plaint provided that where the plaintiff has not claimed any such compensation in the plaint, the Court shall at any stage at the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such compensation. Even if the contract has become incapable of specific performance that does not preclude the Court from exercising the jurisdiction conferred by this section.

The conditions according to which damages may be awarded by the Court in addition to specific performance are:

- (i) the Court decides that specific performance ought to be granted but,
- (ii) the justice of the case requires that not only specific performance but also some compensation for the breach of the contract should also be given to the plaintiff.

In a suit for specific performance, the plaintiff may ask for damages in the alternative or in addition to specific performance of the contract. The Court's power to award damages in a suit for specific performance is laid down in Section 21.

The circumstances in which a court would award damages in lieu of specific performance:

- (a) Specific performance could have been granted but in the circumstances of the case the Court in its discretion considers that it would be better to award damages instead of specific performance.
- (b) Though specific performance is refused, plaintiff is entitled to compensation for breach of the contract.
- (c) If the circumstances are such that specific performance would not be granted; for example, where the plaintiff has disintitiled himself to the specific performance, damages cannot be awarded under Section 21 in lieu of specific performance.

Section 22 gives power to the Court to grant relief for possession, partitions, refund of earnest money. Under Section 22 any person, suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case ask for (a) possession or partition and separate possession, of the property in addition to any such performance; or (b) any other relief to which he may be entitled in case his claim for specific performance is refused.

The power of the Court to grant relief under clause (b) shall be without prejudice to its power to award compensation under Section 21.

### **Illustrations**

(a) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(b) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument dated the 1st January 1877. Soon after that day, A fraudulently grants to C a lease of part of the land, and procures the lease dated the 1st October, 1876 to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

On such cancellation, the Court may require the party to whom such relief is granted to restore as far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

In a case defendant and plaintiff were real brothers residing jointly in a house. The defendant executed

agreement to sell the property of his share in favour of plaintiff. Subsequently he sold the same property to another purchaser. The subsequent purchaser had no knowledge about the earlier agreement. It was held that he is the *bona-fide* purchaser of the property. The plaintiff can recover back earnest money paid by him to defendant (*Jagtar Singh v. Gurmit Singh*, AIR 2006 P&H 62).

Section 23 lays down that even if the parties have agreed for liquidated damages, in the contract itself, specific performance of that contract may be decreed by the Court in proper cases but in that case the payment of the sum named in the contract will not be decreed.

Section 24 imposes a bar on suit for compensation for breach of a contract after dismissal of the suit for specific performance.

## RECTIFICATION OF INSTRUMENTS

Section 26 of the Specific Relief Act, 1963 contains the law as to rectification of instruments.

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Where a contract reduced into writing in pursuance of a previous agreement, fails to express the real intention of the parties, the court will rectify the instrument in accordance with their true intention. Here, there must be in existence as between the parties, a complete and perfectly unobjectionable contract; but the writing designed to embody it, either from fraud or mutual mistake, is incorrect or imperfect and the relief sought is to rectify the writing so as to bring it into conformity with the true intention. In such a case, if such instrument is enforced, one party will suffer and if it is rescinded altogether both the parties will suffer but if it is rectified and enforced neither party will suffer. The principle on which the courts act in correcting instruments is that the parties are to be placed in the same position as that in which they would have stood if no error had been committed (*Sudha Singh v. Munshi Ram*, A.I.R. 1927 Cal. 605). There must have been a complete agreement prior to the instrument. It should be in writing and there must be clear evidence of mutual mistake or of fraud.

In order to obtain rectification the conditions mentioned in Section 26 must be present. Thus:

- (i) Rectification would be granted where, though there was a consensus between the parties as to the contract through fraud of one of the parties, the instrument did not correctly express the real intention.
- (ii) It will also be granted, at the instance of third party, where both the parties are equally innocent, but owing to a common mistake, the instrument does not express their intention.
- (iii) Sub-section (2) makes it clear that rectification would not be allowed so as to prejudice rights acquired by third party in good faith and for value.

*For example*, A intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B in which through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and let the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C, but it cannot be rectified so as to affect D's lease.

- (iv) The only limitation placed on the Courts discretion is that the rectification can be done without prejudice to the rights acquired by third persons in good faith and for value.

## RESCISSION OF CONTRACTS

Section 27 deals with Rescission of Contracts. "Rescission" means putting an end to a contract which is still operative and making it null and void *ab initio*. It does not apply to void contracts. Section 27 states the

principle upon which rescission can be ordered. A person suing for rescission cannot, in the alternative sue for specific performance but a person suing for specific performance can sue for rescission. Sub-section (1) lays down that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely – (a) where the contract is voidable or terminable by the plaintiff; (b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff. Sub-section (2) lays down that notwithstanding anything contained in Sub-section (1), the Court may refuse to rescind the contract – (a) where the plaintiff has expressly or impliedly ratified the contract; or (b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or (c) where third-parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or (d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract. The explanation provides that in this Section, “contract” in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.

“This specie of specific relief is the reverse of specific performance. In one case the relief is granted by enforcing the performance of a contract which binds the parties, and the other by discharging him when it is not just to bind him” (Banerjee). So the equitable relief by way of rescission is exactly opposite of specific performance. Here, the contract is put to an end and is made null and void where by the contractual obligations also come to an end. Section 27 provides ground to the aggrieved party to rescind a contract without obtaining consent of the other party.

Under clause (a) where a contract is voidable or terminable by the plaintiff, he may rescind it. The contract may become voidable or terminable due to fraud, undue influence, misrepresentation or coercion.

Any person interested in a contract may sue to have it rescinded. Hence a suit may be brought by a third party whose interests are affected by the contract.

In case of a rescission of a contract, the Court may, in its discretion, require the party to whom such relief is granted to make any compensation to the other party. The main object of this relief is to put both the parties in their original positions. If a plaintiff fails to get specific performance of a contract in writing, he may get it rescinded and delivered up to be cancelled.

### **Doctrine of part performance**

The doctrine of part performance has been applied in India to the contracts of transfer of immovable property which though required to be registered have not been registered. The doctrine has been given statutory recognition in 1929 adding two new sections to Section 53A of the Transfer of Property Act and Section 27A to the Specific Relief Act, and a proviso to Section 49 of the Indian Registration Act.

### **CANCELLATION OF INSTRUMENTS**

Sub-section (1) of Section 31 provides that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may in its discretion, so adjudge it and order it to be delivered up and cancelled. Sub-section (2) lays down that if the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

The relief of cancellation of instruments is founded upon the administration of protective justice which is

technically known as “*Quia time*”. It is based upon the administration of protective justice for fear that the instrument may be vexatiously, or injuriously used by the defendant against the plaintiff when the evidence to impeach it may be lost or that it may throw a cloud of suspicion over the title or interest (*Jekadula v. Bai Jini*, 39 B T R.,1072).

Relief of cancellation under Section 31 would be available when (i) an instrument is void or voidable against the plaintiff; (ii) where the plaintiff may apprehend serious injury if the instrument is left outstanding and (iii) where it is proper under the circumstances of the case to grant the relief.

#### Illustrations

(a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(b) A agrees to sell and deliver a ship to B, to be paid for by B's acceptance of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills (*Anglo Danubian Co. v. Rogerson* (1867) L.R. 4 Eq. 3).

Section 32 lays down that where an instrument is evidence of different rights or different obligations, the Court may, in proper case, cancel it in part and allow it to stand for the residue. The Court is not bound to cancel the whole of the instrument but may, in its discretion, when necessary, cancel it in part and allow rest of it to stand.

A executes a deed of mortgage in favour of B. A gets back the deed from B by fraud and endorses on it a receipt for Rs. 1,200 purporting to be signed by B. B's signature is forged. B is entitled to have the endorsement cancelled, leaving the deed to stand in other respects (*Ram Chandar v. Ganga Saran*, (1917) 39 All. 103).

Section 33(1) provides that on adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require. The provisions of this Section are almost similar to the provisions of Section 30 of this Act. Under both the Sections, the plaintiff must make such compensation to the defendant as the justice may require.

### DECLARATORY DECREES

A declaratory decree is a decree whereby any right as to any property or the legal character of a person is judicially ascertained.

The Supreme Court in *State of Madhya Pradesh v. Mangilal Sharma*, 1997 (7) SCALE 743, held that a declaratory decree merely declares the right of the decreeholder *vis-a-vis* the judgement debtor and does not in terms direct the judgement debtor to do or refrain from doing any particular act or thing. It cannot be executed as it only declares the rights of the decree-holder qua the judgement debtor and does not, in terms, direct him to do or refrain from doing any particular act or thing.

Section 34 lays down that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The explanation provides that a trustee of property is a “person interested to deny” a title adverse to the title of someone who is not in

existence, and for whom, if in existence, he would be a trustee.

The object of declaratory decree is to remove doubt by having legal status of any rights declared by the Court, and to perpetuate and strengthen testimony regarding title of the plaintiff and protect it from adverse attacks. One of the objects of the legislature was to allow the right to enjoy the property rightfully belonging to the plaintiff. In case of declaratory decree, neither specific performance nor any compensation is awarded but only a declaration of the rights of the parties is made without any consequential relief being granted. The declaration does not confer any new rights upon the plaintiff but it merely declares what he had before. It only clears the mist that has gathered round the plaintiff's title or status. The Court is being asked to put an end to the dispute and uncertainty by determining the legal character in issue. By that way the property may be put to better use, enjoyment and improvement. To maintain a suit under this Section following conditions must be fulfilled:

- (a) the plaintiff must be a person entitled to any legal character or to any right as to any property;
- (b) the defendant must be a person denying or interested to deny the plaintiff's title to such legal character or, right;
- (c) The declaration issued for must be a declaration that the plaintiff is entitled to a legal character or to a right to property; and
- (d) where the plaintiff is able to seek further relief than a mere declaration he must seek such relief.

### Illustration

A is properly in possession of certain lands. The inhabitants of a neighbouring village claim a right of way across the land. A may use for a declaration that they are not entitled to the right so claimed.

The relief by way of declaration is purely discretionary. Instances of legal characters are —

- (1) Divorce on the ground of impotency
- (2) Legal character by marriage
- (3) Legitimacy or illegitimacy
- (4) Status of an adopted son
- (5) Priest of temple

### Effect of Declaration

Section 35 lays down that a declaration is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Such a declaration is not *judgement in rem* and as such it cannot bind strangers.

### Illustration

A, a Hindu, in a suit to which B, his alleged wife is the defendant's seeks a declaration that his marriage was duly solemnised and prays for an order of restitution of conjugal rights. The Court makes the declaration and order of restitution of conjugal rights. C, a third-party claiming that B is his wife, sues A for the recovery of B. The declaration made in the former suit is not binding upon C.



## PREVENTIVE RELIEFS

Part III of the Specific Relief Act, 1963 grants specific relief called Preventive Relief i.e., preventing a party from doing that which he is under an obligation not to do. Preventive relief is granted at the discretion of the court by way of an injunction.

An injunction is a specific order of the Court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun, or in some cases (when it is called a 'mandatory injunction') commanding active restitution of the former state of things.

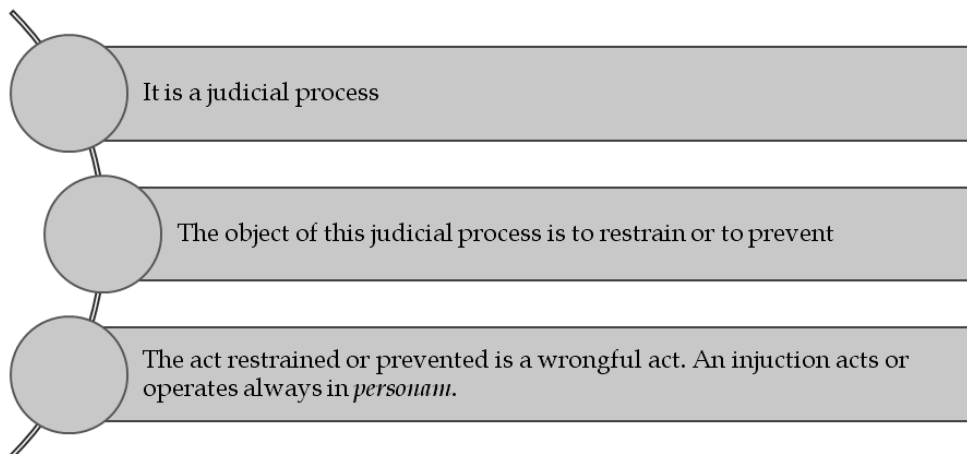
Lord Halsbury defines injunction as “a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing”.

The main difference between an injunction and specific performance is that the remedy in case of an injunction is generally directed to prevent the violation of a negative act and therefore deals not only with contracts but also with torts and many other subjects of purely equitable one, whereas specific performance is directed to compelling performance of an active duty.

It is known as a “judicial process by which one, who has invaded or is threatening to invade the rights (legal or equitable) of another is restrained from continuing or commencing such wrongful act. Injunction is the most ordinary form of preventive relief. For the effective administration of justice, this power to prevent and to restrain is absolutely necessary.

### Characteristics of an injunction

*An injunction has three characteristic features;*



If the wrongful act has already taken place, the injunction prevents its repetition. If it is merely threatened, the threat is prevented from being executed.

### Temporary and perpetual injunctions

Section 36 states that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

The temporary injunctions are granted under Order 39 Rules 1-2 of the Civil Procedure Code while perpetual injunctions are dealt within Section 38 of the Specific Relief Act.

The temporary injunction may be dissolved at any time under Civil Procedure Code by the defendant

showing specific cause to the satisfaction of the Court against the order granting the injunction, or it automatically terminate with the disposal of the suit. The general principles governing temporary and permanent injunctions are mainly the same except that a temporary injunction is granted before the plaintiff establishes his case at the trial.

Sub-section (1) of Section 37 lays down that temporary injunctions are such as are to continue until a specified time, or until the further order of the Court and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

Sub-section (2) states that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of right, or from the commission of an act, which would be contrary to the rights of the Plaintiff. It may be pointed out that:

- (i) While Section 37(1) of the Act gives the meaning of a perpetual injunction, Sections 37 to 62 lay down the principles according to which the perpetual injunction would be granted.
- (ii) The cases in which the perpetual injunction may be granted are of two classes. The object is to prevent the breach of an obligation existing in favour of the applicant, but such obligation may either arise out of a contract or otherwise. In case of contractual agreement principles governing specific performance will apply and in other cases, the injunction would be granted if the plaintiff can show that the defendant has a legal duty or obligation towards him and that by the non-performance of such duty the right to enjoyment of property has been materially affected. Such cases are where the defendant is trustee of the property of the plaintiff or where the injunction is necessary to prevent multiplicity of judicial proceedings, etc.

Section 38 deals with granting of perpetual injunction. Sub-section (1) states that subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour whether express or by implication.

Sub-section (2) provides that when any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II, i.e., the chapter on specific performance of contracts. Sub-section (3) lays down that when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction in the following cases, namely: (a) where the defendant is a trustee of the property for the plaintiff; (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion; (c) where the invasion is such that compensation in money would not afford adequate relief; (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

### **Difference between the remedies of specific performance and injunction**

Specific performance is decreed to compel the performance of an active duty, while injunction is decreed to prevent the violation of a negative duty. Normally, the former deals with contracts, while the latter with torts and other subjects of equitable nature. If a contract is positive in its nature, it calls for the relief of specific performance, on the other hand, if it is negative in its nature, it calls for relief of injunction.

The principle governing the award of injunction as a mode of enforcement of contracts is similar to that of specific performance. This is clearly borne out by Section (38)2 of the Act. Thus, the enforcement of a contract is governed by both specific relief and injunction. "The jurisdiction of equity to grant such injunction is substantially coexistent with its jurisdiction to compel a specific performance". But still their fields of operation are separate from each other. While a promise to do is enforced by specific performance, a promise to forbear is enforced by injunction. Section 41(e) further provides that contract which will not be

affirmatively enforced by a decree of specific performance, will not be negatively enforced by issuing an injunction. The only exception to this rule is found in Section 42.

### **Mandatory injunction**

Section 39 dealing with mandatory injunctions states that when to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts. For example, A builds a house with eaves projecting over B's land, B may sue for an injunction to pull down so much of the eaves as so projecting over his land.

According to Section 40, the plaintiff in a suit for perpetual injunction under Section 38 or mandatory injunction under Section 39, may claim damages either in addition to, or in substitution for such injunction and the Court, may, if it thinks fit, award such damages.

### **Injunction when refused**

Section 41 gives a list of cases in which a perpetual injunction cannot be granted. It says that an injunction cannot be granted —

- (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought;
- (c) to restrain any person from applying to any legislative body;
- (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
- (e) to prevent the breach of a contract the performance of which would not be specifically enforced;
- (f) to prevent on the ground of nuisance, an act of which it is not reasonably clear that it will be nuisance;
- (g) to prevent a continuing breach in which the plaintiff has acquiesced;
- (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;
- (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court;
- (j) when the plaintiff has no interest in the matter.

It may be noted that this relief also is a discretionary remedy. It may be refused even if the case is not covered by Section 41.

### **Injunction to perform negative agreement**

Section 42 provides that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement,

provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

This Section is based upon an English case viz., *Lumley v. Wagner* (21) L.J. CH. 898. In this case Miss W, a singer agreed to sing at L's theatre for a certain period and not to sing anywhere else during that period. Afterwards, she entered into a contract to sing at another theatre and refused to perform her contract with L. The Court refused to enforce her positive agreement to sing at L's theatre (by specific performance) but granted an injunction restraining her from singing at any other theatre thereby preventing breach of the negative part of the agreement though the positive part of it, being a contract for the personal service, could not be specifically enforced.

Conditions necessary for the applicability of this Section are:

- (1) The contract should comprise of two agreements, one affirmative and another negative.
- (2) Both the agreements must be divisible.
- (3) The negative agreement must relate to a specific act.
- (4) The Court should be unable to compel specific performance of the affirmative agreement.
- (5) The plaintiff must not have failed to perform the contract, so far as it is binding upon him.

A negative stipulation may be express or implied. An express negative stipulation in one where the negative stipulation is put expressly. The Section does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is therefore a question of interpretation in each case to find whether a particular contract can be said to have a negative stipulation, express or implied, contained in it, e.g., the mere use of word "exclusively" does not imply a negative stipulation to refrain from service of other people.

The provisions of this Section are based on the equitable principle that "he who seeks equity must do equity".

The principle as laid down in Section 42 was followed in the cases of *Burn McDonald* (1907) 36 Cal 354; *Metropolitan Electric Supply v. Ginder*, (1901) 2 Ch. 799; *Subba Naidu v. Hari Badshah*, (13 M.L.J. 13); and *Madras Rly Co. v. Rust*, (1891) 14 Mad 18.

## LESSON ROUND-UP

- Under the Specific Relief Act, 1963 only a party to the contract can get its specific performance. The section gives the list of persons who can sue for specific performance of a contract. The general principle is that in a suit for specific performance of a contract, all the parties to the contract should be parties to the suit and no one else.
- The contracts which cannot be specifically enforced are a contract for the non-performance of which compensation in money is an adequate relief; a contract which runs into such minute and numerous details that the Court cannot enforce specific performance of its material terms or which is dependant upon the personal qualification or volition of the parties or a contract from its nature is such that the Court cannot enforce specific performance.
- The contracts which cannot be specifically enforced are a contract which is in its nature determinable; a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise.
- The very foundation of specific performance of a contract is that an award for damages does not afford the aggrieved party a complete remedy. If in the opinion of the Court damages will be an adequate remedy, specific performance of the contract cannot be decreed.





# Lesson 22

## Sale of Goods Act, 1930

### LESSON OUTLINE

- Learning objectives
- Essentials of a Contract of Sale
- Sale Distinguished from Agreement to Sell
- Bailment
- Contract for Work and Labour and Hire-Purchase
- Conditions and Warranties
- Doctrine of Caveat Emptor
- Performance of the Contract of Sale
- Lesson Round up
- Self-test Questions

### LEARNING OBJECTIVES

Sale of Goods Act is one of very old mercantile law. Sale of Goods is one of the special types of contract. Initially, this was part of Indian Contract Act itself. Later, this was deleted in Contract Act, and separate Sale of Goods Act was passed in 1930.

Sale of Goods Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of Sale of Goods Act also. Basic requirements of contract i.e. Offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract; free consent, lawful object, consideration etc. apply to contract of Sale of Goods Act also.

This lesson is to be taught after the students have been made familiar with the general principles of contract in which the emphasis is on understanding and appreciating the basic essentials of a valid contract and on the existence of contractual relationship in various instances. In today's era, the need for awareness of buyers and sellers rights is of utmost importance. In the backdrop of this and Contract Act, Sales of Goods Act is taught here to let the buyers beware and sellers to comply the requisite law in better and spirit.

*Every sale has five basic obstacles: no need, no money, no hurry, no desire, no trust.*

*Zig Ziglar*

The law relating to sale of goods is contained in the Sale of Goods Act, 1930. It has to be read as part of the Indian Contract Act, 1872 [Sections 2(5) and (3)].

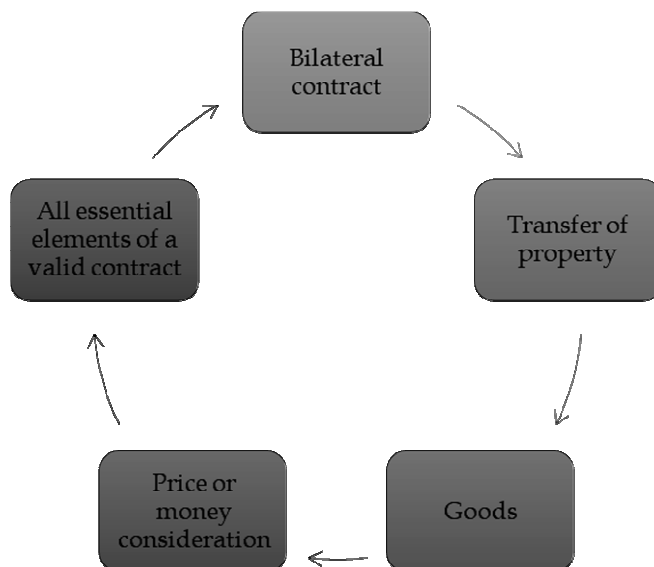
### Contract of Sale of Goods

According to Section 4, a contract of sale of goods is a contract whereby the seller:

- (i) transfers or agrees to transfer the property in goods,
- (ii) to the buyer,
- (iii) for a money consideration called the price.

It shows that the expression “contract of sale” includes both a sale where the seller transfers the ownership of the goods to the buyer, and an agreement to sell where the ownership of goods is to be transferred at a future time or subject to some conditions to be fulfilled later on.

The following are thus the essentials of a contract of sale of goods:



- (i) *Bilateral contract*: It is a bilateral contract because the property in goods has to pass from one party to another. A person cannot buy the goods himself.
- (ii) *Transfer of property*: The object of a contract of sale must be the transfer of property (meaning ownership) in goods from one person to another.
- (iii) *Goods*: The subject matter must be some goods.
- (iv) *Price or money consideration*: The goods must be sold for some price, where the goods are exchanged for goods it is barter, not sale.
- (v) *All essential elements of a valid contract* must be present in a contract of sale.

### Distinction between Sale and Agreement to Sell

The following points will bring out the distinction between sale and an agreement to sell:

- (a) In a sale, the property in the goods sold passes to the buyer at the time of contract so that he



becomes the owner of the goods. In an agreement to sell, the ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfilment of some conditions subject to which the property in the goods is to be transferred.

- (b) An agreement to sell is an executory contract, a sale is an executed contract.
- (c) An agreement to sell is a contract pure and simple, but a sale is contract plus conveyance.
- (d) If there is an agreement to sell and the goods are destroyed by accident, the loss falls on the seller. In a sale, the loss falls on the buyer, even though the goods are with the seller.
- (e) If there is an agreement to sell and the seller commits a breach, the buyer has only a personal remedy against the seller, namely, a claim for damages. But if there has been a sale, and the seller commits a breach by refusing to deliver the goods, the buyer has not only a personal remedy against him but also the other remedies which an owner has in respect of goods themselves such as a suit for conversion or detinue, etc.

### Sale and Bailment

A “bailment” is a transaction under which goods are delivered by one person (the bailor) to another (the bailee) for some purpose, upon a contract that they be returned or disposed of as directed after the purpose is accomplished (Section 148 of the Indian Contract Act, 1872).

The property in the goods is not intended to and does not pass on delivery though it may sometimes be the intention of the parties that it should pass in due course. But where goods are delivered to another on terms which indicate that the property is to pass at once the contract must be one of sale and not bailment.

### Sale and Contract for Work and Labour

The distinction between a “sale” and a “contract for work and labour” becomes important when question of passing of property arises for consideration.

However, these two are difficult to distinguish. The test generally applied is that if as a result of the contract, property in an article is transferred to one who had no property therein previously for a money consideration, it is a sale, where it is otherwise it is a contract for work and labour.

### Sale and Hire Purchase Agreement

“Sale”, is a contract by which property in goods passes from the seller to the buyer for a price.

A “hire purchase agreement” is basically a contract of hire, but in addition, it gives the hirer an option to purchase the goods at the end of the hiring period. Consequently, until the final payment, the hirer is merely a bailee of goods and ownership remains vested in the bailor. Under such a contract, the owner of goods delivers the goods to person who agrees to pay certain stipulated periodical payments as hire charges. Though the possession is with the hirer, the ownership of the goods remains with the original owner.

The essence of hire purchase agreement is that there is no agreement to buy, but only an option is given to the hirer to buy by paying all the instalments or put an end to the hiring and return the goods to the owner, at any time before the exercise of the option.

Since the hirer does not become owner of the goods until he has exercised his option to buy, he cannot pass any title even to an innocent and *bona fide* purchaser. The transaction of hire-purchase protects the owner of the goods against the insolvency of the buyer, for if the buyer becomes insolvent or fails to pay the instalments, he can take back the goods as owner. And if the hirer declines to take delivery of the goods, the remedy of the owner will be damages for non-hiring and not for rent for the period agreed.

It is important to note the difference between a hire purchase agreement and mere payment of the price by instalments because, the latter is a sale, only the payment of price is to be made by instalments.

The distinction between the two is very important because, in a hire-purchase agreement the risk of loss or deterioration of the goods hired lies with the owner and the hirer will be absolved of any responsibility therefor, if he has taken reasonable care to protect the same as a bailee. But it is otherwise in the case of a sale where the price is to be paid in instalments.

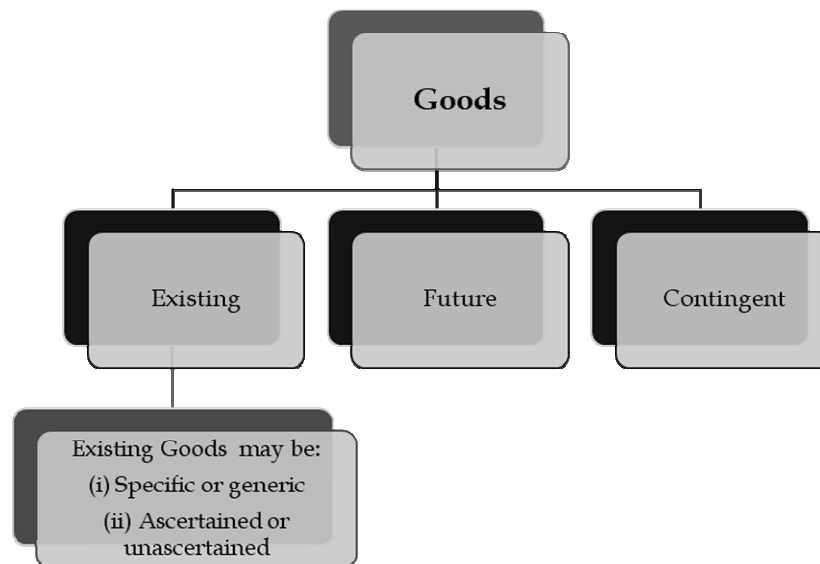
## Subject matter of Contract of Sale of Goods

### Goods

The subject matter of the contract of sale is essentially goods. According to Section 2(7) of the Sale of Goods Act, "goods" means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Actionable claims and money are not goods and cannot be brought and sold under this Act. Money means current money, i.e., the recognised currency in circulation in the country, but not old and rare coins which may be treated as goods. An actionable claim is what a person cannot make a present use of or enjoy, but what can be recovered by him by means of a suit or an action. Thus, a debt due to a man from another is an actionable claim and cannot be sold as goods, although it can be assigned. Under the provisions of the Transfer of Property Act, 1882, goodwill, trade marks, copyrights, patents are all goods, so is a ship. As regards water, gas, electricity, it is doubtful whether they are goods (*Rash Behari v. Emperor*, (1936) 41 C.W.N. 225; *M.B. Electric Supply Co. Ltd. v. State of Rajasthan*, AIR (1973) Raj. 132).

Goods may be (a) existing, (b) future, or (c) contingent. The existing goods may be (i) specific or generic, (ii) ascertained or unascertained.



### Existing Goods

Existing goods are goods which are either owned or possessed by the seller at the time of the contract. Sale of goods possessed but not owned by the seller would be by an agent or pledgee.

Existing goods are specific goods which are identified and agreed upon at the time of the contract of sale. Ascertained goods are either specific goods at the time of the contract or are ascertained or identified to the contract later on i.e. made specific.

Generic or unascertained goods are goods which are not specifically identified but are indicated by description. If a merchant agrees to supply a radio set from his stock of radio sets, it is a contract of sale of unascertained goods because it is not known which set will be delivered. As soon as a particular set is separated or identified for delivery and the buyer has notice of it, the goods are ascertained and become specific goods.

### **Future Goods**

Future goods are goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. A agrees to sell all the mangoes which will be produced in his garden next season. This is an agreement for the sale of future goods. [Section 2(6)]

### **Contingent Goods**

Where there is a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen—such goods are known as contingent goods. Contingent goods fall in the class of future goods. A agrees to sell a certain TV set provided he is able to get it from its present owner. This is an agreement to sell contingent goods. In such a case, if the contingency does not happen for no fault of the seller, he will not be liable for damages.

Actual sale can take place only of specific goods and property in goods passes from the seller to buyer at the time of the contract, provided the goods are in a deliverable state and the contract is unconditional.

There can be an agreement to sell only in respect of future or contingent goods.

### **Effect of Perishing of Goods**

In a contract of sale of goods, the goods may perish before sale is complete. Such a stage may arise in the following cases:

#### ***(i) Goods perishing before making a contract***

Where in a contract of sale of specific goods, the goods without the knowledge of the seller have, at the time of making the contract perished or become so damaged as no longer to answer to their description in the contract, the contract is void. This is based on the rule that mutual mistake of fact essential to the contract renders the contract void. (Section 7)

If the seller was aware of the destruction and still entered into the contract, he is estopped from disputing the contract. Moreover, perishing of goods not only includes loss by theft but also where the goods have lost their commercial value.

#### ***(ii) Goods perishing after agreement to sell***

Where there is an agreement to sell specific goods, and subsequently the goods without any fault of any party perish or are so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided. The provision applies only to sale of specific goods. If the sale is of unascertained goods, the perishing of the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver. (Section 8)

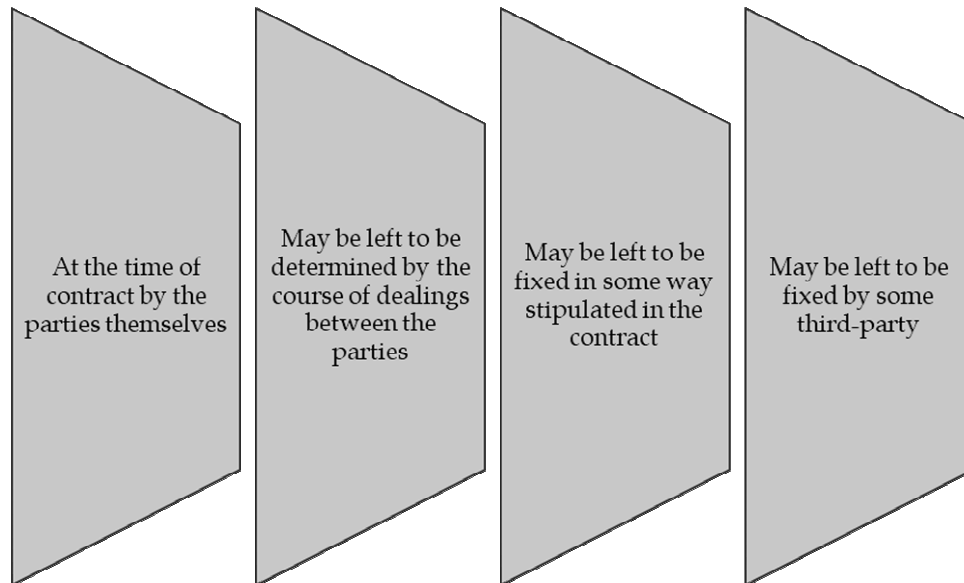
### **Price**

No sale can take place without a price. Thus, if there is no valuable consideration to support a voluntary

surrender of goods by the real owner to another person, the transaction is a gift, and is not governed by the Sale of Goods Act. Therefore, price, which is money consideration for the sale of goods, constitutes the essence for a contract of sale. It may be money actually paid or promised to be paid. If a consideration other than money is to be given, it is not a sale.

### **Modes of Fixing Price (Sections 9 and 10)**

The price may be fixed:



Where the contract states that the price is to be fixed by a third-party and such third-party fails to do so, the contract is void. But if the buyer has already taken the benefit of the goods, he must pay a reasonable price for them. If the third-party's failure to fix the price is due to the fault of the seller or buyer, then that party is liable for an action for damages.

Where nothing is said by the parties regarding price, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case. Generally, the market price would be a reasonable price.

### **Conditions and Warranties (Sections 12-17)**

The parties are at liberty to enter into a contract with any terms they please. As a rule, before a contract of sale is concluded, certain statements are made by the parties to each other. The statement may amount to a stipulation, forming part of the contract or a mere expression of opinion which is not part of the contract. If it is a statement by the seller on the reliance of which the buyer makes the contract, it will amount to a stipulation. If it is a mere commendation by the seller of his goods it does not amount to a stipulation and does not give the right of action.

The stipulation may either be a condition or a warranty. Section 12 draws a clear distinction between a condition and a warranty. Whether a stipulation is a condition or only a warranty is a matter of substance rather than the form of the words used. A stipulation may be a condition though called a warranty and vice versa.

## Conditions

If the stipulation forms the very basis of the contract or is essential to the main purpose of the contract, it is a condition. The breach of the condition gives the aggrieved party a right to treat the contract as repudiated. Thus, if the seller fails to fulfil a condition, the buyer may treat the contract as repudiated, refuse the goods and, if he has already paid for them, recover the price. He can also claim damages for the breach of contract.

## Warranties

If the stipulation is collateral to the main purpose of the contract, i.e., is a subsidiary promise, it is a warranty. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the contract but can only claim damages. Thus, if the seller does not fulfil a warranty, the buyer must accept the goods and claim damages for breach of warranty.

Section 11 states that the stipulation as to time of payment are not to be deemed conditions (and hence not to be of the essence of a contract of sale) unless such an intention appears from the contract. Whether any other stipulation as to time (e.g., time of delivery) is of the essence of the contract or not depends on the terms of the contract.

## When condition sinks to the level of warranty

In some cases a condition sinks or descends to the level of a warranty. The first two cases depend upon the will of the buyer, but the third is compulsory and acts as estoppel against him.

- (a) A condition will become a warranty where the buyer waives the condition; or
- (b) A condition will sink to the level of a warranty where the buyer treats the breach of condition as a breach of warranty; or
- (c) Where the contract is indivisible and the buyer has accepted the goods or part thereof, the breach of condition can only be treated as breach of warranty. The buyer can only claim damages and cannot reject the goods or treat the contract as repudiated.

Sometimes the seller may be excused by law from fulfilling any condition or warranty and the buyer will not then have a remedy in damages.

## Implied Warranties/Conditions

Even where no definite representations have been made, the law implies certain representations as having been made which may be warranties or conditions. An express warranty or condition does not negative an implied warranty or condition unless inconsistent therewith.

There are two implied warranties:

### Implied Warranties [Section 14(b), 14(c) and 16(3)]

- (a) *Implied warranty of quiet possession*: If the circumstances of the contract are such as there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.
- (b) *Implied warranty against encumbrances*: There is a further warranty that the goods are not subject to any right in favour of a third-party, or the buyer's possession shall not be disturbed by reason of the existence of encumbrances. This means that if the buyer is required to, and does discharge the amount of the encumbrance, there is breach of warranty, and he is entitled to claim damages from the seller.

### **Implied Conditions [Sections 14(a), 15(1), (2), 16(1) and Proviso 16(2), and Proviso 16(3) and 12(b) and 12(c)].**

Different implied conditions apply under different types of contracts of sale of goods, such as sale by description, or sale by sample, or sale by description as well as sample. The condition, as to title to goods applies to all types of contracts, subject to that there is apparently no other intention.

#### **Implied Conditions as to title**

There is an implied condition that the seller, in an actual sale, has the right to sell the goods, and, in an agreement to sell, he will have a right to sell the goods at the time when property is to pass. As a result, if the title of the seller turns out to be defective, the buyer is entitled to reject the goods and can recover the full price paid by him.

In *Rowland v. Divall* (1923) 2 K.B. 500, 'A' had bought a second hand motor car from 'B' and paid for it. After he had used it for six months, he was deprived of it because the seller had no title to it. It was held that 'B' had broken the condition as to title and 'A' was therefore, entitled to recover the purchase money from 'B'

#### **Implied conditions under a sale by description**

In a sale by description there are the following implied conditions:

**(a) Goods must correspond with description:** It is provided under Section 15 of the Act that when there is a sale of goods by description, there is an implied condition that the goods shall correspond with description.

In a sale by description, the buyer relies for his information on the description of the goods given by the seller, e.g. in the contract or in the preliminary negotiations.

Where 'A' buys goods which he has not seen, it must be sale by description, e.g., where he buys a 'new Fiat car' from 'B' and the car is not new, he can reject the car.

Even if the buyer has seen the goods, the goods must be in accordance with the description (*Beale v. Taylor* (1967) All E.R. 253).

**(b) Goods must also be of merchantable quality:** If they are bought by description from dealer of goods of that description. [Section 16(2)]

*Merchantable quality* means that the goods must be such as would be acceptable to a reasonable person, having regard to prevailing conditions. They are not merchantable if they have defects which make them unfit for ordinary use, or are such that a reasonable person knowing of their condition would not buy them. 'P' bought black yarn from 'D' and, when delivered, found it damaged by the white ants. The condition of merchantability was broken.

But, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. If, however, examination by the buyer does not reveal the defect and he approves and accepts the goods, but when put to work, the goods are found to be defective, there is a breach of condition of merchantable quality.

The buyer is given a right to examine the goods before accepting them. But a mere opportunity without an actual examination, however, cursory, would not suffice to deprive him of this right.

**(c) Condition as to wholesomeness:** The provisions, (i.e., eatables) supplied must not only answer the description, but they must also be merchantable and wholesome or sound. 'F' bought milk from 'A' and the milk contained typhoid germs. 'F's wife became infected and died. 'A' was liable for damages. Again, 'C' bought a

bun at 'M's bakery, and broke one of his teeth by biting on a stone present in the bun. 'M' was held liable.

**(d) Condition as to quality or fitness for a particular purpose:** Ordinarily, in a contract of sale, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied.

But there is an implied condition that the goods are reasonably fit for the purpose for which they are required if:

- (i) the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill and judgement, and
- (ii) the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not). There is no such condition if the goods are bought under a patent or trade name.

In *Priest v. Last* (1903) 2 K.B. 148, a hot water bottle was bought by the plaintiff, a draper, who could not be expected to have special skill knowledge with regard to hot water bottles, from a chemist, who sold such articles stating that the bottle will not stand boiling water but was intended to hold hot water. While being used by the plaintiff's wife, the bottle bursted and injured her. *Held*, the seller was responsible for damages as the bottle was not fit for use as a hot water bottle.

In *Grant v. Australian Knitting Mills* (1936) 70 MLJ 513, 'G' a doctor purchased woollen underpants from 'M' a retailer whose business was to sell goods of that description. After wearing the underpants, 'G' developed some skin diseases. *Held*, the goods were not fit for their only use and 'G' was entitled to avoid the contract and claim damages.

### Implied conditions under a sale by sample (Section 17)

In a contract of sale by sample:

- (a) there is an implied condition that the bulk shall correspond with the sample in quality;
- (b) there is another implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
- (c) it is further an implied condition of merchantability, as regards latent or hidden defects in the goods which would not be apparent on reasonable examination of the sample. "Worsted coating" quality equal to sample was sold to tailors, the cloth was found to have a defect in the fixture rendering the same unfit for stitching into coats. The seller was held liable even though the same defect existed in the sample, which was examined.

### Implied conditions in sale by sample as well as by description

In a sale by sample as well as by description, the goods supplied must correspond both with the samples as well as with the description. Thus, in *Nichol v. Godts* (1854) 158 E.R. 426, there was a sale of "foreign refined rape-oil having warranty only equal to sample". The oil tendered was the same as the sample, but it was not "foreign refined rape-oil" having a mixture of it and other oil. It was held that the seller was liable, and the buyer could refuse to accept.

## IMPLIED WARRANTIES

Implied warranties are those which the law presumes to have been incorporated in the contract of sale in spite of the fact that the parties have not expressly included them in a contract of sale. Subject to the

contract to the contrary, following are the implied warranties in a contract of sale:

- (i) *Warranty as to quiet possession*: Section 14(b) of the Sale of Goods Act provides that there is an implied warranty that the buyer shall have and enjoy quiet possession of goods. If the buyer's possession is disturbed by anyone having superior title than that of the seller, the buyer is entitled to hold the seller liable for breach of warranty.
- (ii) *Warranty as to freedom from encumbrances*: Section 14(c) states that in a contract of sale, there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made. But if the buyer is aware of any encumbrance on the goods at the time of entering into the contract, he will not be entitled to any compensation from the seller for discharging the encumbrance.
- (iii) *Warranty to disclose dangerous nature of goods*: If the goods are inherently dangerous or likely to be dangerous and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger.
- (iv) *Warranties implied by the custom or usage of trade*: Section 16(3) provides that an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

### Doctrine of Caveat Emptor

The term "*caveat emptor*" is a Latin word which means "let the buyer beware". This principle states that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires. If he buys goods for a particular purpose, he must satisfy himself that they are fit for that purpose. The doctrine of *caveat emptor* is embodied in Section 16 of the Act which states that "subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale". In simple words, it is not the seller's duty to give to the buyer the goods which are fit for a suitable purpose of the buyer. If he makes a wrong selection, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose. The principle was applied in the case of *Ward v. Hobbs*, (1878) 4 A.C. 13, where certain pigs were sold by auction and no warranty was given by seller in respect of any fault or error of description. The buyer paid the price for healthy pigs. But they were ill and all but one died of typhoid fever. They also infected some of the buyer's own pigs. It was held that there was no implied condition or warranty that the pigs were of good health. It was the buyer's duty to satisfy himself regarding the health of the pigs.

**Exceptions: Section 16 lays down the following exceptions to the doctrine of *Caveat Emptor*:**

- (1) Where the seller makes a false representation and the buyer relies on it.
- (2) When the seller actively conceals a defect in the goods which is not visible on a reasonable examination of the same.
- (3) When the buyer, relying upon the skill and judgement of the seller, has expressly or impliedly communicated to him the purpose for which the goods are required.
- (4) Where goods are bought by description from a seller who deals in goods of that description.

### Passing of Property or Transfer of Ownership (Sections 18-20)

The sole purpose of a sale is the transfer of ownership of goods from the seller to the buyer. It is important to know the precise moment of time at which the property in the goods passes from the seller to the buyer for the following reasons:

- (a) The general rule is that risk follows the ownership, whether the delivery has been made or not. If the



goods are lost or damaged by accident or otherwise, then, subject to certain exceptions, the loss falls on the owner of the goods at the time they are lost or damaged.

- (b) When there is a danger of the goods being damaged by the action of third parties, it is generally the owner who can take action.
- (c) The rights of third parties may depend upon the passing of the property if the buyer resells the goods to a third-party, the third-party will only obtain a good title if the property in the goods has passed to the buyer before or at the time of the resale. Similarly, if the seller, in breach of his contract with the buyer, attempts to sell the goods to a third party in the goods, has not passed to the buyer, e.g., where there is only an agreement to sell.
- (d) In case of insolvency of either the seller or the buyer, it is necessary to know whether the goods can be taken over by the official assignee or the official receiver. It will depend upon whether the property in the goods was with the party adjudged insolvent.

Thus in this context, ownership and possession are two distinct concepts and these two can at times remain separately with two different persons.

### Passing of property in specific goods

In a sale of specific or ascertained goods, the property in them passes to the buyer as and when the parties intended to pass. The intention must be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case.

Unless a contrary intention appears, the following rules are applicable for ascertaining the intention of the parties:

- (a) Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made. Deliverable state means such a state that the buyer would be bound to take delivery of the goods. The fact that the time of delivery or the time of payment is postponed does not prevent the property from passing at once. (Section 20)
- (b) Where there is a contract for the sale of specific goods not in a deliverable state, i.e., the seller has to do something to the goods to put them in a deliverable state, the property does not pass until that thing is done and the buyer has notice of it. (Section 21)

A certain quantity of oil was brought. The oil was to be filled into casks by the seller and then taken away by the buyer. Some casks were filled in the presence of buyer but, before the remainder could be filled, a fire broke out and the entire quantity of oil was destroyed, *Held*, the buyer must bear the loss of the oil which was put into the casks (i.e., put in deliverable state) and the seller must bear the loss of the remainder (*Rugg v. Minett* (1809) 11 East 210).

- (c) Where there is a sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of ascertaining the price, the property to the goods for the purpose of ascertaining the price, does not pass until such act or thing is done and the buyer has notice of it. (Section 22)
- (d) When goods are delivered to the buyer “on approval” or “on sale of return” or other similar terms the property therein passes to the buyer:
  - (i) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction;

- (ii) if he does not signify his approval or acceptance but retains the goods without giving notice of rejection, in such a case—(a) if a time has been fixed for the return of the goods, on the expiration of such time; and (b) if no time has been fixed, on the expiration of a reasonable time.

### Ownership in unascertained goods

The property in unascertained or future goods does not pass until the goods are ascertained.

Unascertained goods are goods defined by description only, for example, 100 quintals of wheat; and not goods identified and agreed upon when the contract is made.

Unless a different intention appears, the following rules are applicable for ascertaining the intention of the parties in regard to passing of property in respect of such goods:

- (a) The property in unascertained or future goods sold by description passes to the buyer when goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller. Such assent may be expressed or implied and may be given either before or after the appropriation is made. (Section 23)
- (b) If there is a sale of a quantity of goods out of a large quantity, for example, 50 quintals of rice out of a heap in B's godown, the property will pass on the appropriation of the specified quantity by one party with the assent of the other.
- (c) Delivery by the seller of the goods to a carrier or other buyer for the purpose of transmission to the buyer in pursuance of the contract is an appropriation sufficient to pass the property in the goods.
- (d) The property in goods, whether specific or unascertained, does not pass if the seller reserves the right of disposal of the goods. Apart from an express reservation of the right of disposal, the seller is deemed to reserve the right of disposal in the following two cases:
  - (i) where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, the goods are deliverable to the order of the seller or his agent.
  - (ii) when the seller sends the bill of exchange for the price of the goods to the buyer for this acceptance, together with the bill of lading, the property in the goods does not pass to the buyer unless he accepts the bill of exchange.

### Passing of Risk (Section 26)

The general rule is that goods remain at the seller's risk until the ownership is transferred to the buyer. After the ownership has passed to the buyer, the goods are at the buyer's risk whether the delivery has been made or not. For example, 'A' buys goods of 'B' and property has passed from 'B' to 'A'; but the goods remain in 'B's warehouse and the price is unpaid. Before delivery, 'B's warehouse is burnt down for no fault of 'B' and the goods are destroyed. 'A' must pay 'B' the price of the goods, as he was the owner. The rule is *resperit domino*- the loss falls on the owner.

But the parties may agree that risk will pass at the time different from the time when ownership passed. For example, the seller may agree to be responsible for the goods even after the ownership is passed to the buyer or *vice versa*.

In *Consolidated Coffee Ltd. v. Coffee Board*, (1980 3 SCC 358), one of the terms adopted by coffee board for auction of coffee was the property in the coffee knocked down to a bidder would not pass until the

payment of price and in the meantime the goods would remain with the seller but at the risk of the buyer, in such cases, risk and property passes on at different stages.

In *Multanmal Champalal v. Shah & Co.*, AIR (1970) Mysore 106, goods were despatched by the seller from Bombay to Bellary through a public carrier. According to the terms of the contract, the goods were to remain the property of the seller till the price was paid though the risk was to pass to the buyer when they were delivered to public carrier for despatch. When the goods were subsequently lost before the payment of the price (and the consequent to the passing of the property to the buyer), the Court held that the loss was to be borne by the buyer.

It was further held in the same case that the buyer was at fault in delaying delivery unreasonably and therefore on that ground also he was liable for the loss, because such loss would not have arisen but for such delay.

Thus, where delivery has been delayed through the fault of either the buyer or the seller, in such a case, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

### Transfer of Title by Person not the Owner (Section 27-30)

The general rule is that only the owner of goods can sell the goods. Conversely, the sale of an article by a person who is not or who has not the authority of the owner, gives no title to the buyer. The rule is expressed by the maxim; "*Nemo Dat Quod Non Habet*" i.e. no one can pass a better title than he himself has. As applied to the sale of goods, the rule means that a seller of goods cannot give a better title to the buyer than he himself possess. Thus, even a *bona fide* buyer who buys stolen goods from a thief or from a transferee from such a thief can get no valid title to them, since the thief has no title, nor could he give one to any transferee.

### Example:

1. A, the hirer of goods under a hire purchase agreement, sells them to B, then B, though a *bona fide* purchaser, does not acquire the property in the goods. At most he can acquire such an interest as the hirer had.
2. A finds a ring of B and sells it to a third person who purchases it for value and in good faith. The true owner, i.e. B can recover from that person, for A having no title to the ring could pass none the better.

### Exception to the General Rule

The Act while recognizing the general rule that no one can give a better title than he himself has, laid down important exceptions to it. Under the exceptions the buyer gets a better title to the goods than the seller himself. These exceptions are given below:

- (a) *Sale by a mercantile agent*: A buyer will get a good title if he buys in good faith from a mercantile agent who is in possession either of the goods or documents of title to the goods with the consent of the owner, and who sells the goods in the ordinary course of his business.
- (b) *Sale by a co-owner*: A buyer who buys in good faith from one of the several joint owners who is in sole possession of the goods with the permission of his co-owners will get good title to the goods.
- (c) *Sale by a person in possession under a voidable contract*: A buyer buys in good faith from a person in possession of goods under a contract which is voidable, but has not been rescinded at the time of the sale.

- (d) *Sale by seller in possession after sale*: Where a seller, after having sold the goods, continues or is in possession of the goods or of the documents of title to the goods and again sells them by himself or through his mercantile agent to a person who buys in good faith and without notice of the previous sale, such a buyer gets a good title to the goods.
- (e) *Sale by buyer in possession*: If a person has brought or agreed to buy goods obtains, with the seller's consent, possession of the goods or of the documents of title to them, any sale by him or by his mercantile agent to a buyer who takes in good faith without notice of any lien or other claim of the original seller against the goods, will give a good title to the buyer. In any of the above cases, if the transfer is by way of pledge or pawn only, it will be valid as a pledge or pawn.
- (f) *Estoppel*: If the true owner stands by and allows an innocent buyer to pay over money to a third-party, who professes to have the right to sell an article, the true owner will be estopped from denying the third-party's right to sell.
- (g) *Sale by an unpaid seller*: Where an unpaid seller has exercised his right of lien or stoppage in transit and is in possession of the goods, he may resell them and the second buyer will get absolute right to the goods.
- (h) *Sale by person under other laws*: A pawnee, on default of the pawnee to repay, has a right to sell the goods, pawned and the buyer gets a good title to the goods. The finder of lost goods can also sell under certain circumstances. The Official Assignee or Official Receiver, Liquidator, Officers of Court selling under a decree, Executors, and Administrators, all these persons are not owners, but they can convey better title than they have.

### Performance of the Contract of Sale

It is the duty of the seller and buyer that the contract is performed. The duty of the seller is to deliver the goods and that of the buyer is to accept the goods and pay for them in accordance with the contract of sale.

Unless otherwise agreed, payment of the price and the delivery of the goods are concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.

### Delivery (Sections 33-39)

Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic. *Actual or physical delivery* takes place where the goods are handed over by the seller to the buyer or his agent authorised to take possession of the goods. *Constructive* delivery takes place when the person in possession of the goods acknowledges that he holds the goods on behalf of and at the disposal of the buyer. For example, where the seller, after having sold the goods, may hold them as bailee for the buyer, there is constructive delivery. *Symbolic* delivery is made by indicating or giving a symbol. Here the goods themselves are not delivered, but the "means of obtaining possession" of goods is delivered, e.g., by delivering the key of the warehouse where the goods are stored, bill of lading which will entitle the holder to receive the goods on the arrival of the ship.

### Rules as to delivery

The following rules apply regarding delivery of goods:

- (a) Delivery should have the effect of putting the buyer in possession.
- (b) The seller must deliver the goods according to the contract.
- (c) The seller is to deliver the goods when the buyer applies for delivery; it is the duty of the buyer to

claim delivery.

- (d) Where the goods at the time of the sale are in the possession of a third person, there will be delivery only when that person acknowledges to the buyer that he holds the goods on his behalf.
- (e) The seller should tender delivery so that the buyer can take the goods. It is no duty of the seller to send or carry the goods to the buyer unless the contract so provides. But the goods must be in a deliverable state at the time of delivery or tender of delivery. If by the contract the seller is bound to send the goods to the buyer, but no time is fixed, the seller is bound to send them within a reasonable time.
- (f) The place of delivery is usually stated in the contract. Where it is so stated, the goods must be delivered at the specified place during working hours on a working day. Where no place is mentioned, the goods are to be delivered at a place at which they happen to be at the time of the contract of sale and if not then in existence they are to be delivered at the place at which they are manufactured or produced.
- (g) The seller has to bear the cost of delivery unless the contract otherwise provides. While the cost of obtaining delivery is said to be of the buyer, the cost of the putting the goods into deliverable state must be borne by the seller. In other words, in the absence of an agreement to the contrary, the expenses of and incidental to making delivery of the goods must be borne by the seller, the expenses of and incidental to receiving delivery must be borne by the buyer.
- (h) If the goods are to be delivered at a place other than where they are, the risk of deterioration in transit will, unless otherwise agreed, be borne by the buyer.
- (i) Unless otherwise agreed, the buyer is not bound to accept delivery in instalments.

### Acceptance of Goods by the Buyer

Acceptance of the goods by the buyer takes place when the buyer:

- (a) intimates to the seller that he has accepted the goods; or
- (b) retains the goods, after the lapse of a reasonable time without intimating to the seller that he has rejected them; or
- (c) does any act on the goods which is inconsistent with the ownership of the seller, e.g., pledges or resells. If the seller sends the buyer a larger or smaller quantity of goods than ordered, the buyer may:
  - (i) reject the whole; or
  - (ii) accept the whole; or
  - (ii) accept the quantity be ordered and reject the rest.

If the seller delivers with the goods ordered, goods of a wrong description, the buyer may accept the goods ordered and reject the rest, or reject the whole.

Where the buyer rightly rejects the goods, he is not bound to return the rejected goods to the seller. It is sufficient if he intimates the seller that he refuses to accept them. In that case, the seller has to remove them.

### Instalment Deliveries

When there is a contract for the sale of goods to be delivered by stated instalments which are to be

separately paid for, and either the buyer or the seller commits a breach of contract, it depends on the terms of the contract whether the breach is a repudiation of the whole contract or a severable breach merely giving right to claim for damages.

### **Suits for Breach of Contract**

Where the property in the goods has passed to the buyer, the seller may sue him for the price.

Where the price is payable on a certain day regardless of delivery, the seller may sue for the price, if it is not paid on that day, although the property in the goods has not passed.

Where the buyer wrongfully neglects or refuses to accept the goods and pay for them, the seller may sue the buyer for damages for non-acceptance.

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue him for damages for non-delivery.

Where there is a breach of warranty or where the buyer elects or is compelled to treat the breach of condition as a breach of warranty, the buyer cannot reject the goods. He can set breach of warranty in extinction or diminution of the price payable by him and if loss suffered by him is more than the price he may sue for the damages.

If the buyer has paid the price and the goods are not delivered, the buyer can sue the seller for the recovery of the amount paid. In appropriate cases the buyer can also get an order from the court that the specific goods ought to be delivered.

### **Anticipatory Breach**

Where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either treat the contract as still subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

In case the contract is treated as still subsisting it would be for the benefit of both the parties and the party who had originally repudiated will not be deprived of:

- (a) his right of performance on the due date in spite of his prior repudiation; or
- (b) his rights to set up any defence for non-performance which might have actually arisen after the date of the prior repudiation.

### **Measure of Damages**

The Act does not specifically provide for rules as regards the measure of damages except by stating that nothing in the Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law they are entitled to the same. The inference is that the rules laid down in Section 73 of the Indian Contract Act will apply.

### **Unpaid Seller (Sections 45-54)**

#### ***Who is an unpaid seller? (Section 45)***

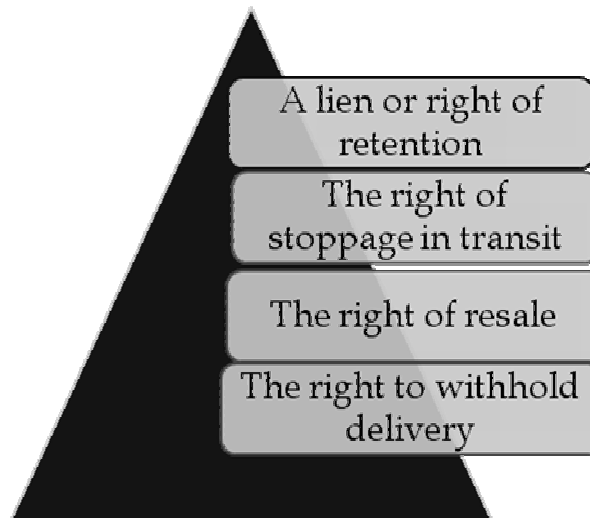
The seller of goods is deemed to be unpaid seller:

- (a) When the whole of the price has not been paid or tendered; or

- (b) When a conditional payment was made by a bill of exchange or other negotiable instrument, and the instrument has been dishonoured.

### Rights of an Unpaid Seller against the Goods

*An unpaid seller's right against the goods are:*



(a) *Right of Lien* (Sections 47-49 and 54) An unpaid seller in possession of goods sold, may exercise his lien on the goods, i.e., keep the goods in his possession and refuse to deliver them to the buyer until the fulfilment or tender of the price in cases where:

- (i) the goods have been sold without stipulation as to credit; or
- (ii) the goods have been sold on credit, but the term of credit has expired; or
- (iii) the buyer becomes insolvent.

The lien depends on physical possession. The seller's lien is *possessory lien*, so that it can be exercised only so long as the seller is in possession of the goods. It can only be exercised for the non-payment of the price and not for any other charges.

A lien is lost—

- (i) When the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods;
- (ii) When the buyer or his agent lawfully obtains possession of the goods;
- (iii) By waiver of his lien by the unpaid seller.

(b) *Stoppage in transit* (Sections 50-52) The right of stoppage in transit is a right of stopping the goods while they are in transit, resuming possession of them and retaining possession until payment of the price.

The right to stop goods is available to an unpaid seller

- (i) when the buyer becomes insolvent; and
- (ii) the goods are in transit.

The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the court.

The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehousekeeper for the purpose of transmission to the buyer and until the buyer takes delivery of them.

The transit comes to an end in the following cases:

- (i) If the buyer obtains delivery before the arrival of the goods at their destination;
- (ii) If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer;
- (iii) If the carrier wrongfully refuses to deliver the goods to the buyer.

If the goods are rejected by the buyer and the carrier or other bailee holds them, the transit will be deemed to continue even if the seller has refused to receive them back.

The right to stop in transit may be exercised by the unpaid seller either by taking actual possession of the goods or by giving notice of the seller's claim to the carrier or other person having control of the goods. On notice being given to the carrier, he must redeliver the goods to the seller who must pay the expenses of the redelivery.

The seller's right of lien or stoppage in transit is not affected by any sale on the part of the buyer unless the seller has assented to it. A transfer, however, of the bill of lading or other document of seller to a bona fide purchaser for value is valid against the seller's right.

(c) *Right of re-sale* (Section 54): The unpaid seller may re-sell:

- (i) where the goods are perishable;
- (ii) where the right is expressly reserved in the contract;
- (iii) where in exercise of right of lien or stoppage in transit, the seller gives notice to the buyer of his intention to re-sell, and the buyer, does not pay or tender the price within a reasonable time.

If on a re-sale, there is a deficiency between the price due and amount realised, he is entitled to recover it from the buyer. If there is a surplus, he can keep it. He will not have these rights if he has not given any notice and he will have to pay the buyer profit, if any, on the resale.

(d) *Rights to withhold delivery*: If the property in the goods has passed, the unpaid seller has right as described above. If, however, the property has not passed, the unpaid seller has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit.

### **Rights of an unpaid seller against the buyer (Sections 55 and 56)**

An unpaid seller may sue the buyer for the price of the goods in case of breach of contract where the property in the goods has passed to the buyer or he has wrongfully refused to pay the price according to the terms of the contract.

The seller may sue the buyer even if the property in the goods has not passed where the price is payable on a certain day.

Under Section 56, the seller may sue the buyer for damages or breach of contract where the buyer wrongfully neglects or refuses to accept and pay for the goods.



Thus an unpaid seller's rights against the buyer personally are:

- (a) a suit for the price.
- (b) a suit for damages.

### **Auction Sales (Section 64)**

A sale by auction is a public sale where goods are offered to be taken by bidders. It is a proceeding at which people are invited to compete for the purchase of property by successive offer of advancing sums.

Section 64 lays down the rules regulating auction sales. Where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale. The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made, any bidder may retract his bid.

A right to bid may be reserved expressly by or on behalf of the seller. Where such right is expressly so reserved, the seller or any other person on his behalf may bid at the auction. Where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale in contravention of this rule may be treated as fraudulent by the buyer. The sale may be notified to be subject to a reserved price. Where there is such notification, every bid is a conditional offer subject to its being up to the reserve price. Where an auctioneer inadvertently knocks down to a bidder who has bid less than the reserved price, there is no contract of sale. If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

### **Trading Contracts Involving Rail or Sea Transit**

In the case of a contract for the sale of goods which are to be shipped by sea a number of conditions are attached by the parties or by custom and practice of merchants. Some of the important types of such contracts are given below:

- (a) *F.O.B. (Free on Board)*: Under an F.O.B. contract, it is the duty of the seller to put the goods on board a ship at his own expenses. The property in goods passes to the buyer only after the goods have been put on board the ship, and they are at buyer's risk as soon as they are put on board the ship, usually named by the buyer. The seller must notify the buyer immediately that the goods have been delivered on board, so that the buyer may insure them. If he fails to do so the goods shall be deemed to be at seller's risk during such sea transit.
- (b) *F.O.R. (Free on Rail)*: Similar position prevails in these contracts as in the case of F.O.B. contracts.
- (c) *C.I.F. or C.F.I. (Cost Insurance and Freight)*: A CIF contract is a contract for the sale of insured goods lost or not lost to be implemented by transfer of proper documents.

In such types of contracts, the seller not only bears all the expenses of putting the goods on board the ship as in an F.O.B. contract, but also to bear the freight and insurance charges. He will arrange for an insurance of the goods for the benefit of the buyer. On the tender of documents, the buyer is required to pay and then take delivery. He has a right to reject the goods if they are not according to the contract.

- (d) *Ex-Ship*: Here the seller is bound to arrange the shipment of the goods to the port of destination, and to such further inland destination as the buyer may stipulate. The buyer is not bound to pay until the goods are ready for unloading from the ship and all freight charges paid. The goods travel at the seller's risk, but he is not bound to insure them.

## LESSON ROUND-UP

- In a sale, the property in the goods sold passes to the buyer at the time of contract so that he becomes the owner of the goods. In an agreement to sell, the ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfilment of some conditions subject to which the property in the goods is to be transferred.
- Where goods are delivered to another on terms which indicate that the property is to pass at once the contract must be one of sale and not bailment.
- The subject matter of the contract of sale is essentially goods. According to Section 2(7) of the Sale of Goods Act, “goods” means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Goods may be (a) existing, (b) future, or (c) contingent. The existing goods may be (i) specific or generic, (ii) ascertained or unascertained.
- The sole purpose of a sale is the transfer of ownership of goods from the seller to the buyer. The general rule is that only the owner of goods can sell the goods. Conversely, the sale of an article by a person who is not or who has not the authority of the owner, gives no title to the buyer.
- It is the duty of the seller and buyer that the contract is performed. The duty of the seller is to deliver the goods and that of the buyer to accept the goods and pay for them in accordance with the contract of sale.
- Unless otherwise agreed, payment of the price and the delivery of the goods and concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.
- Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic.
- A sale by auction is a public sale where goods are offered to be taken by bidders. It is a proceeding at which people are invited to compete for the purchase of property by successive offer of advancing sums.

## SELF TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define contract of sale of goods and distinguish between sale and agreement to sell and hire purchase agreement.
2. Write short notes on:
  - (i) Existing goods,
  - (ii) Future goods
3. Why it is important to know the time of passing of property?
4. What are the rights of an unpaid seller against the goods and against the buyer?
5. Explain Doctrine of *Caveat emptor*.

# Lesson 23

## Indian Partnership Act, 1932

### LESSON OUTLINE

- Learning objectives
- Nature of Partnership
- Essentials of a Partnership registration of Partnership
- Classification of Partnership
- Kinds of Partners
- Rights and Duties of Partners
- Relation of Partners to Third Parties
- Dissolution of Partnership
- Lesson Round Up
- Self-Test Questions

### LEARNING OBJECTIVES

Likewise corporations which are regulated by Companies Act, 2013, the other form of business is partnership which is regulated by Indian Partnership Act, 1932. The partnership is considered as the convenient way to start a business. Suppose one wants to open a bookshop in the locality. There are various things that are required to start and run the business which may not be feasible to arrange all alone. These may include resources from money to place to management. In that case, the idea may be spoken to friends and relatives who may agree to run the bookshop by contributing a certain amount of money and other things required. So all of them join hands together to become the owners and agree to share profits and losses.

This chapter deals with laws relating to partnership that will regulate this form of business, its registration, admission of new partners, and dissolution. It also explains other aspects of partnership like kinds of partners, relationship among themselves and with others.

*There's an assumption by many partners that no matter what happens to their business, they'll be partners forever.*

*David Gibbs*

## INTRODUCTION

The Indian Partnership Act, 1932, came into force w.e.f. 1st October, 1932 except section 69, which came into force on the 1st day of October, 1933. It extends to the whole of India except the state of Jammu and Kashmir.

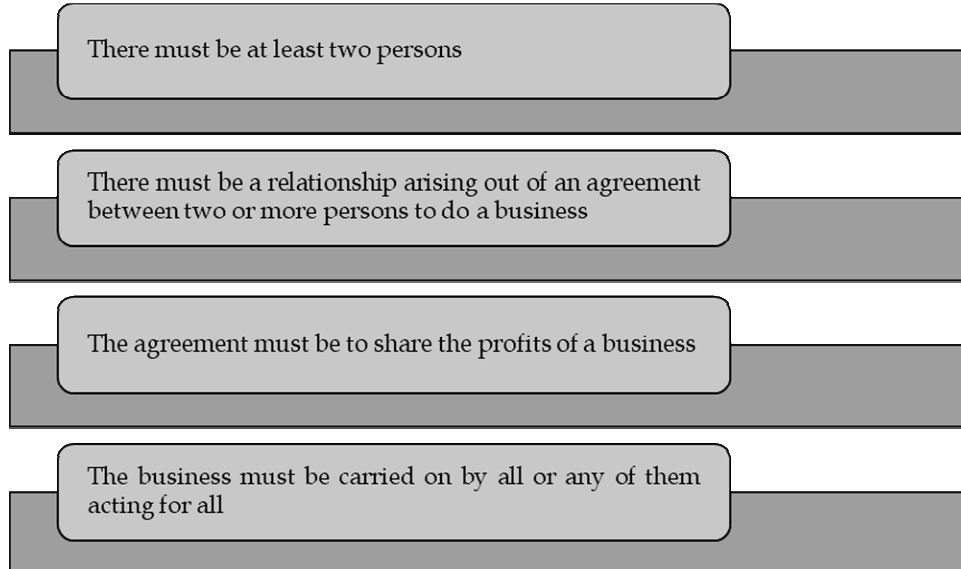
It lays down the important provisions relating to partnership contracts. However, the general principles of the Indian Contracts Act, 1872 which formally contained the provisions of the law of partnership shall apply so far as they are not inconsistent with this Act. (Section 3)

## DEFINITIONS

### Partnership

According to Section 4 “Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all”.

When analysed, the definition tells us that in order that persons may become partners, it is essential that:



All these four elements must be present before a group or an association can be held to be partners. In other words, it can be said that all the aforesaid four elements must co-exist before a partnership can be said to come into existence. If any one of them is not proved to be present, there cannot be a partnership. The first element relates to the voluntary contractual nature of partnership; the second gives the motive which leads to the formation of firms, i.e. the acquisition of gains; the third shows that the persons of the group who conduct the business do so as agents for all the persons in the group, and are therefore liable to account to all the persons in the group (*Maliram Choudhary v. Jagannath*, AIR 1972 Orissa 17).

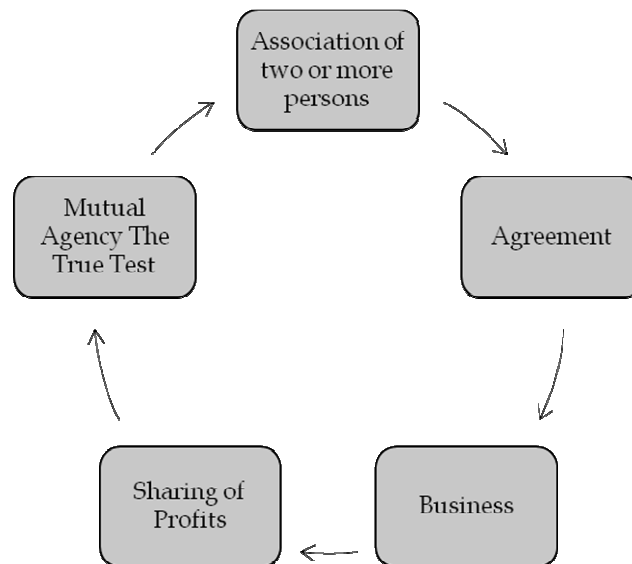
### Partners, Firm and Firm Name

Persons who have entered into partnership with one another are called individually “partners” and collectively “a firm”, and the name under which their business is carried on is called the “firm name”. (Section 4)

In law, “a firm” is only a convenient phrase for describing the partners, and the firm has no legal existence apart from its partners. It is neither a legal entity, nor is it a person as is a corporation; it is a collective name of the members of a partnership.

As regard the “firm name”, partners have a right to carry on business under any name and style which they choose to adopt, provided they do not violate the rules relating to trade name or goodwill. They must not adopt name calculated to mislead the public into confusing them with a firm of repute already in existence with a similar name. They must not use a name implying the sanction of patronage of the Government. A partnership firm cannot use the word “Limited” as a part of its name.

### **Essentials of a Partnership and True Test of Partnership**



These elements are discussed below in detail:

#### **(1) Association of two or more persons**

There must be a contract between two or more persons. Therefore unless there are at least two persons there can not be a partnership. Persons must be competent to enter into a contract. They may all be natural or artificial or some natural and other artificial. Thus a corporation or limited partnership may itself be a partner in a general partnership.

#### **(2) Agreement**

Existence of an agreement is essential of partnership. Section 5 of the Act states that the relation of partnership arises from contract and not from status; and in particular, the members of a Hindu Undivided Family carrying on a family business as such, or a Burmese Buddhist Husband and wife carrying on business as such are not partners in such business.

Such an agreement between the partners may be express or implied. Further, the agreement must be a valid agreement and for a lawful object and purpose and between the persons competent to contract.

#### **(3) Business**

Partnership implies business and when there is no association to carry on business there is no partnership.

The term “business” is, however, used in the widest sense to cover trade, occupation and profession. As per Section 2(b) of the Act the term “business” includes every trade, occupation and profession. In the definition of partnership the word “business” is used in the sense of “carrying on business” which suggests continuity or repetition of acts. But it does not mean that it should be confined to lengthy operations, it may consist of a single adventure of a single undertaking, if there is continued participation of two or more persons for acquisition of gains.

The term must be understood in a particular sense . It refers to any activity which, if successful, would result in profit.

#### ***(4) Sharing of Profits***

To constitute a partnership, the parties must have agreed to carry on a business and to share profits in common. “Profits” mean the excess of returns over advances, the excess of what is obtained over the cost of obtaining it. Sharing of profits also involves sharing of losses. But whereas the sharing of profit is an essential element of partnership, the sharing of losses is not. It is open to one or more partners to bear all the losses of the business.

It follows that the sharing of profits is an essential ingredient of partnership and there would be no partnership where only one of the partners is entitled to the whole of the profits of the business. But it is open to the partners to agree to share the profits in any way they like. They may agree to share the profits either in specific proportions or in specific sums.

#### **Sharing of Profits is not Conclusive**

Test Although sharing of profits is a prima facie evidence of the existence of partnership, this is not the conclusive test of the same. A person may have a share in the partnership profits, but still may not be a partner. For instance, a joint owner of a property sharing its return or members of non-profit or non-trading associations will not be called partners.

#### **Illustrations**

1. A and B buy 100 bales of cotton, which they agree to sell for their joint account, each party sharing profits and bearing losses equally. A and B are partners in respect of such account.
2. A and B buy 100 bales of cotton agreeing to divide these between them. A and B are not partners.
3. “A” a trader, owed money to XY&Z. He agreed to pay XY&Z out of the profits of his business (run under the supervision of X, Y and Z) what he owed to them. It was held that the arrangement does not make X, Y and Z the partners with A in the business.

#### ***(5) Mutual Agency The True Test***

Mutual agency is the foundation of partner’s liability. Each partner is both an agent and principal for himself and others; that is the significance of the phrase “carried on by all or any of them acting for all”. Each partner is an agent binding the other partners who are his principal and each partner is again a principal, who in turn is bound by the acts of the other partners. In other words, there must be facts or circumstances from which it can be inferred that each of the persons alleged to be partners was the agent, real or implied of another. What is essential is that the partner who conducts the business of the firm not only acts for himself but for the other partners also.

The true test, therefore, in determining whether a partnership exists, is to see whether the relation of principal and agent exists between the parties and not merely whether the parties share the profits or the

business is carried on for the benefit of all. It is this relation of agency among partners which distinguishes a partnership from a single co-ownership on the one hand and the agreement to share profits on the other. The existence of this relation of agency can be gathered from the real intention of the parties and the circumstances of the case. The question of intention must be decided on the basis of the conduct of parties and of all the surrounding circumstances. The law of partnership is the extension of the law of agency therefore every partner is liable for the act of other partner if within authority upto unlimited extent. The relation of mutual agency is the conclusive test of partnership.

It may be observed that the question whether a person is or is not a partner depends almost in all cases upon whether he has the authority to act for other partners and whether other partners have the authority to act for him. It follows that the agency relationship is the most important test of partnership.

### **Formation of Partnership**

According to the definition of partnership under the Indian Partnership Act, 1932, there must be an agreement between the partners of a partnership firm.

The partnership agreement must comply with all the essentials of a valid contract. There must be free consent of the parties who must be competent to contract and the object of partnership should not be forbidden by law or immoral or opposed to public policy. Two exceptions, however, may be noted:

- (i) A minor may be admitted to the benefits of a partnership with the consent of all other partners.
- (ii) As relations of partners inter se are that of agency, no consideration is required to create the partnership.

### **Partnership Deed**

The agreement of partnership may be oral but to avoid future disputes it is always advisable to have it in writing. The mutual rights and obligations of partners must be discussed in detail and should be put into writing in the shape of a 'Partnership Deed', before the partnership is actually started. Thus, the written document which contains the mutual rights and obligations of partners is known as partnership deed. (The partnership deed is also called as 'Partnership Agreement', 'Constitution of Partnership', 'Articles of Partnership' etc.). The deed must be properly drafted and stamped according to the provisions of the Indian Stamp Act. Each partner should be given a copy of the deed and if the firm is to be registered, a copy of the deed should be filed with the Registrar of Firms at the time of such legislation. The partnership deed is not a public document and therefore binds only third parties so far as they have notice of it.

### **Contents of Partnership Deed**

The exact terms of the partnership deed (or agreement) will depend upon the circumstances but generally a partnership deed contains the following covenants:

- (i) The firm name and business to be carried on under that name.
- (ii) Names and addresses of partners.
- (iii) Nature and scope of business and address(s) of business place(s).
- (iv) Commencement and duration of partnership.
- (v) The capital and the contribution made by each partner.
- (vi) Provision for further capital and loans by partners to the firm.
- (vii) Partner's drawings.

- (viii) Interest on capital, loans, drawings and current account.
- (ix) Salaries, commission and remuneration to partners,
- (x) Profit (or loss) sharing ratio of partners.
- (xi) The keeping of proper books of accounts, inspection and audit, Bank Accounts and their operation.
- (xii) The accounting period and the date on which that accounts are to be prepared.
- (xiii) Rights, powers and duties of the partners.
- (xiv) Whether and in what circumstances, notice of retirement or dissolution can be given by a partner.
- (xv) Provision that death or retirement of a partner will not bring about dissolution of partnership,
- (xvi) Valuation of goodwill on retirement, death, dissolution etc.
- (xvii) The method of valuation of assets (and liabilities) on retirement or death of any partner.
- (xviii) Provision for expulsion of a partner.
- (xix) Provision regarding the allocation of business activities to be performed by individual partners.
- (xx) The arbitration clause for the settlement of disputes. The terms contained in the partnership deed may be varied with the consent of all the parties, and such consent may be express or implied by a course of dealing. [Section 11(1)]

### **Classification of Partnership**

A partnership may either be for a particular adventure or for a fixed period. It may also be a partnership at will. From the duration point of view, a partnership may be classified into the following two categories:

#### ***(i) Particular Partnership (Section 8)***

“A person may become a partner with another person in a particular adventure or undertaking”. When two or more persons agree to do business in a particular adventure or undertaking, such a partnership is called “Particular Partnership”. Thus, a particular partnership may even be for a single adventure or undertaking.

#### ***(ii) Partnership at Will (Section 7)***

“Where no provision is made by contract between the partners for the duration of their partnership or for the determination of their partnership, the partnership is called Partnership at Will”. A partnership is deemed to be a partnership at will when (i) no fixed period has been agreed upon for the duration of partnership, and (ii) there is no provision made as to the determination of partnership in any other way. The partnership at will has no fixed or definite date of termination and, therefore, death or retirement of a partner does not affect the existence of such partnership.

Section 43(1) provides that “Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no such date is mentioned, as from the date of communication of the notice”. This accounts for the importance of the definition of ‘Partnership at Will’.

### **Co-ownership and Partnership**

There is a possibility that two co-owners may employ their property in a business and share the profits, and still be not partners. A distinction between the two is in point. Partnership is between two persons Co-ownership is not always the result of an agreement: it may arise by the operation of law or from status, e.g., co-heirs of a property. Partnership must arise from an agreement. A partner is the agent of the other



partners, but a co-owner is not the agent of the other co-owner(s). Co-ownership does not necessarily involve community of profits and loss, partnership does. A co-owner can without the consent of the others transfer his rights and interests to strangers, a partner cannot do so without the consent of all the other partners so as to make the transferee a partner in the firm. A co-owner can ask for division of property in specie, but no partner can ask for this. His only right is to have a share of the profits out of the properties. Partnerships end at death or insolvency; co-ownerships end at death. A co-owner has no lien on the property while a partner has a lien on the firm property.

### Hindu Joint Family Firm and Partnership

A Hindu joint family firm differs from a partnership in the following ways:

A partnership comes into existence by means of a contract between the partners; a Hindu joint family firm arises as a result of status, i.e., by birth in the family. The death of a partner dissolves the partnership, but the death of a co-parcener does not dissolve the family firm. In a joint family firm only the Karta or manager (who is the head of the family) has implied authority to borrow and bind other members; in a partnership each partner is entitled to do so. Every partner is personally liable for the debts of the firm; in a joint family business only the Karta is personally liable. A minor is a member of a joint family firm from the very day of his birth by virtue of his status, but he is not personally liable. A minor cannot be a partner, although he may be admitted to the benefits of partnership. A partner can demand the accounts of the firm, a co-parcener cannot ask for accounts, his only remedy is to ask for partition of the assets of the family firm. No registration of a family firm is necessary, while a partnership firm must be registered before it can maintain suits against outsiders. Each partner has a definite share in the business and this can be changed only by agreement, but the share of a co-parcener is not fixed; it may be enlarged by death or reduced by a birth in the family. There is a definite limit to the number of partners, but there is no such limit in the case of a Hindu joint family firm. A Hindu joint family business is governed by Hindu Law, while Indian Partnership Act, governs partnerships and excludes Hindu joint family firms. (Section 5)

### Company and Partnership

The members constituting a partnership do not form a whole as distinct from the individuals composing it. The firm has no legal entity and has no rights and obligations separate from the partners. In a firm every partner is an agent of the rest of the partners, but a member of a company is neither the agent of the company nor of other members. A company, as soon as it is incorporated, say by registration under the Companies Act, becomes a legal entity distinct from its members constituting it (*Salomon v. Salomon & Co.*, 1897, A.C. 22). It can sue and be sued in its own name like any natural person. In a partnership, there are rights and obligations as against individual partners, but in the case of a company, the rights and obligations are as against the fictitious entity of the whole of the company and not the members composing it. The creditors of the partnership can call upon individual partners to pay the firm's debt, but the members of a company are not personally liable for the company's debts. In other words, a partner's liability is unlimited while the liability of the members of a company is limited to the extent of the amount remaining unpaid on their shares (*Prasad v. Missir*). Partnership firm may dissolve by the death or insolvency of a partner, but a company is not affected by the death or insolvency of a member. A partner cannot transfer his interest so as to substitute the transferee in his place as the partner, without the consent of all the other partners; a member can transfer his share to any one he likes.

### Change in a Firm

The Indian Partnership Act, 1932, contemplates the following changes in a partnership firm:

- (1) Changes in the constitution of a firm.

- (2) Changes in the nature of a business or undertakings.
- (3) Changes in the duration of a firm.

A change in the constitution of a firm takes place when:

- (a) a new partner is introduced as a partner in a firm; (Section 31)
- (b) a partner retires from a firm; (Section 32),
- (c) a partner is expelled from a firm; (Section 33),
- (d) a partner is adjudicated as an insolvent; (Section 34) and
- (e) a partner dies. (Section 35)

A change in the nature of the business can only be brought about by the consent of all the partners. Thus, a partnership formed for a definite purpose, agreed upon at the time of formation of the partnership, cannot depart from the agreed purpose without the consent of all the partners [Section 12(c)]. Section 17(c) provides for a case whether a partnership firm is formed for a particular undertaking or undertakings, it proceeds to carry on other undertaking or undertakings, in that event the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures of undertakings.

### Partnership Property

It is open to the partners to agree among themselves as to what is to be treated as the property of the firm, and what is to be separate property of one or more partners, although employed for the purposes of the firm. In the absence of any such agreement, express or implied, the property of the firm is deemed to include:

- (a) all property, rights and interests which have been brought into the common stock for the purposes of the partnership by individual partners, whether at the commencement of the business or subsequently added thereto;
- (b) those acquired in the course of the business with money belonging to the firm; and
- (c) the goodwill of the business. (Section 14)

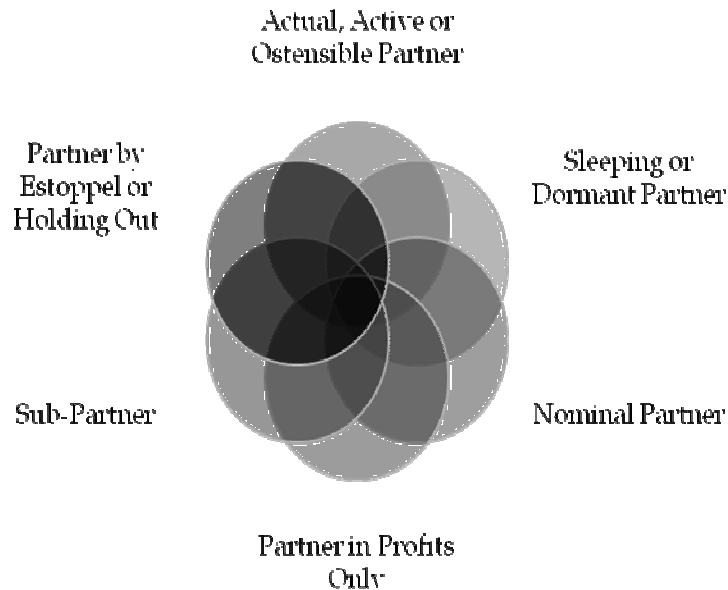
The property of the firm belongs to the firm and not to the individual partner or partners. The ownership belongs to the firm, and no partner can deal with specific properties as if the properties are his own, nor does the partner possess any assignable interest in such property (*Narayanappa v. Bhaskaia Krishnappa*, AIR 1966 SC 1300). What is meant by the share of a partner is his proportion of the partnership assets after they are all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. If certain partners jointly own immovable property which they use for the purposes of the partnership business, the mere use of such property does not make such property as partnership property. Whether such property is or is not partnership property depends upon the agreement between the partners (*Lachhman Dass v. Mrs. Gulab Devi*, AIR 1936 ALL. 270). The ultimate test to determine the property of the firm is the real intention of the partners and the Court can take into consideration the following facts:

- (1) The source of the purchase money.
- (2) The reason due to which the property was purchased or acquired.
- (3) The object for which the property was purchased or acquired.
- (4) The mode in which the property was obtained.
- (5) The mode in which the property was dealt with.
- (6) The use to which the property was put to.

All such facts are matter of evidence and depend on the facts of each case. These facts indicate the intention of the parties but are not conclusive to make a property as partnership property. These facts can be established by entries in the books of account of the firm and of the partners, correspondence, the deed of partnership, etc.

### Kinds of Partners

The following kinds of partners generally exist in a partnership:



#### (i) Actual, Active or Ostensible Partner

These are the ordinary types of partners who invest money into the business of the firm, actively participate in the functioning and management of the business and share its profits or losses. Section 12(a) lays down that “Subject to contract between the partners, every partner is entitled to take part in the conduct of the business of the firm”. Such partner as actively participates in the firm’s business, binds himself and other partners by all his acts done in the usual course of partnership business. Such partner must give a public notice of his retirement from the firm in order to absolve (free) himself from liability for the acts of the other partners done after his retirement.

#### (ii) Sleeping or Dormant Partner

These partners invest money in the firm’s business and take their share of profits but do not participate in the functioning and management of the business. But even then their liability is unlimited. The Act specially provides that if an act is binding on the firm, every partner is liable for it.

A sleeping partner can retire from the firm without giving any public notice to this effect. His liability for the acts of the firm ceases soon after retirement. Such partner has no duties to perform but is entitled to have access to books and accounts of the firm and he can have a copy of them.

**(iii) Nominal Partner**

Some people do not invest or participate in the management of the firm but only give their name to the business or firm. They are nominal partners but are liable to third parties for all the acts of the firm. Unlike a sleeping partner, they are known to the outsiders as partners in the firm, whereas actually they are not.

**(iv) Partner in Profits Only**

A partner who is entitled to share in the profits of a partnership firm without being liable to share the losses, is called a partner in profits only. Thus, a person who has sufficient capital but is not prepared to take risk may be admitted to the partnership by the other partners. In spite of his specific position, he continues to be liable to the third parties for all acts of the firm, just like other parties.

**(v) Sub-Partner**

Where a partner agrees to share his profits in the firm with a third person, that third person is called a sub-partner. Such a sub-partner has no rights or duties towards the firm and does not carry any liability for the debts of the firm. Also he cannot bind the firm or other partners by his acts.

**(vi) Partner by Estoppel or Holding Out**

If the behaviour of a person arouses misunderstanding that he is a partner in a firm (when actually he is not), such a person is estopped from later on denying the liabilities for the acts of the firm. Such person is called partner by estoppel and is liable to all third parties.

Similarly, if a person who is declared to be a partner (when actually he is not) does not deny the fact that he is a partner, he being held out as a partner is responsible for all liability of the business. The law relating to partners by holding out is contained in Section 28 of the Act which lays down thus:

“Any one who by words, spoken or written or by conduct represents himself, or knowingly permits himself to be represented to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit”. The rule as to holding out is based on the doctrine of estoppel as contained in Section 115 of the Indian Evidence Act.

*Holding Out* means “to represent”. Strangers, who hold themselves out or represent themselves to be partners in a firm, whereby they induce others to give credit to the partnership are called “Partners by Holding Out”.

In case of “Partnership by Estoppel”, the representation is made by partners about a stranger within his knowledge and hearing and he does not contradict it. He is then held liable as a partner.

*Effects of Holding out*

The Holding Out partner becomes personally and individually liable for the acts of the firm. But he does not become a partner in the firm and is not entitled to any rights or claim upon the firm. An outsider, who has given credit to the firm thinking him to be a partner, can hold him liable as if he is a partner in that firm. As the liability of the partners is joint and several he can be held liable to pay the entire amount. But under the doctrine of subrogation as well as on the basis of quasi-contract, he can recover the amount so paid from the partners of the firm, if they are solvent.

*Exceptions to Holding Out*

The doctrine of Holding Out is not applicable in the following cases:

1. It does not apply to cases of torts committed by partners. A person, therefore, cannot be held liable for the torts of another simply because that other person held himself to be his partner.
2. It does not extend to bind the estate of a deceased partner, where after a partner's death the business of the firm is continued in the old firm name. [Section 28(2)]
3. It also does not apply where the Holding Out partner has been adjudicated insolvent. (Section 45)

### Minor Admitted to the Benefits of Partnership

In view of Section 11 of the Indian Contract Act, 1872, and the decision of the Privy Council in *Nohori Bibi v. Dharmo Das Ghose*, (1903) 30 I.A 114, a minor's agreement is altogether void and unenforceable. An agreement is an essential ingredient in a partnership, it follows that a minor cannot enter into an agreement of partnership. On the same principle, a minor cannot be clothed with all the rights and obligations of a full-fledged partner through a guardian. Section 5 states "The relation of partnership arises from a contract..." The minor is incompetent to contract and, therefore, partnership cannot come into existence if the parties to a contract of partnership consist of one major and one minor. The only provision that Section 30 makes is that with the "consent of all the partners for the time being, a minor can be admitted into the benefits of partnership to which a minor is going to be admitted". A partnership firm cannot be formed with only minors as partners. There must be at least two major partners before a minor is admitted into the benefits of partnership.

### Rights of Minor

He is entitled to his agreed share and can inspect books of account of the firm [Section 30(2)]. He can bring a suit for account and his share when he intends to sever his connections with the firm, but not otherwise. [Section 30(4)]

A minor who was admitted to the benefits during his minority within six months of his attaining the age of majority or when he comes to know of his being so admitted (whichever date is later), he has to elect whether he wants to become a partner, or sever his connection with the firm. He may give public notice of his election to continue or repudiate, but if he fails to give any public notice within the period stated above, he will be deemed to have elected to become a partner in the firm. [Section 30(5)]

### Liabilities of Minor

#### 1. His Share in Liability

A minor partner's liability is confined only to the extent of his share in the firm. Section 30(3) provides that a minor's share is liable for the acts of the firm. But a minor is not personally liable in any such act. Thus, he is neither personally liable nor is his private estate liable for the acts of the firm.

#### 2. Personal Liabilities

Where a minor on attaining majority, elects to become a partner, he becomes personally liable as other partners to the third parties for all the acts of the firm done since he was admitted to the benefits of partnership.

### Election by Minor

A minor who was admitted to the benefits during his minority within six months of his attaining the age of majority or when he comes to know of his being so admitted (whichever date is later), he has to elect whether he wants to become a partner, or sever his connection with the firm. He may give public notice of his election to continue or repudiate, but if he fails to give any public notice within the period stated above, he will be deemed to have elected to become a partner in the firm. [Section 30(5)]

If he becomes or elects to become a partner, his position will be as under:

1. His rights and liabilities will be similar to those of a full-fledged partner.
2. He will be personally liable for all the acts of the firm, done since he was first admitted to the benefits of the partnership.
3. His share of profits and property remains the same as was before, unless altered by agreement.

If he elects not to become a partner, then:

1. His rights and liabilities shall continue to be those of a minor upto the date of his giving public notice.
2. His share shall not be liable for any acts of the firm done after the date of the public notice.
3. He is entitled to sue the partners for his share of the property and profits in the firm. [Section 30(8)]

### **Relation of Partners to one another**

The relation of partnership arises through an agreement between the parties and such an agreement normally provides for mutual rights and obligations, or duties of the partners. Where, however, partnership arises by implication, or wherever the articles of partnership are silent, or where they do not exist, the rights and duties of partners are governed by the Act.

### **Rights of Partners**

Unless otherwise agreed by the partners, the following rules apply:

- (a) Every partner has a right to take part in the conduct and management of the business. [Section 12(a)]
- (b) Every partner whether active or dormant, has a right of free access to all records, books and accounts of the business and also to examine and copy them. [Section 12(d)]
- (c) Every partner is entitled to share in the profits equally, unless different proportions are stipulated. [Section 13(b)]
- (d) A partner who has contributed more than the share of the capital for the purpose of the business is entitled to an interest at a rate agreed upon, and where no rate is stipulated for, at six per cent per annum. But a partner cannot claim interest on capital, unless there is an agreement to pay it. [Section 13(d)]
- (e) A partner is entitled to be indemnified by the firm for all expenses incurred by him in the course of the business, for all payments made by him in respect of partnership debts or liabilities and disbursements made in an emergency for protecting the firm from loss. [Section 13(e)]
- (f) Every partner is, as a rule, a joint owner of the partnership property, and have it applied exclusively for the purposes of the partnership. (Section 15)
- (g) A partner has power to act in an emergency for protecting the firm from loss. (Section 21)
- (h) Every partner is entitled to prevent the introduction of a new partner into the firm without his consent. (Section 31)
- (i) Every partner has a right to retire by giving notice where the partnership is at will. [Section 32(1)(c)]
- (j) Every partner has a right to continue in the partnership and not to be expelled from it. [Section 33(1)]

- (k) An incoming partner will not be liable for any debts or liabilities of the firm before he becomes a partner. [Section 31(2)] (l)
- (l) Every outgoing partner has a right to carry on a competitive business under certain conditions. (Section 36)

### Duties of Partners

Apart from any duties imposed by the partnership articles, the following statutory duties are implied:

- (a) Every partner is bound to carry on the business of the firm to the greatest common advantage. (Section 9)
- (b) Every partner must be just and faithful to other partners. (Section 9)
- (c) A partner is bound to keep and render true, proper and correct accounts of the partnership. (Section 9)
- (d) Utmost good faith between the partners is the rule and one partner must not take advantage of the other. As an agent of other partners, every partner is bound to communicate full information to them. (Section 9)
- (e) Every partner must account for any benefits derived from the partnership business without the consent of the other partners, i.e., a partner must not make “secret profits”. [Section 16(a)]
- (f) A partner must not compete with the firm, without the consent of the other partners. Any profits made by such unauthorised competition can be claimed by the firm. [Section 16(b)]
- (g) Every partner is bound to attend diligently to the business of the firm and in the absence of any agreement to the contrary, he is not entitled to receive any remuneration. [Section 12(b) and 13(a)]
- (h) In the absence of an agreement to the contrary, every partner is bound to share losses equally with the others. [Section 13(b)]
- (i) Every partner must hold and use the partnership property exclusively for the firm. (Section 15)
- (j) Every partner is bound to indemnify the firm for any loss caused by fraud in the conduct of the business. (Section 10)
- (k) A partner who is guilty of wilful neglect in the conduct of the business and the firm suffers loss in consequence, is bound to make compensation to the firm and other partners. [Section 13(f)]
- (l) No partner can assign or transfer his partnership interest to any other person, so as to make him a partner in the business. (Section 29)
- (m) But a partner may assign the profits and share in the partnership assets. But the assignee or transferee will have no right to ask for the accounts or to interfere in the management of the business; he would be entitled only to share the actual profits. On dissolution of the firm, he will be entitled to the share of the assets and also to accounts but only from the date of dissolution. (Section 29)
- (n) Every partner is bound to act within the scope of his actual authority. If he exceeds his authority, he shall compensate the other partners for loss unless they ratify his act.

### Relation of Partners to Third Parties

#### Partners as Agents

Every partner is an agent of the firm and of other partners for the purpose of the business of the firm (Section 18). In the case of a partnership each partner is a principal and each one is an agent for the other partners. A

partner is both a principal and an agent. Thus, the general law of agency is incorporated into the law of partnership. The law of partnership is often regarded as branch of the law of agency. The acts of every partner who does any act for carrying on in the usual way the business of the kind carried on by the firm bind the firm and his partners unless:

- (i) The partner so acting has no authority to act for the firm in that matter; and
- (ii) The person with whom he is dealing knows that he has no authority; or
- (iii) Does not know or believe him to be a partner.

### Authority of a Partner

The authority of a partner means the capacity of a partner to bind the firm by his act. This authority may be express or implied.

**(i) Express Authority:** - Authority is said to be express when it is given by words, spoken or written. The firm is bound by all acts of a partner done within the scope of his express authority even if the acts are not within the scope of the partnership business.

**(ii) Implied Authority:** - The implied authority of a partner is also known as ostensible or apparent authority, Sections 19 and 22 contain provisions regarding the scope of the implied authority of a partner. The implied authority is subject to the following conditions:

- (1) the act done must relate to the “normal business” of the firm;
- (2) the act must be done in the usual way;
- (3) the act must be done in the name of the firm.

### Implied Authority of a Partner

Subject to the limitations mentioned above, every partner has an implied authority to bind the firm by the following acts:

- (i) By selling firm's goods;
- (ii) By purchasing goods for the firm;
- (iii) By accepting any payment of debts due to the firm; and
- (iv) By engaging and discharging employees.

In a Trading Firm (one which carries on business of buying and selling goods), a partner has the following additional powers:

- (i) To borrow money on the firm's credit and to pledge the firm's goods for that purpose;
- (ii) To accept, make and issue negotiable instruments in the firm's name; and
- (iii) To employ a solicitor or attorney on behalf of the firm (*Bank of Australasia v. Berliat*, (1847) 6 Moor, P.C. 152 at pp. 193-94).

### Acts beyond Implied Authority

Section 19(2) states that in the absence of any usage or custom or trade to the contrary, the implied authority of a partner does not empower him to:

- (a) submit a dispute relating to the business of the firm to arbitration;



- (b) open a banking account on behalf of the firm in his own name;
- (c) compromise or relinquish any claim or portion of a claim by the firm;
- (d) withdraw a suit or proceeding filed on behalf of the firm;
- (e) admit any liability in a suit or proceedings against the firm;
- (f) acquire immovable property on behalf of the firm;
- (g) transfer immovable property belonging to the firm; and
- (h) enter into a partnership on behalf of the firm.

### **Extent of Partners' Liability**

It is, however, open to the partners by means of an express contract to extend or limit the implied authority, but third parties will be bound by such limitations only when they have notice of such curtailment.

All partners are liable jointly and severally for all acts or omissions binding on the firm including liabilities arising from contracts as well as torts (Section 25). This is known as the liability of partners for the acts of the firm. But in order that an act done may be an act of the firm and, therefore, binding on the firm, it is necessary that the partner doing the act on behalf of the firm must have done that act in the name of and on behalf of the firm and not in his personal capacity. And the act must have been done in the ordinary course of the business of the firm. [Sections 19(1) and 22]

### **Liability of the Firm for Torts**

Every partner is liable for the negligence and fraud of the other partners in the course of the management of business. A partner charges the firm if he acts as an agent for it. The firm is similarly liable where a partner commits a tort with the authority of his co-partners. (Section 26)

If a partner acting within the scope of his apparent authority receives the property of a third person and misapplies it, or if the firm in the course of its business receives the property of a third person and, while it is in the firm's custody, a partner misapplies it, in each case the firm is liable to make good the loss. (Section 27)

### **Liability of an Incoming Partner**

As a general rule, an incoming partner is not liable for the debts incurred before he joined the firm as a partner [Section 31(2)]. The incoming partner may, however, assume liability for past debts by novation, i.e., by a tripartite agreement between (i) the creditor of the firm, (ii) the partners existing at the time the debt was incurred, and (iii) the incoming partner.

### **Liability of an Outgoing or Retiring Partner**

An outgoing partner remains liable for the partnership debts contracted while he was a partner. He may, however, be discharged by novation, i.e., by an agreement between himself, the new firm and the creditors. He may also continue to be liable after retirement if he allows himself to be held out as a partner, e.g. by allowing his name to remain the firm name. To protect himself from his liability, he should give express notice of his retirement to the persons who were dealing with the firm before his retirement or give public notice in the manner as laid down in Section 72 of the Act, that is to say, by publishing it in the Official Gazette and in at least one vernacular newspaper where the firm carries on the business. [Section 32(3)]

### **Death or Insolvency**

The estate of a partner who dies, or who becomes insolvent, is not liable for partnership debts contracted after

the date of the death or insolvency. It will, however, be liable for debts incurred before death or insolvency. (Sections 34 and 35)

## Dissolution

According to Section 39 “The dissolution of partnership between all the partners of a firm” is called the “Dissolution of the Firm”. A dissolution does not necessarily follow because the partnership has ceased to do business, for the partnership may continue for the purpose of realising the assets.

The Partnership Act makes a distinction between the “dissolution of partnership” and “dissolution of firm”. Where there is dissolution of partnership between all the partners of a firm, it is a dissolution of the firm (Section 39). Where there is an extinction of relationship between some of the partners only, it is a dissolution of partnership. So the dissolution of a partnership may or may not include the dissolution of the firm, but the dissolution of the firm necessarily means the dissolution of the partnership as well.

## Dissolution of Partnership

The dissolution of partnership takes place (even when there is no dissolution of the firm) in the following circumstances:

- (a) By the expiry of the fixed term for which the partnership was formed. [Section 42(a)]
- (b) By the completion of the adventure. [Section 42(b)]
- (c) By the death of a partner. [Section 42(c)]
- (d) By the insolvency of a partner. [Section 42(d)]
- (e) By the retirement of a partner. [Section 42(e)]

In all the above cases, the remaining partners may continue the firm in pursuance of an agreement to that effect. If they do not continue then the dissolution of the firm takes place automatically.

## Dissolution of the Firm

In the following cases there is necessarily a breaking up or extinction of the relationship between all the partners of the firm, and closing up of the business:

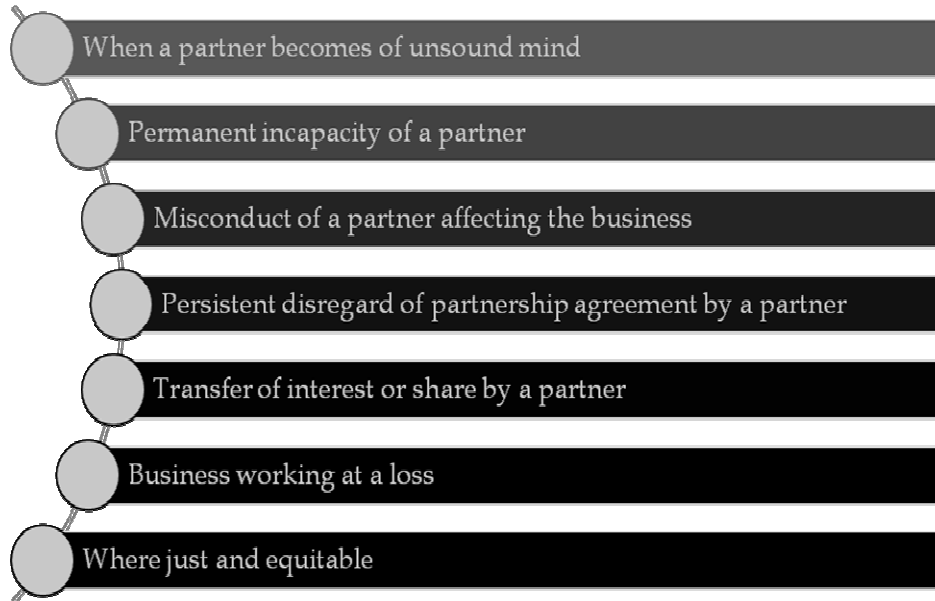
- (a) *By mutual agreement:* A firm may be dissolved where all the partners agree that it shall be dissolved. (Section 40)
- (b) *By the insolvency of all the partners but one:* If all the partners except one become insolvent, the firm must come to an end, as a partnership firm with one partner cannot continue. [Section 41(a)]
- (c) *By business becoming illegal:* If the business of the firm becomes illegal because of some subsequent events, such as change of law, it is automatically or compulsorily dissolved by the operation of law. [Section 41(b)]
- (d) *By notice of dissolution:* Where the partnership is at will, the firm may be dissolved at any time, by any partner giving notice in writing of his intention to dissolve the firm, to all the other partners. The dissolution will take place from the date mentioned in the notice or, if no such date is mentioned, as from the date of the communication of the notice. (Section 43)

## Dissolution of the Firm through Court

Unlike a partnership at will, the partnership for a fixed period cannot be dissolved by a notice. It could only be dissolved by Court in a suit by a partner. Though remedy of dissolution by a suit is available in case of all

kinds of partnership, it is of practical importance in case of partnership for a fixed period.

**As per Section 44, the Court may order dissolution of the firm in the following circumstances:**



- (a) *When a partner becomes of unsound mind:* As the insanity of a partner does not automatically dissolve the firm, either the lunatic through his guardian or other partners may file a suit for the dissolution of the firm, in either case the Court may order dissolution which will take effect from the date of the order.
- (b) *Permanent incapacity of a partner:* Where a partner has become permanently incapable of performing his duties as a partner, e.g., he becomes blind, paralytic, etc., the Court may, at the instance of any of the other partners, order the dissolution of the firm.
- (c) *Misconduct of a partner affecting the business:* Where a partner is guilty of misconduct, which is likely to affect prejudicially the business of the firm, the Court may dissolve the firm at the instance of any of the other partners. Gambling by a partner or conviction of a partner for travelling without ticket would be sufficient ground for dissolution.
- (d) *Persistent disregard of partnership agreement by a partner:* Where a partner frequently commits breaches of the partnership agreement and the other partners find it impossible to carry on the business, the Court may order dissolution at the instance of the other partners.
- (e) *Transfer of interest or share by a partner:* A partner is not entitled to assign away his interest so as to introduce a new partner into the firm. Where a partner has transferred the whole of his interest to a third person or where his interest has been attached under a decree or sold under a process of law, the other partners may sue for dissolution.
- (f) *Business working at a loss:* The Court may dissolve a partnership firm where it is satisfied that the business of the firm cannot be carried on except at a loss.
- (g) *Where just and equitable:* As the grounds mentioned are not exhaustive, the Court may dissolve a

firm on any other ground if it is satisfied that it would be just and equitable to dissolve the firm. The Court may order dissolution where the sub-stratum of the partnership firm has gone or where there is a complete deadlock and destruction of confidence between the partners [re. *Yenidje Tobacco Co. Ltd.* (1916) 2 Ch. 426].

## **Effect of Dissolution**

### ***Continuing authority of partners***

The authority of partners to bind the firm continues so long as is necessary to wind up the business, provided that the firm is in no case bound by the acts of a partner who has been adjudged an insolvent except on the principle of holding out. (Section 47)

Also each partner has an equitable lien over the firm's assets entitling him to have them applied in payment of the firm's debts, and in payment of whatever is due to partner. This lien can be enforced by injunction forbidding unfair distribution. (Section 46)

### ***Continuing liability of partners***

The partners continue to be liable to outsiders for any act done by any of them which would have been an act of the firm if done before the dissolution, unless a public notice is given of the dissolution.

After dissolution, the rights and obligations of partners continue in all things necessary for the winding up of the business. The partners may complete unfinished transactions. But this authority is only for the winding up of the affairs of the firm and not for new transactions.

### ***Right to Return of Premium***

To buy entry into an existing firm, a new partner sometimes has to pay a premium to the existing partners in addition to any investment of capital. On dissolution, he is entitled to demand the return of a proportion of the premium if the partnership was for a fixed term and was dissolved before the expiry of that term, unless dissolution was caused by (i) agreement, or (ii) misconduct of the party seeking return of the premium, or (iii) death of a partner. (Section 51)

### ***Settlement of Accounts on Dissolution***

Section 48 of the Act provides that in settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

- (a) Losses, including deficiencies of capital shall be paid first out of undistributed profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits
- (b) The assets of the firm, including the sums, contributed by the partners to make up losses or deficiencies of capital shall be applied in the following manner and order:
  - (i) in paying outside creditors;
  - (ii) in repaying advances made by partners (distinct from investment of capital);
  - (iii) in repaying capital to partners; and
  - (iv) the ultimate residue, if any, shall be divided among the partners in the proportions in which profits are divisible.

Where the assets are not sufficient, the partners have to bear the loss in equal shares. After they have

contributed their share of the deficiency they will be paid rateably the amount due to them by way of their capital (The Rule followed in the case of *Garner v. Murray*, 1904 73 L.J. Ch. 66).

### **Loss due to insolvency of partners**

In case a partner is insolvent and is not able to contribute towards the deficiency, the principle laid down in the case of *Garner vs. Murray* will be applicable.

#### **It holds that:**

- (a) The solvent partners will contribute only their share of deficiency in cash
- (b) The available assets should be distributed among the solvent partners in proportion to their capital.
- (c) Thus, the deficiency of capital of the insolvent partners will be distributed among the solvent partners in the ratio of their respective capitals.

### **Goodwill**

This is a partnership asset and means the benefit arising from a firm's business connections or reputation. "It is the advantage which is acquired by a business, beyond the mere value of the capital, stock fund and properly employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers". Though an intangible asset, it has value; and unless otherwise agreed in the partnership articles, upon dissolution it must be sold and the proceeds of sale distributed as capital. Where dissolution is caused by death, the estate of the deceased partner is entitled to share in the proceeds of the sale.

If the goodwill is sold and there is no agreement as to its disposal, any partner can carry on the business, provided that by doing so he does not expose former partners to liability. But if by agreement the goodwill is assigned to any person, he can restrain partners as explained in the next para.

### **Sale of Goodwill**

Where goodwill is sold, either to a partner or to an outsider, the value is divisible among the partners in the same manner as they share profits and losses, unless otherwise agreed.

The rights of the buyer and seller of the goodwill are as follows:

- (a) *Buyer's rights:* On the sale of goodwill the buyer may, unless the terms in the contract of sale provide otherwise:
  - (i) represent himself in continuing the business,
  - (ii) maintain his exclusive rights to the use of the firm name, and
  - (iii) solicit former customers of the business and restrain the seller of the goodwill from doing so.
- (b) *Seller's rights:* The vendors may enter into competition with the purchaser unless he is prevented by a valid restraint clause in the contract of sale.

### **Registration of the Firm**

Section 56-71 deal with the registration of a firm and consequences of non-registration.

### **Registration**

The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the

prescribed form and accompanied by the prescribed fee, stating:

- (a) the name of the firm;
- (b) the place or principal place of business of the firm;
- (c) the names of any other places where the firm carries on business;
- (d) the date when each partner joined the firm;
- (e) the names in full and permanent addresses of the partners; and
- (f) the duration of the firm.

The statement shall be signed and verified by all the partners or by their agents specially authorised in this behalf. (Section 58)

The Partnership Act, 1932, does not make registration of a firm compulsory but it introduces certain disabilities, which makes registration necessary at one time or other. An unregistered firm is not an illegal association.

### Effects of Non-registration

The following are the effects of non-registration of a firm:

1. Sub-section (1) of Section 69 places a bar on the right of the partners of a firm to sue each other or the firm for enforcing any right arising from a contract or conferred by the Partnership Act, if the firm is not registered and the person suing is or has not been shown in the Register of Firms as a partner in the firm.
2. Sub-section (2) of Section 69 places a bar on the institution of a suit by or on behalf of a firm against a third-party if the firm is not registered and the persons suing are or have not been shown in the Register of Firms as partners in the firm.
3. There is no bar on the right of third-parties to sue the firm or any partner.

However, the Act allows the following suits:

- (a) A suit for the dissolution of a firm.
- (b) A suit for rendering of accounts of a dissolved firm.
- (c) A suit for realisation of the property of a dissolved firm.
- (d) A suit or claim of set-off, the value of which does not exceed one hundred rupees,
- (e) A proceeding in execution or other proceeding incidental to or arising from a suit or claim for not exceeding one hundred rupees in value.
- (f) A suit by a firm which has no place of business in the territories to which the Indian Partnership Act extends.
- (g) A suit for the realisation of the property of an insolvent partner.
- (h) A suit by a firm whose places of business are situated in areas which are exempted from the application of Chapter VII of the Indian Partnership Act, 1932.

Section 69 bars the very institution of a suit by an unregistered firm or by its partners. Registration is a condition precedent to the right to institute the suit and, therefore, the condition precedent must first be fulfilled before the institution of the suit. If, therefore, on the date of the institution of a suit, the firm is not

registered, the subsequent registration cannot validate the suit. The only option left to the Court is to dismiss the suit (*Prithvi Singh v. Hasan Ali*, (1950) Bom. L.R. 862). By virtue of this provision a partner of an unregistered firm cannot institute a suit to compel the other partner or partners to join in the registration of firm. The only remedy of such a partner is to institute a suit for dissolution (*Keshav Lal v. Chuni Lal*, AIR 1941 Rangoon 196). A suit by the firm is really a suit by all the partners who were its partners at the time of the accrual of the cause of action and, therefore, all must join in the institution of the suit.

However, an unregistered firm can bring a suit to enforce a right arising otherwise than out of contract e.g., for an injunction against a person for wrongful infringement of trade mark etc.

### Specific Performance of Partnership Agreement

It is not allowed. The working of a partnership depends upon the personal inclination of the partners, there can be no specific performance of a partnership agreement (*Scott v. Raymont*, 1868, 7 Fq. 112).

### Suit for Libel or Slander

A firm is merely a collection of partners and cannot bring a suit for libel or slander. Libel or slander against a firm imply a libel or slander of its partners. Such partners themselves or any one may file the suit for libel or slander (*P.K. Oswal Hosiery Mills v. Tilak Chand*, AIR 1969, Punj. 150).

## LESSON ROUND-UP

- The Indian Partnership Act, 1932 lays down the important provisions relating to partnership contracts.
- According to Section 4 “Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.
- A partnership may either be for a particular adventure or for a fixed period. It may also be a partnership at will.
- The minor is incompetent to contract and, therefore, partnership cannot come into existence if the parties to a contract of partnership consist of one major and one minor.
- Every partner is an agent of the firm and of other partners for the purpose of the business of the firm.
- The authority of a partner means the capacity of a partner to bind the firm by his act. This authority may be express or implied.
- All partners are liable jointly and severally for all acts or omissions binding on the firm including liabilities arising from contracts as well as torts.
- The dissolution of partnership between all the partners of a firm is called the “Dissolution of the Firm”.
- A dissolution does not necessarily follow because the partnership has ceased to do business, for the partnership may continue for the purpose of realising the assets.

## SELF TEST QUESTIONS

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Describe the essentials of partnership. What is the true test of partnership?
2. What is the position of a minor in a partnership?
3. Discuss the liability of partners *inter se*.





# Lesson 24

## Negotiable Instruments Act, 1881

### LESSON OUTLINE

- Learning objectives
- Negotiable Instruments and Parties
- Alteration
- Crossing and bouncing of Cheques
- Dishonour of Cheques & its Remedies
- Presumption of Law as to Negotiable Instruments
- Lesson round up
- Self-test questions

### LEARNING OBJECTIVES

Sale Exchange of goods and services is the basis of every business activity. Goods are bought and sold for cash as well as on credit. All these transactions require flow of cash either immediately or after a certain time. In modern business, large number of transactions involving huge sums of money takes place every day. It is quite inconvenient as well as risky for either party to make and receive payments in cash. Therefore, it is a common practice for business men to make use of certain documents as means of making payment. Some of these documents are called negotiable instruments. But on the other hand, accepting payment using negotiable instruments is no less than a risky transaction since it involves deferred payments.

In the light of this, the Negotiable Instruments Act was passed in 1881. There is no doubt that the Act is to regulate commercial transactions and was drafted to suit requirements of business conditions prevailing then.

This lesson deals with the common provisions of the mentioned act, which has played an important role in increasing commercial activities.

## DEFINITION OF A NEGOTIABLE INSTRUMENT

The law relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881. It is an Act to define and amend the law relating to promissory notes, bills of exchange and cheques.

The Act does not affect the custom or local usage relating to an instrument in oriental language i.e., a Hundi.

The term “*negotiable instrument*” means a document transferable from one person to another. However the Act has not defined the term. It merely says that “A negotiable instrument” means a promissory note, bill of exchange or cheque payable either to order or to bearer. [Section 13(1)]

A negotiable instrument may be defined as “an instrument, the property in which is acquired by anyone who takes it bona fide, and for value, notwithstanding any defect of title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of instrument” (*Willis—The Law of Negotiable Securities, Page 6*).

According to this definition the following are the conditions of negotiability:

- (i) The instrument should be freely transferable. An instrument cannot be negotiable unless it is such and in such state that the true owner could transfer by simple delivery or endorsement and delivery.
- (ii) The person who takes it for value and in good faith is not affected by the defect in the title of the transferor.
- (iii) Such a person can sue upon the instrument in his own name.

Negotiability involves two elements namely, transferability free from equities and transferability by delivery or endorsement (*Mookerjee J. In Tailors Priya v. Gulab Chand, AIR 1965 Cal*).

But the Act recognises only three types of instruments viz., a Promissory Note, a Bill of Exchange and a Cheque as negotiable instruments. However, it does not mean that other instruments are not negotiable instruments provided that they satisfy the following conditions of negotiability:

1. The instrument should be freely transferable by the custom of trade. Transferability may be by (i) delivery or (ii) endorsement and delivery.
2. The person who obtains it in good faith and for consideration gets it free from all defects and can sue upon it in his own name.
3. The holder has the right to transfer. The negotiability continues till the maturity.

## Effect of Negotiability

The general principle of law relating to transfer of property is that no one can pass a better title than he himself has (*nemo dat quod non-habet*). The exceptions to this general rule arise by virtue of statute or by a custom. A negotiable instrument is one such exception which is originally a creation of mercantile custom.

Thus a *bona fide* transferee of negotiable instrument for consideration without notice of any defect of title, acquires the instrument free of any defect, i.e., he acquires a better title than that of the transferor.

## IMPORTANT CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS

*Following are the important characteristics of negotiable instruments:*

The holder of the instrument is presumed to be the owner of the property contained in it

They are freely transferable

A holder in due course gets the instrument free from all defects of title of any previous holder

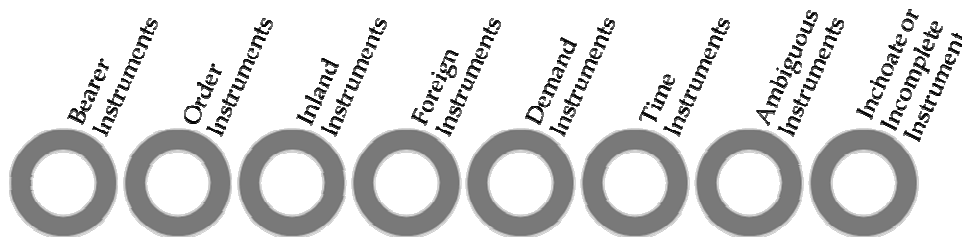
The holder in due course is entitled to sue on the instrument in his own name

The instrument is transferable till maturity and in case of cheques till it becomes stale (on the expiry of 6 months from the date of issue)

Certain equal presumptions are applicable to all negotiable instruments unless the contrary is proved

## Classification of Negotiable Instruments

The negotiable instruments may be classified as under:



### (1) Bearer Instruments

A promissory note, bill of exchange or cheque is payable to bearer when (i) it is expressed to be so payable, or (ii) the only or last endorsement on the instrument is an endorsement in blank. A person who is a holder of a bearer instrument can obtain the payment of the instrument.

### (2) Order Instruments

A promissory note, bill of exchange or cheque is payable to order (i) which is expressed to be so payable; or (ii) which is expressed to be payable to a particular person, and does not contain any words prohibiting transfer or indicating an intention that it shall not be transferable.

### (3) Inland Instruments (Section 11)

A promissory note, bill of exchange or cheque drawn or made in India, and made payable, or drawn upon

any person, resident in India shall be deemed to be an inland instrument. Since a promissory note is not drawn on any person, an inland promissory note is one which is made payable in India. Subject to this exception, an inland instrument is one which is either:

- (i) drawn and made payable in India, or
- (ii) drawn in India upon some persons resident therein, even though it is made payable in a foreign country.

#### **(4) Foreign Instruments**

An instrument which is not an inland instrument, is deemed to be a foreign instrument. The essentials of a foreign instrument include that:

- (i) it must be drawn outside India and made payable outside or inside India; or
- (ii) it must be drawn in India and made payable outside India and drawn on a person resident outside India.

#### **(5) Demand Instruments (Section 19)**

A promissory note or a bill of exchange in which no time for payment is specified is an instrument payable on demand.

#### **(6) Time Instruments**

Time instruments are those which are payable at sometime in the future. Therefore, a promissory note or a bill of exchange payable after a fixed period, or after sight, or on specified day, or on the happening of an event which is certain to happen, is known as a time instrument. The expression "after sight" in a promissory note means that the payment cannot be demanded on it unless it has been shown to the maker. In the case of bill of exchange, the expression "after sight" means after acceptance, or after noting for non-acceptance or after protest for non-acceptance.

#### **Ambiguous Instruments (Section 17)**

An instrument, which in form is such that it may either be treated by the holder as a bill or as a note, is an ambiguous instrument. Section 5(2) of the English Bills of Exchange Act provides that where in a bill, the drawer and the drawee are the same person or where the drawee is a fictitious person or a person incompetent to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

Bill drawn to or to the order of the drawee or by an agent on his principal, or by one branch of a bank on another or by the direction of a company or their cashier are also ambiguous instruments. A promissory note addressed to a third person may be treated as a bill by such person by accepting it, while a bill not addressed to any one may be treated as a note. But where the drawer and payee are the same, e.g., where A draws a bill payable to A's order, it is not an ambiguous instrument and cannot be treated as a promissory note. Once an instrument has been treated either as a bill or as a note, it cannot be treated differently afterwards.

#### **Inchoate or Incomplete Instrument (Section 20)**

When one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a

negotiable instrument, for any amount specified therein, and not exceeding the amount, covered by the stamp. Such an instrument is called an inchoate instrument. The person so signing shall be liable upon such instrument, in the capacity in which he signs the same, to any holder in due course for such amount, provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereon.

The authority to fill up a blank or incomplete instrument may be exercised by any “holder” and not only the first holder to whom the instrument was delivered. The person signing and delivering the paper is liable both to a “holder” and a “holder-in-due-course”. But there is a difference in their respective rights. A “holder” can recover only what the person signing and delivering the paper agreed to pay under the instrument, while a “holder-in-due-course” can recover the whole amount made payable by the instrument provided that it is covered by the stamp, even though the amount authorised was smaller.

## KINDS OF NEGOTIABLE INSTRUMENTS

The Act recognises only three kinds of negotiable instruments under Section 13 but it does not exclude any other negotiable instrument provided the instrument entitles a person to a sum of money and is transferable by delivery. Instruments written in oriental languages i.e. hundis are also negotiable instruments. These instruments are discussed below:

### (i) Promissory Notes

A “promissory note” is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum of money to, or to the order of, a certain person, or only to bearer of the instrument. (Section 4)

### Parties to a Promissory Note:

A promissory note has the following parties:

- (a) *The maker*: the person who makes or executes the note promising to pay the amount stated therein.
- (b) *The payee*: one to whom the note is payable.
- (c) *The holder*: is either the payee or some other person to whom he may have endorsed the note.
- (d) *The endorser*.
- (e) *The endorsee*.

### Essentials of a Promissory Note:

To be a promissory note, an instrument must possess the following essentials:

- (a) It must be in writing. An oral promise to pay will not do.
- (b) It must contain an express promise or clear undertaking to pay. A promise to pay cannot be inferred. A mere acknowledgement of debt is not sufficient. If A writes to B “I owe you (I.O.U.) Rs. 500”, there is no promise to pay and the instrument is not a promissory note.
- (c) The promise or undertaking to pay must be unconditional. A promise to pay “when able”, or “as soon as possible”, or “after your marriage to D”, is conditional. But a promise to pay after a specific time or on the happening of an event which must happen, is not conditional, e.g. “I promise to pay Rs. 1,000 ten days after the death of B”, is unconditional.
- (d) The maker must sign the promissory note in token of an undertaking to pay to the payee or his

order.

- (e) The maker must be a certain person, i.e., the note must show clearly who is the person engaging himself to pay.
- (f) The payee must be certain. The promissory note must contain a promise to pay to some person or persons ascertained by name or designation or to their order.
- (g) The sum payable must be certain and the amount must not be capable of contingent additions or subtractions. If A promises to pay Rs. 100 and all other sums which shall become due to him, the instrument is not a promissory note.
- (h) Payment must be in legal money of the country. Thus, a promise to pay Rs. 500 and deliver 10 quintals of rice is not a promissory note.
- (i) It must be properly stamped in accordance with the provisions of the Indian Stamp Act. Each stamp must be duly cancelled by maker's signature or initials.
- (j) It must contain the name of place, number and the date on which it is made. However, their omission will not render the instrument invalid, e.g. if it is undated, it is deemed to be dated on the date of delivery.

*Note:* A promissory note cannot be made payable or issued to bearer, no matter whether it is payable on demand or after a certain time (Section 31 of the RBI Act).

## **(ii) Bills of Exchange**

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. (Section 5)

The definition of a bill of exchange is very similar to that of a promissory note and for most of the cases the rules which apply to promissory notes are in general applicable to bills. There are however, certain important points of distinction between the two.

### **Parties to bills of exchange**

The following are parties to a bill of exchange:

- (a) *The Drawer:* the person who draws the bill.
- (b) *The Drawee:* the person on whom the bill is drawn.
- (c) *The Acceptor:* one who accepts the bill. Generally, the drawee is the acceptor but a stranger may accept it on behalf of the drawee.
- (d) *The payee:* one to whom the sum stated in the bill is payable, either the drawer or any other person may be the payee.
- (e) *The holder:* is either the original payee or any other person to whom, the payee has endorsed the bill. In case of a bearer bill, the bearer is the holder.
- (f) *The endorser:* when the holder endorses the bill to any one else he becomes the endorser.
- (g) *The endorsee:* is the person to whom the bill is endorsed.
- (h) *Drawee in case of need:* Besides the above parties, another person called the "drawee in case of need", may be introduced at the option of the drawer. The name of such a person may be inserted

either by the drawer or by any endorser in order that resort may be had to him in case of need, i.e., when the bill is dishonoured by either non-acceptance or non-payment.

- (i) *Acceptor for honour*: Further, any person may voluntarily become a party to a bill as acceptor. A person, who on the refusal by the original drawee to accept the bill or to furnish better security, when demanded by the notary, accept the bill supra protest in order to safeguard the honour of the drawer or any endorser, is called the acceptor for honour.

### Essentials of a Bill of Exchange:

- (1) It must be in writing.
- (2) It must contain an unconditional order to pay money only and not merely a request.
- (3) It must be signed by the drawer.
- (4) The parties must be certain.
- (5) The sum payable must also be certain.
- (6) It must comply with other formalities e.g. stamps, date, etc.

### Distinction between Bill of Exchange and Promissory Note

The following are the important points of distinction between a bill of exchange and a promissory note:

- (a) A promissory note is a two-party instrument, with a maker (debtor) and a payee (creditor). In a bill there are three parties—drawer, drawee and payee, though any two out of the three capacities may be filled by one and the same person. In a bill, the drawer is the maker who orders the drawee to pay the bill to a person called the payee or to his order. When the drawee accepts the bill he is called the acceptor.
- (b) A note cannot be made payable to the maker himself, while in a bill, the drawer and payee may be the same person.
- (c) A note contains an unconditional promise by the maker to pay to the payee or his order; in a bill there is an unconditional order to the drawee to pay according to the directions of the drawer.
- (d) A note is presented for payment without any prior acceptance by the maker. A bill payable after sight must be accepted by the drawee or someone else on his behalf before it can be presented for payment.
- (e) The liability of the maker of a pro-note is primary and absolute, but the liability of the drawer of a bill is secondary and conditional.
- (f) Foreign bill must be protested for dishonour but no such protest is necessary in the case of a note.
- (g) When a bill is dishonoured, due notice of dishonour is to be given by the holder to the drawer and the intermediate endorsee, but no such notice need to be given in the case of a note.
- (h) A bill can be drawn payable to bearer provided it is not payable on demand. A promissory note cannot be made payable to bearer, even if it is made payable otherwise than on demand.

### How Bill of Exchange Originates—Forms of Bills of Exchange

Bills of exchange were originally used for payment of debts by traders residing in one country to another country with a view to avoid transmission of coin. Now-a-days they are used more as trade bills both in connection with domestic trade and foreign trade and are called inland bills and foreign bills respectively.

### **Inland Bills (Sections 11 and 12)**

A bill of exchange is an inland instrument if it is (i) drawn or made and payable in India, or (ii) drawn in India upon any person who is a resident in India, even though it is made payable in a foreign country. But a promissory note to be an inland should be drawn and payable in India, as it has no drawee.

Two essential conditions to make an inland instrument are:

- (1) the instrument must have been drawn or made in India; and
- (2) the instrument must be payable in India or the drawee must be in India.

*Examples:* A bill drawn in India, payable in USA, upon a person in India is an inland instrument. A bill drawn in India and payable in India but drawn on a person in USA is also an inland instrument.

### **Foreign Bills**

All bills which are not inland are deemed to be foreign bills. Normally foreign bills are drawn in sets of three copies.

### **Trade Bill**

A bill drawn and accepted for a genuine trade transaction is termed as a trade bill. When a trader sells goods on credit, he may make use of a bill of exchange. Suppose A sells goods worth Rs. 1,000 to B and allows him 90 days time to pay the price, A will draw a bill of exchange on B, on the following terms: "Ninety days after date pay A or order, the sum of one thousand rupees only for value received". A will sign the bill and then present it to B for acceptance. This is necessary because, until a bill is accepted by the drawee, nobody has either rights or obligations. If B agrees to obey the order of A, he will accept the bill by writing across its face the word "accepted" and signing his name underneath and then delivering the bill to the holder. B, the drawee, now becomes the acceptor of the bill and liable to its holders. Such a bill is a genuine trade bill.

### **Accommodation Bill**

All bills are not genuine trade bills, as they are often drawn for accommodating a party. An accommodation bill is a bill in which a person lends or gives his name to oblige a friend or some person whom he knows or otherwise. In other words, a bill which is drawn, accepted or endorsed without consideration is called an accommodation bill. The party lending his name to oblige the other party is known as the accommodating or accommodation party, and the party so obliged is called the party accommodated. An accommodation party is not liable on the instrument to the party accommodated because as between them there was no consideration and the instrument was merely to help. But the accommodation party is liable to a holder for value, who takes the accommodation bill for value, though such holder may not be a holder in due course. Thus, A may be in need of money and approach his friends B and C who, instead of lending the money directly, propose to draw an "Accommodation Bill" in his favour in the following form:

"Three months after date pay A or order, the sum of Rupees one thousand only".

B.

To

C.

If the credit of B and C is good, this device enables A to get an advance of ₹1,000 from his banker at the



commercial rate of discount. The real debtor in this case is not C, but A the payee who promises to reimburse C before the period of three months only. A is here the principal debtor and B and C are mere sureties. This inversion of liability affords a good definition of an accommodation bill: "If as between the original parties to the bill the one who should prima facie be principal is in fact the surety whether he be drawer, acceptor, or endorser, that bill is an accommodation bill".

### **Bills in Sets (Section 132 and 133)**

Foreign bills are usually drawn in sets to avoid the danger of loss. They are drawn in sets of three, each of which is called "Via" and as soon as any one of them is paid, the others become inoperative. All these parts form one bill and the drawer must sign and deliver all of them to the payee. The stamp is affixed only on one part and one part is required to be accepted. But if the drawer mistakenly accepts all the parts of the same bill, he will be liable on each part accepted as if it were a separate bill.

### **Right to Duplicate Bill**

Where a bill of exchange has been lost before it was overdue, the person who was the holder to it may apply to the drawer, to give him another bill of the same tenor. It is only the holder who can ask for a duplicate bill, promissory note or cheque.

### **Bank Draft**

A bill of exchange is also sometimes spoken of as a draft. It is called as a bank draft when a bill of exchange drawn by one bank on another bank, or by itself on its own branch, and is a negotiable instrument. It is very much like the cheque with three points of distinction between the two. A bank draft can be drawn only by a bank on another bank, usually its own branch. It cannot so easily be counter-manded. It cannot be made payable to bearer.

### **Specimen of a Bank Draft**

A.B.C. Bank  
X.Y.Z. Branch

No.....

Date.....

On demand pay 'A' or order the sum of rupees one thousand five hundred only for value received.

₹1,500/-

Sd./-

Manager

To

'B' Branch, (Place)

In the above demand draft, the drawer is X.Y.Z. Branch, the drawee is 'B' branch and the payee is 'A'.

### **(iii) Cheques**

The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 has broadened, the definition of cheque to include the electronic image of a truncated cheque and a cheque in the electronic form. Section 6 of the Act provides that a 'cheque' is a bill of exchange drawn on a specified banker and not

expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Despite the amendment as is evident the basic definition of the cheque has been retained and the definition has only been enlarged to include cheques in the above form as well.

As per explanation appended to the section, the expression:

- (i) “a cheque in the electronic form” means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and asymmetric crypto system or with electronic signature, as the case may be;
- (ii) ‘a truncated cheque’ means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing. (Explanation I).

The expression ‘clearing house’ means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India. (Explanation II).

*Explanation III.* – For the purposes of this section, the expressions “asymmetric crypto system”, “computer resource”, “digital signature”, “electronic form” and “electronic signature” shall have the same meanings respectively assigned to them in the Information Technology Act, 2000.’

Simply stated, a cheque is a bill of exchange drawn on a bank payable always on demand. Thus, a cheque is a bill of exchange with two additional qualifications, namely: (i) it is always drawn on a banker, and (ii) it is always payable on demand. A cheque being a species of a bill of exchange, must satisfy all the requirements of a bill; it does not, however, require acceptance.

**Note:** By virtue of Section 31 of the Reserve Bank of India Act, no bill of exchange or hundi can be made payable to bearer on demand and no promissory note or a bank draft can be made payable to bearer at all, whether on demand or after a specified time. Only a cheque can be payable to bearer on demand.

### Parties to a cheque

The following are the parties to a cheque:

- (a) The drawer: The person who draws the cheque.
- (b) The drawee: The banker of the drawer on whom the cheque is drawn.
- (c), (d), (e) and (f) The payee, holder, endorser and endorsee: same as in the case of a bill.

### Essentials of a Cheque

- (1) It is always drawn on a banker.
- (2) It is always payable on demand.
- (3) It does not require acceptance. There is, however, a custom among banks to mark cheques as good for purposes of clearance.
- (4) A cheque can be drawn on bank where the drawer has an account.
- (5) Cheques may be payable to the drawer himself. It may be made payable to bearer on demand unlike a bill or a note.

- (6) The banker is liable only to the drawer. A holder has no remedy against the banker if a cheque is dishonoured.
- (7) A cheque is usually valid for six months. However, it is not invalid if it is post dated or ante-dated.
- (8) No Stamp is required to be affixed on cheques.

**Distinction between Cheques and Bills of Exchange**

As a general rule, the provisions applicable to bills payable on demand apply to cheques, yet there are few points of distinction between the two, namely:

- (a) A cheque is a bill of exchange and always drawn on a banker, while a bill may be drawn on any one, including banker.
- (b) A cheque can only be drawn payable on demand, a bill may be drawn payable on demand, or on the expiry of a specified period after sight or date.
- (c) A bill payable after sight must be accepted before payment can be demanded, a cheque does not require acceptance and is intended for immediate payment.
- (d) A grace of 3 days is allowed in the case of time bills, while no grace is given in the case of a cheque, for payment.
- (e) The drawer of a bill is discharged, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presentment for payment.
- (f) Notice of the dishonour of a bill is necessary, but not in the case of a cheque.
- (g) The cheque being a revocable mandate, the authority may be revoked by countermending payment, and is determined by notice of the customer's death or insolvency. This is not so in the case of bill.
- (h) A cheque may be crossed, but not a bill.

A cheque is a bill of exchange drawn on a specified banker and always payable on demand. A cheque is always drawn on a particular banker and is always payable on demand. Consequently, all cheques are bills of exchange but all bills are not cheques.

**Specimen of a Cheque**

A.B.C. Bank  
X.Y.Z. Branch

Date.....

Pay 'A'..... or the bearer sum of rupees..... only.

Rs...../-

A/c No.....LF.....

No.....

Sd/-

**Banker**

A banker is one who does banking business. Section 5(b) of the Banking Regulation Act, 1949 defines banking as, "accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft or otherwise." This definition

emphasises two points: (1) that the primary function of a banker consists of accepting of deposits for the purpose of lending or investing the same; (2) that the amount deposited is repayable to the depositor on demand or according to the agreement. The demand for repayment can be made through a cheque, draft or otherwise, and not merely by verbal order.

### **Customer**

The term “customer” is neither defined in Indian nor in English statutes. The general opinion is that a customer is one who has an account with the bank or who utilises the services of the bank.

The special features of the legal relationship between the banker and the customer may be termed as the obligations and rights of the banker. These are:

1. Obligation to honour cheques of the customers.
2. Obligation to collect cheques and drafts on behalf of the customers.
3. Obligation to keep proper record of transactions with the customer.
4. Obligation to comply with the express standing instructions of the customer.
5. Obligation not to disclose the state of customer’s account to anyone else.
6. Obligation to give reasonable notice to the customer, if the banker wishes to close the account.
7. Right of lien over any goods and securities bailed to him for a general balance of account.
8. Right of set off and right of appropriation.
9. Right to claim incidental charges and interest as per rules and regulations of the bank, as communicated to the customer at the time of opening the account.

### **Liability of a Banker**

By opening a current account of a customer, the banker becomes liable to his debtor to the extent of the amount so received in the said account and undertakes to honour the cheques drawn by the customer so long as he holds sufficient funds to the customer’s credit. If a banker, without justification, fails to honour his customer’s cheques, he is liable to compensate the drawer for any loss or damage suffered by him. But the payee or holder of the cheque has no cause of action against the banker as the obligation to honour a cheque is only towards the drawer.

The banker must also maintain proper and accurate accounts of credits and debits. He must honour a cheque presented in due course. But in the following circumstances, he must refuse to honour a cheque and in some others he may do so.

### **When Banker must Refuse Payment**

In the following cases the authority of the banker to honour customer’s cheque comes to an end, he must refuse to honour cheques issued by the customer:

- (a) When a customer countermands payment i.e., where or when a customer, after issuing a cheque issues instructions not to honour it, the banker must not pay it.
- (b) When the banker receives notice of customer’s death.
- (c) When customer has been adjudged an insolvent.

- (d) When the banker receives notice of customer's insanity.
- (e) When an order (e.g., Garnishee Order) of the Court, prohibits payment.
- (f) When the customer has given notice of assignment of the credit balance of his account.
- (g) When the holder's title is defective and the banker comes to know of it.
- (h) When the customer has given notice for closing his account.

### **When Banker may Refuse Payment**

In the following cases the banker may refuse to pay a customer's cheque:

- (a) When the cheque is post-dated.
- (b) When the banker has no sufficient funds of the drawer with him and there is no communication between the bank and the customer to honour the cheque.
- (c) When the cheque is of doubtful legality.
- (d) When the cheque is not duly presented, e.g., it is presented after banking hours.
- (e) When the cheque on the face of it is irregular, ambiguous or otherwise materially altered.
- (f) When the cheque is presented at a branch where the customer has no account.
- (g) When some persons have joint account and the cheque is not signed jointly by all or by the survivors of them.
- (h) When the cheque has been allowed to become stale, i.e., it has not been presented within six months of the date mentioned on it.

### **Protection of Paying Banker (Sections 10, 85 and 128)**

Section 85 lays down that where a cheque payable to order purports to be endorsed by or on behalf of the payee the banker is discharged by payment in due course. He can debit the account of the customer with the amount even though the endorsement turns out subsequently to have been forged, or the agent of the payee without authority endorsed it on behalf of the payee. It would be seen that the payee includes endorsee. This protection is granted because a banker cannot be expected to know the signatures of all the persons in the world. He is only bound to know the signatures of his own customers.

Therefore, the forgery of drawer's signature will not ordinarily protect the banker but even in this case, the banker may debit the account of the customer, if it can show that the forgery was intimately connected with the negligence of the customer and was the proximate cause of loss.

In the case of bearer cheques, the rule is that once a bearer cheque, always a bearer cheque. Where, therefore, a cheque originally expressed by the drawer himself to be payable to bearer, the banker may ignore any endorsement on the cheque. He will be discharged by payment in due course. But a cheque which becomes bearer by a subsequent endorsement in blank is not covered by this Section. A banker is discharged from liability on a crossed cheque if he makes payment in due course.

### **Payment in due Course (Section 10)**

Any person liable to make payment under a negotiable instrument, must make the payment of the amount due thereunder in due course in order to obtain a valid discharge against the holder.

A payment in due course means a payment in accordance with the apparent tenor of the instrument, in good

faith and without negligence to any person in possession thereof.

A payment will be a payment in due course if:

- (a) it is in accordance with the apparent tenor of the instrument, i.e., according to what appears on the face of the instrument to be the intention of the parties;
- (b) it is made in good faith and without negligence, and under circumstances which do not afford a ground for believing that the person to whom it is made is not entitled to receive the amount;
- (c) it is made to the person in possession of the instrument who is entitled as holder to receive payment;
- (d) payment is made under circumstances which do not afford a reasonable ground believing that he is not entitled to receive payment of the amount mentioned in the instrument; and
- (e) payment is made in money and money only.

Under Sections 10 and 128, a paying banker making payment in due course is protected.

### Collecting Banker

Collecting Banker is one who collects the proceeds of a cheque for a customer. Although a banker collects the proceeds of a cheque for a customer purely as a matter of service, yet the Negotiable Instruments Act, 1881 indirectly imposes statutory obligation, statutory in nature. This is evident from Section 126 of the Act which provides that a cheque bearing a "general crossing" shall not be paid to anyone other than banker and a cheque which is "specially crossed" shall not be paid to a person other than the banker to whom it is crossed. Thus, a paying banker must pay a generally crossed cheque only to a banker thereby meaning that it should be collected by another banker. While so collecting the cheques for a customer, it is quite possible that the banker collects for a customer, proceeds of a cheque to which the customer had no title in fact. In such cases, the true owner may sue the collecting banker for "conversion". At the same time, it cannot be expected of a banker to know or to ensure that all the signatures appearing in endorsements on the reverse of the cheque are genuine. The banker is expected to be conversant only with the signatures of his customer. A customer to whom a cheque has been endorsed, would request his banker to collect a cheque. In the event of the endorser's signature being proved to be forged at later date, the banker who collected the proceeds should not be held liable for the simple reason that he has merely collected the proceeds of a cheque. Section 131 of the Negotiable Instruments Act affords statutory protection in such a case where the customer's title to the cheque which the banker has collected has been questioned. It reads as follows:

"A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason of only having received such payment.

*Explanation:* A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

The Amendment Act, 2002 has added a new explanation to Section 131 which provides that it shall be the duty of the banker who receives payment based on an electronic image of a truncated cheque held with him, to verify the *prima facie* genuineness of the cheque to be truncated and any fraud, forgery or tampering apparent on the face of the instrument that can be verified with due diligence and ordinary care. (*Explanation II*)

The requisites of claiming protection under Section 131 are as follows:

- (i) The collecting banker should have acted in good faith and without negligence. An act is done in good faith when it is done honestly. The plea of good faith can be rebutted on the ground of recklessness indicative of want of proper care and attention. Therefore, much depends upon the facts of the case. The burden of proving that the cheque was collected in good faith and without negligence is upon the banker claiming protection. Failure to verify the regularity of endorsements, collecting a cheque payable to the account of the company to the credit of the director, etc. are examples of negligence.
- (ii) The banker should have collected a crossed cheque, i.e., the cheque should have been crossed before it came to him for collection.
- (iii) The proceeds should have been collected for a customer, i.e., a person who has an account with him.
- (iv) That the collecting banker has only acted as an agent of the customer. If he had become the holder for value, the protection available under Section 131 is forfeited—Where for instance, the banker allows the customer to withdraw the amount of the cheque before the cheque is collected or where the cheque has been accepted in specific reduction of an overdraft, the banker is *deemed to have become the holder for value and the protection is lost*. But the explanation to Section 131 says that the mere crediting of the amount to the account does not imply that the banker has become a holder for value because due to accounting conveniences the banker may credit the account of the cheque to the customer's account even before proceeds thereof are realised.

### Overdue, Stale or Out-of-date Cheques

A cheque is overdue or becomes statute-barred after three years from its due date of issue. A holder cannot sue on the cheque after that time. Apart from this provision, the holder of a cheque is required to present it for payment within a reasonable time, as a cheque is not meant for indefinite circulation. In India, a cheque, which has been in circulation for more than six months, is regarded by bankers as stale. If, as a result of any delay in presenting a cheque, the drawer suffers any loss, as by the failure of the bank, the drawer is discharged from liability to the holder to the extent of the damage.

### Liability of Endorser

In order to charge an endorser, it is necessary to present the cheque for payment within a reasonable time of its delivery by such endorser. 'A' endorses and delivers a cheque to B, and B keeps it for an unreasonable length of time, and then endorses and delivers it to C. C presents it for payment within a reasonable time after its receipt by him, and it is dishonoured. C can enforce payment against B but not against A, as *qua* A, the cheque has become stale.

### Rights of Holder against Banker

A banker is liable to his customer for wrongful dishonour of his cheque but it is not liable to the payee or holder of the cheque. The holder has no right to enforce payment from the banker except in two cases, namely, (i) where the holder does not present the cheque within a reasonable time after issue, and as a result the drawer suffers damage by the failure of the banker in liquidation proceedings; and (ii) where a banker pays a crossed cheque by mistake over the counter, he is liable to the owner for any loss occasioned by it.

### Crossing of Cheques

A cheque is either "open" or "crossed". An open cheque can be presented by the payee to the paying banker and is paid over the counter. A crossed cheque cannot be paid across the counter but must be collected through a banker.

A crossing is a direction to the paying banker to pay the money generally to a banker or to a particular banker, and not to pay otherwise. The object of crossing is to secure payment to a banker so that it could be traced to the person receiving the amount of the cheque. Crossing is a direction to the paying banker that the cheque should be paid only to a banker or a specified banker. To restrain negotiability, addition of words "Not Negotiable" or "Account Payee Only" is necessary. A crossed bearer cheque can be negotiated by delivery and crossed order cheque by endorsement and delivery. Crossing affords security and protection to the holder of the cheque.

### **Modes of Crossing (Sections 123-131A)**

There are two types of crossing which may be used on cheque, namely: (i) General, and (ii) Special. To these may be added another type, i.e. Restrictive crossing.

It is general crossing where a cheque bears across its face an addition of two parallel transverse lines and/or the addition of the words "and Co." between them, or addition of "not negotiable". As stated earlier, where a cheque is crossed generally, the paying banker will pay to any banker. Two transverse parallel lines are essential for a general crossing (Sections 123-126).

In case of general crossing, the holder or payee cannot get the payment over the counter of the bank but through a bank only. The addition of the words "and Co." do not have any significance but the addition of the words "not negotiable" restrict the negotiability of the cheque and in case of transfer, the transferee will not give a better title than that of a transferor.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable" that addition constitutes a crossing and the cheque is crossed specially and to that banker. The paying banker will pay only to the banker whose name appears across the cheque, or to his collecting agent. Parallel transverse lines are not essential but the name of the banker is the insignia of a special crossing.

In case of special crossing, the paying banker is to honour the cheque only when it is prescribed through the bank mentioned in the crossing or its agent bank.

*Account Payee's Crossing:* Such crossing does, in practice, restrict negotiability of a cheque. It warns the collecting banker that the proceeds are to be credited only to the account of the payee, or the party named, or his agent. If the collecting banker allows the proceeds of a cheque bearing such crossing to be credited to any other account, he will be guilty of negligence and will not be entitled to the protection given to collecting banker under Section 131. Such crossing does not affect the paying banker, who is under no duty to ascertain that the cheque is in fact collected for the account of the person named as payee.

### **Not Negotiable Crossing**

A cheque may be crossed not negotiable by writing across the face of the cheque the words "Not Negotiable" within two transverse parallel lines in the case of a general crossing or alongwith the name of a banker in the case of a special crossing. Section 130 of the Negotiable Instruments Act provides "A person taking a cheque crossed generally or specially bearing in either case with the words "not negotiable" shall not have and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had". The crossing of cheque "not negotiable" does not mean that it is non-transferable. It only deprives the instrument of the incident of negotiability. Normally speaking, the essential feature of a negotiable instrument as opposed to chattels is that a person who takes the instrument in good faith, without negligence, for value, before maturity and without knowledge of the defect in the title of the transferor, gets a good title to the instrument. In other words, he is called a holder in due course who acquires an indisputable title to the cheque. (When the instrument passes through a holder-in-due course, it is purged of all defects and the subsequent holders also get good title). It is exactly this important feature which is taken away by crossing



the cheque “not negotiable”. In other words, a cheque crossed “not negotiable” is like any other chattel and therefore the transferee gets same title to the cheque which his transferor had. That is to say that the transferee cannot claim the rights of a holder-in-due-course. So long as the title of the transferors is good, the title of the transferees is also good but if there is a taint in the title to the cheque of one of the endorsers, then all the subsequent transferees’ title also become tainted with the same defect they cannot claim to be holders-in-due-course.

The object of this Section is to afford protection to the drawer or holder of a cheque who is desirous of transmitting it to another person, as much protection as can reasonably be afforded to him against dishonestly or actual miscarriage in the course of transit. For example, a cheque payable to bearer is crossed generally and is marked “not negotiable”. It is lost or stolen and comes into the possession of X who takes it in good faith and gives value for it, X collects the cheque through his bank and paying banker also pays. In this case, both the paying and the collecting bankers are protected under Sections 128 and 131 respectively. But X cannot claim that he is a holder-in-due course which he could have under the normal circumstances claimed. The reason is that cheque is crossed “not negotiable” and hence the true owner’s (holder’s) right supercedes the rights of the holder-in-due-course. Since X obtained the cheque from a person who had no title to the cheque (i.e. from one whose title was defective) X can claim no better title solely because the cheque was crossed “not negotiable” and not for any other reason. Thus “not negotiable” crossing not only protects the rights of the true owner of the cheque but also serves as a warning to the endorsees’ to enquire thoroughly before taking the cheque as they may have to be answerable to the true owner thereof if the endorser’s title is found to be defective.

“Not negotiable” restricts the negotiability of the cheque and in case of transfer, the transferee will not get a better title than that of a transferor.

If the cheque becomes “not negotiable” it lacks negotiability. A cheque crossed specially or generally bearing the words “not negotiable”, lacks negotiability and therefore is not a negotiable instrument in the true sense. It does not restrict transferability but restricts negotiability only.

Specimen of a general crossing

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 \_\_\_\_\_  
 \_\_\_\_\_  
**& CO.**  
 \_\_\_\_\_  
 \_\_\_\_\_  
**Not Negotiable**  
 \_\_\_\_\_

Specimen of a special crossing

**Model Bank**  
 \_\_\_\_\_  
**Model Bank**  
 \_\_\_\_\_  
**Not Negotiable**  
**Model Bank**  
 \_\_\_\_\_  
**Model Bank**  
**Not Negotiable**

## Maturity

Cheques are always payable on demand but other instruments like bills, notes, etc. may be made payable on a specified date or after the specified period of time. The date on which payment of an instrument falls due is called its maturity. According to Section 22 of the Act, “the maturity of a promissory note or a bill of exchange is the date at which it falls due”. According to Section 21 a promissory note or bill of exchange payable “at sight” or “on presentment” is payable on demand. It is due for payment as soon as it is issued. The question of maturity, therefore, arises only in the case of a promissory note or a bill of exchange payable “after date” or “after sight” or at a certain period after the happening of an event which is certain to happen.

Maturity is the date on which the payment of an instrument falls due. Every instrument payable at a specified period after date or after sight is entitled to three days of grace. Such a bill or note matures or falls due on the last day of the grace period, and must be presented for payment on that day and if dishonoured, suit can be instituted on the next day after maturity. If an instrument is payable by instalments, each instalment is entitled to three days of grace. No days of grace are allowed for cheques, as they are payable on demand.

Where a note or bill is expressed to be payable on the expiry of specified number of months after sight, or after date, the period of payment terminates on the day of the month which corresponds with the date of instrument, or with the date of acceptance if the bill be accepted or presented for sight, or noted or protested for non-acceptance. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month.

### *Illustrations*

- (i) A negotiable instrument dated 31st January, 2001, is made payable at one months after date. The instrument is at maturity on the third day after the 28th February, 2001, i.e. on 3rd March, 2001.
- (ii) A negotiable instrument dated 30th August, 2001, is made payable three months after date. The instrument is at maturity on 3rd December, 2001.
- (iii) A negotiable instrument dated the 31st August, 2001, is made payable three months after date. The instrument is at maturity on 3rd December, 2001.

If the day of maturity falls on a public holiday, the instrument is payable on the preceeding business day. Thus, if a bill is at maturity on a Sunday. It will be deemed due on Saturday and not on Monday.

The ascertainment of the date of maturity becomes important because all these instruments must be presented for payment on the last day of grace and their payment cannot be demanded before that date. Where an instrument is payable by instalments, it must be presented for payment on the third day after the day fixed for the payment of each instalment.

## Holder

According to Section 8 of the Act a person is a holder of a negotiable instrument who is entitled in his own name (i) to the possession of the instrument, and (ii) to recover or receive its amount from the parties thereto. It is not every person in possession of the instrument who is called a holder. To be a holder, the person must be named in the instrument as the payee, or the endorsee, or he must be the bearer thereof. A person who has obtained possession of an instrument by theft, or under a forged endorsement, is not a holder, as he is not entitled to recover the instrument. The holder implies de jure (holder in law) holder and not de facto (holder in fact) holder. An agent holding an instrument for his principal is not a holder although he may receive its payment.

## Holder in Due Course

Section 9 states that a holder in due course is (i) a person who for consideration, obtains possession of a negotiable instrument if payable to bearer, or (ii) the payee or endorsee thereof, if payable to order, before its maturity and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

In order to be a holder in due course, a person must satisfy the following conditions:

- (i) He must be the holder of the instrument.
- (ii) He should have obtained the instrument for value or consideration.
- (iii) He must have obtained the negotiable instrument before maturity.
- (iv) The instrument should be complete and regular on the face of it.
- (v) The holder should take the instrument in good faith.

A holder in due course is in a privileged position. He is not only himself protected against all defects of the persons from whom he received the instrument as current coin, but also serves as a channel to protect all subsequent holders. A holder in due course can recover the amount of the instrument from all previous parties, although, as a matter of fact, no consideration was paid by some of the previous parties to the instrument or there was a defect of title in the party from whom he took it. Once an instrument passes through the hands of a holder in due course, it is purged of all defects. It is like current coin. Whoever takes it can recover the amount from all parties previous to such holder.

## Capacity of Parties

Capacity to incur liability as a party to a negotiable instrument is co-extensive with capacity to contract. According to Section 26, every person capable of contracting according to law to which he is subject, may bind himself and be bound by making, drawing, acceptance, endorsement, delivery and negotiation of a promissory note, bill of exchange or cheque.

Negatively, minors, lunatics, idiots, drunken person and persons otherwise disqualified by their personal law, do not incur any liability as parties to negotiable instruments. But incapacity of one or more of the parties to a negotiable instrument in no way, diminishes the abilities and the liabilities of the competent parties. Where a minor is the endorser or payee of an instrument which has been endorsed all the parties accepting the minor are liable in the event of its dishonour.

## Liability of Parties

The provisions regarding the liability of parties to negotiable instruments are laid down in Sections 30 to 32 and 35 to 42 of the Negotiable Instruments Act. These provisions are as follows:

### 1. Liability of Drawer (Section 30)

The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to or received by the drawer.

The nature of drawer's liability is that by drawing a bill, he undertakes that (i) on due presentation, it shall be accepted and paid according to its tenor, and (ii) in case of dishonour, he will compensate the holder or any endorser, provided notice of dishonour has been duly given. However, in case of accommodation bill no notice of dishonour to the drawer is required.

The liability of a drawer of a bill of exchange is secondary and arises only on default of the drawee, who is primarily liable to make payment of the negotiable instrument.

### **2. Liability of the Drawee of Cheque (Section 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 so and, or in default of such payment, he shall compensate the drawer for any loss or damage caused by such default.

As a cheque is a bill of exchange, drawn on a specified banker, the drawee of a cheque must always be a banker. The banker, therefore, is bound to pay the cheque of the drawer, i.e., customer, if the following conditions are satisfied:

- (i) The banker has sufficient funds to the credit of customer's account.
- (ii) The funds are properly applicable to the payment of such cheque, e.g., the funds are not under any kind of lien etc.
- (iii) The cheque is duly required to be paid, during banking hours and on or after the date on which it is made payable.

If the banker is unjustified in refusing to honour the cheque of its customer, it shall be liable for damages.

### **3. Liability of "Maker" of Note and "Acceptor" of Bill (Section 32)**

In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity, according to the apparent tenor of the note or acceptance respectively. The acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

It follows that the liability of the acceptor of a bill corresponds to that of the maker of a note and is absolute and unconditional but the liability under this Section is subject to a contract to the contrary (e.g., as in the case of accommodation bills) and may be excluded or modified by a collateral agreement. Further, the payment must be made to the party named in the instrument and not to any-one else, and it must be made at maturity and not before.

### **4. Liability of endorser (Section 35)**

Every endorser incurs liability to the parties that are subsequent to him. Whoever endorses and delivers a negotiable instrument before maturity is bound thereby to every subsequent holder in case of dishonour of the instrument by the drawee, acceptor or maker, to compensate such holder of any loss or damage caused to him by such dishonour provided (i) there is no contract to the contrary; (ii) he (endorser) has not expressly excluded, limited or made conditional his own liability; and (iii) due notice of dishonour has been given to, or received by, such endorser. Every endorser after dishonour, is liable upon the instrument as if it is payable on demand.

He is bound by his endorsement notwithstanding any previous alteration of the instrument. (Section 88)

### **5. Liability of Prior Parties (Section 36)**

Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. Prior parties may include the maker or drawer, the acceptor and all the intervening endorsers to a negotiable instrument. The liability of the prior parties to a holder in due course is joint and several. The holder in due course may hold any or all prior parties liable for the amount of the dishonoured instrument.

## 6. Liability inter se

Various parties to a negotiable instrument who are liable thereon stand on a different footing with respect to the nature of liability of each one of them.

## 7. Liability of Acceptor of Forged Endorsement (Section 41)

An acceptor of a bill of exchange already endorsed is not relieved from liability by reason that such endorsement is forged, if he knew or had reason to believe the endorsement to be forged when he accepted the bill.

## 8. Acceptor's Liability on a Bill drawn in a Fictitious Name

An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an endorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

## Negotiation (Section 14)

A negotiable instrument may be transferred by negotiation or assignment. Negotiation is the transfer of an instrument (a note, bill or cheque) for one person to another in such a manner as to convey title and to constitute the transferee the holder thereof. When a negotiable instrument is transferred by negotiation, the rights of the transferee may rise higher than those of the transferor, depending upon the circumstances attending the negotiation. When the transfer is made by assignment, the assignee has only those rights which the assignor possessed. In case of assignment, there is a transfer of ownership by means of a written and registered document.

## Negotiability and Assignability Distinguished

A transfer by negotiation differs from transfer by assignment in the following respects:

- (a) Negotiation requires mere delivery of a bearer instrument and endorsement and delivery of an order instrument to effectuate a transfer. Assignment requires a written document signed by the transferor.
- (b) Notice of transfer of debt (actionable claim) must be given by the assignee to the debtor in order to complete his title; no such notice is necessary in a transfer by negotiation.
- (c) On assignment, the transferee of an actionable claim takes it subject to all the defects in the title of, and subject to all the equities and defences available against the assignor, even though he took the assignment for value and in good faith. In case of negotiation the transferee, as holder-in-due course, takes the instrument free from any defects in the title of the transferor.

## Importance of Delivery

Negotiation is effected by mere delivery of a bearer instrument and by endorsement and delivery of an order instrument. This shows that "delivery" is essential in negotiable instruments. Section 46 expressly provides that making acceptance or endorsement of negotiable instrument is not complete until delivery, actual or constructive, of the instrument. Delivery made voluntarily with the intention of passing property in the instrument to the person to whom it is given is essential.

## Negotiation by Mere Delivery

A bill or cheque payable to bearer is negotiated by mere delivery of the instrument. An instrument is payable

to bearer:

- (i) Where it is made so payable, or
- (ii) Where it is originally made payable to order but the only or the last endorsement is in blank.
- (iii) Where the payee is a fictitious or a non-existing person.

These instruments do not require signature of the transferor. The person who takes them is a holder, and can sue in his own name on them. Where a bearer negotiates an instrument by mere delivery, and does not put his signature thereon, he is not liable to any party to the instrument in case the instrument is dishonoured, as he has not lent his credit to it. His obligations are only towards his immediate transferee and to no other holders.

A cheque, originally drawn payable to bearer remains bearer, even though it is subsequently endorsed in full. The rule is once a bearer cheque always a bearer cheque.

### **Negotiation by Endorsement and Delivery**

An instrument payable to a specified person or to the order of a specified person or to a specified person or order is an instrument payable to order. Such an instrument can be negotiated only by endorsement and delivery. Unless the holder signs his endorsement on the instrument, the transferee does not become a holder. Where an instrument payable to order is delivered without endorsement, it is merely assigned and not negotiated and the holder thereof is not entitled to the rights of a holder in due course, and he cannot negotiate it to a third person.

### **Endorsement (Sections 15 and 16)**

Where the maker or holder of a negotiable instrument signs the same otherwise than as such maker for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto (called Allonge), or so, signs for the same purpose, a stamped paper intended to be completed as a negotiable instrument, he is said to endorse the same (Section 15), the person to whom the instrument is endorsed is called the endorsee.

In other words, 'endorsement' means and involves the writing of something on the back of an instrument for the purpose of transferring the right, title and interest therein to some other person.

### **Classes of endorsement**

An endorsement may be (a) Blank or General, (b) Special or Full, (c) Restrictive, or (d) Partial, and (e) Conditional or Qualified.

- (a) *Blank or General*: An endorsement is to be blank or general where the endorser merely writes his signature on the back of the instrument, and the instrument so endorsed becomes payable to bearer, even though originally it was payable to order. Thus, where bill is payable to "Mohan or order", and he writes on its back "Mohan", it is an endorsement in blank by Mohan and the property in the bill can pass by mere delivery, as long as the endorsement continues to be a blank. But a holder of an instrument endorsed in blank may convert the endorsement in blank into an endorsement in full, by writing above the endorser's signature, a direction to pay the instrument to another person or his order.
- (b) *Special or Full*: If the endorser signs his name and adds a direction to pay the amount mentioned in the instrument to, or to the order of a specified person, the endorsement is said to be special or in full. A bill made payable to Mohan or Mohan or order, and endorsed "pay to the order of Sohan"

would be specially endorsed and Sohan endorses it further. A blank endorsement can be turned into a special one by the addition of an order making the bill payable to the transferee.

- (c) *Restrictive*: An endorsement is restrictive which prohibits or restricts the further negotiation of an instrument. Examples of restrictive endorsement: “Pay A only” or “Pay A for my use” or “Pay A on account of B” or “Pay A or order for collection”.
- (d) *Partial*: An endorsement partial is one which purports to transfer to the endorsee a part only of the amount payable on the instrument. A partial endorsement does not operate as negotiation of the instrument. A holds a bill for Rs. 1,000 and endorses it as “Pay B or order Rs. 500”. The endorsement is partial and invalid.
- (e) *Conditional or qualified*: An endorsement is conditional or qualified which limits or negatives the liability of the endorser. An endorser may limit his liability in any of the following ways:
  - (i) By sans recourse endorsement, i.e. by making it clear that he does not incur the liability of an endorser to the endorsee or subsequent holders and they should not look to him in case of dishonour of instrument. The endorser excludes his liability by adding the words “sans recourse” or “without recourse”, e.g., “pay A or order sans recourse”.
  - (ii) By making his liability depending upon happening of a specified event which may never happen, e.g., the holder of a bill may endorse it thus: “Pay A or order on his marrying B”. In such a case, the endorser will not be liable until A marries B.

It is pertinent to refer to Section 52 of the Negotiable Instruments Act, 1881 here. It reads “The endorser of a negotiable instrument may, by express words in the endorsement exclude his own liability thereon, or make such liability or the right of the endorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen”.

### **Negotiation Back**

Where an endorser negotiates an instrument and again becomes its holder, the instrument is said to be negotiated back to that endorser and none of the intermediary endorsees are then liable to him. The rule prevents a circuitry of action. For example, A, the holder of a bill endorses it to B, B endorses to C, and C to D, and endorses it again to A. A, being a holder in due course of the bill by second endorsement by D, can recover the amount thereof from B, C, or D and himself being a prior party is liable to all of them. Therefore, A having been relegated by the second endorsement to his original position, cannot sue B, C and D.

*Where an endorser so excludes his liability and afterwards becomes the holder of the instrument, all the intermediate endorsers are liable to him.* “the italicised portion of the above Section is important”. An illustration will make the point clear. A is the payee of a negotiable instrument. He endorses the instrument ‘sans recourse’ to B, B endorses to C, C to D, and D again endorses it to A. In this case, A is not only reinstated in his former rights but has the right of an endorsee against B, C and D.

### **Negotiation of Lost Instrument or that Obtained by Unlawful Means**

When a negotiable instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or endorsee, who claims through the person who found or obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor, or holder from any party prior to such holder unless such possessor or endorsee is, or some person through whom he claims was, a holder in due course.

### Forged Endorsement

The case of a forged endorsement is worth special notice. If an instrument is endorsed in full, it cannot be negotiated except by an endorsement signed by the person to whom or to whose order the instrument is payable, for the endorsee obtains title only through his endorsement. Thus, if an instrument be negotiated by means of a forged endorsement, the endorsee acquires no title even though he be a purchaser for value and in good faith, for the endorsement is a nullity. Forgery conveys no title. *But where the instrument is a bearer instrument or has been endorsed in blank, it can be negotiated by mere delivery, and the holder derives his title independent of the forged endorsement and can claim the amount from any of the parties to the instrument.* For example, a bill is endorsed, "Pay A or order". A endorses it in blank, and it comes into the hands of B, who simply delivers it to C, C forges B's endorsement and transfer it to D. Here, D, as the holder does not derive his title through the forged endorsement of B, but through the genuine endorsement of A and can claim payment from any of the parties to the instrument in spite of the intervening forged endorsement.

### Acceptance of a Bill of Exchange

The drawee of a bill of exchange, as such, has no liability on any bill addressed to him for acceptance or payment. A refusal to accept or to pay such bill gives the holder no rights against him. The drawee becomes liable only after he accepts the bill. The acceptor has to write the word 'accepted' on the bill and sign his name below it. Thus, it is the acceptor who is primarily liable on a bill.

The acceptance of a bill is the indication by the drawee of his assent to the order of the drawer. Thus, when the drawee writes across the face of the bill the word "accepted" and signs his name underneath he becomes the acceptor of the bill.

An acceptance may be either general or qualified. A general acceptance is absolute and as a rule, an acceptance has to be general. Where an acceptance is made subject to some condition or qualification, thereby varying the effect of the bill, it is a qualified acceptance. The holder of the bill may either refuse to take a qualified acceptance or non-acquiescence in it. Where he refuses to take it, he can treat the bill as dishonoured by non-acceptance, and sue the drawer accordingly.

### Acceptance for Honour

When a bill has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto. The stranger so accepting, will declare under his hand that he accepts the protested bill for the honour of the drawer or any particular endorser whom he names.

The acceptor for honour is liable to pay only when the bill has been duly presented at maturity to the drawee for payment and the drawee has refused to pay and the bill has been noted and protested for non-payment. Where a bill has been protested for non-payment after having been duly accepted, any person may intervene and pay it *supra protest* for the honour of any party liable on the bill. When a bill is paid *supra protest*, it ceases to be negotiable. The stranger, on paying for honour, acquires all the right of holder for whom he pays.

### Presentment for Acceptance

It is only bills of exchange that require presentment for acceptance and even these of certain kinds only. Bills payable on demand or on a fixed date need not be presented. Thus, a bill payable 60 days after due date on the happening of a certain event may or may not be presented for acceptance. But the following bills must be presented for acceptance otherwise, the parties to the bill will not be liable on it:

- (a) A bill payable *after sight*. Presentment is necessary in order to fix maturity of the bills; and



- (b) A bill in which there is an express stipulation that it shall be presented for acceptance before it is presented for payment.

Section 15 provides that the presentment for acceptance must be made to the drawee or his duly authorised agent. If the drawee is dead, the bill should be presented to his legal representative, or if he has been declared an insolvent, to the official receiver or assigner.

The following are the persons to whom a bill of exchange should be presented:

- (i) The drawee or his duly authorised agent.
- (ii) If there are many drawees, bill must be presented to all of them.
- (iii) The legal representatives of the drawee if drawee is dead.
- (iv) The official receiver or assignee of insolvent drawee.
- (v) To a drawee in case of need, if there is any. This is necessary when the original drawee refuses to accept the bill.
- (vi) The acceptor for honour. In case the bill is not accepted and is noted or protested for non-acceptance, the bill may be accepted by the acceptor for honour. He is a person who comes forward to accept the bill when it is dishonoured by non-acceptance.

The presentment must be made before maturity, within a reasonable time after it is drawn, or within the stipulated period, if any, on a business day within business hours and at the place of business or residence of the drawee. The presentment must be made by exhibiting the bill to the drawee; mere notice of its existence in the possession of holder will not be sufficient.

When presentment is compulsory and the holder fails to present for acceptance, the drawer and all the endorsers are discharged from liability to him.

### **Presentment for Acceptance when Excused**

Compulsory presentment for acceptance is excused and the bill may be treated as dishonoured in the following cases:

- (a) Where the drawee cannot be found after reasonable search.
- (b) Where drawee is a fictitious person or one incapable of contracting.
- (c) Where although the presentment is irregular, acceptance has been refused on some other ground.

### **Presentment for Payment**

Section 64 lays down the general rule as to presentment of negotiable instruments for payment. It says all notes, bills and cheques must be presented for payment thereof respectively by or on behalf of the holder during the usual hours of business and of the maker or acceptor, and if at banker's within banking hours. [Section 64(1)]

As mentioned earlier, the definition of cheque has been broadened to include the electronic image of a truncated cheque and a cheque in the electronic form. Thus, the section has also been suitably amended to provide rules as to presentment of truncated cheque. The amendment, despite recognising electronic image of a truncated cheque, has made provision for the drawee bank to call for the truncated cheque in original if it is not satisfied about the instrument.

Section 64(2) stipulates, where an electronic image of a truncated cheque is presented for payment, the

drawee bank is entitled to demand any further information regarding the truncated cheque from the bank holding the truncated cheque in case of any reasonable suspicion about the genuineness of the apparent tenor of instrument, and if the suspicion is that of any fraud, forgery, tampering or destruction of the instrument, it is entitled to further demand the presentment of the truncated cheque itself for verification:

Provided that the truncated cheque so demanded by the drawee bank shall be retained by it, if the payment is made accordingly.

### **Presentment for Payment when Excused**

No presentment is necessary and the instrument may be treated as dishonoured in the following cases:

- (a) Where the maker, drawer or acceptor actively does something so as to intentionally obstruct the presentment of the instrument, e.g., deprives the holder of the instrument and keeps it after maturity.
- (b) Where his business place is closed on the due date.
- (c) Where no person is present to make payment at the place specified for payment.
- (d) Where he cannot, after due search be found. (Section 61)
- (e) Where there is a promise to pay notwithstanding non-presentment.
- (f) Where the presentment is express or impliedly waived by the party entitled to presentment.
- (g) Where the drawer could not possibly have suffered any damage by non-presentment.
- (h) Where the drawer is a fictitious person, or one incompetent to contract.
- (i) Where the drawer and the drawee are the same person.
- (j) Where the bill is dishonoured by non-acceptance.
- (k) Where presentment has become impossible, e.g., the declaration of war between the countries of the holder and drawee.
- (l) Where though the presentment is irregular, acceptance has been refused on some other grounds.

### **Dishonour by Non-Acceptance**

Section 91 provides that a bill is said to be dishonoured by non-acceptance:

- (a) When the drawee does not accept it within 48 hours from the time of presentment for acceptance.
- (b) When presentment for acceptance is excused and the bill remains unaccepted.
- (c) When the drawee is incompetent to contract.
- (d) When the drawee is a fictitious person or after reasonable search can not be found.
- (e) Where the acceptance is a qualified one.

### **Dishonour by Non-payment (Section 92)**

A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same. Also, a negotiable instrument is dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid.

If the bill is dishonoured either by non-acceptance or by non-payment, the drawer and all the endorsers of the bill are liable to the holder, provided he gives notice of such dishonour. The drawee is liable only when there is dishonour by non-payment.

### **Notice of Dishonour (Sections 91-98 and Sections 105-107)**

When a negotiable instrument is dishonoured either by non-acceptance or by non-payment, the holder or some party liable thereon must give notice of dishonour to all other parties whom he seeks to make liable. Each party receiving notice of dishonour must in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time after he has received it. The object of giving notice is not to demand payment but to whom the party notified of his liability and in case of drawer to enable him to protect himself as against the drawee or acceptor who has dishonoured the instrument issued by him. Notice of dishonour is so necessary that an omission to give it discharges all parties other than the maker or acceptor. These parties are discharged not only on the bill or note, but also in respect of the original consideration.

Notice may be oral or in writing, but it must be actual formal notice. It must be given within a reasonable time of dishonour.

### **Notice of Dishonour Unnecessary**

No notice of dishonour is necessary:

- (a) When it is dispensed with or waived by the party entitled thereto, e.g., where an endorser writes on the instrument such words as “notice of dishonour waived”,
- (b) When the drawer has countermanded payment.
- (c) When the party charged would not suffer damage for want of notice.
- (d) When the party entitled to notice cannot after due search be found.
- (e) When the omission to give notice is caused by unavoidable circumstances, e.g., death or dangerous illness of the holder.
- (f) Where the acceptor is also a drawer, e.g., where a firm draws on its branch.
- (g) Where the promissory note is not negotiable. Such a note cannot be endorsed.
- (h) Where the party entitled to notice promises to pay unconditionally.

### **Noting and Protest (Sections 99-104 A)**

#### **Noting**

Where a note or bill is dishonoured, the holder is entitled after giving due notice of dishonour, to sue the drawer and the endorsers. Section 99 provides a convenient method of authenticating the fact of dishonour by means of “Noting”. Where a bill or note is dishonoured, the holder may, if he so desires, cause such dishonour to be noted by a notary public on the instrument, or on a paper attached thereto or partly on each. The noting or minute must be recorded by the notary public within a reasonable time after dishonour and must contain the fact of dishonour, the date of dishonour, the reason, if any, assigned for such dishonour if the instrument has not been expressly dishonoured the reasons why the holder treats it dishonoured and notary’s charges.

## Protest

The protest is the formal notarial certificate attesting the dishonour of the bill, and based upon the noting which has been effected on the dishonour of the bill. After the noting has been made, the formal protest is drawn up by the notary and when it is drawn up it relates back to the date of noting.

Where the acceptor of a bill has become insolvent, or has suspended payment, or his credit has been publicly impeached, before the maturity of the bill, the holder may have the bill protested for better security. The notary public demands better security and on its refusal makes a protest known as “protest for better security”.

Foreign bills must be protested for dishonour when such protest is required by the law of the place where they are drawn. Foreign promissory notes need not be so protested. Where a bill is required by law to be protested, then instead of a notice of dishonour, notice of protest must be given by the notary public.

A protest to be valid must contain on the instrument itself or a literal transcript thereof, the names of the parties for and against whom protest is made, the fact and reasons for dishonour together with the place and time of dishonour and the signature of the notary public. Protest affords an authentic evidence of dishonour to the drawer and the endorsee.

## Discharge

The discharge in relation to negotiable instrument may be either (i) discharge of the instrument or (ii) discharge of one or more parties to the instrument from liability.

### Discharge of the Instrument

A negotiable instrument is discharged:

- (a) by payment in due course;
- (b) when the principal debtor becomes the holder;
- (c) by an act that would discharge simple contract;
- (d) by renunciation; and
- (e) by cancellation.

### Discharge of a Party or Parties

When any particular party or parties are discharged, the instrument continues to be negotiable and the undischarged parties remain liable on it. For example, the non-presentment of a bill on the due date discharges the endorsers from their liability, but the acceptor remains liable on it.

A party may be discharged in the following ways :

- (a) *By cancellation* by the holder of the name of any party to it with the intention of discharging him.
- (b) *By release*, when the holder releases any party to the instrument
- (c) *Discharge* of secondary parties, i.e., endorsers.
- (d) *By the operation* of the law, i.e., by insolvency of the debtor.
- (e) *By allowing* drawee more than 48 hours to accept the bill, all previous parties are discharged.
- (f) *By non-presentment* of cheque promptly the drawer is discharged.

- (g) *By taking qualified acceptance*, all the previous parties are discharged.
- (h) *By material alteration*.

### Material Alteration (Section 87)

An alteration is material which in any way alters the operation of the instrument and the liabilities of the parties thereto. Therefore, any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, or which changes legal character of the instrument is a material alteration.

A material alteration renders the instrument void, but it affects only those persons who have already become parties at the date of the alteration. Those who take the altered instrument cannot complain. Section 88 provides that an acceptor or endorser of a negotiable instrument is bound by his acceptance or endorsement notwithstanding any previous alteration of the instrument.

Examples of material alteration are :

Alteration (i) of the date of the instrument (ii) of the sum payable, (iii) in the time of payment, (iv) of the place of payment, (v) of the rate of interest, (vi) by addition of a new party, (vii) tearing the instrument in a material part.

There is no material alteration and the instrument is not vitiated in the following cases:

(i) correction of a mistake, (ii) to carry out the common intention of the parties, (iii) an alteration made before the instrument is issued and made with the consent of the parties, (iv) crossing a cheque, (v) addition of the words "on demand" in an instrument where no time of payment is stated.

Section 89 affords protection to a person who pays an altered note bill or cheque. However, in order to be able to claim the protection, the following conditions must be fulfilled:

- (i) the alteration should not be apparent;
- (ii) the payment must be made in due course; and
- (iii) the payment must be by a person or banker liable to pay.

Section 89 has been amended to provide for the amendment in the definition of cheque so as to provide for electronic image of a truncated cheque. The section provides that any bank or a clearing house which receives a transmitted electronic image of a truncated cheque, shall verify from the party who transmitted the image to it, that the image so transmitted to it and received by it, is exactly the same. Where there is any difference in apparent tenor of such electronic image and the truncated cheque, it shall be a material alteration. In such a case, it shall be the duty of the bank or the clearing house, as the case may be, to ensure the exactness of the apparent tenor of electronic image of the truncated cheque while truncating and transmitting the image. If the bank fails to discharge this duty, the payment made by it shall not be regarded as good and it shall not be afforded protection.

### Retirement of a Bill under Rebate

An acceptor of a bill may make payment before maturity, and the bill is then said to be retired, but it is not discharged and must not be cancelled except by the acceptor when it comes into his hands. It is customary in such a case to make allowance of interest on the money to the acceptor for the remainder of the time which the bill has to run. The interest allowance is known as rebate.

## Hundis

Hundis are negotiable instruments written in an oriental language. They are sometimes bills of exchange and sometimes promissory notes, and are not covered under the Negotiable Instruments Act, 1881. Generally, they are governed by the customs and usages in the locality but if custom is silent on the point in dispute before the Court, this Act applies to the hundis. The term “hundi” was formerly applicable to native bills of exchange. The promissory notes were then called “teep”. The hundis were in circulation in India even before the present Negotiable Instrument Act, 1881 came into operation. The usages attached to these hundis varied with the locality in which they were in circulation.

Generally understood, the term “hundi” includes all indigenous negotiable instruments whether they are bills of exchange or promissory notes. An instrument in order to be a hundi must be capable of being sued by the holder in his own name, and must by the custom of trade be transferred like cash by delivery. Obviously the customs relating to hundis were many. In certain parts of the country even oral acceptance was in vogue.

The following types of hundis are worth mentioning :

### 1. *Shah Jog Hundi*

“Shah” means a respectable and responsible person or a man of worth in the bazar. Shah Jog Hundi means a hundi which is payable only to a respectable holder, as opposed to a hundi payable to bearer. In other words the drawee before paying the same has to satisfy himself that the payee is a ‘SHAH’.

### 2. *Jokhmi Hundi*

A “jokhmi” hundi is always drawn on or against goods shipped on the vessel mentioned in the hundi. It implies a condition that money will be paid only in the event of arrival of the goods against which the hundi is drawn. It is in the nature of policy of insurance. The difference, however, is that the money is paid before hand and is to be recovered if the ship arrives safely.

### 3. *Jawabee Hundi*

According to Macpherson, “A person desirous of making a remittance writes to the payee and delivers the letter to a banker, who either endorses it on to any of his correspondents near the payee’s place of residence, or negotiates its transfer. On the arrival, the letter is forwarded to the payee, who attends and gives his receipt in the form of an answer to the letter which is forwarded by the same channel of the drawer or the order.” Therefore, this is a form of hundi which is used for remitting money from one place to another.

### 4. *Nam jog Hundi*

It is a hundi payable to the party named in the bill or his order. The name of the payee is specifically inserted in the hundi. It can also be negotiated like a bill of exchange. Its alteration into a Shah Jog hundi is a material alteration and renders it void.

### 5. *Darshani Hundi*

This is a hundi payable at sight. It is freely negotiable and the price is regulated by demand and supply. They are payable on demand and must be presented for payment within a reasonable time after they are received by the holder.

### 6. *Miadi Hundi*

This is otherwise called *muddati* hundi, that is, a hundi payable after a specified period of time. Usually money is advanced against these hundis by shroffs after deducting the advance for the period in advance.

There are other forms of hundis also like.

*Dhani Jog Hundi* - A hundi which is payable to “dhani” i.e., the owner.

*Firman Jog Hundi* - which is payable to order if can be negotiated by endorsement and delivery.

### **Presumptions of Law**

A negotiable instrument is subject to certain presumptions. These have been recognised by the Negotiable Instruments Act under Sections 118 and 119 with a view to facilitate the business transactions. These are described below:

It shall be presumed that:

- (1) Every negotiable instrument was made or drawn for consideration irrespective of the consideration mentioned in the instrument or not.
- (2) Every negotiable instrument having a date was made on such date.
- (3) Every accepted bill of exchange was accepted within a reasonable time before its maturity.
- (4) Every negotiable instrument was transferred before its maturity.
- (5) The instruments were endorsed in the order in which they appear on it.
- (6) A lost or destroyed instrument was duly signed and stamped.
- (7) The holder of the instrument is a holder in due course.
- (8) In a suit upon an instrument which has been dishonoured, the Court shall presume the fact of dishonour, or proof of the protest.

However these legal presumptions are rebuttable by evidence to the contrary. The burden to prove to the contrary lies upon the defendant to the suit and not upon the plaintiff.

### **Payment of Interest in case of dishonour**

The Negotiable Instruments Act, 1881 was amended in the year 1988, revising the rate of interest as contained in Sections 80 and 117, from 6 per cent to 18 per cent per annum payable on negotiable instruments from the due date in case no rate of interest is specified, or payable to an endorser from the date of payment on a negotiable instrument on its dishonour with a view to discourage the withholding of payment on negotiable instruments on due dates.

### **Penalties in case of dishonour of cheques**

Chapter XVII of the Negotiable Instruments Act provides for penalties in case of dishonour of certain cheques for insufficiencies of funds in the accounts. Sections 138 to 147 deal with these aspects.

Chapter XVII has been amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. The amendments have provided the drawer with more time to send notice, made the punishment for the offence more stringent, given power to court for condonation of delay in filing of complaint, excluded liability of government nominated directors, made provision for summary trial of cases under the Chapter and time bound disposal of cases, have relaxed the rules of evidence, and made the offences under the Act compoundable.

The working of the provisions of Chapter XVII for a period of more than a decade had brought to the fore front various lacunae and shortcomings from which it suffered. It was seen that there were enormous delays in the disposal of the cases filed under Section 138 and the drawer of the cheques, by taking shield of various technicalities and procedures were frustrating the very object of the Chapter.

The provisions contained in this Chapter provide that where any cheque drawn by a person for discharge of any liability is returned by the bank unpaid for the reason of insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangement made by the drawer of the cheque with the banker for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the Act, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both.

In order to constitute the said offence

- (a) such cheque should have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier; and
- (b) the payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving notice, in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque unpaid; and
- (c) the drawer of such cheque should have failed to make the payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of the receipt of the said notice.

It has also been provided that it shall be presumed, unless the contrary is proved, that the holder of such cheque received the cheque in the discharge of a liability. Defences which may or may not be allowed in any prosecution for such offence have also been provided to make the provisions effective. The Supreme Court in *Modi Cements Ltd. v. K.K. Nandi*, (1988) 28 CLA 491, held that merely because the drawer issued a notice to the drawee or to the Bank for 'stop payment', it would not preclude an action under Section 138 by the drawee or holder in due course.

The liability of government nominated directors has been excluded under Section 141 of the Act dealing with 'offences by companies'. The second proviso inserted in Section 141 by the Amendment Act, 2002 provides that where a person is nominated as a director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter. In order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient safeguards have also been provided in the new Chapter, as under:

- (a) that no court shall take cognizance of such offence except on a complaint in writing, made by the payee or the holder in due course of the cheque;
- (b) that such complaint is made within one month or the date on which the cause of action arises;

Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period.

- (c) that no court inferior to that of a Metropolitan Magistrate or a Judicial magistrate of the first class



shall try any such offence. (Section 142)

Moreover, the new Sections inserted by the Amendment Act, 2002 provide that all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a *summary trial* under this Section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of, a summary trial under this Section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall, after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

According to the sub-section (2) of Section 142 of the Negotiable Instrument (Amendment) Act, 2015, the offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation. – For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”.

(2) The trial of a case under this Section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this Section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint. (Section 143)

A Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works for gain, by speed post or by such courier services as are approved by a Court of Session.

Where an acknowledgement purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the court issuing the summons may declare that the summons has been duly served. (Section 144)

The evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

The court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and

examine any person giving evidence on affidavit as to the facts contained therein. (Section 145)

The court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved. Every offence punishable under this Act shall be compoundable. (Sections 146 and 147)

The practical effect of these amendments which have only recently been brought into force would be seen with time to come but it is expected that they would go a long way in making the remedy provided for by Chapter XVII meaningful and effective.

### **National Electronic Funds Transfer (NEFT) and Real Time Gross Settlement (RTGS)**

National Electronic Funds Transfer (NEFT) is a nation-wide payment system facilitating one-to-one funds transfer. Under this Scheme, individuals, firms and corporates can electronically transfer funds from any bank branch to any individual, firm or corporate having an account with any other bank branch in the country participating in the Scheme.

NEFT is an electronic fund transfer system that operates on a Deferred Net Settlement (DNS) basis which settles transactions in batches. In DNS, the settlement takes place with all transactions received till the particular cut-off time. These transactions are netted (payable and receivables) in NEFT whereas in RTGS the transactions are settled individually. For example, currently, NEFT operates in hourly batches. Any transaction initiated after a designated settlement time would have to wait till the next designated settlement time. Contrary to this, in the RTGS transactions are processed continuously throughout the RTGS business hours.

The acronym 'RTGS' stands for Real Time Gross Settlement, which can be defined as the continuous (real-time) settlement of funds transfers individually on an order by order basis (without netting). 'Real Time' means the processing of instructions at the time they are received rather than at some later time; 'Gross Settlement' means the settlement of funds transfer instructions occurs individually (on an instruction by instruction basis). Considering that the funds settlement takes place in the books of the Reserve Bank of India, the payments are final and irrevocable.

### **LESSON ROUND-UP**

- The law relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881. It is an Act to define and amend the law relating to promissory notes, bills of exchange and Cheques.
- The term "negotiable instrument" means a document transferable from one person to another.
- A "promissory note" is an instrument in writing containing an unconditional undertaking, signed by the maker to pay a certain sum of money to, or to the order of, a certain person, or only to bearer of the instrument.
- 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.
- Bills of exchange were originally used for payment of debts by traders residing in one country to another country with a view to avoid transmission of coin. Now-a-days they are used more as trade bills both in connection with domestic trade and foreign trade and are called inland bills and foreign bills respectively.
- A 'Cheque' is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated Cheque and a Cheque in the electronic form.





EXECUTIVE PROGRAMME  
ECONOMIC BUSINESS AND COMMERCIAL LAWS

# EP-EBCL

## WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

“27. Suspension and cancellation of examination results or registration

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or the Committee concerned may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity to state his case, suspend or debar the person from appearing in any one or more examinations, cancel his examination result, or studentship registration, or debar him from future registration as a student, as the case may be.

Explanation - Misconduct for the purpose of this regulation shall mean and include behaviour in a disorderly manner in relation to the Institute or in or near an Examination premises/centre, breach of any regulation, condition, guideline or direction laid down by the Institute, malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with the writing of any examination conducted by the Institute”.

**EXECUTIVE PROGRAMME**  
**ECONOMIC BUSINESS AND COMMERCIAL LAWS**

**TEST PAPER**

*Time Allowed: 3 hours*

*Maximum Marks: 100*

**NOTE:** Answer All Questions.

**PART I**

1. (a) Discuss the functions of the Reserve Bank of India.  
(b) Reserve Bank of India as Banker to Banks. Examine.  
(c) What are the instrument of Monetary Policy?  
(d) State the overview of Foreign Exchange Management Act, 1999  
(e) Enumerate the Prohibited Transactions under Liberalized Remittance Scheme. *(4 Marks each)*
  
2. (a) Define Authorised person? Briefly discuss the powers of RBI to give directions to Authorised persons?  
(b) Explain the concept of 'organisation of a political nature' under the Foreign Contribution (Regulation) Act, 2010.  
(c) Write short notes on: (i) Automatic Route (ii) Government Route under FDI Policy  
(d) State Permissible source of funding under Overseas Direct Investment.  
(e) Is it necessary that every NBFC should be registered with RBI? *(4 Marks each)*

**PART II**

3. (a) The Competition Act does not prohibit dominance, but the abuse of dominant position. Explain.  
(b) Discuss the procedure for enquiry into anti-competitive agreements.  
(c) States the factor that the Commission shall have due regard while determining whether an enterprise enjoys dominant position or not under the Competition Act, 2002.  
(d) What are the thresholds for availing exemption for acquisitions under Competition Act, 2002?  
(e) Define and discuss Relevant Geographic Market under Competition Act, 2002? *(5 Marks each)*

**PART III**

4. (a) Specify the authority responsible for the administration and execution of the Essential Commodities Act?  
(b) Briefly explain the provision regarding declaration on pre-packed commodities.  
(c) What are the rights and duties of the allottees under the Real Estate (Regulation and Development) Act, 2016? *(5 Marks each)*

5. (a) State the Salient Features of the Benami Transactions (Prohibition) Act, 1988.
- (b) What are the obligation of banking companies, financial institutions and intermediaries under the Prevention of Money-laundering Act, 2002?
- (c) "No consideration, no contract". Do you agree?
- (5 Marks each)*

***Attempt all parts of either the Question No. 6 or 6A***

6. (a) Who May Sue for Specific Performance under the Specific Relief Act, 1963?
- (b) Why it is important to know the time of passing of property under the Sale of Goods Act, 1930?
- (5 Marks each)*

***Or Alternate Question to Qn. No. 6***

- 6A (a) Briefly discuss the provisions relating to the dissolution of partnership or firm and what are its effect sunder Indian Partnership Act, 1932?
- (b) Discuss the penal provisions in case of dishonour of cheque under the Negotiable Instruments Act, 1881?
- (5 Marks each)*
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