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**SUPPLEMENT FOR
ECONOMIC, BUSINESS AND COMMERCIAL
LAWS
MODULE 2
PAPER 7**

The study material Economic, Business and Commercial Laws available on the web link: <https://www.icsi.edu/media/webmodules/Economic%20Business%20and%20Commercial%20Laws.pdf>.

The students are advised to read their Study Material along with these updates. These academic updates are to facilitate the students to acquaint themselves with the amendments in the Specific Relief (Amendment) Act, 2018, Negotiable Instruments (Amendment) Act, 2018 and External Commercial Borrowings (ECB) applicable for December, 2019 Examination.

Lesson 21

Specific Relief Act, 1963

Introduction

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. As a result of wide discretionary powers, the courts in majority of cases award damages as a general rule and grant specific performance as an exception.

The tremendous economic development since the enactment of the Act have brought in enormous commercial activities in India including foreign direct investments, public private partnerships, public utilities infrastructure developments, etc.; which have prompted extensive reforms in the related laws to facilitate enforcement of contracts, settlement of disputes in speedy manner. It has been felt that the Act is not in tune with the rapid economic growth happening in our country and the expansion of infrastructure activities that are needed for the overall development of the country.

In view of the above, Parliament enacted Specific Relief (Amendment) Act, 2018 and it came into effect from 01 October, 2018 to do away with the wider discretion of courts to grant specific performance and to make specific performance of contract a general rule than exception subject to certain limited grounds and to provide for substituted performance of contracts, where a contract is broken, the party who suffers would be entitled to get the contract performed by a third party or by his own agency and to recover expenses and costs, including compensation from the party who failed to perform his part of contract.

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.

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).

RECOVERING POSSESSION OF PROPERTY

Recovery of specific immovable property

According to Section 5 of the Specific Relief Act, 1963 a person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

Suit by person dispossessed of immovable property

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 ***through whom he has been in possession or any person*** claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

No suit under section 6 shall be brought—

- (a) after the expiry of six months from the date of dispossession; or
- (b) against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under section 6, nor shall any review of any such order or decree be allowed.

Section 6 shall not bar any person from suing to establish his title to such property and to recover possession thereof.

Recovery of specific movable property

As per Section 7 a person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

Explanation 1.—A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2.—A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

Liability of person in possession, not as owner, to deliver to persons entitled to immediate possession

Section 8 provides 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 cases:—

- (a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;
- (b) when 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.

Explanation.—Unless and until the contrary is proved, the court shall, in respect of any article of movable property claimed under clause (b) or clause (c) above, presume—

- (a) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;
- (b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

SPECIFIC PERFORMANCE OF CONTRACTS

Defences respecting suits for relief based on contract

According to section 9, where any relief is claimed in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

Specific performance in respect of contracts

As per section 10 of the Act, the specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16 of the Specific Relief Act, 1963.

Cases in which specific performance of contracts connected with trusts enforceable

Section 11 provides that except as otherwise provided in this Act, specific performance of a contract shall be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Specific performance of part of 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 bears 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 or 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.

Rights of purchaser or lessee against person with no title or imperfect title

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 subsequently 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 person is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons 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, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lesser in the property which is the subject-matter of the contract.

Above provisions shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Contracts not specifically enforceable

Section 14 lays down the contracts which cannot be specifically enforced. The following contracts cannot be specifically enforced, namely:—

- (a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;
- (b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;
- (c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and
- (d) a contract which is in its nature determinable.

Power of court to engage experts

Section 14A (1) provides that without prejudice to the generality of the provisions contained in the Code of Civil Procedure, 1908, in any suit under this Act, where the court considers it necessary to get expert opinion to assist it on any specific issue involved in the suit, it may engage one or more experts and direct to report to it on such issue and may secure attendance of the expert for providing evidence, including production of documents on the issue.

Section 14A (2) lays down that the court may require or direct any person to give relevant information to the expert or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

As per Section 14A (3) the opinion or report given by the expert shall form part of the record of the suit; and the court, or with the permission of the court any of the parties to the suit, may examine the expert personally in open court on any of the matters referred to him or mentioned in his opinion or report, or as to his opinion or report, or as to the manner in which he has made the inspection.

According to Section 14A (4) the expert shall be entitled to such fee, cost or expense as the court may fix, which shall be payable by the parties in such proportion, and at such time, as the court may direct.

Who may obtain specific performance

Section 15 lays down that the 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:

It may be noted that where the learning, skill, solvency 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 a 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;

(fa) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.

(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 purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Personal bars to relief

According to Section 16 Specific performance of a contract cannot be enforced in favour of a person—

(a) who has obtained substituted performance of contract under section 20; 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 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 of the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c) above,-

(i) where a contract involves 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 prove** performance of, or readiness and willingness to perform, the contract according to its true construction.

Contract to sell or let property by one who has no title, not specifically enforceable

As per Section 17, a contract to sell or let any immovable property cannot be specifically enforced in favour of a 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.

The above provisions shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Non-enforcement except with variation

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.

Relief against parties and persons claiming under them by subsequent title

Section 19 lays down that specific performance of a contract may be enforced against—

(a) either party thereto;

(b) any other 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;

(ca) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.

(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, the company. It may be noted that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Substituted performance of contracts, etc.

Section 20(1) lays down that without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872, and, except as otherwise agreed upon by the parties, where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

According to section 20(2), No substituted performance of contract under above sub-section (1) shall be undertaken unless the party who suffers such breach has given a notice in writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency.

However, the party who suffers such breach shall not be entitled to recover the expenses and costs under sub-section (1) unless he has got the contract performed through a third party or by his own agency.

Section 20(3) provides that where the party suffering breach of contract has got the contract performed through a third party or by his own agency after giving notice under sub-section (1), he shall not be entitled to claim relief of specific performance against the party in breach. Section 20 shall not prevent the party who has suffered breach of contract from claiming compensation from the party in breach.

Special provisions for contract relating to infrastructure project

Section 20A lays down Special provisions for contract relating to infrastructure project. According to section 20A(1), No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.

As per Section 20A(2), the Central Government may, depending upon the requirement for development of infrastructure projects, and if it considers necessary or expedient to do so,

by notification in the Official Gazette, amend the Schedule relating to any Category of projects or Infrastructure Sub-Sectors.

Section 20A(3) provides that every notification issued under the Act by the Central Government shall be laid, as soon as may be after it is issued, 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 notification or both Houses agree that the notification should not be made, the notification 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 notification

Special Courts

Section 20B empowers the State Government, in consultation with the Chief Justice of the High Court, shall designate, by notification published in the Official Gazette, one or more Civil Courts as Special Courts, within the local limits of the area to exercise jurisdiction and to try a suit under this Act in respect of contracts relating to infrastructure projects

Expeditious disposal of suits

Section 20C states that notwithstanding anything contained in the Code of Civil Procedure, 1908, a suit filed under the provisions of this Act shall be disposed of by the court within a period of twelve months from the date of service of summons to the defendant:

The above stated period may be extended for a further period not exceeding six months in aggregate after recording reasons in writing for such extension by the court.

Power to award compensation in certain cases

Under section 21 of the Specific Relief Act, 1963, the Court is empowered to award compensation in certain cases. They are as follows:

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, *in addition to*, such performance.

(2) If, in any such 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.

(3) 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.

(4) 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.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint. However, where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of 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 does not preclude the court from exercising the jurisdiction conferred by this section.

Power to grant relief for possession, partition, refund of earnest money, etc

Section 22 gives power to grant relief for possession, partition, refund of earnest money, etc. Under section 22(1) 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 such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed. Where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

Liquidation of damages not a bar to specific performance

According to Section 23, a contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance. When enforcing specific performance, the court shall not also decree payment of the sum so named in the contract.

Bar of suit for compensation for breach after dismissal of suit for specific performance

Section 24 provides that the dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

Enforcement of awards and directions to execute settlements

RECTIFICATION OF INSTRUMENTS

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Section 26 of the Specific Relief Act, 1963 contains the law as to rectification of instruments.

Section 26 (1) provides that when, through fraud or a mutual mistake of the parties a contract or other instrument in writing not being the articles of association of a company to which the Companies Act, applies does not express their real intention, then—

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

If, in any suit in which a contract or other instrument is sought to be rectified, the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

Relief for the rectification of an instrument shall not be granted to any party under this section unless it has been specifically claimed. Where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

RESCISSION OF CONTRACTS

Section 27 deals with when rescission may be adjudged or refused. “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(1) states 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.

As per Section 27(2) 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.

Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed

Section 28(1) provides that where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

As per Section 28 (2), where a contract is rescinded under sub-section (1), the Court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor; and
(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice

of the case so requires, the refund of any sum paid by the vendee or the lessee as earnest money or deposit in connection with the contract.

According to Section 28(3), if the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

Separate suit in respect of any relief which may be claimed shall not lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be. The costs of any proceedings under this section shall be in the discretion of the court.

Alternative prayer for rescission in suit for specific performance

Section 29 of the Act, provides that a plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

Court may require parties rescinding to do equity

According to Section 30, on adjudging the rescission of a contract, 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.

CANCELLATION OF INSTRUMENTS

Section 31 dealing with when cancellation may be ordered. Section 31(1) 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.

As per Section 30(2), 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.

What instruments may be partially cancelled

According to Section 32 of the Act, where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable

Section 33 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.

Where a defendant successfully resists any suit on the ground—

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby

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 783*, 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

Discretion of court as to declaration of status or right

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:

It may be noted that court shall not make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Effect of declaration

According to Section 35 of the Act, a declaration made 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.

PREVENTIVE RELIEF

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;

- (a) It is a judicial process.
- (b) The object of this judicial process is to restrain or to prevent.
- (c) The act restrained or prevented is a wrongful act. An injunction acts or operates always in *personam*.

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.

Injunctions Generally

As per Section 36 of the Act, preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Temporary and perpetual injunctions

(1) Temporary injunctions are such as are to continue until a specific 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.

(2) 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 a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

PERPETUAL INJUNCTIONS

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.

Perpetual injunction when granted

According to Section 38 states that a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication. When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

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 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.

Mandatory injunctions

As per Section 39 of the Act, 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.

Damages in lieu of, or in addition to, injunction

Section 40 dealing with damages in lieu of, or in addition to, injunction. It states that 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.

Relief for damages shall not be granted unless the plaintiff has claimed such relief in his plaint. Where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

Injunction when refused

Section 41 gives a list of cases when 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 a 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;

(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to be the assistance of the court;

(j) when the plaintiff has no personal interest in the matter.

Injunction to perform negative agreement

Section 42 of the Act 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 a 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. It may be noted that the plaintiff has not failed to perform the contract so far as it is binding on him.

THE SCHEDULE [sections 20A and 41 (ha)] Category of projects and Infrastructure Sub-Sectors		
Sl No.	category	Infrastructure Sub-Sectors
1	Transport	(a) Road and bridges (b) Ports (including Capital Dredging) (c) Shipyards (including a floating or land-based facility with the essential features of waterfront, turning basin, berthing and docking facility, slipways or ship lifts, and which is self-sufficient for carrying on shipbuilding/repair/breaking activities) (d) Inland Waterways (e) Airports (f) Railway Track, tunnels, viaducts, bridges, terminal infrastructure including stations and adjoining commercial infrastructure (g) Urban Public Transport (except rolling stock in case of urban road transport)
2	Energy	(a) Electricity Generation

		<ul style="list-style-type: none"> (b) Electricity Transmission (c) Electricity Distribution (d) Oil pipelines (e) Oil/Gas/Liquefied Natural Gas (LNG) storage facility (including strategic storage of crude oil) (f) Gas pipelines (including city gas distribution network)
3	Water and Sanitation	<ul style="list-style-type: none"> (a) Solid Waste Management (b) Water supply pipelines (c) Water treatment plants (d) Sewage collection, treatment and disposal system (e) Irrigation (dams, channels, embankments, etc.) (f) Storm Water Drainage System (g) Slurry pipelines
4	Communication	<ul style="list-style-type: none"> (a) Telecommunication (Fixed network including opticfibre/wire/cable networks which provide broadband/internet) (b) Telecommunication towers (c) Telecommunications and Telecom Services
5	Social and Commercial Infrastructure	<ul style="list-style-type: none"> (a) Education Institutions (capital stock) (b) Sports infrastructure (including provision of Sports Stadia and Infrastructure for Academies for Training/ Research in Sports and Sports-relating activities) (c) Hospitals (capital stock including Medical Colleges, Para Medical Training Institutes and Diagnostic Centres) (d) Tourism infrastructure viz.(i) three-star or higher category classified hotels located outside cities with population of more than one million; (ii) ropeways and cable cars (e) Common infrastructure for industrial parks and other parks with industrial activity such as food parks, textile parks, Special Economic Zones, tourism facilities and agriculture markets

		<p>(f) Post-harvest storage infrastructure for agriculture and horticulture produce including cold storage</p> <p>(g) Terminal markets</p> <p>(h) Soil-testing laboratories</p> <p>(i) Cold chain (including cold room facility for farm level pre-cooling, for preservation or storage of agriculture and allied produce, marine products and meat)</p> <p>(j) Affordable Housing (including a housing project using at least 50% of the Floor Area Ratio (FAR)/ Floor Space Index (FSI) for dwelling units with carpet area of not more than 60 square meters</p> <p>Explanation.—For the purposes of this sub-clause, the term “carpet area” shall have the same meaning as assigned to it in clause (k) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).</p>
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Lesson 24

Negotiable Instruments Act, 1881

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 148 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.

Further Chapter XVII amended by the Negotiable Instruments (Amendment) Act, 2015. The amendment focused on clarifying the jurisdiction related issues for filing cases for offence committed under section 138 of the Negotiable Instruments Act, 1881. The Negotiable Instruments (Amendment) Act, 2015, facilitates filing of cases only in a court within whose local jurisdiction the bank branch of the payee, where the payee delivers the cheque for payment through his account, is situated, except in case of bearer cheques, which are presented to the branch of the drawee bank and in that case the local court of that branch would get jurisdiction. The Negotiable Instruments (Amendment) Act, 2015 provides for retrospective validation for the new scheme of determining the jurisdiction of a court to try a case under Section 138 of the Negotiable Instruments Act, 1881. The Negotiable Instruments (Amendment) Act, 2015 also mandates centralisation of cases against the same drawer.

With a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation, Parliament enacted the Negotiable Instruments (Amendment) Act,

2018 and notified by the Central Government on 1st September, 2018. The Amendments Act strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy. The Negotiable Instruments (Amendment) Act, 2018 inserted two new sections i.e. Section 143A dealing with Power to direct interim compensation and Section 148 dealing with Power of Appellate Court to order payment pending appeal against conviction.

Dishonour of Cheque for Insufficiency, etc., of Funds in the Account

Section 138 of the Act provides that where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years', or with fine which may extend to twice the amount of the cheque, or with both.

Provided that nothing contained in this section shall apply unless—

(a) the cheque has 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;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a 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 as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Presumption in Favour of Holder

As per Section 139 of the Act, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

Defence which may not be allowed in any Prosecution under Section 138

Section 140 states that it shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in section 138.

Offences by Companies

According to Section 141(1) of the Act, if the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to 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.

Provided further 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 Chapter XVII.

Further Section 141(2) states that notwithstanding anything contained in sub-section(1), where any offence under this 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: For the purposes of section 141 (a) "company" means anybody corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

Cognizance of Offences

As per Section 142(1) of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

Clause (c) of the proviso to Section 138 provides that the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

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 a complaint within such period;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.

Further, Section 142(2) provides that the offence under Section 138 shall be inquired into and tried only by a court within whose local local jurisdiction—

(a) 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

(b) 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.

Validation for Transfer of Pending Cases

Section 142A (1) of the Negotiable Instrument Act states that notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under section 142(2), as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.

As per Section 142A(2), notwithstanding anything contained in Section 142(2) or Section 142(1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under section 142(2) or the case has been transferred to that court under Section 142(1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

Section 142A(3) states that if, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under Section 142(2), as

amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.

Power of Court to try Cases Summarily

Section 143 (1) of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973 all offences under Chapter XVII of the Act 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 Code of Criminal Procedure, 1973 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 Code of Criminal Procedure, 1973 .

As per Section 143(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.

Section 143(3) states that 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.

Power to Direct Interim Compensation

Section 143A(1) Negotiable Instruments Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 of the Negotiable Instrument Act, 1881 (Dishonour of cheque for insufficiency, etc., of funds in the account) may order the drawer of the cheque to pay interim compensation to the complainant—

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing of charge.

Section 143A (2) states that the interim compensation under sub-section (1) shall not exceed twenty per cent. of the amount of the cheque.

Section 143A (3), the interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

As per Section 143A (4), if the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

Section 143A (5) provides that the interim compensation payable section 143A may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973.

As per Section 143A(6), the amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973, shall be reduced by the amount paid or recovered as interim compensation under this section.

Mode of Service of Summons

According to Section 144 of the Act, 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 acknowledgment 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.

Evidence on Affidavit

Section 145 of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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 Code of Criminal Procedure, 1973.

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.

Bank's Slip Prima Facie Evidence of Certain Facts

According to Section 146, 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.

Offences to be Compoundable

Section 147 of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under the Negotiable Instrument Act shall be compoundable.

Power of Appellate Court to Order Payment Pending Appeal against Conviction

Section 148(1) provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138 of the Negotiable Instrument Act, 1881 (Dishonour of cheque for insufficiency, etc., of funds in the account), the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent. of the fine or compensation awarded by the trial Court.

The amount payable shall be in addition to any interim compensation paid by the appellant under section 143A.

Section 148(2) states that the amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

As per Section 148(3) the Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

It may be noted that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

External Commercial Borrowings (ECB)

Introduction

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 Section 6(3) (d) 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, 2018 and the Foreign Exchange Management (Guarantees) Regulations, 2000 as amended from time to time framed under FEMA. Within the contours of the Regulations, Reserve Bank of India also issues directions to Authorised Persons.

ECB Framework

The framework for raising loans through ECB comprises the following two options:

Parameters	Foreign Currency denominated ECB	Indian Rupee denominated ECB
Currency of Borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
Forms of ECB	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; Foreign Currency Convertible Bonds; Foreign Currency Exchangeable Bonds and Financial Lease. It may be noted that Foreign Currency Convertible Bonds (FCCBs) refers to foreign currency denominated instruments which are issued in	Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; and Financial Lease. Also, plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per

	<p>accordance with the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, as amended from time to time. Issuance of FCCBs shall also conform to other applicable regulations. Further, FCCBs should be without any warrants attached.</p> <p>Further, Foreign Currency Exchangeable Bonds (FCEBs) refers to foreign currency denominated instruments which are issued in accordance with the Issue of Foreign Currency Exchangeable Bonds Scheme, 2008, as amended from time to time. FCEBs are exchangeable into equity share of another company, to be called the Offered Company, in any manner, either wholly, or partly or on the basis of any equity related warrants attached to debt instruments. Issuance of FCEBs shall also conform to other applicable regulations.</p>	<p>host country regulations.</p>
<p>Eligible Borrowers</p>	<p>All entities eligible to receive Foreign Direct Investment (FDI). Further, the following entities are also eligible to raise ECB:</p> <ul style="list-style-type: none"> i. Port Trusts; ii. Units in SEZ; iii. SIDBI; and iv. EXIM Bank of India. 	<ul style="list-style-type: none"> a) All entities eligible to raise Foreign Currency ECB; and b) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/ cooperatives and Non-Government Organisations.

Recognised Lenders

The lender should be resident of Financial Action Task Force (FATF) or International Organisation of Securities Commission's IOSCO compliant country, including on transfer of ECB. However,

(a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;

(b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and

c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for Foreign Currency ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

It may be noted that FATF Compliant Country means a country that is a member of the Financial Action Task Force (FATF) or a member of a FATF-Style Regional Body; and should not be a country identified in the public statement of the FATF as (i) A jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or (ii) A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

Further, IOSCO Compliant Country means a country whose securities market regulator is a signatory to the International Organisation of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding or a signatory to bilateral Memorandum of Understanding with the SEBI for information sharing arrangements.

Minimum Average Maturity Period (MAMP)

Minimum Average Maturity Period (MAMP) for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity.

However, for the specific categories mentioned below, the Minimum Average Maturity Period (MAMP) are as under:

Category	Minimum Average Maturity Period (MAMP)
<p>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year</p>	<p>1 year</p>
<p>ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans.</p> <p>It may be noted that:</p> <p>(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks</p> <p>(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>	<p>5 year</p>
<p>ECB raised for</p> <p>(i) Working capital purposes or general corporate purposes</p> <p>(ii) on-lending by NBFCs for working capital purposes or general corporate purposes.</p> <p>It may be noted that:</p> <p>(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks</p> <p>(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>	<p>10 year</p>
<p>ECB raised for</p>	<p>7 year</p>

<p>(i) repayment of Rupee loans availed domestically for capital expenditure</p> <p>(ii) on-lending by NBFCs for the same purpose.</p> <p>It may be noted that:</p> <p>(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks</p> <p>(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>	
<p>ECB raised for</p> <p>(i) repayment of Rupee loans availed domestically for purposes other than capital expenditure</p> <p>(ii) on-lending by NBFCs for the same purpose.</p> <p>It may be noted that:</p> <p>(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks</p> <p>(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>	<p>10 years</p>

All-In-Cost Ceiling per Annum

All-in-cost ceiling per annum is the Benchmark rate plus 450 bps spread.

It may be noted that All-in-Cost includes rate of interest, other fees, expenses, charges, guarantee fees, ECA charges, whether paid in foreign currency or INR but will not include commitment fees and withholding tax payable in INR. In the case of fixed rate loans, the swap cost plus spread should not be more than the floating rate plus the applicable spread. Additionally, for FCCBs, the issue related expenses should not exceed 4 per cent of the issue size and in case of private placement, these expenses should not exceed 2 per cent of the issue size, etc. Under Trade Credit (TC) Framework, all-in-cost shall include rate of interest, other fees, expenses, charges, guarantee fees whether paid in foreign currency or INR. Withholding tax payable in INR shall not be a part of all-in-cost. Various components of all-

in-cost have to be paid by the borrower without taking recourse to the drawdown of ECB/TC, i.e., ECB/TC proceeds cannot be used for payment of interest/charges.

Further, Benchmark rate in case of Foreign Currency ECB refers to 6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, for eg., EURIBOR. Benchmark rate in case of Rupee denominated ECB/TC will be prevailing yield of the Government of India securities of corresponding maturity.

Other Costs

Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.

End-uses (Negative list)

The negative list, for which the ECB proceeds cannot be utilised, would include the following:

- Real estate activities.
- Investment in capital market.
- Equity investment.
- Working capital purposes, **except** ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans **and except** ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by Non-Banking Financial Companies (NBFCs) for working capital purposes or general corporate purposes.
- General corporate purposes, **except** in case of ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans **and except** ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes.
- Repayment of Rupee loans, **except** in case of ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose **and except** ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose.

- On-lending to entities for the above activities, **except** in case of ECB raised by NBFCs for (i) working capital purposes or general corporate purposes (ii) on-lending by

NBFCs for working capital purposes or general corporate purposes *and* (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose *and except* ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose.

Exchange rate

Change of currency of Foreign Currency ECB into Indian Rupee ECB can be at the exchange rate prevailing on the date of the agreement for such change between the parties concerned or at an exchange rate, which is less than the rate prevailing on the date of the agreement, if consented to by the ECB lender.

For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement.

Hedging Provision

The entities raising ECB are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in respect of foreign currency exposure. Infrastructure space companies shall have a Board approved risk management policy. Further, such companies are required to mandatorily hedge 70 per cent of their ECB exposure in case the average maturity of the ECB is less than 5 years. The designated AD Category-I bank shall verify that 70 per cent hedging requirement is complied with during the currency of the ECB and report the position to RBI through Form ECB 2.

The following operational aspects with respect to hedging should be ensured:

- *Coverage:* The ECB borrower will be required to cover the principal as well as the coupon through financial hedges. The financial hedge for all exposures on account of ECB should start from the time of each such exposure (i.e. the day the liability is created in the books of the borrower).
- *Tenor and rollover:* A minimum tenor of one year for the financial hedge would be required with periodic rollover, duly ensuring that the exposure on account of ECB is not unhedged at any point during the currency of the ECB.
- *Natural Hedge:* Natural hedge, in lieu of financial hedge, will be considered only to the extent of offsetting projected cash flows / revenues in matching currency, net of all other projected outflows. For this purpose, an ECB may be considered naturally

hedged if the offsetting exposure has the maturity/cash flow within the same accounting year. Any other arrangements/ structures, where revenues are indexed to foreign currency will not be considered as a natural hedge

Overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD Category I banks in India. The investors can also access the domestic market through branches / subsidiaries of Indian banks abroad or branches of foreign banks with Indian presence on a back to back basis.

Change of Currency of Borrowing

Change of currency of ECB from one freely convertible foreign currency to any other freely convertible foreign currency as well as to Indian Rupee is freely permitted.

Change of currency from Indian Rupee to any freely convertible foreign currency is not permitted.

It may be noted that the ECB framework is not applicable in respect of investments in Non-Convertible Debentures in India made by Registered Foreign Portfolio Investors. Lending and borrowing under the ECB framework by Indian banks and their branches/subsidiaries outside India will be subject to prudential guidelines issued by the Department of Banking Regulation of the Reserve Bank. Further, other entities raising ECB are required to follow the guidelines issued, if any, by the concerned sectoral or prudential regulator.

Limit and Leverage

All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in case of Foreign Currency denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1.

However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.

Issuance of Guarantee, etc. by Indian banks and Financial Institutions

Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted.

Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or Non-Banking Financial Companies) shall not invest in Foreign Currency Convertible Bonds/ Foreign Currency Exchangeable Bonds in any manner whatsoever.

Parking of ECB proceeds

ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:

Parking of ECB proceeds abroad: ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilisation. Till utilisation, these funds can be invested in the following liquid assets (a) deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/Fitch IBCA or Aa3 by Moody's; (b) Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above and (c) deposits with foreign branches/subsidiaries of Indian banks abroad.

Parking of ECB proceeds domestically: ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India. ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.

Procedure of raising ECB

All ECB can be raised under the automatic route if they conform to the parameters prescribed under this framework. For approval route cases, the 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. ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) would be placed before the Empowered Committee set up by the Reserve Bank. The Empowered Committee will have external as well as internal members and the Reserve Bank will take a final decision in the cases 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 ECB.

Reporting Requirements

Borrowings under ECB Framework are subject to following reporting requirements apart from any other specific reporting required under the framework:

Loan Registration Number (LRN): Any draw-down in respect of an ECB should happen only after obtaining the LRN from the Reserve Bank. To obtain the LRN, borrowers are required to submit duly certified Form ECB, 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, Reserve Bank of India, Department of Statistics and Information Management, External Commercial Borrowings Division, Bandra-Kurla Complex, Mumbai – 400 051. Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

Changes in terms and conditions of ECB: Changes in ECB parameters in consonance with the ECB norms, including reduced repayment by mutual agreement between the lender and borrower, should be reported to the Department of Statistics and Information Management through revised Form ECB at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form ECB the changes should be specifically mentioned in the communication.

Monthly Reporting of actual transactions: The borrowers are required to report actual ECB transactions through Form ECB 2 Return through the AD Category I bank on monthly basis so as to reach Department of Statistics and Information Management within seven working days from the close of month to which it relates. Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.

Late Submission Fee (LSF) for delay in reporting: Any borrower, who is otherwise in compliance of ECB guidelines, can regularise the delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of prescribed late submission fees.

Standard Operating Procedure (SOP) for Untraceable Entities: The following SOP has to be followed by designated AD Category-I banks in case of untraceable entities who are found to be in contravention of reporting provisions for ECB by failing to submit prescribed return(s) under the ECB framework, either physically or electronically, for past eight quarters or more.

Any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:

- Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorised by the AD bank for the purpose;
- Entities have not submitted Statutory Auditor's Certificate for last two years or more;

The followings actions are to be undertaken in respect of 'untraceable entities':

- File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with 'UNTRACEABLE ENTITY' written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means;
- No fresh ECB application by the entity should be examined/processed by the AD bank;
- Directorate of Enforcement should be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
- No inward remittance or debt servicing will be permitted under auto route.

Conversion of ECB into equity

Conversion of ECB, 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 or Government approval is received, wherever applicable, for foreign equity participation as per extant Foreign Direct Investment policy.

ii. The conversion, which should be with the lender's consent and without any additional cost, should not result in contravention of eligibility and breach of applicable sector cap on the foreign equity holding under Foreign Direct Investment policy;

iii. Applicable pricing guidelines for shares are complied with;

iv. In case of partial or full conversion of ECB into equity, the reporting to the Reserve Bank will be as under:

- For partial conversion, the converted portion is to be reported in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to DSIM in Form ECB 2 Return will be with suitable remarks, viz., "ECB partially converted to equity".
- For full conversion, the entire portion is to be reported in Form FC-GPR, while reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.

- For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.

v. If the borrower concerned has availed of other credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, the applicable prudential guidelines issued by the Department of Banking Regulation of Reserve Bank, including guidelines on restructuring are complied with;

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.

vii. 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 shall be worked out with reference to the date of conversion only.

Security for raising ECB

AD Category I banks are permitted to allow creation/cancellation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised/ raised by the borrower, subject to satisfying themselves that:

- the underlying ECB is in compliance with the extant ECB guidelines,
- there exists a security clause in the Loan Agreement requiring the ECB borrower to create/cancel charge, in favour of overseas lender/security trustee, on immovable assets/movable assets/financial securities/issuance of corporate and/or personal guarantee, and
- No objection certificate, as applicable, from the existing lenders in India has been obtained in case of creation of charge.

Once the aforesaid stipulations are met, the AD Category I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, subject to the following:

Creation of Charge on Immovable Assets: The arrangement shall be subject to the following:

- Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017, as amended from time to time.
- The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.

- In the event of enforcement / invocation of the charge, the immovable asset/ property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

Creation of Charge on Movable Assets: In the event of enforcement/ invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim against the ECB. Encumbered movable assets may also be taken out of the country subject to getting 'No Objection Certificate' from domestic

Creation of Charge over Financial Securities: The arrangements may be permitted subject to the following:

- Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower is permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, is also permitted.
- In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.
- In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, as amended from time to time.

Issue of Corporate or Personal Guarantee: The arrangement shall be subject to the following:

- A copy of Board Resolution for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.
- Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.
- Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000, as amended from time to time.
- ECB can be credit enhanced / guaranteed / insured by overseas party/ parties only if it/ they fulfil/s the criteria of recognised lender under extant ECB guidelines.

ECB facility for Oil Marketing Companies

Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3 years from all recognised lenders under the automatic route without mandatory hedging and individual limit requirements. The overall

ceiling for such ECB shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECB. All other provisions under the ECB framework will be applicable to such ECB.

ECB facility for Startups

AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:

- *Eligibility:* An entity recognised as a Startup by the Central Government as on date of raising ECB.
- *Maturity:* Minimum average maturity period will be 3 years.
- *Recognised lender:* Lender / investor shall be a resident of a FATF compliant country. However, foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognised lenders under this framework.
- *Forms:* The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.
- *Currency:* The borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the non-resident lender, should mobilise INR through swaps/outright sale undertaken through an AD Category-I bank in India.
- *Amount:* The borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.
- *All-in-cost:* Shall be mutually agreed between the borrower and the lender.
- *End uses:* For any expenditure in connection with the business of the borrower.
- *Conversion into equity:* Conversion into equity is freely permitted subject to Regulations applicable for foreign investment in Startups.
- *Security:* The choice of security to be provided to the lender is left to the borrowing entity. Security can be in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc. and shall comply with foreign direct investment / foreign portfolio investment / or any other norms applicable for foreign lenders / entities holding such securities. Further, issuance of corporate or personal guarantee is allowed. Guarantee issued by a non-resident(s) is allowed only if such parties qualify as lender under ECB for Startups. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted.

- *Hedging:* The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD Category – I banks in India. The lender can also access the domestic market through branches/ subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis. Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECB.
- *Conversion rate:* In case of borrowing in INR, the foreign currency - INR conversion will be at the market rate as on the date of agreement.
- *Other Provisions:* Other provisions like parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be as included in the ECB framework.

Borrowing by Entities under Investigation

All entities against which investigation / adjudication / appeal by the law enforcing agencies for violation of any of the provisions of the Regulations under FEMA pending, may raise ECB as per the applicable norms, if they are otherwise eligible, notwithstanding the pending investigations / adjudications / appeals, without prejudice to the outcome of such investigations / adjudications / appeals. The borrowing entity shall inform about pendency of such investigation / adjudication / appeal to the AD Category-I bank / RBI as the case may be. Accordingly, in case of all applications where the borrowing entity has indicated about the pending investigations / adjudications / appeals, the AD Category I Banks / Reserve Bank while approving the proposal shall intimate the agencies concerned by endorsing a copy of the approval letter.

ECB by entities under restructuring/ ECB facility for refinancing stressed assets

An entity which is under a restructuring scheme/ corporate insolvency resolution process can raise ECB only if specifically permitted under the resolution plan. Eligible corporate borrowers who have availed Rupee loans domestically for capital expenditure in manufacturing and infrastructure sector and which have been classified as SMA-2 or NPA can avail ECB for repayment of these loans under any one time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, provided, the resultant external commercial borrowing complies with all-in-cost, minimum average maturity period and other relevant norms of the ECB framework. Foreign branches/ overseas subsidiaries of Indian banks are not eligible to lend for the above purposes. The applicable MAMP will have to be strictly complied with under all circumstances.

Eligible borrowers under the ECB framework, who are participating in the Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 as resolution applicants, can raise ECB from all recognised lenders, except foreign branches/subsidiaries of Indian banks, for repayment of Rupee term loans of the target company.
