
STUDY MATERIAL

PROFESSIONAL PROGRAMME

FORENSIC AUDIT

MODULE 3 ELECTIVE PAPER 9.4



**THE INSTITUTE OF
Company Secretaries of India**

भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE

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ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003

tel 011-4534 1000 fax +91-11-2462 6727

email info@icsi.edu website www.icsi.edu

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TIMING OF HEADQUARTERS

Monday to Friday
Office Timings – 9.00 A.M. to 5.30 P.M.

Public Dealing Timings
Without financial transactions – 9.30 A.M. to 5.00 P.M.
With financial transactions – 9.30 A.M. to 4.00 P.M.

Phone
011-45341000

Fax
011-24626727

Website
www.icsi.edu

E-mail
info@icsi.edu

PROFESSIONAL PROGRAMME

FORENSIC AUDIT

India is leading its way towards attainment, progress and growth with global recognition as one of the fastest growing economies of the contemporary world. This emerging face of India is indeed a capture of spirited government's reform and initiatives under the realm of Good Governance.

The contemporary lead of good governance, which revolves around five 'E's being '*Effective, Efficient, Easy, Empower, and Equity*' calls for an accountable, transparent and developed face of a globally recognized welfare state.

In this direction, we are adopting a highly collaborative approach and addressing challenges like fraud, deceit, financial misplacement and alike, which are hindering the inclusive growth of India. Inter-alia, where fraud is considered as one of the critical ailments, which not only holdup the corporate organizations where it has been conducted, rather it shakes the entire economy sometimes with temporary effects and sometimes with permanent ones, it has always been the priority of growing economies including India to detect, prevent and regulate the menace of fraud in the larger interest of the nation.

In this selection of timely detection, prevention and regulation over corporate fraud and reference to due investigation, Forensic Audit is having an imperative role in assisting the corporates for maintaining efficiency and merit. On the larger parameters, Forensic audit as tool-mix of accounting and investigation is serving all the five E's of good governance and make the corporates to grow and develop on the parameters of being *Effective, Efficient, Easy, Empower, and Equity*'

In this background, where forensic audit is considered as a need of the hour for enhancing the corporate culture of India, varied roles are played by the Company Secretaries in the field of Forensic Audit. Further, the present day progressive changes in the Forensic Audit are expanding the gateway of opportunities for the professionals to guide, advice, operationalize, and appear in the matters related to Forensic Audit.

The Institute of Company Secretaries of India (ICSI), while persistently playing a pivotal role in building capacities of its members has decided to provide a 360 degree rounded set of learning to the students along with apprising them with the advanced changes in the arena of Forensic Audit and their directed implementation.

Therefore, this study material has been prepared to provide the students with a wide perspective and in-depth knowledge in forensic audit to enable them to get solid grounding in the legislative framework, practice and procedure of the forensic audit. The course contents of this study material have been so designed as to develop specialised skills in the corpus and complexities of the different aspects of the subject besides meeting the requirements of a future career in this area.

The domain of forensic audit is vast. Every effort has been made to provide a self- contained material and an integrated approach has been adopted throughout.

This study material may therefore be regarded as basic material and must be read along with the Bare Act, Rules, Regulations, Case Laws, Chartered Secretary as well as suggested readings. The study material is based on those sections of the relevant laws and the rule made there under which have been notified by the Government of India (including Amendments/clarifications/circulars issued there under up to December, 2019).

The students to be conversant with the amendments to the laws made up to six months preceding the date of

examination. It may happen that some developments might have taken place during the printing of the study material and its supply to the students.

The students are therefore advised to refer to the updations at the Regulator's website, Supplement relevant for the subject issued by ICSI and ICSI Journal Chartered Secretary and other publications for updation of study material. In the event of any doubt, students may contact the Directorate of Academics at academics@icsi.edu.

Should there be any discrepancy, error or omission noted in the study material, the Institute shall be obliged if the same are brought to its notice for issue of corrigendum. Although due care has been taken in publishing this study material, yet the possibility of errors, omissions and/ or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omission and/or discrepancies or any action taken in that behalf.

THE LIST OF LAWS COVERED UNDER THE STUDY

Bankers Books Evidence Act, 1891

Companies Act, 2013

Companies (Audit and Auditors) Rules, 2014

Companies (Auditors Report) Order, 2016

Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971

Contract Act, 1872

Criminal Procedure Code, 1973

Finance Act, 2018

Foreign Corrupt Practices Act, 1977

ICSI Anti Bribery Code

Income Tax Act, 1961

Indian Evidence Act, 1872

Indian Penal Code, 1860

Informational Technology Act, 2000

Insurance Act, 1938

OECD Guidelines for Multinational Enterprises relating to Combating Bribery

Prevention of Corruption Act, 1988

Prevention of Money Laundering Act, 2002 (PMLA)

Prohibition of Benami Property Transactions Act, 1988

SEBI Act, 1992

SEBI (Acquisition of Shares & Takeovers) Regulations, 1997

SEBI (Prohibition of Insider Trading) Regulations, 1992

United Kingdom Bribery Act, 2010

PROFESSIONAL PROGRAMME

MODULE 3

PAPER 9.4

FORENSIC AUDIT (MAX MARKS 100)

SYLLABUS

Objective: To understand and analyse the concept of Corporate Fraud and Forensics Audit in the contemporary world along with the legal mechanism to counter the corporate fraud and understanding Forensic Audit and its methods.

Detailed Contents:

1. Introduction

- What is Fraud
- Meaning and Definition under the Companies Act, 2013 and Criminal Procedure Code, 1973
- Elements of Fraud
- What is Audit; Forensic Audit
- Need and Objectives
- Fraud and Forensic Audit
- Forensic Audit vis-a-vis Audit

2. Fraud and Audit

- Modern Day Scenario
- Fundamentals of Forensic Audit
- Fraud related Concepts
- Kinds of Frauds
- Corporate Frauds: An Insight
- Live Cases
- Directors' Responsibilities

3. Audit and Investigations

- Tools for handling Forensic Audit and the Role of Company Secretary
- Investigation Mechanism
- Field Investigations
- Methods of Investigations
- Red Flags
- Green Flags

4. Forensic Audit : Laws and Regulations

- Information Technology and Business Laws
- International Laws and Practices;
- UK Bribery Act
- US Foreign Corrupt Practices Act
- Indian Laws
- ICSI Anti Bribery Code

5. Forensic Audit and Indian Evidence Law

- Finding Facts
- Relevant Facts
- Admission of Evidence
- Methods to Prove Cases

6. Cyber Forensics

- Introduction to Cyber Crime
- International Guidance to Cyber Forensics Laws
- Digital Forensics and Cyber Laws
- Introduction to Data Extraction
- Digital Forensics and Cyber Crime
- Ethical Hacking
- Digital Incident Response
- Case Laws: Indian and International

7. Case Laws, Case Studies and Practical Aspects

LESSON WISE SUMMARY

FORENSIC AUDIT

Lesson 1 – Introduction

In the selection of timely detection, prevention and regulation over corporate fraud and reference to due investigation, Forensic Audit is having an imperative role in assisting the corporates for maintaining efficiency and merit. On the larger parameters, Forensic audit as tool-mix of accounting and investigation is serving all the five E's of good governance and make the corporates to grow and develop on the parameters of being Effective, Efficient, Easy, Empower, and Equity'. In this background, where forensic audit is considered as a need of the hour for enhancing the corporate culture of India, this chapter covers the verve of the forensic audit including the meaning, definition, objectives and significance of forensic audit.

Lesson 2 – Fraud and Audit

In the contemporary era, Government of India is adopting a highly collaborative approach and addressing various challenges like fraud, deceit, financial misplacement and alike, which are a big hindrances in the path of inclusive growth of corporates in India. Among other things, 'fraud' is one of the most critical ailments which not only holdups the corporate organizations where it is conducted, rather it shakes the economy of entire country which has both short term as well as long term impact. In this whole process of timely detection of frauds and reference of such case for due investigation, Forensic Audit has an imperative role in assisting the corporates to maintain efficiency as well as merit at par. In the larger perspective, this lesson aims to apprise the students with modern day scenario of forensic audit, fundamentals of forensic audit along with other related concepts.

Lesson 3 – Audit and Investigations

Right from conducting forensic audit to examining the evidences, from finding the culprit behind the fraud to appearing in the court for submitted the testimony, a Company Secretary is apt in serving his professional excellence as a forensic auditor.

To summarize, where forensic audit is a detailed engagement which requires the expertise of not only accounting and auditing procedures but also expert knowledge regarding the legal framework, and a forensic auditor is required to have an understanding of various frauds that can be carried out and of how evidence needs to be collected.

In this context, Company Secretary is a Catalyst in Upholding Good Governance via Forensic Audit. His role in specific to Forensic audit is the main objective of this lesson. Henceforth, the lesson aims to provide a clear understanding to the matters including Tools for handling Forensic Audit and the Role of Company Secretary; Investigation Mechanism; Field Investigations; Methods of Investigations; Red Flags; Green Flags and alike.

Lesson 4 – Forensic Audit: Laws and Regulations

A forensic audit is an examination and evaluation of a firm's or individual's financial information for use as evidence in the court of law. A forensic audit can be conducted in order to prosecute a party for fraud, embezzlement or other financial claims. In order to understand the legal consequences that a person attracts on being caught in a forensic audit, it is necessary to know about the various statutes that talk about the implementation of forensic audits in India. Therefore, this lesson aims at providing the basic understanding as to the laws, regulations and statues, nationally as well as internationally, dealing with corporate laws and empowering forensic auditors in performing their duties in its true letter and spirit.

Lesson 5 – Forensic Audit and Indian Evidence Law

In order to prove a case in the court of law and to penalize the wrong doers, the matter must be proved beyond reasonable doubt. For this purpose, one must adduce relevant evidences in the court of law. The similar context is applicable for proving the corporate fraud and the person behind it through the use of forensic audit reports. Therefore, this lesson deals with the concepts of evidence law in reference to forensic audit. In specific, it deals with Finding Facts; Relevant Facts; Admission of Evidence; Methods to Prove Cases.

Lesson 6 – Cyber Forensics

The impact of Information and Communication Technology is very profound. Both Society and the Technology are operating in a way so as to harmonize with the pace of each other's growth. As the World is developing, more technology is emerging with each passing day and thus there is more development taking place in the society. All the facets of human life including education, health, entertainment and communication are being influenced by and have been impacted by the advent of the Information and Communication Technology. This way, Information Technology is rightly called as a boon.

With boon goes the bane, so is the case with Information and Communication Technology. One of the major challenges in this era of ICT is of an increasing number of cyber-crimes taking place in the World today. Corporate Frauds are not the exception to it.

In the light of corporate frauds executed via the means of Information Technology, a new branch of forensic audit called Cyber Forensics audit has emerged in the contemporary world.

In this perspective, this chapter aims to apprise the students with concepts like Cyber Crime; International Guidance to Cyber Forensics Laws; Digital Forensics and Cyber Laws; Introduction to Data Extraction; Digital Forensics and Cyber Crime; Ethical Hacking, Digital Incident Response and alike.

Lesson 7 – Case Laws, Case Studies and Practical Aspects

In order to apprise the students, with the applied issue of Forensic Audit and its procedure in the legal regime in India, the chapter aims providing the gist of some leading case laws related to Forensic Audit. It also provide a glimpse of practical aspects of the Forensic Audit and its procedure with the discussion of a case study too.

LIST OF RECOMMENDED BOOKS

Paper 9.4: Forensic Audit

- | | | | |
|-----|-----------------------|---|--|
| 1. | Crain at el | : | Essentials of Forensic Accounting |
| 2. | Crumbly at el | : | Case Studies in Forensic Accounting and Fraud Auditing |
| 3. | Davis Chris | : | IT Auditing Using Controls to Protect Information Assets |
| 4. | Field C D | : | Commentary on Law on Oral and Documentary Evidence |
| 5. | Godbole Nina | : | Cyber Security |
| 6. | Joshi Apporva | : | Students' Handbook on Forensic Accounting |
| 7. | Keane Adrian | : | The Modern Law of Evidence |
| 8. | Mark J. Nigrini | : | Forensic Analytics: Methods and Techniques for Forensic Accounting Investigations |
| 9. | Shields Greg | : | Accounting: What the World's Best Forensic Accountants and Auditors Know About Forensic Accounting and Auditing – That You Don't |
| 10. | Shraibman and Sampath | : | Forensic Accounting for Dummies |

Journals

- | | | | |
|----|--|---|---|
| 1. | All India Reporter | : | All India Reporter Ltd., Congress Nagar, Nagpur |
| 2. | Chartered Secretary (Monthly) | : | The ICSI, New Delhi-110 003 |
| 3. | e-Bulletin ('Student Company Secretary') | : | The ICSI, New Delhi-110 003 |
| 4. | Journal on Audit | | |
| 5. | Journal on Forensic Audit | | |
| 6. | Journal of Forensic and Investigative Accounting | | |
| 7. | Students Professional Today | : | The ICSI, New Delhi-110 003 |

Note :

1. Students are advised to read the above journals for updating the knowledge.
2. Students are advised to read/refer the latest editions of the recommended books.
3. Students are also advised to read legal glossary/legal terms given in Study Material

ARRANGEMENT OF STUDY LESSON

Module-3 – Paper-9.4

FORENSIC AUDIT

Sr. No.	Lesson Title
1.	Introduction
2.	Fraud and Audit
3.	Audit and Investigations
4.	Forensic Audit: Laws and Regulations
5.	Forensic Audit and Indian Evidence Law
6.	Cyber Forensics
7.	Case Laws, Case Studies and Practical Aspects

CONTENTS

LESSON 1 INTRODUCTION

Introduction	2
What is Fraud	3
Meaning and Definition under the Companies Act, 2013 and Criminal Procedure Code, 1973	4
Meaning and Definition under Companies Act, 2013	4
Meaning and Definition under Criminal Procedure Code, 1973	6
Meaning and Definition under Indian Penal Code, 1860	6
Meaning and Definition under Indian Contract Act, 1872	6
Definition of Fraud: The Judicial View	7
Elements of Fraud	7
Examples – Corporate Fraud	9
Serious Fraud Investigation Office (SFIO)	10
Forensic Audit: Meaning and Significance	10
Meaning of Audit	11
Audit: An Adhering Significance	12
Stages of Audit	13
Meaning of Forensic Audit	14
Significance of Forensic Audit	14
Key Benefits of Forensic Audit	15
Need and Objectives: Forensic Audit	18
Fraud and Forensic Audit: An Introspect	19
Forensic Audit vis-à-vis Audit	20
LESSON ROUND UP	21
SELF-TEST QUESTIONS	21

LESSON 2 FRAUD AND AUDIT

Modern Day Scenario	24
Forensic Audit: Leading Way to Emergent Economy	25

Fundamentals of Forensic Audit	27
Elements of Fraud	28
Kinds of Frauds	30
Kinds of Fraud specific to Economy and Financial Transactions	31
Corporate Frauds: An Insight	31
Recent Cases	32
Directors' Responsibilities	33
Director's Personal Liability	34
Criminal Liability	34
Lifting of Corporate Veil	35
Ultra Vires	35
Fraud on Minority	35
Actions against Directors by SEBI	35
Liability under Prevention of Money Laundering Act, 2002 (PMLA)	35
Developments in Cyber World	36
LESSON ROUND UP	37
SELF-TEST QUESTIONS	38

LESSON 3

AUDIT AND INVESTIGATIONS

Tools for handling Forensic Audit	40
Forensic Audit Thinking (Thinking Forensically)	40
Forensic Audit Procedures	40
Tools for handling Forensic Audit and the Role of Company Secretary	42
Role of CS as a Forensic Auditor	44
Fraud and Companies Act, 2013	45
Power and Duties of Auditors	46
Investigation Mechanism	53
Types of Investigations	55
Methods of Investigations	56
Finding Facts and Conducting Investigations: A Process Exemplified	58
STEP ONE: Begin the case (respond to complaint, etc.)	60
STEP TWO: Evaluate the allegations or suspicions	60
STEP THREE: Conduct due diligence background checks	61

STEP FOUR: Complete the internal stage of the investigation	61
STEP FIVE: Check for predication and get organized	61
STEP SIX: Begin the external investigation	61
STEP SEVEN: Prove illicit payments	62
STEP EIGHT: Obtain the cooperation of an inside witness	62
STEP NINE: Interview the primary subject	65
STEP TEN: Prepare the final report	65
Red Flags	65
Green Flags	67
LESSON ROUND UP	67
SELF-TEST QUESTIONS	68

LESSON 4

FORENSIC AUDIT: LAWS AND REGULATIONS

Indian Laws: Information Technology and Business Laws	72
Companies Act, 2013	72
Fraud Reporting under Companies Act, 2013	73
SEBI Act, 1992	75
Information and Technology Act, 2000	76
Insurance Act, 1938	76
The Companies (Auditor's Report) Order, 2016	76
Penalty under the Prevention of Corruption Act, 1988 (PC Act)	76
The Prevention of Corruption (Amendment) Act, 2018: An Abridged	76
Backdrop of the Amendment Act	76
Highlights of the The Prevention of Corruption (Amendment) Act, 2018	77
Income Tax Act, 1961	79
Indian Penal Code, 1860	80
International Laws	80
United Nations Convention against Corruption (UNCAC)	81
OECD Guidelines for Multinational Enterprises relating to Combating Bribery	81
The Integrity Pact (IP)	82
Foreign Corrupt Practices Act, 1977 (U.S.A.)	82
The United Kingdom Bribery Act, 2010	83
The Fugitive Economic Offenders Act, 2018	85

ICSI Anti Bribery Code	86
ICSI Anti-Bribery Code: A Way Ahead	87
LESSON ROUND UP	88
SELF-TEST QUESTIONS	89

LESSON 5

FORENSIC AUDIT AND INDIAN EVIDENCE LAW

Finding Facts	92
Question of Law and Question of Fact	93
Materiality and Facts-in-issue	94
Relevant Facts	95
Relevancy	96
Types of Relevancy and Test to Determine Relevancy	97
Admissibility and Weight of an Evidence	98
Admission of Evidence	98
Section 17	100
Admission to be used as a whole and unambiguous.	101
Mode of proof of admissions	101
Section 18	102
Persons whose statements are admissions	102
Statements of parties suing or sued in a representative character	102
Section 19	103
Section 20	104
Section 21	105
Section 22	106
Section 22A	106
Section 23	107
Methods to Prove Cases	107
Oral Evidence	108
Documentary Evidence	110
Proving a Matter through Evidences On the Basis of Sources	113
Direct evidence	113
Circumstantial evidence	113
Other kinds of evidence	114

LESSON ROUND UP	116
SELF-TEST QUESTIONS	117

LESSON 6

CYBER FORENSICS

Introduction to Cyber Crime	120
Cyber Crime: Meaning and Definition	121
International Guidance to Cyber Forensics Laws	123
Necessity of International Standards	124
Introduction to Data Extraction	127
Advantages of Using Data Extraction Tools	128
Ethical Hacking	129
Technological Advances and Cyber Security	129
Cyber Crime cases	130
1. Official Website of Maharashtra Government hacked	130
2. Official Website of IRCTC hacked	130
3. CBI Website hacked	131
4. ICICI- Pune Bank Fraud case	131
5. Pune Citibank Mphasis Call Centre fraud	132
6. Parliament attack case	132
7. Andhra Pradesh tax case	132
8. Insulting Images of Chatrapati Shivaji Maharaj on Google - Orkut	132
9. India's first ATM Card fraud	133
10. Chennai's Violation of Software Terms	133
11. Napster case	133
12. Cosmos Bank loses INR 94 Crore to cyber attack (Aug., 2018)	134
13. Phishing attack at Wipro (April 2019)	134
14. ONGC & Aramco (Sep., 2015)	134
LESSON ROUND UP	135
SELF-TEST QUESTIONS	136

LESSON 7

CASE LAWS, CASE STUDIES AND PRACTICAL ASPECTS

Case Laws	138
-----------	-----

Sahara Group Scam	138
Satyam Computers	138
Saradha Chit Fund	139
Ketan Parekh Scam	139
Case Studies: Practical Aspects	139
Case Study – 1: Collusive Bidding by Contractors	139
Case Study – 2: NSEL – FTIL Case	140
Case Study – 3: Bank Fraud Case	141
Case Study – 4: Corruption and Bribe Case	143
Case Study – 5: PMC Bank Fraud Case:	144
Case Study – 6: The Punjab National Bank Fraud Case	144
Case Study – 7: Amrapali Group Case: (Bikram Chatterji vs Union Of India on 23 July, 2019)	145
Model Test Paper	147
BIBLIOGRAPHY & References	150

Lesson 1

Introduction

LESSON OUTLINE

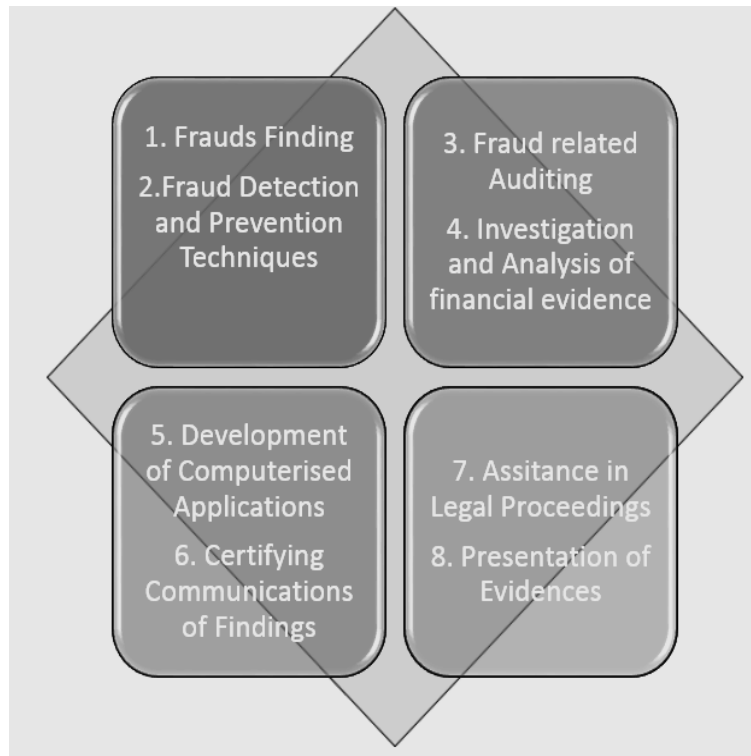
- Introduction
- What is Fraud
- Meaning and Definition under the Companies Act, 2013 and Criminal Procedure Code, 1973
- Meaning and Definition under Companies Act, 2013
- Meaning and Definition under Criminal Procedure Code, 1973
- Meaning and Definition under Indian Penal Code, 1860
- Meaning and Definition under Indian Contract Act, 1872
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- Key Benefits of Forensic Audit
- Need and Objectives: Forensic Audit
- Fraud and Forensic Audit: An Introspect
- Forensic Audit vis-à-vis Audit
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

In the selection of timely detection, prevention and regulation over corporate fraud and reference to due investigation, Forensic Audit is having an imperative role in assisting the corporates for maintaining efficiency and merit. On the larger parameters, Forensic audit as tool-mix of accounting and investigation is serving all the five E's of good governance and make the corporates to grow and develop on the parameters of being *Effective, Efficient, Easy, Empower, and Equity*'. In this background, where forensic audit is considered as a need of the hour for enhancing the corporate culture of India, this chapter covers the verve of the forensic audit including the meaning, definition, objectives and significance of forensic audit.

Introduction

In general, Forensic Audit represents an area of finance that combines detective skills and financial acuity. The forensic audit professionals dig deep into financial reports, locate financial transactions and figure out what really happened at various companies and who is the real culprit behind any fraud which has taken place in the company.



They cover areas such as:

1. Frauds Finding,
2. Fraud detection and prevention techniques;
3. Fraud related auditing;
4. Investigation and analysis of financial evidence;
5. Development of computerized applications to assist in the analysis and presentation of financial evidence;
6. Communication of findings in the form of reports, exhibits and collections of documents; and
7. Assistance in legal proceedings, including testifying in court as expert witness and preparing visual aids to support trial evidence, *etc.*¹

Further, Forensic Auditing is used in a number of ways and for a number of purposes and not just for criminal activity detection. Firms that do “turn-arounds” or takeovers of businesses, for example, need to have an in-depth understanding of their target’s finances. In that scenario, Forensic Audit provides a clear understanding of the financial position along with the connection of the communications related to that.

¹ See, Daga Jayesh, *CISA on What is the Importance of Forensic Auditors*.

What is Fraud

'Fraud', in general, refers to a wrongful or criminal deception practiced which is intended to result in financial or personal gain to oneself and a financial or personal loss to the other.

As per Business Dictionary, 'Fraud' is an act or course of deception, an intentional concealment, omission, or perversion of truth, to:

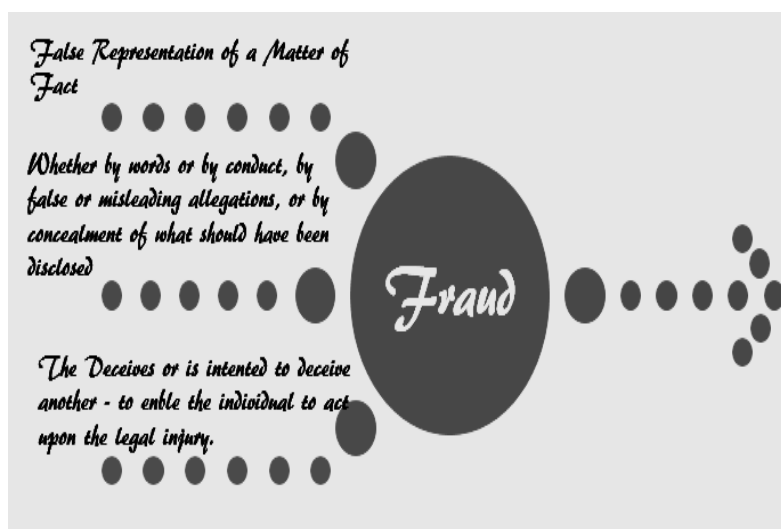
- (1) Gain unlawful or unfair advantage,
- (2) Induce another to part with some valuable item or surrender a legal right, or
- (3) Inflict injury in some manner.²

In law, fraud is a deliberate deception to secure unfair or unlawful gain, or to deprive a victim of a legal right.³

Fraud can also be a civil wrong (*i.e.*, a fraud victim may sue the fraud perpetrator to avoid the fraud or recover monetary compensation), a criminal wrong (*i.e.*, a fraud perpetrator may be prosecuted and imprisoned by governmental authorities) or it may cause no loss of money, property or legal right but still be an element of another civil or criminal wrong.

The ultimate object of practising fraud may be some monetary gain or other benefit, such as, obtaining a passport or travel document, driver's license or qualifying for a mortgage by way of false statements.⁴

As per Black Law Dictionary, 'Fraud' refers to 'All multifarious means which human ingenuity can devise, and which are resorted to by one individual to get an advantage over another by false suggestions or suppression of the truth. It includes all surprises, tricks, cunning or dissembling, and any unfair way which another is cheated.'⁵



With the clear analysis of the above definitions, it could be asserted that Fraud is a –

- False representation of a matter of fact;
- Whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed;
- That deceives and is intended to deceive another;
- So that the individual will act upon it to her or his legal injury.

'Fraud' is commonly understood as dishonesty calculated for advantage. A person who is dishonest may be called a fraudster. In almost all the legal systems, fraud is a specific offence with certain unique features.

'Fraud' is most commonly practiced in the acts of buying or selling of property, including real estate, personal property, and intangible property, such as, stocks, bonds, and copyrights. Indian law under various statutes criminalizes fraud, but not all cases graduate to the level of criminality. Prosecutors also have discretion in determining which case to pursue and which not. Victims may also seek redress in civil court, provided that the

2. Definition of Fraud, Business Dictionary, Business Dictionary.com.

3. Definition of Fraud, Legal Dictionary, Law.com.

4. Basic Legal Concepts, Journal of Accountancy.

5. Black's Law Dictionary, 5th ed., by Henry Campbell Black, West Publishing Co., St. Paul, Minnesota, 1979.

4 PP-FA

fraud conducted does not affect the society at large. For example, if a fraud is carried out in a company and has adversely affected the profit generation in that company without in any way affecting any counter of the economy, the victims might seek relief under the civil remedy. On the other hand, if the fraud conducted in the company affects the entire economy altogether then the only way to punish the accused is through criminal prosecution against the accused under different criminal law statutes, including the Indian Penal Code, 1860 along with the recovery of amount earned through fraudulent transactions. For instance, in the recent ill-fated Punjab National Bank Scam, CBI added the charges of Criminal Breach of Trust under section 409 of IPC along with charges of Fraud under section 420 IPC, 1860.⁶

As it is clear that fraud is recognized as an act of deceit which is subject to criminal as well as civil legal action in almost all the jurisdictions, including India, hence, it would be apt to discuss the definition and meaning of Fraud under specific laws like Companies Act, 2013, Indian Contract Act, 1872, Criminal Procedure Code, 1973 and Indian Penal Code, 1860.

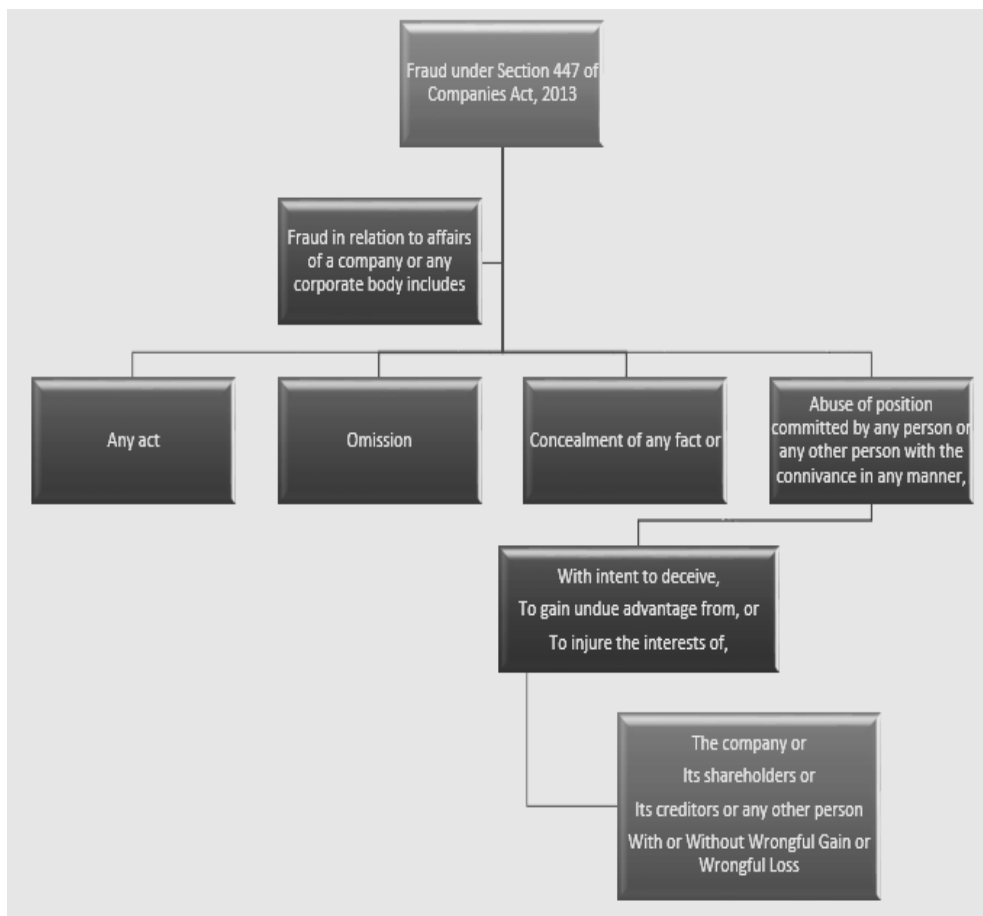
MEANING AND DEFINITION UNDER THE COMPANIES ACT, 2013 AND CRIMINAL PROCEDURE CODE, 1973

Meaning and Definition under Companies Act, 2013

Explanation of Section 447 of Companies Act 2013 defines Fraud and related terms as below:

- (i) 'Fraud' in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
- (ii) 'Wrongful gain' means the gain by unlawful means of property to which the person gaining is not legally entitled;
- (iii) 'Wrongful loss' means the loss by unlawful means of property to which the person losing is legally entitled.

6. See, *PNB Scam: CBI adds charge of Criminal Breach of Trust to FIR: Mehul Choksi, and Others may face life term if found guilty.*



In the context of this definition, it could be said that Corporate Fraud is a Fraud in relation to affairs of a company or any corporate body as defined in the explanations of Section 447 of Companies Act 2013, which includes⁷

- a. Any act,
- b. Omission,
- c. Concealment of any fact or
- d. Abuse of position committed by any person or any other person with the connivance in any manner, -
 - i. with intent to deceive,
 - ii. to gain undue advantage from, or
 - iii. to injure the interests of,
 - a. the company or
 - b. its shareholders or
 - c. its creditors or any other person,

Whether or not there is any wrongful gain or wrongful loss.

7. See, Pratyush Pandey (2014), *Corporate Fraud Prevention Mechanism under Companies Act, 2013*, Ipleader.

Meaning and Definition under Criminal Procedure Code, 1973

The Code of Criminal Procedure, 1973 is the procedural law providing the machinery for punishment of offenders under substantive criminal law. The Code contains elaborate details/provisions regarding the procedure to be followed in every investigation, inquiry and trial, for every offence under the IPC or any other criminal law. In general, the Code does not provide for the definition of various terms rather it only describes certain limited terms like Complaint, Cognizable Offence, Warrant Case and alike, which helps in the interpretation of the Code. For rest of the terms, section 2(y) of Code says that “words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.” Therefore, to understand the meaning of ‘Fraud’ in the sphere of criminal law, one has to take recourse of Indian Penal Code, 1860.

Meaning and Definition under Indian Penal Code, 1860

The term ‘Fraud’ is not defined in the Indian Penal Code per se, but Section 25 defines as to what would amount to ‘fraudulently’. As per the definition, fraudulently refers – “A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.”

This shows that fraud as a crime is nowhere defined in the Indian Penal Code, but implication of this term is made at various places in Indian Penal Code.

In general, fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss.

Whenever the term fraud or defraud appears in the context of criminal law, two things are automatically to be assumed.

- First is deceit or deceiving someone; and
- Second is, injury to someone because of such deceit.

Implications of fraud are found in the following sections of IPC namely, 421, 422, 423 and 424.

- Fraudulent removal or concealment of property to prevent distribution among creditors.
- Fraudulently preventing debt being available for creditors.
- Fraudulent execution of deed of transfer containing false statement of consideration.
- Fraudulent removal or concealment of property.

Though Fraud is not clearly defined in CrPC and IPC, yet Indian Contract Act, 1872 defines the term Fraud quite clearly. In the context of Corporate Fraud, there is no harm in exploring the definition of Fraud as per the other related statutes.

Meaning and Definition under Indian Contract Act, 1872

Section 17 of the Act defines Fraud as –

“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto his agent, or to induce him to enter into the contract.

Section 17 (1) – the suggestion as to a fact of that which is not by one who does not believe it to be true – is known as *SUGGESTIO FALSI* or suggestion of falsehood.

Section 17 (2) – the active concealment of a fact by one having the knowledge or belief of the fact – is known as *SUPPRESIO VERI* or suppression of a fact.

Section 17 (3) – a promise made without any intention of performing it. It means a promise made falsely with the intention of inducing the other party to make a reciprocal promise and thereby enter into a contract.

Section 17 (4) – any other Act fitted or designed to deceive.

Section 17 (5) – any such act or omission as the law specially declares to be fraudulent

Explanation to Section 17

This explanation states a very important proposition of law. According to Explanation to Section 17 – the mere silence as to a fact likely to affect the willingness of a person to enter into a contract is not fraud. However, such silence is to be held as fraud, if the circumstances of the case that –

- It is the duty of the person keeping silence – to speak
- That his silence in itself is equivalent to speech.

Definition of Fraud: The Judicial View

The Supreme Court of India in *Dr. S. Dutt v. State of Uttar Pradesh*⁸, while dilating upon the words “with intent to deceive” has observed that it does not indicate a bare intent to deceive, but an intent to cause a person to act, or omit to act, on account of deception practiced upon him, to his advantage. The words ‘but not otherwise’ after the words ‘with intent to deceive’ in the definition of ‘fraudulently’, it has been observed, clearly show, “..... that the words intent to defraud are not synonymous with intent to deceive and requires some action resulting in some disadvantage which but for the deception, the person deceived would have avoided”.

In the case of *Dr. Vimla v. Delhi Administration* (1963 AIR 1572) the court observed that “the expression ‘fraud’ involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others.

So, under the Indian law a penal offence of fraud, demands for successful prosecution, the twin elements of ‘intent to defraud’ of the offender *i.e.*–

- (i) An intent to deceive another; and
- (ii) An intent to cause, by that deception, injury to some person.⁹

Lord Denning has observed in the case of *Lazarus Estates Ltd.* (1956) “Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.”

Now to clearly understand the term ‘fraud’ in reference of penalizing, preventing and regulating this act, one should be well-versed with the elements of fraud.

ELEMENTS OF FRAUD

Few Essential Elements of Fraud are listed as below¹⁰:

1. **False and Wilful representation or Assertion:** To constitute fraud there must be some representation or assertion, which is untrue. In the absence of representation or assertion except in the following two cases, there can be no fraud.

- Where silence may itself amount to fraud, and
- Where there is active concealment of facts

The person making the representation should not believe it to be true, otherwise he/she will not be guilty of fraud. Moreover, to constitute fraud, the false representation must have been made wilfully or intentionally. For example, X, intending to deceive Y, informs him that his estate is free from

8. (AIR 1966 SC 523).

9. Justice Satheesa chandran S.S. (2016), *offences of Fraud: Need for New Perspective, The Live Law*.

10. *Top Ten Essentials Elements of Fraud, Money Matters – Management Articles*.

8 PP-FA

encumbrance. Y thereupon buys the estate. The estate is, however, subject to mortgage. The contract is induced by fraud.

2. **Perpetrator of Representation:** The false representation or misstatement must have been made by a party to the contract or by anyone with its connivance, or by its agent. If a stranger makes the misstatement to the contract, it cannot result in fraud. For instance, A suggests B to buy C's car, which according to A runs 15 kms per litre. Later on, B finds that the car runs only 8 kms per litre. A was, however, acting neither at the instance of C nor was his agent; he was a stranger. The contract that took place between B and C cannot be stated to be induced by fraud.
3. **Intention to deceive:** Intention to deceive the other party is the essence of fraud. In order to commit a fraud, one person asserts or misstates the fact with the intention that it should be acted upon. As a matter of fact, misrepresentation elevates to the level of fraud when it is prefixed by the element of intention to deceive the other party. For example, A, intending to deceive B, falsely represents that 1,000 tons of sugar is produced annually at his factory, although A is fully aware that only 600 tons of sugar can be produced annually. B thereby agrees to buy the factory. A has resorted to fraud to obtain the consent of B.
4. **Representation must relate to a fact:** The representation made by the party must relate to a fact, which is material to the formation of the contract. A mere statement of opinion, belief, or commendation cannot be treated as fraud. For instance, A states that the detergent produced at his factory washes whiter than whitest. The statement made by A is merely a commendation of the product and not a fact. But if A describes the ingredients, which the detergent contains, it becomes a statement of fact. And if that is found incorrect, it amounts to fraud provided A knows it to be a false statement.
5. **Active concealment of facts:** 'Active concealment' must be distinguished from 'passive concealment'. Passive concealment implies mere silence as to material facts, which barring a few cases, does not amount to fraud. Whereas, active concealment implies 'when the party takes positive or deliberate steps to prevent information from reaching the other party and this is treated as fraud.' For example, A sells a horse to B in an auction despite knowing that the horse is unsound. A says nothing to B about the horse's soundness. This is a case of passive concealment of fact and cannot tantamount to fraud.
6. **Promise made without intention of performing it:** If a person while entering into a contract has no intention to perform his/her promise, there is a fraud on his/her part, for the intention to deceive the other party is there from the very beginning. For example, an English merchant appointed an Indian woman as his personal secretary and promised that he would marry her. Later she came to know that he was already married and had made the promise without any intention to perform it. It was held that she could avoid the contract on the ground of fraud.

On similar count, a purchase of goods without any intention of paying the price is a fraud and the contract can be avoided on this ground.

7. **Representation must have actually deceived the other party:** The representation made with the intention to deceive must actually deceive. The party, induced by fraudulent statement, must have relied on it to accord its consent.

Thus, an attempt to deceive does not amount to fraud until the other party is deceived thereby. A case in point is the following example. A had a defective cannon. With a view to conceal the defect, he put a metal plug on it. B without examining it bought it. The cannon burst when used by B. B refused to pay the price and accused A of fraud. It was held that B was bound to pay because he was not actually deceived, as he would have bought the cannon even if the deceptive plug had not been inserted.

8. **Any other act fitted to deceive:** The expression 'any other act fitted to deceive' obviously means any act, which is done with the intention of committing fraud. This category includes all tricks, dissembling,

and other unfair ways, which are used by cunning and clever people to cheat others. For example, a husband persuaded his illiterate wife to sign certain documents telling her that by the papers he was going to mortgage her two plots of land to secure his indebtedness. But, in fact, he mortgaged four plots of land belonging to her. This was held as an act done with the intention of deceiving the wife.

9. **Any such Act or omission that the law specially declares as void:** This category includes the act or omission that the law specially declares to be fraudulent. For example, the Insolvency Act and the Companies Act declare certain kinds of transfers to be fraudulent. Similarly, under the Transfer of Property Act, the transferor of real estate is bound to disclose to the transferee the following details:

- Material defects, if any, in the property such as, cracks in the wall or in beams, and/or
- Any defect or dispute as regards transferor's title, such as property is subject to encumbrance, i.e., mortgaged or is subject to some dispute pending in a court of law. An omission to make such disclosure on the part of transferor amounts to fraud.

10. **Wrongful Loss and Wrongful Gain is Immaterial.** For the purposes of "Fraud" under the Companies Act, 2013, it is immaterial whether there has been some wrongful loss to one and/or wrong gain to another. The only important thing is intention to deceive and the act or omission actually deceiving the victim. Common corporate frauds for example are, if the CMD husband benefits from a loan transaction sanctioned by her it is a fraud. If a CEO take bribe to approve a contract that is a fraud.

On the same principle, Indian Penal Code too works, as for IPC to constitute an offence, two elements are required which are *Mens Rea* – Intention to Commit Offence and *Actus Reus* – The Wrongful Act.

Examples – Corporate Fraud

There are a number of ways in which a corporation can commit fraud. Corporate fraud can encompass the loss of assets by a corporation, or acts perpetrated by the corporation to take funds from others. Here are several examples:

- **Personal purchases.** An employee can divert funds to buy goods or services on his own behalf. This is usually done by approving his own expense reports or supplier invoices. The person must hold a sufficiently senior position to be able to browbeat other employees into participating in this diversion of assets. Usually, the potential amount of funds diverted increases with the seniority of the job title of the individual committing the fraud.
- **Ghost employees.** The payroll staff can create fake employees and then pay these "ghost employees," directing the funds into their own bank accounts. Weak controls over the payment of employees makes this type of fraud more likely.
- **Skimming.** Incoming funds are intercepted before they can be recorded in a company's accounting records. This is usually caused when a person is allowed to both open the mail and record accounting transactions.
- **Tax avoidance.** A company can alter its tax returns to reveal less taxable corporate income than is really the case, resulting in lower tax remittances. This can only be done with the connivance of senior management, which typically signs off on the tax returns.
- **Asset theft.** Any employee can steal from an organization by making off with assets, such as cash or fixed assets. Weak controls can encourage employees to engage in this activity.
- **Unauthorized use.** An employee may use company assets in an unauthorized manner, such as driving a company car for personal use, or using a company condominium for personal use. Though the asset is not stolen, it is being consumed, so its value lessens over time.

10 PP-FA

- Financial statement falsification. An organization can falsify its financial statements to reveal excellent financial results. These documents can then be used as the basis for obtaining bank loans or selling stock to investors. Such falsification can be conducted entirely within the accounting department, or be forced upon it by management. Examples of such falsification are:
 - Extending the depreciation period to delay depreciation recognition
 - Shifting debt to special purpose entities
 - Accelerate the recognition of revenues and delay the recognition of expenses
 - Capitalize expenses
 - Counting nonexistent inventory, which reduces the cost of goods sold

Corporate fraud can be extremely difficult to contain, and is essentially impossible to stop if senior management is willing to engage in it. In such cases, even the most robust control systems can be breached. This contemplates the significance of Forensic Audit, wherein a check and vigil mechanism could be establishing in finding out the probability of fraud as well as real culprit behind corporate frauds.

Fraud Investigation Office (SFIO)

Section 211 of the Companies Act, 2013, empowers the Central Government to establish an office called Serious Fraud Investigation Office (SFIO) to investigate frauds relating to companies. No other investigating agency shall proceed with investigation in a case in respect of any offence under the Act, once the case has been assigned to SFIO. The SFIO has power to arrest individuals if it has reason to believe that he is guilty based on the material in possession. SFIO shall submit a report to the Central Government on conclusion of investigation. Central Government may direct SFIO to initiate prosecution against the company. SFIO shall share information they possess regarding a case being investigated by the latter and vice versa.

Auditors shall report material fraud to the Central Government within 30 days. Immaterial fraud shall be reported to the board or the auditor of the company. Audit committee is required to monitor that every listed company shall establish a vigilance mechanism for directors and employees to report genuine concerns. The vigilance mechanism shall provide for adequate safeguards against victimization of persons who use such mechanism. It shall make provision for direct access to the Chairperson of the Audit Committee in appropriate cases.

Independent directors shall report concerns about actual or suspected fraud. They must also ascertain and ensure that the company has an adequate and functional vigilance mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use.

Forensic Audit: Meaning and Significance

As, it has been thoroughly laid down in the previous discussion that fraud is a termite to growth, development and prosperity, in general, and to the progression of the corporates and economy, in specific. And therefore, the Government is quite dynamic in regulating and preventing the practices of fraud as well as any likelihood of fraud from Indian economy.

In addition, with various laws constituting civil as well as criminal liability for the accused, it is important that fraud should be detected at the first instance and further accused should be penalized with the appropriate punishment in order to introduce the element of deterrence for the anticipated fraudsters, while preventing them from playing any fraud in future.

Checklist

Companies going for frequent forensic audit by third-party consultants

FOR EVERY CXO SEARCH THERE IS A FORENSIC BACKGROUND CHECK

Private equity firms demanding thorough investigation of past record

Cos checking behavioural conduct of CEO/CXO in the past and team perception



This all requires a diligent set of skills and tools for detecting the fraud through transactions outside the system reflecting fraud, through analysing the financial statements and other circumstantial evidences making the difference in identifying fraudulent disclosure and finding the real culprit behind the fraud and related loss, providing the evidences in the court and in to helping the governance of the company with regulation and prevention of frauds in the company. *This consolidated tool is known as Forensic Audit.*

Therefore, one has to understand the meaning and significance of “Forensic Audit” with clarity and precision.

In order to catch the glimpse of Forensic Audit in totality, it also become significant to know and understand the meaning of Audit itself.

Source : The Economic Times

Meaning of Audit

Audit, in general, refers to the examination or inspection of various books of accounts by an auditor followed by physical checking of inventory to make sure that all departments are following documented system of recording transactions. It is done to ascertain the accuracy of financial statements provided by the organization.¹¹

Audit can be done internally by employees or heads of a particular department and externally by an outside firm or an independent auditor. The idea is to check and verify the accounts by an independent authority to ensure that all books of accounts are made in a fair manner and there is no misrepresentation or fraud that is being conducted.

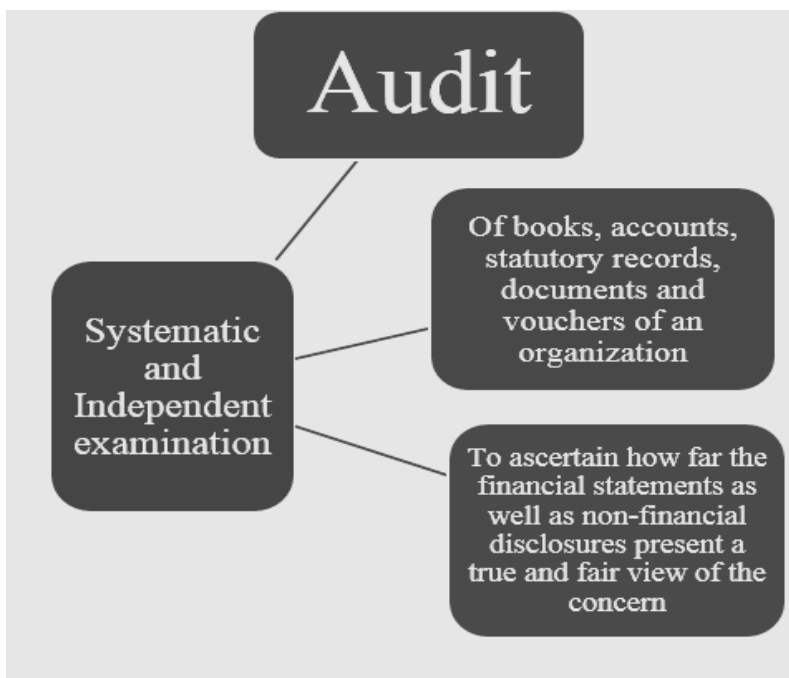
All the public listed firms have to get their accounts audited by an independent auditor before they declare their results for any quarter.

As per *English Oxford Dictionary*, “Audit” means an official inspection of an organization’s accounts, typically by an independent body. It also states a word of caution that many a times, audits are not expected to detect every fraud.

Cambridge Dictionary refers that Audit is a systematic process to make an official examination of the accounts of a business and produce a report.

11. Definition of Audit, *The Economic Times*.

English Oxford Dictionary	Cambridge Dictionary
<p>Audit means -</p> <ul style="list-style-type: none"> • An official inspection of an organization's accounts, • Typically, by an independent body. <p>It also states a word of cautions that many a times, audits are not expected to detect every fraud.</p>	<p>Audit refers as</p> <ul style="list-style-type: none"> • Systematic process • To make an official examination of the accounts of a business and • To produce a report.



With an analysis of these definitions, it is apt to state that an audit is a systematic and independent examination of books, accounts, statutory records, documents and vouchers of an organization to ascertain how far the financial statements as well as non-financial disclosures present a true and fair view of the concern.

It also attempts to ensure that the books of accounts are properly maintained by the concern, as required by law.

When we talk about Audit, one should not forget the role of Indian Accounting Standard (abbreviated as Ind-AS). Ind-AS is the Accounting standard adopted by companies in India and issued under the supervision

of Accounting Standards Board (ASB) which consists of representatives from government department, academicians, other professional bodies, representatives from ASSOCHAM, CII, FICCI, etc.

The Ind AS are named and numbered in the same way as the International Financial Reporting Standards (IFRS). National Advisory Committee on Accounting Standards (NACAS) recommend these standards to the Ministry of Corporate Affairs (MCA). MCA has to spell out the accounting standards applicable for companies in India. As on date MCA has notified 41 Ind AS. This shall be applied to the companies of financial year 2015-16 voluntarily and from 2016-17 on a mandatory basis.

Based on the international consensus, the regulators will separately notify the date of implementation of Ind-AS for the banks, insurance companies etc. Standards for the computation of Tax has been notified as ICDS in February 2015.

Audit: An Adhering Significance

The word audit is derived from a Latin word "audire" which means "to hear".¹²

During the medieval times when manual book-keeping was prevalent, auditors in Britain used to hear the accounts read out for them and checked that the organization's personnel were not negligent or fraudulent.¹³

12. See, *Assurance, Auditing and. Chapter 1, Volume 1: Institute of Chartered Accountants of India.* p. 1.

13. Derek Matthews, *History of Auditing. The changing audit process from the 19th century till date.* Routledge-Taylor & Francis Group . p. 6.

Any subject matter may be audited. Auditing is a safeguard measure not only in medieval times, rather it is in existence since ancient times.¹⁴

As per the description referred by Loeb and Shamoo, Audit provides third party assurance to various stakeholders that the subject matter is free from material misstatement. The term is most frequently applied to audits of the financial information relating to a legal person. Other areas which are commonly audited include, secretarial & compliance audit, internal controls, quality management, project management, water management, and energy conservation.

Moyer¹⁵ while identifying the most important duty of the auditor stated that it is always to detect the cases of fraud. Chatfield¹⁶ also documented that early United States auditing was viewed mainly as verification of Book keeping details.

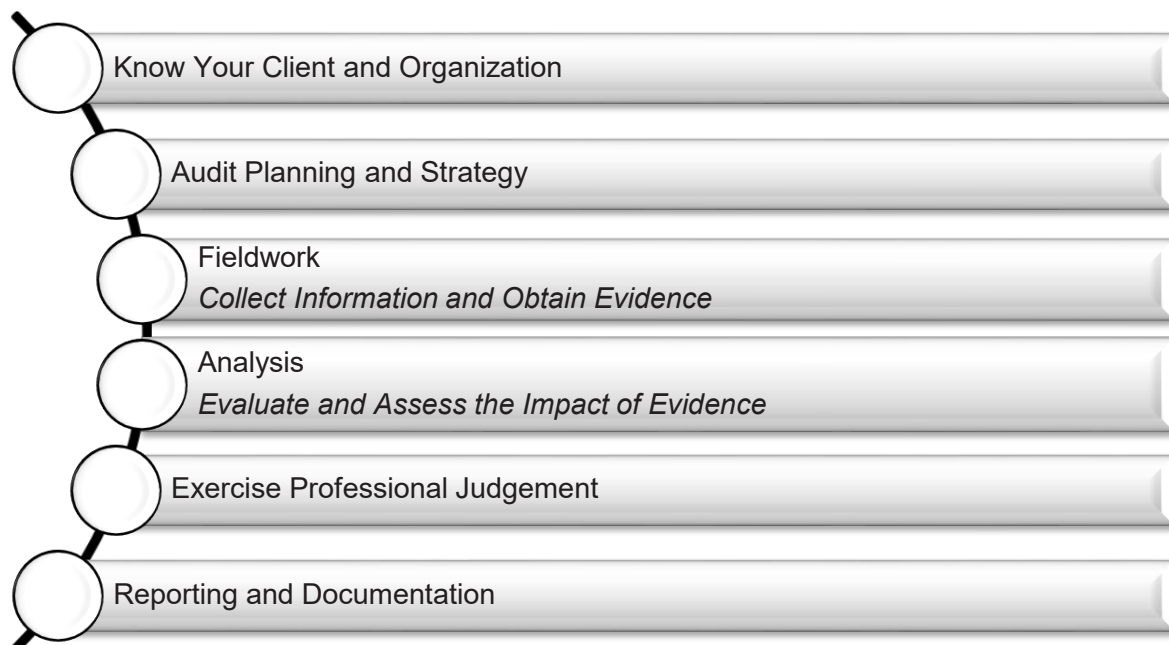
In view of Audits' imperative value for detecting the fraud and ensuing financial health of the corporate, auditing has become such a ubiquitous phenomenon in the corporate and the public sector that professionals started to specialize the process of auditing, wherein forensic audit is also one specialized branch of audit having specific objectives in operation.

During the Audit, the auditor perceives and recognizes the propositions before them for examination, obtains evidence, evaluates the same and formulates an opinion on the basis of his judgment which is communicated through their audit report.

As a result of an audit, stakeholders may effectively evaluate and improve the effectiveness of risk management, control, and the governance process over the subject matter.

Stages of Audit

Some Typical Stages in the Audit Process are as below:



14. Available at Loeb, Stephen E.; Shamoo, Adil E. (1989-09-01). "Data audit: Its place in auditing". *Accountability in Research*, 1 (1): 23–32

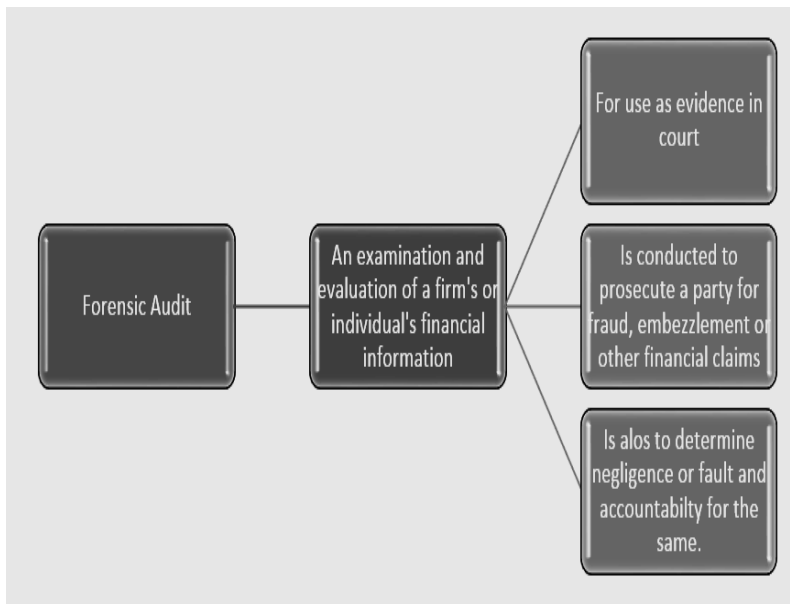
15. C. A., Moyer (1951), *Early Developments in American Auditing*, *Accounting Review*, 26-6.

16. Michael, Chatfield (1974), *A History of Accounting Thought*, *Business History Review*, 49.

Meaning of Forensic Audit

Forensic audit is, in general, referred to as an examination of evidence regarding an assertion to determine its correspondence to established criteria carried out in a manner suitable to the court.

As per the definition given in Investopedia, Forensic Audit is an examination and evaluation of a firm's or individual's financial information for use as evidence in court. A Forensic Audit can be conducted in order to prosecute a party for fraud, embezzlement or other financial claims. In addition, an audit may be conducted to determine negligence or even to determine how much spousal or child support an individual will have to pay.



Jack Bologna and Robert defined Forensic Audit as the application of financial skills and an investigative mentality to unresolved issues, conducted within the context of the rules of evidence. As a discipline, it encompasses financial expertise, fraud knowledge, and a strong knowledge and understanding of business reality and the working of the legal system.¹⁷

Collin Greenland defines that forensic accounting (or auditing) is the integration of accounting, auditing and investigative skills in order to provide an accounting analysis suitable for the resolution of disputes (usually but not exclusively) in the courts.¹⁸

Business Dictionary defines Forensic Audit as the application of accounting methods to the tracking and collection of forensic evidence, usually for investigation and prosecution of criminal acts such as embezzlement or fraud. It further states that forensic audit is also called forensic accounting.

Significance of Forensic Audit

Forensic auditing has taken an important role in both private and public organizations since the dawn of the 21st century especially in the advance economies. The catastrophe of some formerly prominent public companies such as Enron and WorldCom (MCI Inc.) in the late 1990s, coupled with the terrorist attacks of September 11, 2001 and the recent incidence of frauds taken place in the corporates including the one in the leading public bank of Indian economy, have fueled the prominence of forensic auditing/ accounting, creating a new, important and lucrative specialty. Forensic auditing procedures target mostly financial and operational fraud, discovery of hidden assets, and adherence to federal regulations.

Cressy¹⁹ (2012) in his paper explained that in forensic auditing specific procedures are carried out in order to produce evidence. Audit techniques and procedures are used to identify and to gather evidence to prove, for example, how long have fraudulent activities existed and carried out in the organization, and how it was conducted and concealed by the perpetrators. Evidence may also be gathered to support other issues which would be relevant in the event of a court case.

17. Available at: Jack Bologna and Robert J. Lindquist (1987), *Fraud Auditing and Forensic Accounting : New Tools and Techniques*, by, John Wiley & Sons, New York.

18. Collin Greenland (2001), *Demystifying Forensic Accounting*, *The Weekend Observer*, Pg. 5, December 7, 2001

19. See, Hubar Dennis (2016), *Forensic Accounting, Fraud Theory, and the End of the Fraud Triangle* *Journal of Theoretical Accounting Research*, 12(2), 28-48, 2017.

Further, with the increase in the financial frauds popularly known as white collar crimes, forensic auditing and accounting have risen to prominence for ensuring the directed growth of the corporates and inclusive growth of economy.

Forensic audit is becoming increasingly frequent for top leadership searches as stringent corporate governance norms and increasing stakes are prompting Indian and multinational companies to make sure that the people they take on board have no blotches on their track record. This realizes the significance of Forensic Audit in the contemporary time for the corporates to rationalize premier principles of Good Governance.

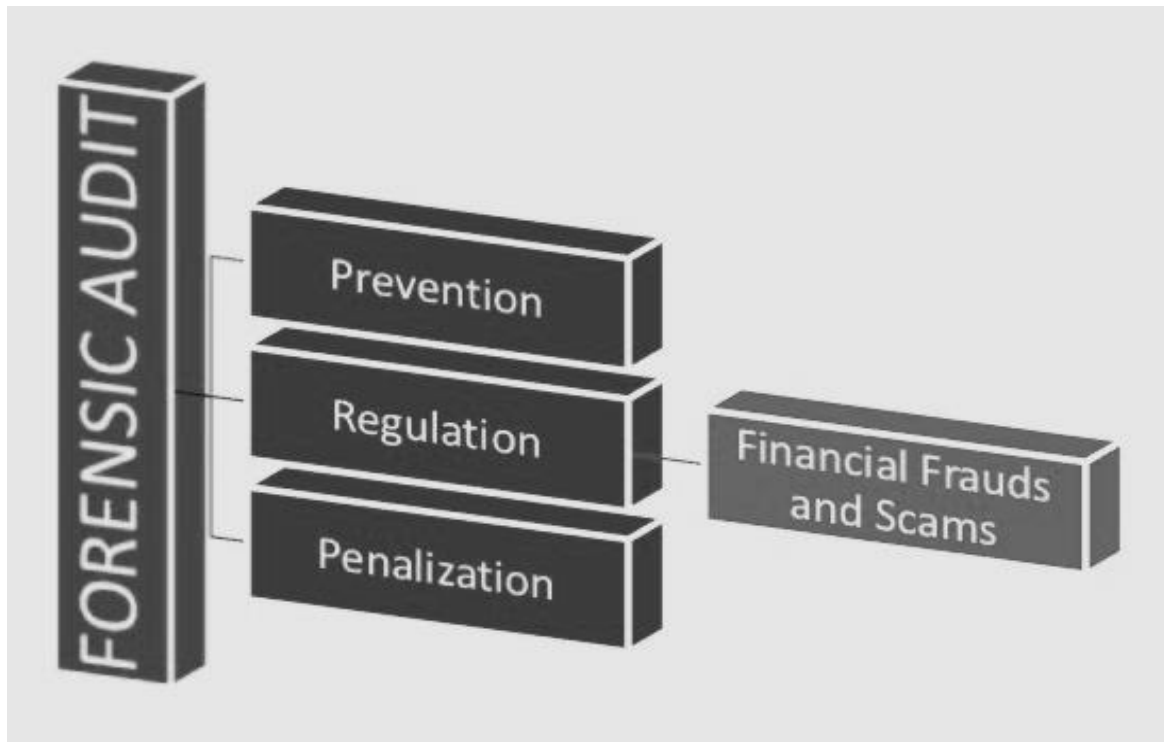
A Ready Reference to the Significance of Forensic Audit could be rationalized as below:

- In general, forensic auditing, which is described as a specialized field of accountancy investigates fraud and analyses financial information to be used in legal proceedings.
- In Forensic Audit, a systematic and independent examination of books, accounts, statutory records, documents and vouchers of an organization is held to ascertain fraud or probability of fraud.
- Much beyond the official documents of the company, the Forensic audit involves lot of field work, trying to talk to multiple stake holders to gather information and then look for evidence to corroborate it and alike.
- It also attempts to identify or to corroborate the culprit behind the fraud.
- It arranges and collects the evidences of the fraud and the person accused of fraud.
- The collected evidences and reviewed facts are used in the legal proceedings which assist the court in granting punishment to the real accused of the fraud.
- Forensic auditing uses accounting, auditing, and investigative skills to conduct investigations into theft and fraud. It encompasses both Litigation Support and Investigative Accounting.

This makes forensic audit an apt tool in the contemporary times, ensuring financial health of the companies through aiding in the ***Prevention, Regulation and Penalization*** of financial frauds and scams.

Key Benefits of Forensic Audit

As we have discussed clearly that Forensic Audit is an examination of a company's financial records to derive evidence which can be used in a court of law or legal proceeding. In the contemporary times, when the Government is looking forward for a robust economy and nation building at par, financial stability is a must in the corporates. Henceforth, Forensic audit submits various recompenses in ensuring commercial health of the companies through aiding in the ***Prevention, Regulation and Penalization*** of financial frauds and scams.



For example, A Company, on the recommendation of its Chief Financial Officer (CFO), entered into a contract with ABC Inc for the supply of carts. At the time, ABC Inc was not authorized to conduct business, as its license was suspended due to certain irregularities in taxes paid. The CFO had knowledge of this fact, but still recommended the company to enter into a contract with ABC Inc because he was secretly receiving compensation from ABC Inc for doing so.²⁰ A forensic audit cannot reveal such cases of fraud, but could also create bunch of evidences for the production the court of Law. This way forensic audit ensures the healthy conduct of the organization and stability and growth to the economy as a whole.

Key Advantages

In this context, few key benefits of Forensic Audit are listed below:

1. **Detection and Responsibility of Corruption:** In a Forensic Audit, while investigating fraud, an auditor would look out for:
 - Conflicts of interest – When fraudster uses his/her influence for personal gains detrimental to the company. For example, if a manager allows and approves inaccurate expenses of an employee with whom he has personal relations. Even though the manager is not directly financially benefitted from this approval, he is deemed likely to receive personal benefits after making such inappropriate approvals.
 - Bribery – As the name suggests, offering money to get things done or influence a situation in one's favor is bribery. For example, ABC bribing an employee of B2C company to provide certain data to aid ABC in preparing a tender offer to B2C.
 - Extortion – If B2C demands money in order to award a contract to ABC, then that would amount to extortion.

In this process, Forensic Audit aids in detecting the corruption in the corporates and also determine responsibility of the person liable for the corruption and its practices.

²⁰. *Forensic Audit Guide (2017)*, Corporate Financial Institute.

2. **Detection of Asset Misappropriation:** This is the most common and prevalent form of fraud. Misappropriation of cash, raising fake invoices, payments made to non-existing suppliers or employees, misuse of assets, or theft of Inventory are a few examples of such asset misappropriation.
3. **Detection of Financial Statement Fraud:** Companies get into this type of fraud to try to show the company's financial performance as better than what it actually is. The goal of presenting fraudulent numbers may be to improve liquidity, ensure top management continue receiving bonuses, or to deal with pressure for market performance. Some examples of the form that financial statement fraud takes are the intentional forgery of accounting records, omitting transactions – either revenue or expenses, non-disclosure of relevant details from the financial statements, or not applying the requisite financial reporting standards.
4. **Fraud Identification and Prevention:** Fraud is quite common in big organizations where the number of daily financial transactions is huge. In such an environment, an employee can easily undertake fraudulent activities without being caught. Forensic accounting helps in analyzing whether the company's accounting policies are followed or not, and whether all the transactions are clearly stated in the books of accounts. Any deviation observed in the books of accounts can help in identifying fraud, and necessary measures can be taken to prevent it in the future.
5. **Making Sound Investment Decisions:** As forensic accounting helps in analyzing the financial standing and weaknesses of a business, it provides a path for investors to make thoughtful investment decisions. A company engaged in fraud is definitely not a good option for investment. Therefore, the reports of forensic accountants act as a guide for potential investors of a company. Many organizations also apply for loans from various financial institutions. By performing an analysis, such institutions can come to a decision on whether they would like to fund a company or not.
6. **Formulation of Economic Policies:** Various cases of fraud that becomes evident after forensic analysis act as a reference for the government to formulate improved economic policies that would be able to curb such fraudulent activities in the future. By doing so, the government can strengthen the economy and prevent such illegal activities in the country.
7. **Rewarding Career Opportunity:** As a career, forensic auditing is extremely rewarding, as it not only involves regular auditing and accounting activities, but also involves identification, analysis, and reporting of the findings during an audit. The acceptance of reports generated by a forensic auditors by the court of law, gives them an upper hand as compared to other accountants. Good forensic auditors are in high demand and can easily draw a striking starting salaries around the globe.

Other Advantages²¹

- **Objectivity and Credibility** - An external party as a forensic auditor would be far more independent and objective than an internal auditor or company accountant who ultimately reports to management on his findings. An established firm of forensic auditors and its team would also have credibility stemming from the firm's reputation, network and track record.
- **Accounting Expertise and Industry Knowledge** - An external forensic auditor would add to the organization's investigation team with breadth and depth of experience and deep industry expertise in handling frauds of the nature encountered by the organization.
- **Provision of Valuable Manpower Resources** - An organization in the midst of reorganization and restructuring following a major fraud would hardly have the full-time resources to handle a broad-based exhaustive investigation. The forensic audit and his team of assistants would provide the much needed experienced resources, thereby freeing the organization's staff for other more immediate management

21. See, *Forensic Accounting, Oxford Home Study*.

demands. This is all the more critical when the nature of the fraud calls for management to move quickly to contain the problem and when resources cannot be mobilized in time.

- **Enhanced Effectiveness and Efficiency** - This arises from the additional dimension and depth which experienced individuals in fraud investigation bring with them to focus on the issues at hand. Such individuals are specialists in rooting out fraud and would recognize transactions normally passed over by the organization's accountants or auditors.

The above discussed advantages of Forensic Audit confirms that Forensic Audit is a strategical approach in detecting the financial frauds in the organizations along with enhancing their financial stability at par.

Need and Objectives: Forensic Audit



Source: The Hindu

Time and again, it has been established that corporate frauds are one of the major hindrances to the inclusive growth of the economy. In any economy the rise in corporate frauds is directly proportionate to the fall of economy. Corporate fraud schemes go beyond the scope of an employee's stated position, and are marked by their complexity and economic impact on the business, other employees and outside parties.

As per the Report submitted by Goldman Sachs on the Impact of

PNB Scam on Indian Economy²², it is stated that "To global investors, India's economy may seem a bit like a raw mango these days—enticing from a distance but bitter to taste; good for pickles, and not much more. That Goldman Sachs cut India's economic growth estimate from 8% to 7.6% for financial year 2019 may not be a surprise after the swell of bank scams that have washed over headlines in the last few weeks. The global investment bank has cited the \$2 billion fraud at the state-run Punjab National Bank (PNB) among the reasons for slashing the projections for the world's fastest-growing major economy. It is feared that the fraud is just the beginning of a prolonged period of pain for the Indian economy. "Markets and investors are questioning whether the problem is more systemic," the analysts wrote in the note to clients.

Indeed, in the days following the revelation that billionaire jewellers, Nirav Modi and Mehul Choksi, duped India's second-largest government bank, the PNB stock has lost more than a quarter of its market value. Other public sector bank scrips have tumbled, too."

In the previous years too, India has witnessed financial frauds which affected the golden growth of India's economy. The Investigations and risk consulting firm Kroll unearthed in their survey²³ that 69% of companies studied were affected by fraud in Financial Year of 2013, up from 68% in the previous year. The value of fraud, the study found, rose, to 71% from 67%. Insider fraud was particularly rife in India, with 89% of respondents indicating the perpetrator was an insider of some sort — a junior, middle management or senior employee, or an agent. That's the reason that a team of Deloitte Forensic (India) pointed out,

22. Iyer Sriram (2018), *Nine Ways in Which the PNB Scam will affect India's Economy, The Bitter Truth*, Quartz India.

23. Naik Devesh (2015), *A Report on Forensic Accounting and Auditing*, The LinkedIn.

forensic audit practices have evolved significantly over the last 10-15 years. He added that “*earlier the investigations were restricted to books and records but now there is a significant element of intelligence gathering*. The technology, analytics and professional expertise have a greater play in every aspect of forensic auditing”

Indeed, the recent upswing in the financial frauds in India, compelling more management to conduct forensic audits in the interest of our growing economy. Experts on white-collar crimes say forensic auditing is not just gaining prominence, the methods are changing fast.

From all the past incidences, it has been found that Crimes are of all hues, seven in particular — (i) Theft of physical assets, (ii) Theft of information, (iii) Corruption and Bribery, (iv) Internal financial fraud, (v) Vendor fraud, (vi) Management conflict of interest and (v) Regulatory breach, are high in their perspectives of corporate fraud.

That's not surprising given how the incidence of corporate fraud is on the rise. But other spaces too are exposed to fraud, which is why the scope and need of forensic auditing is getting wider.

Kroll observed²⁴ that there are other reasons like ensuing financial stability, holding accountability of the accused and deterring the future fraudsters alike are also giving rise to the need and significance of Forensic Audit.

Further, provisions of the new Companies Act mean that every company now has to have proactive fraud risk management policies. The Act requires independent directors to increase safeguards against fraud and reminds them of their whistleblowing responsibilities. Objections must be documented, and now that the Act defines fraud and safeguards explicitly, ignorance of the parameters of either will no longer be a defense.

Companies Act, 2013
– A big leap to prevent and punish fraud

Fraud and Forensic Audit : An Introspect

Forensic auditing covers a broad spectrum of activities, with terminology not strictly defined in regulatory guidance. Generally, the term ‘forensic auditing’ is used to describe the wide range of investigative work which the professionals in practice could be asked to perform. The work would normally involve an investigation into the financial affairs of an entity and is often associated with investigations into alleged fraudulent activity.²⁵

- Forensic Auditing refers to the whole process of investigating a financial matter, including potentially acting as an expert witness if the fraud comes to trial.
- The process of forensic accounting includes the ‘forensic investigation’ itself, which refers to the practical steps that the forensic auditor takes in order to gather evidence relevant to the alleged fraudulent activity.
- The investigation is likely to be similar in many ways to an audit of financial information, in that it will include a planning stage, a period when evidence is gathered, a review process, and a report to the client.

24. Naik Devesh (2015), *A Report on Forensic Accounting and Auditing*, The LinkedIn.

25. Soni Bhagwan Lal (2016), *Forensic Audit, Fraud Detection and Investigation Techniques*, International Centre for Environment Audit and Sustainable Development.

- The purpose of the investigation, in the case of an alleged fraud, would be to discover-
 - a. If a fraud had actually taken place,
 - b. To identify those involved,
 - c. To quantify the monetary amount of the fraud (*i.e.* the financial loss suffered by the client), and
 - d. To ultimately present findings to the client and potentially to court.
- Finally, 'forensic auditing' refers to the specific procedures carried out in order to produce evidence.
- Audit techniques are used to identify and to gather evidence to prove, **for example**, "how long the fraud has been carried out, and how it was conducted and concealed by the perpetrators."
- Evidence may also be gathered to support other issues which would be relevant in the event of a court case. Such issues could include:
 - a. The suspect's motive and opportunity to commit fraud
 - b. Whether the fraud involved collusion between several suspects
 - c. Any physical evidence at the scene of the crime or contained in documents
 - d. Comments made by the suspect during interviews and/or at the time of arrest
 - e. Attempts to destroy evidence.

This way, it is proved that the tool of forensic audit is one of the strong tool in detecting the frauds, assisting financial stability and enduring economic growth of the nation under vision New India, 2022.

Forensic Audit vis-à-vis Audit

Major difference between Audit and Forensic Audit is discussed as below²⁶:

- Objective of financial auditing is to express opinion as to 'true & fair' presentation. Forensic Audit determines correctness of the accounts or whether any fraud has actually taken place.
- Techniques used in the financial auditing are more of 'Substantive' and 'compliance' procedures. The techniques used in the forensic auditing are analysis of past trend and substantive or 'in depth' checking of selected transactions.
- Normally all transactions for the particular accounting period are covered under the financial audits. Forensic audits don't face any such limitations. Forensic auditors may be appointed to examine the accounts from the beginning.
- For ascertaining the accuracy of the current assets and the liabilities financial auditor relies on the management certificate or representation of management. Forensic auditors are required to carry out the independent verification of suspected or selected items.
- Whenever the financial auditor has adverse findings, then the auditor expresses the qualified opinion, with/without quantification. In case of the adverse findings, the forensic auditors are required to quantify the damages to the clients and is also supposed to point the culprit. Many a times, Legal action will be sought.

26. Joshi Apporva (2017), *Definition and Basics of Forensic Audit*, The Riskpro Management Consulting.

LESSON ROUND UP

- In general, Forensic Audit represents an area of finance that combines detective skills and financial acuity.
- Further, Forensic Auditing is used in a number of ways and for a number of purposes and not just for criminal activity detection.
- ‘Fraud’, in general, refers to a wrongful or criminal deception practiced which is intended to result in financial or personal gain to oneself and a financial or personal loss to the other.
- Explanation of Section 447 of Companies Act 2013 defines Fraud and related terms as below:
 - i. ‘Fraud’ in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
 - ii. ‘Wrongful gain’ means the gain by unlawful means of property to which the person gaining is not legally entitled;
 - iii. ‘Wrongful loss’ means the loss by unlawful means of property to which the person losing is legally entitled.
- In general, fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss.
- In order to catch the glimpse of Forensic Audit in totality, it also become significant to know and understand the meaning of Audit itself.
- As per English Oxford Dictionary, “Audit” means an official inspection of an organization’s accounts, typically by an independent body. It also states a word of caution that many a times, audits are not expected to detect every fraud.
- Forensic audit is, in general, referred to as an examination of evidence regarding an assertion to determine its correspondence to established criteria carried out in a manner suitable to the court.
- As per the definition given in Investopedia, Forensic Audit is an examination and evaluation of a firm’s or individual’s financial information for use as evidence in court.
- Forensic audit is becoming increasingly frequent for top leadership searches as stringent corporate governance norms and increasing stakes are prompting Indian and multinational companies to make sure that the people they take on board have no blotches on their track record.
- Forensic audit submits various recompenses in ensuring commercial health of the companies through aiding in the Prevention, Regulation and Penalization of financial frauds and scams.
- Kroll observed that there are other reasons like ensuing financial stability, holding accountability of the accused and deterring the future fraudsters alike are also giving rise to the need and significance of Forensic Audit.

SELF-TEST QUESTIONS

1. Write a note explaining Meaning and Definition under the Companies Act, 2013 as well as Criminal Procedure Code, 1973.

2. What do you mean by Forensic Audit? Discuss its need and significance in detail.
3. Write down the similarities and differences between Audit and Forensic Audit.
4. Discuss the elements of Frauds and Civil and Criminal Remedies available against it.

[illegible]

Lesson 2

Fraud and Audit

LESSON OUTLINE

- Modern Day Scenario
- Forensic Audit: Leading Way to Emergent Economy
- Fundamentals of Forensic Audit
- Elements of Fraud
- Kinds of Frauds
- Corporate Frauds: An Insight
- Recent Cases
- Directors' Responsibilities
- Development Cyber World
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Lately, the Government of India is adopting a highly collaborative approach and addressing various challenges like fraud, deceit, financial misplacement et al., which are a big hindrance in the path of inclusive growth of corporates and other entities in India. Among other things, 'fraud' is one of the most critical ailments which not only impacts the organizations where it is perpetrated, rather it shakes the economy and social framework of entire country. In this whole process of timely detection of frauds and reference of such case for due investigation, Forensic Audit has an imperative role in maintaining efficiency as well as merit at par. In the larger perspective, this lesson aims to apprise the students with modern day scenario of forensic audit, fundamentals of forensic audit along with other related concepts.

MODERN DAY SCENARIO

There must be a relationship of trust and faith inter se citizens and the Government to ensure availability of best means of livelihood and to provide citizens with virtues of 'Justice' and 'Welfare', which also results in inclusive growth of the nation as a whole. The activity of the Government has to be such that the citizens repose faith in the Government and its activities. It is important to realize that this trust and faith cannot be demanded rather it has to be earned by the Government. The government has to be the harshest on corruption and fraud in any sphere of life and human activity. Capturing the spirit of serving the citizens with welfare, justice and growth to maintain parity while working towards achieving them, and to ensure that the means of inclusive progress and growth of India, are at par with the best, the Government of India has recently adopted "Vision New India, 2022" with the functional objectives of coming together towards building an Inclusive India, which is free from scourge of corruption, terrorism, poverty, communalism, casteism and filth. In order to take forward this pledge of creating a new India which is not only strong and prosperous but also all-encompassing, the Government of India has also launched "Sankalp se Siddhi" (Attainment through Resolve) Scheme, which aims at Good Governance, under a five year plan, wherein new India movement 2017-2022 would take place which would clear the bounds of Governance, Compliance, Transparency, Accountability and establish a Corporate Culture which is free from fraud and deception.¹



Lately, the New India Movement (2017-2022) Scheme envisages an India which is free from poverty, corruption, terrorism, communalism, casteism and uncleanness and aims to unite the entire nation by adopting the policy of Good Governance and most importantly employing technology with the focus objective of serving growth in all sectors of the nation, be it economic, political, social, technological, legal or environmental.

Moreover, one should also have an insight into the Preamble of the Constitution of India, which envisages establishing a nation that provides Justice – Social, Economic and Political, along with Liberty, Equality and Fraternity to the people of India. Aligning this spirit of the Preamble of our Constitution along with the functional objectives and vision of New India, 2022, one can say that the transformation envisaged should take place in all the spheres i.e. social, economic and political spheres of Indian society while at the same time upholding the principles of LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

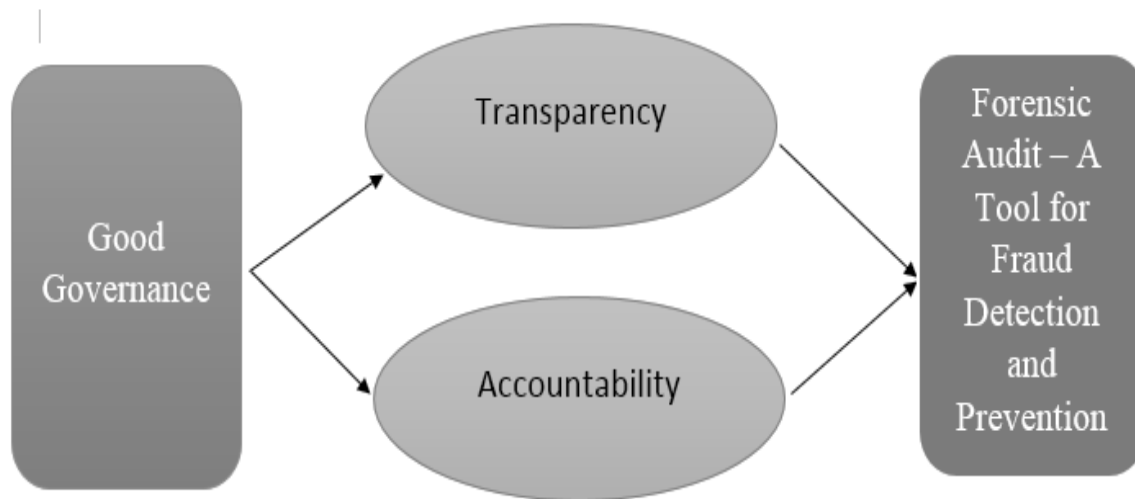
1. *Healthy India Chronicle – PM Vision for New India, 2022, Indian Chronicle, 2018*

In this context, different measures adopted by the Government of India in the form of the reform measures like *Jan Dhan Yojna*, *National Scholarship Portal*, *Pradhan Mantri Kaushal Vikas Yojana*, *National Young Leaders Program*, *Khelo India – Boost the Sports* and many others are being brought in with the single-minded focus of transforming and reforming the nation and take it on the path of success and development. In order to transform the Indian economy to enhance its performance with excellence, we are witnessing a plethora of Government initiatives including *Ease of Doing Business*, *Start-Up India*, *Stand Up India*, *Digital India along with reformative regulating regime with the implementation of Goods and Services Tax*, *Insolvency and Bankruptcy Code*, *Real Estate – Regulation and Development*, *Prohibition of Benami Property Transactions Act* and son on.

A holistic review of these reforms confirms that the Government aims to establish the best practices of Good Governance incorporating virtues of Transparency and Accountability. In order to serve the a growth and development objectives of the Indian economy, the Government of India is not only looking forward to encourage development, it is also introducing some strong measures by regulating the improper practices and non-compliances which hinder the way forward for the inclusive corporate culture of emergent Indian economy. For instance, the recently enacted The Companies (Amendment) Act, 2017 aims to addresses the difficulties faced in implementation of the Companies Act, 2013, facilitates ease of doing business, helps in achieving better harmonization with other statutes like The Reserve Bank of India Act, 1934 and the regulations framed thereunder, rectifies the inconsistencies in the 2013 Act and confirms an attempt to enhance good governance, transparency and accountability in the corporates.

FORENSIC AUDIT: LEADING WAY TO EMERGENT ECONOMY

Apparently, the Government of India is adopting a highly collaborative approach and is addressing various challenges like fraud, deceit and financial misplacement , which are a big hindrances in the path of inclusive growth story of India.



Among other things, ‘fraud’ is one of the most critical ailments which not only impacts the corporate organizations where it is perpetrated, rather it shakes the economy and society of entire country and has both short term as well as long term repercussions.

The recent incident of financial deception faced by Punjab National Bank (PNB), has not only dazed the Government, the Regulator, the Stakeholders, the Corporate community, and also the Public at large, rather it has also rung the alarm bells for all of us, specially regulators and governance professionals to critically examine the gaps responsible for making us to a witness to this kind of financial catastrophe. In fact, after making this discovery and unearthing this massive fraud which took place at PNB, the second biggest state- run lender of

India, the Financial Services Secretary was constrained to direct and instruct that ‘All Bad Loan Cases above INR 50 Crores at Public Sector Banks will be examined for fraud.’ Further the respective MDs were directed to detect bank frauds and consequential wilful default in time and refer all such cases to the CBI.

Globally, the regulators are in the best position and are the best masters to give signals of a financial cataclysm, but it seems that seldom do players heed to their conscience and follow the voice of wisdom. Keeping this vigil perspective in mind, Forensic Audit is a dynamic approach adopted which aims to have timely detection of all frauds and also to take the requisite financial information in determining and identifying the real culprit behind the deceit.

In this whole process of timely detection of frauds and reference of such case for due investigation, Forensic Audit has an imperative role in assisting the corporates to maintain efficiency as well as merit at par. In the larger perspective, Forensic Audit is a tool which aims to improve the efficiency, compliance, governance and merit parameters of financial and other regulatory aspects.

Aligning the augmenting need and significance of Forensic Auditing for making sure that a company's finances are being kept safe and in order has become a growing concern in today's business environment along with the rise in money laundering and wilful default cases, the Reserve Bank of India has recently made forensic audit mandatory for large advances and restructuring of accounts²

Reserve Bank of India has recently made forensic audit mandatory for large advances and for cases involving restructuring of accounts.
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The Enforcement Directorate and the Serious Fraud Investigation Office (SFIO) have also emphasized the need for forensic audit following the rise in money laundering and wilful default cases that are plaguing the banking system.
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Regulatory Reforms for enhancing the financial stability of the country also increases the importance of Forensic Audit in the country's fight against financial offenders.

Along with Reserve Bank of India making forensic audit mandatory for large advances and for cases involving re-structuring of accounts, the Enforcement Directorate and the Serious Fraud Investigation Office have also emphasized the need for forensic audit following the rise in money laundering and wilful default cases that are plaguing the banking system.³ They referred to the example that as the enactment of The Prohibition of Benami Property Transactions Act, 1988 increases the importance of Forensic Audit in the country's fight against financial offenders. There are other levels too, where forensic audit would prove to be a boon in settling down the principles of transparency and integrity in addition to settling down the accountability of real culprit.

The above discussion confirms that in order to assist in the paramount growth of Indian economy on the global platform under the realm of good governance, transparency, accountability and uprightness, Forensic Audit has become a need of the hour. With its key benefits in the form of objectivity, credibility, expert accounting, enhanced effectiveness and efficiency, Forensic Audit assures the growth of the corporates and development of the Indian Economy, which in turn leads to the inclusive growth of the emerging India. Therefore, it becomes imperative that the professionals should be well versed with basic concepts of Forensic Audit in order to effectively implement the means and techniques of Forensic Audit towards mitigating the corporate frauds and strengthening an efficient corporate culture in India.

In an era of supporting a robust economy of India, which is becoming one of the fastest emerging economies of the world, it is significant to encounter all the challenges affecting the directed growth of the economy. In such the efforts encountering the challenges, the menace of frauds and scams has to be encountered at the first instance in order to promote viable growth for corporates and economy as a whole.

2. ET Bureau (2017), *What Does Forensic Audit Achieve?*, *The Economic Times*, February 28, 2017.

3. *Ibid*

With the current phase of making a New India in the year 2022 as free from corruption on the lines of good governance, Forensic auditing is a –

- Rapidly growing area as a specialized branch of accounting and investigations and
- Is concerned with the detection and prevention of financial fraud and white-collar criminal activities.

In this context, this book serves as a ready reference to the principles, facets and the concept of Forensic Audit, providing a basic understanding to the meaning and significance of Forensic Audit, tools and techniques for conducting audit and investigations as well as the laws applicable to Forensic Audit and investigations in India.

FUNDAMENTALS OF FORENSIC AUDIT

Forensic Auditing is a discipline of detecting frauds in the organizations and gathering and presenting financial information in a form of evidences that will be accepted by a court of jurisprudence against perpetrators of economic crimes.

The integration of accounting, auditing, and investigative skills and evidences yields the specialty known as Forensic Auditing which focuses very closely on detecting or preventing financial fraud.

- “Forensic”, according to the Webster’s Dictionary means, “Belonging to, used in or suitable to courts of judicature or to public discussion and debate.”
- The word “Auditing” is defined as the examination or inspection of various books of accounts by an auditor followed by physical checking to make sure that all departments are following documented system of recording transactions. It is done to ascertain the accuracy of financial statements provided by the organization.⁴

With India being ranked as the 78th in the Global Corruption Perception Index⁵, the needs for forensic audit become all the more profound to strengthen the corporate culture with the vibes of good governance in the country.

The term forensic auditing’ refers to financial fraud investigation which includes the analysis of various books of accounts to prove or disprove financial fraud and serving as an expert witness in Court to prove or disprove the same.

Thus, basically, forensic auditing is the use of accounting or secretarial skills for legal purposes.



4. Definition of Audit, *The Economic Times*

5. India Corruption Rank at <https://tradingeconomics.com/india/corruption-rank>

Major fundamentals of Forensic Audit involves:

1. An audit
2. An investigation
3. An agreed-upon procedures engagement
4. A proactive search for fraud
 1. **Forensic Audit:** - An examination of evidence regarding an assertion to review its trail for reporting in a manner regarded suitable by the court of law.
 2. **Forensic Investigation:** - The utilization of specialized investigative skills in carrying out an inquiry conducted in such a manner that the outcome will have application to a court of law. A Forensic Investigation may be grounded in accounting, medicine, engineering or some other discipline.
 3. **Agreed Upon Procedural Engagement:** As the purpose of the forensic audit is to ensure that there is no financial deception in the organizations and it collects evidences after the examination of accounts and its records, therefore, it is required that forensic audit is done under the agreed procedures of Audit and Evidences. For instance for Company Audit, the auditor is required to prepare the audit report in accordance with the Company Auditor's Report Order (CARO) 2016. CARO requires an auditor to report on various aspects of the company, such as fixed assets, inventories, internal audit standards, internal controls, statutory dues, among others. Besides, the agency or entity directing the engagement should have locus standi on the matter.
 4. **Predicting the Unpredictable – A Proactive Search:** A Proactive search for fraud comprises a Forensic Audit Thinking. Forensic Audit Thinking involves –
 - The critical assessment throughout the audit
 - Of all evidential matter and
 - Maintaining a higher degree of professional skepticism
 - That fraud may have occurred, is occurring, or will occur in the future.

It further involves deciphering pattern, evaluating reports with figures to study their number patterns and comparing them with standards established looking for prima facie area of suspicion.

In this scenario, Forensic auditing aids in detecting, investigating and preventing frauds. Whether it is stock market fraud or bank fraud or cyber fraud; forensic auditing seems to be an essential tool for investigation and defining evidences against perpetrators.

ELEMENTS OF FRAUD

Fraud is an independent civil as well as a criminal offence, but it also appears in different contexts as the means used to gain legal advantage or accomplish a specific crime. For example, it is fraud for a person to make a false statement on a license application in order to engage in the regulated activity. A person who did so would not be convicted of fraud. Rather, fraud would simply describe the method used to break the law or regulation requiring the license.

Fraud must be proved by showing that the defendant's actions involved five separate elements :

- (1) A false statement of a material fact,
- (2) Knowledge on the part of the defendant that the statement is untrue,
- (3) Intent on the part of the defendant to deceive the alleged victim,

- (4) Justifiable reliance by the alleged victim on the statement, and
- (5) Injury to the alleged victim as a result.

These elements contain nuances that are not all easily proved. And that is the reason the tool of forensic audit is effective in identifying the fraud, proving the fraud, determining accountability of the malefactors of fraud and assisting the court of law in penalizing the wrongdoers.

In order to understand the fraud in clarity, one must go through the frauds related concepts which are described as below:

- **First**, not all false statements are fraudulent. To be fraudulent, a false statement must relate to a material fact.
- It should also substantially affect a person's decision to enter into a contract or pursue a certain course of action.
- A false statement of fact that does not bear on the disputed transaction will not be considered fraudulent.
- **Second**, the defendant must know that the statement is untrue. A statement of fact that is simply mistaken is not fraudulent.
- To be fraudulent, a false statement must be made with intent to deceive the victim.
- This is perhaps the easiest element to prove, once falsity and materiality are proved, because most material false statements are designed to mislead.
- **Third**, the false statement must be made with the intent to deprive the victim of some legal right.
- **Fourth**, the victim's reliance on the false statement must be reasonable.
- Reliance on a patently absurd false statement generally will not give rise to fraud; however, people who are especially gullible, superstitious, or ignorant or who are illiterate may recover damages for fraud if the defendant knew and took advantage of their condition.
- **Finally**, the false statement must cause the victim some injury that leaves her or him in a worse position than she or he was in before the fraud. A statement of belief is not a statement of fact and thus is not fraudulent. Puffing, or the expression of a glowing opinion by a seller, is likewise not fraudulent. For example, a car dealer may represent that a particular vehicle is "the finest in the lot." Although the statement may not be true, it is not a statement of fact, and a reasonable buyer would not be justified in relying on it.
- **Further**, the relationship between parties can make a difference in determining whether a statement is fraudulent. A misleading statement is more likely to be fraudulent when one party has superior knowledge in a transaction, and knows that the other is relying on that knowledge, than when the two parties possess equal knowledge. For example, if the seller of a car with a bad engine tells the buyer the car is in excellent running condition, a court is more likely to find fraud if the seller is an auto mechanic as opposed to a sales trainee. Misleading statements are most likely to be fraudulent where one party exploits a position of trust and confidence, or a fiduciary relationship. Fiduciary relationships include those between attorneys and clients, physicians and patients, stockbrokers and clients, and the officers and partners of a corporation and its stockholders.
- **A statement need not be affirmative to be fraudulent.** When a person has a duty to speak, silence may be treated as a false statement. This can arise if a party who has knowledge of a fact fails to disclose it to another party who is justified in assuming its nonexistence. For example, if a real estate agent fails to disclose that a home is built on a toxic waste dump, the omission may be regarded as a fraudulent statement. Even if the agent does not know of the dump, the omission may be considered

fraudulent. This is constructive fraud, and it is usually inferred when a party is a fiduciary and has a duty to know of, and disclose, particular facts.

- Fraud resembles theft in that both involve some form of illegal taking, but the two should not be confused. Fraud requires an additional element of “False Pretenses” created to induce a victim to turn over property, services, or money. Theft, by contrast, requires only the unauthorized taking of another’s property with the intent to permanently deprive the other of the property. Because fraud involves more planning than does theft, it is punished more severely.

The above discussion clarifies, that the menace of fraud is not easy to detect and it may be mean different acts, omissions and offences under different circumstances and further it requires vibrant evidences to prove the conduct as fraud. In these circumstances, forensic audit aids for detection and gathering evidence of frauds, embezzlement, or any other such white-collar crime. It is the application of accounting skills to legal questions.

KINDS OF FRAUDS

Fraud in general could be categorized in two category in legal parlance, which includes

1. Fraud as a civil wrong and
2. Fraud as a criminal offence

1. **Fraud as a Civil Wrong**, i.e. a tort : While the precise definitions and requirements of proof vary among jurisdictions, the requisite elements of fraud as a tort generally are the intentional misrepresentation or concealment of an important fact upon which the victim is meant to rely, and in fact does rely, to the harm of the victim. Proving fraud in a court of law is often said to be difficult. That difficulty is found, for instance, in that each and every one of the elements of fraud must be proven, that the elements include proving the states of mind of the perpetrator and the victim, and that some jurisdictions require the victim to prove fraud by clear and convincing evidence.

- The remedies for fraud may include rescission (i.e., reversal) of a fraudulently obtained agreement or transaction, the recovery of a monetary award to compensate for the harm caused, punitive damages to punish or deter the misconduct, and possibly others.
- In cases of a fraudulently induced contract, fraud may serve as a defense in a civil action for breach of contract or specific performance of contract.
- Fraud may serve as a basis for a court to invoke its equitable jurisdiction.

2. **Fraud as a Criminal offence** : It takes many different forms, some general (e.g., theft by false pretense) and some specific to particular categories of victims or misconduct (e.g., bank fraud, insurance fraud, forgery). The elements of fraud as a crime similarly vary. The requisite elements of perhaps the most general form of criminal fraud, theft by false pretense, are the intentional deception of a victim by false representation or pretense with the intent of persuading the victim to part with property and with the victim parting with property in reliance on the representation or pretense and with the perpetrator intending to keep the property from the victim. In a way mens rea or criminal intent remains a key ingredient of the offence. In Indian Law, implications of fraud is found in these following sections of IPC namely, 421, 422, 423 and 424.

- Fraudulent removal or concealment of property to prevent distribution among creditors
- Fraudulently preventing debt being available for creditors.
- Fraudulent execution of deed of transfer containing false statement of consideration.
- Fraudulent removal or concealment of property.

Kinds of Fraud specific to Economy and Financial Transactions

In specific to the impact on economy and financial transactions, frauds could be categorized as below:

- 1) Bank frauds
- 2) Corporate frauds
- 3) Insurance frauds
- 4) Cyber frauds
- 5) Securities frauds
 - 1) **Bank Frauds** : Bank fraud is a big problem in today's world. The number of bank frauds in India is substantial. It is in increasing with the passage of time in all the major operational areas in banking. There is different area in Bank Deposits, loan, inter branch, accounting, transaction etc.
 - 2) **Corporate Frauds** : In India, Corporate Frauds from leading Indian business are shaking the economy time and again from Satyam Computers which stunned the national financial world in 2009, when Satyam's Founder B. Ramalingan Raju declared he had inflated profit and jacked-up the company's Balance Sheet by more than one billion dollars to the recent incident of PNB Fraud in year 2017,. This needs to be checked strictly to ensure financial stability for emerging Indian economy.
 - 3) **Insurance Frauds** : There is different type of frauds in insurance sectors. E.g. health insurance, claims fraud, false claims, insurance speculations, application frauds etc.
 - 4) **Cyber Frauds** : Cyber Frauds are the frauds done with the help of the internet targeting the unauthorized use of digital instruments like credit card, ATM card, cyber equipment's at home etc.
 - 5) **Securities Frauds** : Apart from Corporate Frauds, Frauds in the Securities and Securities Market are also affecting many people time and again. From the perspective of frauds in securities, investor community could not forget the under truncate Rs. 4000 crore of Harshad Metha scam and over Rs. 1000 Crore of Ketan Parekh scams which duped the shareholder with the loss of their wealth in the big markets. In addition to this, the instances of Insider trading are also considered securities fraud in many circumstances. The recent misutilisation of clients securities by Karvy for securing loans for sister concern Karvy Reality could also be regarded as a securities fraud.

CORPORATE FRAUDS : AN INSIGHT

Fraud against a company can be committed either internally by employees, managers, officers, or owners of the company, or externally by customers, vendors, and other parties. Other schemes defraud individuals, rather than organizations.⁶

Internal Fraud: Internal fraud, also called occupational fraud, can be defined as: "the use of one's occupation for personal enrichment through the deliberate misuse or misapplication of the organization's resources or assets." Simply stated, this type of fraud occurs when an employee, manager, or executive commits fraud against his or her employer.

External Fraud: External fraud against a company covers a broad range of schemes. Dishonest vendors might engage in bid-rigging schemes, bill the company for goods or services not provided, or demand bribes from employees. Likewise, dishonest customers might submit bad checks or falsified account information for payment, or might attempt to return stolen or knock-off products for a refund. In addition, organizations also face threats of security breaches and thefts of intellectual property perpetrated by unknown third parties.

As reported time and again with various incidents like that of Nirav Modi in the early month of 2018, of Vijay Mallya,

6. Das Sandeep (2016), *Case Study on Forensic Audit*.

of Sahara Subrato Rao, of Satyam Computers, of 2G and alike, corporate scams are affecting the economic health of the companies time and again. With nearly over 250 scams in India since 1947, an approximate of 20.23 Trillion US Dollar loss has been reported.⁷

Deccan Chronicle in its article⁸ reported that India has seen a significant rise in incidence of fraud, cyber and security related incidents, which according to a private survey is higher than the global average. Around 89 per cent of the respondents in India who participated in the Kroll global fraud survey report said that they had experienced a fraud incident in the past one year. Respondents in India reported one of the world's highest incidences of theft of physical assets or stock, with two-fifths saying they had experienced this type of fraud, second only to those in Canada. Theft of intellectual property and market collusion are also high on the list of incidents of fraud in India. What is more interesting is that a higher proportion of respondents (45 per cent) in India cited joint venture partners as the main reason for increased exposure to fraud while 43 per cent attributed the role of junior employees for the likely occurrence of frauds.

According to the survey⁹, India figures among the top three countries globally for every category measuring fraud vulnerability except for vendor, supplier, or procurement fraud. Nearly nine in 10 respondents (87 per cent) cited information theft, loss, or attack as their greatest concern, 30 percentage points higher than the global average of 57 per cent.¹⁰

Internal financial fraud, IP theft, piracy, and counterfeiting were also significantly higher than the global averages. However, the survey noted that Indian corporates are becoming more aware of the risks and are implementing preventive measures such as financial controls and physical security systems. Coming to cyber related frauds, 84 per cent of the respondents said they experienced a cyber-attack in the last one year. Nearly half of these respondents experienced email-based phishing attacks. Virus/worm attacks were the second most common type of incident reported. The most common targets for cyber-attacks in India were employee records, trade secrets or intellectual property and customer records.

Henceforth, there seems an urgent need to implement the tool of forensic audit, which would be a great check on these frauds and in turn would boost the health of national economy.

RECENT CASES

PNB Scam: Nirav Modi was sometimes referred to as “jeweler to the stars,” with his pieces worn by Priyanka Chopra, Naomi Watts and Kate Winslet. Modi's seemingly charmed life came to a crashing halt in 2018 when the second-largest state-run Indian bank, Punjab National Bank (PNB), filed a police complaint against Modi, another jeweler Mehul Choksi and others, alleging the men had conspired with two of its staff to defraud the bank of nearly \$43 million.

After the Central Bureau of Investigation (CBI) launched an investigation in February, PNB revealed the total amount involved in the fraud was closer to \$2 billion. As the probe continued, regulators discovered that Modi conspired with bank employees to fraudulently obtain Letters of Undertaking (LoUs) from PNB. Letters of Undertaking act as a guarantee by the issuing bank, similar to Letters of Credit, and are often used in international banking transactions. The LoUs in question were issued from PNB via the Society for Worldwide Interbank Financial Telecommunication (SWIFT) network and were issued without proper authorization. They also were not recorded in PNB's record-keeping system, allowing Modi and Choksi to avoid detection while obtaining loans in other countries.

Modi fled India before the scandal broke. As a result of the fraud, the Reserve Bank of India (RBI) discontinued the acceptance and issuance of LoUs. The RBI also ordered the Indian financial institutions to integrate the SWIFT network with their central information systems. As of print, Modi is still considered a fugitive.

7. *The CS Club India*.

8. *Deccan Chronicle (2017), India Sees Rise in Corporate Frauds, Business News, The Deccan Chronicle*.

9. *Deccan Chronicle (2017), India Sees Rise in Corporate Frauds, Business News, The Deccan Chronicle*.

10. *Fraud and Corporate Governance: Changing Paradigm in India – Survey Findings, Ernst and Young, India Today*

Forensic Audit on Dena Bank¹¹: Finance Ministry ordered forensic audit on Dena Bank and OBC in Rs. 437-Crore fraud. The Finance Ministry has ordered a forensic audit of Dena Bank and Oriental Bank of Commerce after some of their Mumbai-based branches allegedly misappropriated funds worth Rs. 437 crore, mobilised through fixed deposits. In the case of Dena Bank, the misappropriation was to the tune of Rs. 257 crore and related to funds mobilised from seven corporate. In Oriental Bank's case, it related to misappropriation of funds amounting to Rs. 180 crore, reportedly belonging to the Jawaharlal Nehru Port Trust. The Central Bureau of Investigation is already looking into the alleged fraud. The developments are disparate ones and took place at different times. But a common feature could be that they centered on mobilising deposits: fixed deposits/bulk deposits. The incidents have again brought to the fore the weak risk management systems in public sector banks. "The persons responsible have been taken to task; some disciplinary action is being taken. There are also some suspensions, some transfers..." said Financial Services Secretary GS Sandhu. He was speaking on the sidelines of a realty and banking conclave in Mumbai. Shri Sandhu added that the Finance Ministry would soon make it mandatory for all senior officers — Deputy General Managers and GMs — to undergo a compulsory risk management course before they are considered for promotions. He said these instances (of misappropriation) have happened at the lower/branch level because of lack of due diligence and non-adherence to norms or procedures. Shri SL Bansal, Former CMD of Oriental Bank, told Business Line in New Delhi that the bank had furnished the necessary information to the forensic auditor. The incident in Oriental Bank of Commerce dated to February 2014 and the bank had swung into action early in March itself to nip the fixed deposit scam in the bud, said Shri Bansal. Of the initial amount of Rs. 180 crore, as much as Rs. 110 crore was immediately recovered and handed over to the original remitter, he added.

DIRECTORS' RESPONSIBILITIES

The ubiquitous issue of corruption and the high risk of internal fraud raise serious concerns about the liability of corporate directors. India has learned a lot in recent years, and its laws have gradually evolved in this context.¹²

Director liability in India can be divided into two principal areas:

- (1) liability under the Companies Act 2013 (the 2013 Act); and
- (2) Liability under other Indian statutes.

There has been a seminal shift in the Indian corporate legal regime with the enactment of the 2013 Act and more recent amendments.

For instance :

- Penalties under the erstwhile 1956 Act that were seen as ineffective have been significantly amplified under the 2013 Act.
- The 2013 Act also provides statutory recognition to the duties of a director, such as exercise of due and reasonable care, skill, diligence, and independent judgment.
- One of the key concepts of the Companies Act is the meaning of the term "officer who is in default." Under the act, liability for default by a company has been imposed on an officer who is in default.
- By virtue of their positions in the company, the managing director, the whole-time director, the CEO, the CFO and the company secretary directly fall within the scope of this term.
- Under the erstwhile 1956 Act, certain key employees such as the chief executive officer and chief financial officer did not directly come within the ambit of the term, which raised serious concerns because these personnel were viewed as key officials in any company.

11. <https://www.fraud-magazine.com/2018Top5Frauds/>

12. Source: Desai and Kabra, *Global Litigator: Director and Officer Liability in India*, Litigation, Volume 41, Number 4, Summer 2015. © 2015 by the American Bar Association

- The 2013 Act corrects this anomaly and significantly expands the scope of the expression “officer in default.” The term also includes the following:
 - i. any individual who, under the superintendence, control, and direction of the board of directors, exercises the management of the whole, or substantially the whole, of the affairs of a company;
 - ii. any person on whose advice, directions, or instructions the board of directors is accustomed to act, other than persons giving advice in a professional capacity; and
 - iii. Every director aware of wrongdoing by virtue of knowledge of or participation in proceedings of the board without objection.

This way, under Companies Act, 2013, the scope of Director Responsibility has been expended to stop the tendencies of fraud in the Corporates. Directors can be held liable both jointly and collectively, for any and every act, commission or omission which is prejudicial to the interests of the company and violates any of the duties to be discharged by them.¹³

A ready reference of Directors Responsibility is chalked as under:

Director’s Personal Liability

As a general rule, since the company and its Director are separate entities, the Director has no personal liability on behalf of the company. However, under certain circumstances, a Director may be held liable on behalf of the company. These circumstances are:

- Liability for Tax
- Debts of the Company
- Liability for company’s contracts
- Refund of share application money
- Liability to pay for qualification shares
- Mis-statement in the prospectus
- Fraudulent conduct of business: A Director may be held personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company if he or she was knowingly party to the fraudulent carrying on of business.
- Unlimited Liability: The liability of any or all of the Directors of a limited company can be unlimited if so provided by the Memorandum, or can be so done if approved by a special resolution as authorized by the Articles.

Criminal Liability

- Dishonored Cheque
- Mis-statement in the Prospectus
- Offences under the Income Tax Act, 1961
- Offences under Labour Laws
- Corporate Frauds

13. Doraswamy and Raja (2011), *Liabilities Of Directors; Persons Who Can Bring Actions Against The Directors, The Mondaq*.

Lifting of Corporate Veil

Lifting the veil under the Companies Act

If, in the course of winding up, it appears that any business of the company has been carried on with an intent to defraud the creditors of the company or any other person, or for any fraudulent purpose, the persons who were knowingly parties to the carrying on of the business in such fraudulent manner shall be personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

Lifting of Veil as recognized by courts

The scope of this principle as applied by Indian courts is broad and largely dependent on the facts of an individual case. The corporate veil may be lifted where:

- a statute itself contemplates this;
- where fraud or improper conduct is intended to be prevented;
- where a taxing statute or a beneficial statute is sought to be evaded; or
- where associated companies are inextricably connected as to be, in reality, part of one concern.

The nature of the impugned conduct, the involvement of the public interest and the effect on the affected parties are all relevant considerations while determining whether or not to lift the corporate veil.

Ultra Vires

A shareholder may bring an action against the company and its Directors in respect of matters which are *ultra vires* the Memorandum or the Articles of the company and which no majority shareholders can sanction. For example, Directors of the company sanctioning an action that is contrary to the objects of the company.

Fraud on Minority

Directors and the company would also be liable if the conduct of the majority of the shareholders constitutes a “fraud on minority”, i.e., a discriminatory action. For example, where the shareholders have passed a special resolution with an effect of discriminating between the majority shareholders and minority shareholders, so as to give the former an advantage of which the latter were deprived.

Actions against Directors by SEBI

In the case of listed companies, SEBI may proceed against the Director(s) where the Directors of a listed public company fail to make certain disclosures as stipulated under the SEBI (Acquisition of Shares & Takeovers) Regulations, 1997 and SEBI (Prohibition of Insider Trading) Regulations, 1992, in respect of their shareholdings in the company.

Liability under Prevention of Money Laundering Act, 2002 (PMLA)

Further, Through the Finance Bill, 2018, the government amended the Prevention of Money Laundering Act, 2002 (PMLA). The handling of proceeds from corporate frauds will now be a money- laundering offence. As the PMLA gives Enforcement Directorate the power to attach and confiscate property determined to be proceeds of crime, the amendment will help authorities to prevent the dissipation of proceeds from corporate frauds. However, the unintended repercussion of the amendment will be innocent parties being questioned about their dealings with a company where fraud is discovered and potentially having their assets seized or directors arrested. Therefore, it is critical for directors (including independent directors) and officials of companies to now maintain high vigil.¹⁴

14. Desai Deepak (2018), *Directors' Liability in Case of Fraud*, the Live Mint

DEVELOPMENTS IN CYBER WORLD

Information technology is now omnipresent and to master prevention and investigation of frauds and pursue cyber forensics, one needs to be well versed with technological advances in the cyber domain and their applications and challenges. Towards this end, these advancements are discussed below:

1. **Virtual Reality (VR)** is the use of computer technology to create a simulated environment. Unlike traditional user interfaces, VR places the user inside an experience. Instead of viewing a screen in front of them, users are immersed and able to interact with 3D worlds. By simulating as many senses as possible, such as vision, hearing, touch, even smell, the computer is transformed into a gatekeeper to this artificial world.

Augmented Reality (AR) is an extension of VR which simulates artificial objects in the real environment. For e.g. One could check which spectacle, hair style or a piece of clothing suits you without even actually wearing one. Similarly one could design one's living room with virtual furniture before ordering the selected piece of furniture.

These developments could be applied for cyber forensics training and re-building the crime scene.

2. **Artificial intelligence (AI)** is the simulation of human *intelligence* processes (thinking / acting humanly and rationally) by machines and computer systems.

Few common examples of AI are: smart assistants like Siri and Alexa, spam filters on email, social media monitoring tools for false news, recommendations by Netflix, Google search, Self-driving cars, etc.

3. **Blockchain** is an ever growing list of records, called blocks that are linked using cryptography. Besides a cryptographic hash of the previous block, each block contains a timestamp and transaction data. By design, a blockchain is resistant to modification of the data. It is an open and distributed ledger that can record transactions between parties in a verifiable and permanent manner. For use as a distributed ledger, a blockchain is typically managed by a peer-to-peer network collectively adhering to a protocol for inter-node communication and validating new blocks. Once recorded, the data in any given block cannot be altered retrospectively without alteration of all subsequent blocks, which requires consensus of the network majority.
4. **Big Data** is a term that describes the large volume of data – both structured and unstructured. Big data can be analyzed for insights that lead to better decisions and strategic business moves. Rightly it's not the amount of data that's important. It's what organizations do with the data that matters. Determining root causes of failures, issues and defects in near-real time.

Applications of Big Data include: generating discount / cash back coupons at the point of sale based on the customer's buying habits; Recalculating entire risk portfolios in minutes; and importantly detecting fraudulent behaviour before it affects any organization.

5. Robotics

Software robotics as a branch of Robotics is the use of bot programs to automate repeated computer tasks. Software robotics is synonymous with robotic process automation (RPA). Its potential benefits include increased efficiency, accuracy, customer satisfaction and visibility, and lower costs.

To understand the concept better let us benchmark with the concept of running macros in an excel template. These macros are constrained to function in particular software. RPA on the other hand could be programmed to work across multiple softwares and applications. This could be a challenge as well a tool for the forensic team.

6. Internet of Things (IoT)

IoT is simply the network of interconnected things/devices which are embedded with sensors, software, network connectivity and necessary electronics that enables them to collect and exchange data making them responsive.

For eg. Inter-connectedness of Smart homes, smart assistants and smart vehicles with the world wide web which in turn is generating data lakes of big data. This is going to change the way in which families, societies, regulators, investigators and states function.

LESSON ROUND UP

- In order to facilitate the growth of Indian economy on the global platform under the realm of good governance, transparency, accountability and uprightness, Forensic Audit has become a need of the hour.
- Forensic Auditing is a discipline of detecting frauds in the organizations and gathering and presenting financial information in a form of evidences that will be accepted by a court of jurisprudence against perpetrators of economic crimes
- Forensic”, according to the Webster’s Dictionary means, “Belonging to, used in or suitable to courts of judicature or to public discussion and debate.”
- The word “Auditing” is defined as the examination or inspection of various books of accounts by an auditor followed by physical checking of inventory to make sure that all departments are following documented system of recording transactions. It is done to ascertain the accuracy of financial statements provided by the organization.
- Major Fundamentals of Forensic Audit involves:
 1. An audit
 2. An investigation
 3. An agreed-upon procedures engagement
 4. A proactive search for fraud
- Fraud in general could be categorized in two category in legal parlance, which includes
 1. Fraud as a Civil Wrong and
 2. Fraud as a criminal Offence
- In specific to the impact on economy and financial transactions, frauds could be categorized as below:
 1. Bank frauds
 2. Corporate frauds
 3. Insurance frauds
 4. Cyber frauds
 5. Securities frauds
- Director liability in India can be divided into two principal areas:
 - (1) Liability under the Companies Act 2013 (the 2013 Act); and
 - (2) Liability under other Indian statutes.

- There has been a seminal shift in the Indian corporate legal regime with the enactment of the 2013 Act and more recent amendments.

SELF-TEST QUESTIONS

1. Discuss the fundamentals of Forensic Audit.
2. What is the contemporary scenario of corporate frauds in India? How Forensic Audit is key to prevent the same?
3. What are the various kinds of fraud? Discuss.
4. Write a short note on Directors' Responsibility.

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Lesson 3

Audit and Investigations

LESSON OUTLINE

- Tools for handling Forensic Audit
- Forensic Audit Thinking (Thinking Forensically)
- Forensic Audit Procedures
- Appropriate Use of Technology
- Tools for handling Forensic Audit and the Role of Company Secretary
- Role of CS as a Forensic Auditor
- Fraud and Companies Act, 2013
- Investigation Mechanism
- Types of Investigations
- Methods of Investigations
- Red Flags
- Green Flags
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Right from conducting forensic audit to examining the evidences, from finding the culprit behind the fraud to appearing in the court for submitting the testimony, a Company Secretary due to his professional excellence is apt in serving as a forensic auditor.

Forensic audit is a detailed engagement which requires the expertise of not only accounting and auditing procedures but also expert knowledge regarding the legal framework, and a forensic auditor is required to have an understanding of various frauds that can be carried out and of how evidence needs to be collected.

In this context, Company Secretary is a catalyst in upholding good governance via Forensic Audit. His role specific to Forensic audit is the main objective of this lesson. The lesson aims to provide a clear understanding about the matters w.r.t. Tools for handling Forensic Audit and the Role of Company Secretary; Investigation Mechanism; Field Investigations; Methods of Investigations; Red Flags; Green Flags and incidental areas.

TOOLS FOR HANDLING FORENSIC AUDIT

Forensic Auditing is a new concept that comprises three key ingredients:

1. Forensic Audit Thinking—in other words —thinking forensically
2. Forensic Audit Procedures—both proactive and reactive
3. Appropriate use of technology and data analysis



The key elements are discussed in detail below :¹

1. Forensic Audit Thinking (Thinking Forensically)

Involves the critical assessment throughout the audit of all evidential matter and maintaining a higher degree of professional skepticism that fraud or financial irregularity may have occurred, is occurring, or will occur in the future. Furthermore, Forensic thinking is a mind shift where the auditor believes that the possibility of fraud or financial irregularity may exist and the controls may be overridden to accomplish that possibility. Forensic thinking is used throughout the audit work i.e. from start to finish.

2. Forensic Audit Procedures

Forensic audit procedures are more specific and geared toward detecting the possible material misstatements in financial statements resulting from fraudulent activities or error.

Audit procedures should align with **Fraud Risks** and **Fraud Risk Assessments**.

According to Donald R. Cressy, in his proposition —Fraud Triangle.²

1. Ibrahim Kabir, *Forensic Audit, Forensic Tools and Techniques for Internal Auditors*.

2. Ibrahim Kabir, *Forensic Audit, Forensic Tools and Techniques for Internal Auditors*.

He highlighted that there are three interrelated elements that enable someone to commit fraud:

- (a) The **Motive** that drives a person to want to commit the fraud,
- (b) The **Opportunity** that enables him to commit the fraud, and
- (c) The ability to **Rationalize** the fraudulent behavior.

The vulnerability that an organization has to those capable of overcoming all three elements of the fraud triangle is **fraud risk**. Fraud risk can come from sources both internal and/or external to the organization.

Fraud Risk Assessment

A fraud risk assessment is a powerful proactive tool in the fight against fraud for any organization. According to Association of Certified Fraud Examiners, Fraud Risk assessment is a process aimed at proactively identifying and addressing an organization's vulnerabilities to internal and external fraud.

It is important to think about a fraud risk assessment as an ongoing, continuous process, rather than just an adhoc activity.

A fraud risk assessment starts with an identification and prioritization of fraud risks that exist in the organization.

Performing Forensic Procedures

Those performing forensic procedures (either the auditor or other forensic specialists like certified fraud examiners, etc.) may consider having:

- An investigative mindset which should be more than skeptical.
- An understanding of fraud schemes termed as occupational fraud (corruption, asset misappropriation and financial statement fraud).
- Experience in dealing with fraud issues.
- Knowledge of certain investigative, analytical, and technology-based techniques (digital or computer forensics, i.e. how to gather, analyze and interpret data)
- Knowledge of legal processes.

3. Appropriate Use of Technology

Forensic Data Analysis can be used to prevent, detect and control fraud along with other irregularities.

Forensic Data Analysis

Forensic data analysis is the process of gathering, summarizing, comparing, and aggregating existing different sets of data that organizations routinely collect in the normal course of business with the goal of detecting anomalies that are traditionally indicative of fraud or other misconduct (Donald, 2007).

Benefits of Forensic Data Analysis

The following are some of the benefits of using forensic data analysis tools and techniques;

- Analyzes 100% of data sets rather than using statistical sampling—such as Risk Based Sampling.
- Can help identify potential control environment weaknesses.
- Can assist with the assessment of the effectiveness of existing anti-fraud and fraud risk management programs and practices.
- Can help to Identify potential policy and process violations—vendor acceptance/approval process, bidding, etc.

- Can assist with interviews in investigations.

Data Analysis Tools

1. Forensic Data Analysis Process
 - (i) Acquire Data and Normalize
 - (ii) Brainstorming and Real-Time Data Analysis
 - (iii) Output and Anomalies
2. Digital and Frequency Testing – Benford Analysis
3. Analytical Testing – Income Statement Items
4. Related Party Transaction Analysis – e-Discovery

Tools for handling Forensic Audit and the Role of Company Secretary

It is reiterated time and again that good governance is paramount for the inclusive growth of the country. While promoting the community confidence, their participation, transparency, accountability, lead to better decisions embarking the welfare of the masses and supporting ethical decision making, which results in bright future of the nation at global platform. In similar context, India has opted to Reform, Perform, Transform under vision New India, 2022, adhering to the best practices of good governance. In this direction, we are witnessing various legal reforms like GST, RERA, IBC, and Benami Act and so on.

The objects of all these reforms and initiatives is to support and ensure inclusive growth and development of the nation in the all the sphere while encountering the challenges hindering the growth in those spheres.

When talking the all compassing growth, economic growth is one of the significant spheres to be adhered with the premium practices of good governance and henceforth the glitches bugging the emerging growth of economy are tackled by the government at priority.

In this context among other things, Corporate Frauds are considered as one of the major challenges which is obstructing the growth of corporates as well as of economy as a whole.

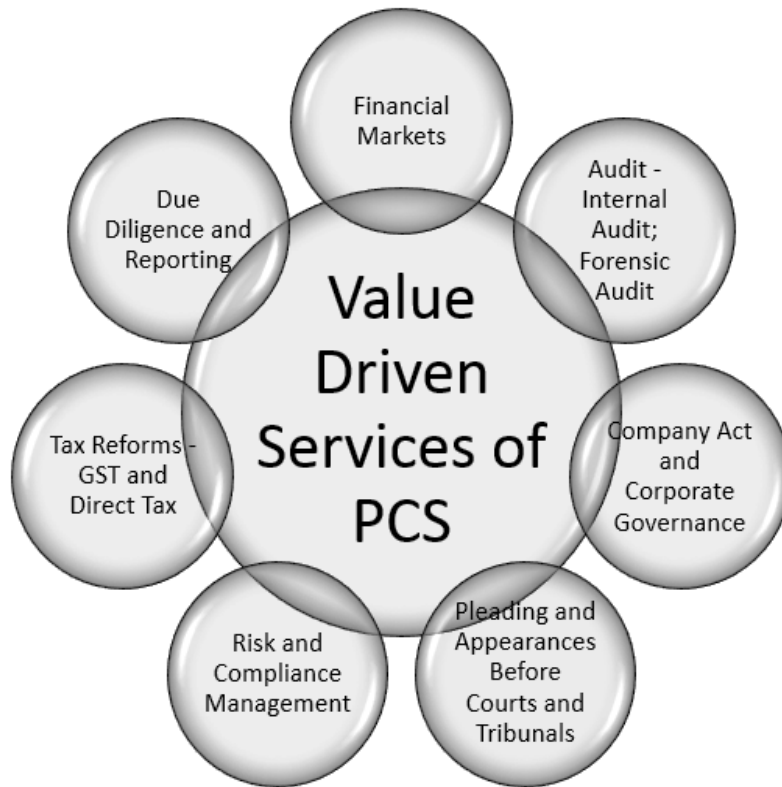
It needs to be comprehended that corporate compliance lies not only in the adequacy of legislature, but more in its implementation. Here comes the effective role of Company Secretaries to implement the various laws in word and in spirit so as to eradicate frauds completely. Implementation of law should be given more importance for reducing the occurrence of fraud. Indeed, a directed implementation of the provisions promoting the parameters of good governance is similar to what is blood for the arteries.

Under this context, one must not forget that in the last five decades, the Institute of Company Secretaries of India along with its expert professional community has immensely contributed in turning each and every stone positively spearheading the successful implementation of good and sustainable governance in our country.

In the paraphrase of reforms, the performance and role of Company Secretaries tends to be vital. It is the Company Secretary who balances the interest of various stakeholders and ensure well complied mechanism of these reforms. It is rightly said that Company Secretary is the conscience keeper of the corporate world.

Rightly quoted by honorable Prime Minister during the inauguration of ICSI Golden Jubilee on October 4, 2017 that “Company Secretaries decides the Corporate Culture of India”, and he felt utmost contented of the fact that Company Secretaries ensures in all the ways that the companies in India follow the laws and regulations, do not mishandle the accounts, and are honest in their work.³”

3. PM addresses Company Secretaries, Press Information Bureau, Government of India, October 4, 2017.



In the environment where government is focussed on establishing the premium practices of governance in general and of corporate governance in specific, Company Secretaries both in practice and employment are providing their value driven professional expertise in the varied domains of corporate transformation viz., Financial Markets, Capital Market, Secretarial Audit, Forensic Audit, Due Diligence and Reporting, IBC, Valuation, RERA, GST, Direct Tax, Internal Audit, Risk and Compliance Management, Insolvency Professionals before NCLT and NCLAT, and many more.

Among all, the role of company secretaries is expanding in the era of forensic audit wherein they are crucially instrumental in preventing, regulating and penalizing in the instance of corporate frauds.



Source: Durkin Forensic Incorporated

To summarize, where forensic audit is a detailed engagement which requires the expertise of not only accounting and auditing procedures but also expert knowledge regarding the legal framework, and a forensic auditor is required to have an understanding of various frauds that can be carried out and of how evidence needs to be collected.

In this context, Company Secretary is a catalyst in upholding good governance via Forensic Audit. His role specific to Forensic audit is discussed as below:

Role of CS as a Forensic Auditor⁴

A Forensic Auditor is often retained to analyze, interpret, summarize and present complex financial and business-related issues in a manner that is both understandable and properly supported. Forensic Auditors can be engaged in public practice or employed by insurance companies, banks, police forces, government agencies and other organizations. The Role of Company Secretary as a Forensic Auditor may be understood as follows:

1. Criminal Investigations

A Company Secretary would use his/her investigative accounting skills to examine the documentary and other available evidence to give his/her expert opinion on the matter. Their services could also be required by Government departments, the Revenue Commissioners, etc. for investigative purposes. Practicing forensic accountants could be called upon by the police to assist them in criminal investigations which could either relate to individuals or corporate bodies.

2. Personal Injury Claims

Where losses arise as a result of personal injury, insurance companies sometimes seek expert opinion from a forensic auditors before deciding whether the claim is valid and how much to pay.

3. Fraud Investigations

A Company Secretary might be called upon to assist in business investigations which could involve funds tracing, asset identification and recovery, forensic intelligence gathering and due diligence review. In cases involving fraud perpetrated by an employee, the forensic auditors will be required to give his/her expert opinion about the nature and extent of fraud and the likely individual or group of individuals who have committed the crime. The forensic expert undertakes a detailed review of the available documentary evidence and forms his/her opinion based on the information gleaned during the course of that review.

4. Investigation and Inspection

Company Secretary may help the Police, ACB and other investigating authorities in collecting evidences and other investigation purposes. For example, section 157 of Cr.P.C, 1973; sections 17 and, 18 of the Prevention of Corruption Act, 1988; Section 6 of The Bankers Books Evidence Act, 1891; Section 78 of Information Technology Act, 2000; Section 447 of the Companies Act, 2013 states that the Court or Police may require the skills of Forensic auditors while inspecting any books in so far as related to the accounts of an accused.

2. Expert Opinion

Company Secretaries see and carefully examine the accounts and balance sheets and use his skills to find out whether there is any fraud committed or any anomaly associated with it by giving his expert opinion. For eg., this finds place in section 45, section 118 of Indian Evidence Act, 1872; section 293 of Cr. P.C, 1973.

4. Shaheen et al. (2014), *Forensic Audit and Fraud Examination in India*, *International Journal of Innovative Research and Development*, Vol 3, Issue 12.

6. Professional Negligence

The forensic auditor might be approached in a professional negligence matter to investigate whether professional negligence has taken place and to quantify the loss which has resulted from the negligence. A matter such as this could arise between any professional and their client. The professional might be an accountant, a lawyer, company secretary etc. The forensic expert uses his/her investigative skills to provide the services required for this assignment.

7. Expert Witness Cases

Company Secretary as Forensic Auditor often attend court to testify in civil and criminal court hearings, as expert witnesses. In such cases, they attend to present investigative evidence to the court so as to assist the presiding judge in deciding the outcome of the case.

8. Mediation and Arbitration

Some forensic auditors because of their specialist training they would have received in legal mediation and arbitration, have extended their forensic auditing practices to include providing Alternative Dispute Resolution (ADR) services, in absence of which a matter could be expensive and time consuming for individuals or businesses involved in commercial disputes with a third party.

9. Litigation Consultancy

Company Secretaries are eligible to be engaged in litigation and assisting with evidence, strategy and case preparation.

10. Computer Forensics

A Company Secretary is trained to assist in electronic data recovery and enforcement of IP rights etc.

Fraud and Companies Act, 2013⁵

The financial/ corporate frauds and scams which have taken place in India, required the attention of the Law makers. It was high time to evaluate the high standards in corporate governance and implement stringent provisions to tackle corporate Fraud. The problem was on the rise both in its frequency and severity. The increasing rate of white-collar crimes demanded stiff penalties, exemplary punishments and effective enforcement of law with the right spirit. Examples: Our country has witnessed several corporate Frauds, till date e.g. Rs. 5,000 crore Harshad Mehta scam in 1992, Rs. 7,000 crore Satyam fiasco in 2009, the Rs. 27,000 crore Sahara fraud case which started in 2010 and was tackled strictly by the Supreme Court of the country. Therefore, the government via Companies Act, 2013 has introduced the definition of fraud for the corporates and also settled down provisions of the regulatory authority and professionals to take measures against the corporate frauds in the country.

The Companies Act, 2013, ("the Act") focuses on the issues related to corporate Fraud, as is visible, it may continue in the future too. The Fraud provisions are in force w.e.f. September 12, 2013 and Fraud Reporting provisions are brought in force w.e.f. April 1, 2014 under the Act.

What is Fraud as per Companies Act, 2013

As per Section 447 – 'Fraud' –

1. In relation to affairs of a company or a body corporate, includes:

- Any act,
- any omission,

5. Source: *Fraud and Companies Act, 2013*, R&A Associates. Available at: <http://www.rna-cs.com/fraud-and-the-companies-act-2013/>

46 PP-FA

- concealment of any fact, or,
 - abuse of position
2. Committed by a person or any other person with the connivance in any manner –,
- with intent to deceive,
 - to gain undue advantage from, or
 - to injure the interests of -
 - the company, or,
 - its shareholders , or,
 - its creditors, or,
 - any other person,
3. Whether or not there is any:
- any wrongful gain, or
 - any wrong loss.
4. Where
- "Wrongful Gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;
 - "Wrongful Loss" means the loss by unlawful means of property to which the person losing is legally entitled.

The definition which clearly talks about the corporate fraud says that Corporate Fraud would mean the actions, omissions, concealment of the facts, should be done to deceive or to gain undue advantage which shall result in loss to the company or its shareholders or its creditors or any other person associated with the company and with or without any wrongful Gain or wrongful Loss in the transaction.

Power and Duties of Auditors⁶

1. Section – 143 of Companies Act, 2013 talks about the power and duties of auditors and auditing standards. It reads: *"Every auditor of a company shall have a right of access at all times to the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place and shall be entitled to require from the officers of the company such information and explanation as he may consider necessary for the performance of his duties as auditor and amongst other matters inquire into the following matters, namely: –*

- a. *whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members;*
- b. *whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company;*
- c. *where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company;*
- d. *whether loans and advances made by the company have been shown as deposits;*

6. Also See, Arora Gunjan (2014), *Power and Duties of Auditors in Companies Act, 2013*.

- e. *whether personal expenses have been charged to revenue account;*
- f. *where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading:*

Provided that the auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries in so far as it relates to the consolidation of its financial statements with that of its subsidiaries.

2. The auditor shall make a report to the members of the company on the accounts examined by him and on every financial statements which are required by or under this Act to be laid before the company in general meeting and the report shall after taking into account the provisions of this Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Act or any rules made there under or under any order made under sub-section (11) and to the best of his information and knowledge, the said accounts, financial statements give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.

3. The auditor's report shall also state –

- a. *whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements;*
- b. *whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;*
- c. *whether the report on the accounts of any branch office of the company audited under sub-section (8) by a person other than the company's auditor has been sent to him under the proviso to that sub-section and the manner in which he has dealt with it in preparing his report;*
- d. *whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns;*
- e. *whether, in his opinion, the financial statements comply with the accounting standards;*
- f. *the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company;*
- g. *whether any director is disqualified from being appointed as a director under sub-section (2) of section 164;*
- h. *any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith;*
- i. *whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls;*
- j. *such other matters as may be prescribed.*

4. Where any of the matters required to be included in the audit report under this section is answered in the negative or with a qualification, the report shall state the reasons therefor.

5. In the case of a Government company, the Comptroller and Auditor-General of India shall appoint the auditor under sub-section (5) or sub-section (7) of section 139 and direct such auditor the manner in which the accounts

of the Government company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India which, among other things, include the directions, if any, issued by the Comptroller and Auditor-General of India, the action taken thereon and its impact on the accounts and financial statement of the company.

6. The Comptroller and Auditor-General of India shall within sixty days from the date of receipt of the audit report under sub-section (5) have a right to, –

- a. conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorize in this behalf; and for the purposes of such audit, require information or additional information to be furnished to any person or persons, so authorized, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General of India may direct; and
- b. comment upon or supplement such audit report:

Provided that any comments given by the Comptroller and Auditor-General of India upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under sub section (1) of section 136 and also be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

7. Without prejudice to the provisions of this Chapter, the Comptroller and Auditor- General of India may, in case of any company covered under sub-section (5) or sub-section (7) of section 139, if he considers necessary, by an order, cause test audit to be conducted of the accounts of such company and the provisions of section 19A of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971, shall apply to the report of such test audit.

8. Where a company has a branch office, the accounts of that office shall be audited either by the auditor appointed for the company (herein referred to as the company's auditor) under this Act or by any other person qualified for appointment as an auditor of the company under this Act and appointed as such under section 139, or where the branch office is situated in a country outside India, the accounts of the branch office shall be audited either by the company's auditor or by an accountant or by any other person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country and the duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor, if any, shall be such as may be prescribed:

Provided that the branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.

9. Every auditor shall comply with the auditing standards.

10. The Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority:

Provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.

11. The Central Government may, in consultation with the National Financial Reporting Authority, by general or special order, direct, in respect of such class or description of companies, as may be specified in the order, that the auditor's report shall also include a statement on such matters as may be specified therein.

12. Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.

13. No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred to in sub-section (12) if it is done in good faith.

14. The provisions of this section shall *mutatis mutandis* apply to –

- a. The cost accountant in practice conducting cost audit under section 148; or
- b. The company secretary in practice conducting secretarial audit under section 204.

15. If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.”

Therefore in accordance with Section 143 the Power and Duties of a Company Secretary are as below:

Powers

Right to access: Every auditor of a company shall have right to access at all time to book of accounts and vouchers of the company. The Auditor shall be entitled to require from officers of the company such information and explanation as he may consider necessary for performance of his duties. There is an inclusive list of matter for which auditor shall seek information and explanation. The list includes issues related to: (a) Proper security for Loan and advances, (b) Transaction by book entries, (c) Sale of assets in securities in loss, (d) Loan and advances made shown as deposits, (e) Personal expenses charged to revenue account, (f) Case received for share allotted for cash. The auditor of holding company also has same rights.

Auditor to sign audit reports: The auditor of the company shall sign the auditor's report or sign or certify any other document of the company and financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

Auditor in general meeting: It is a prime requirement under section 146, that the company must send all notices and communication to the auditor, relating to any general meeting, and he shall attend the meeting either through himself or through his representative, who shall also be an auditor. Such auditor must be given reasonable opportunity to speak at the meeting on any part of the business which concerns him as the auditor.

Right to remuneration: The remuneration of the auditor of a company shall be fixed in its general meeting or in such manner as may be determined therein. It must include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him but does not include any remuneration paid to him for any other service rendered by him at the request of the company.

Consent of auditor: As per Section 26, the company must mention in their prospectus the name, address and consent of the auditors of the company.

Duties

Fraud Reporting: Among others, fraud reporting is one of the major duties of a Company Secretary in the context of forensic audit. If an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed. During the Performance of his duties against Corporate Frauds, a Company Secretary should keep in view the following.

Offence of Fraud Non- Compoundable

As the punishment for Fraud is both imprisonment and fine, it is considered a non-compoundable offence. It shows that, the commission of Fraud has become a serious offence in the eyes of law. The Act has provided

punishment for fraud under Section 447 and around twenty sections of the Act talk about fraud committed by the directors, key managerial personnel, auditors and/or officers of company. Thus, the new Act goes beyond professional liability for fraud and extends to personal liability, if a company contravenes such provisions. Here, the contravention of the provisions of the Act with an intention to deceive are also considered as fraud, to name a few acts amounting to fraud-

- Furnishing of false information at the time of incorporation of company by promoters, first directors or any other person – Section 7(5)&(6)
- Managing the affairs of the non-profit company fraudulently – Section 8(11)
- Misrepresenting any material information in prospectus – Section 34
- Inducing any person fraudulently to invest money – Section 36
- Making of applications for acquisition of any securities in fictitious names – Section 38(1)
- Issue of duplicate shares of company with intent to defraud or deceive – Section 46(5)
- Transfer of any shares by depository or depository participant with an intent to defraud, deceive any person – Section 56(7)
- Concealment of name or misrepresenting the amount of claim knowingly of any creditor – Section 66(10)
- Failure to repay deposit with intent to defraud depositor -Section 75(1)
- Furnishing of false statement, mutilation, destruction of secretarial documents – Section 229
- Conducting business to defraud its creditors, members or any other person – Section 213 (proviso)

Punishment for Fraud (section 447)

Section 447 reads that ‘Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.’

Punishment for False Statement (Section 448)

If in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement, –

- which is false in any material particulars, knowing it to be false; or
- which omits any material fact, knowing it to be material

he shall be liable under section 447.

Punishment for False Evidence (Section 449)

If any person intentionally gives false evidence –

- upon any examination on oath or solemn affirmation; or

- in any affidavit, deposition or solemn affirmation in or about winding up of any company under this Act, or otherwise in or about any matter arising under this Act,

He shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years (and with fine which may extend to Rupees Ten Lakh (Rs. 10 Lakh).

Punishment Where No Specific Penalty or Punishment Is Provided (Section 450)

If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder and for which no penalty or punishment is provided elsewhere in the Act, they shall be punishable with fine which may extend to Rupees Ten thousand (Rs. 10,000) and where the contravention is continuing one, with a further fine which may extend to Rupees One Thousand (Rs. 1,000) for every day after the first during which the contravention continues.

Punishment in case of Repeated Default (section 451)

If a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence. This section is not applicable to the offence repeated after a period of three years from the commitment of first offence.

Other Duties of Company Secretary under Companies Act, 2013

Report: The auditor shall make a report to the members of the company on accounts examined by him on every financial statement and shall state: (a) Whether he has sought and obtained all the necessary information and explanations, (b) Whether proper books of account have been kept, (c) Whether company's balance sheet and profit and loss account are in agreement with books of accounts and returns.

Audit report of Government Company: The auditor of the government company will be appointed by the Comptroller and Auditor-General of India and such auditor shall act according to the directions given by them. He must submit a report to them which should include the action taken by him and impact on accounts and financial statement of the company. The Comptroller and Audit – General of India shall within 60 days of receipt of the report have right to (a) conduct a supplementary audit and (b) comment upon or supplement such audit report. The Comptroller and Audit – General of India may cause test audit to be conducted of the accounts of such company.

Liable to pay damages: As per Section 245, the depository and members of the company have right to file an application before the tribunal if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company. They also have right to claim damages or compensation from the auditor for any improper or misleading statement made in his audit report or for any fraudulent or unlawful conduct.

Branch Audit: Where a company has a branch office, the accounts of that office shall be audited either by the auditor appointed for the company, or by any other person qualified for appointment as an auditor of the company. The branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.

Auditing Standards: Every auditor shall comply with the auditing standards. The Central Government shall notify these standards in consultation with National Financial reporting Authority. The government may also notify that auditors' report shall include a statement on such matters as notified.

Winding up: As per Section 305, at the time of voluntary winding up of a company it is a mandatory requirement that auditor should attach the copy of the audits of the company prepared by him.

Punishment for Default by the Professionals Including Company Secretaries

Section 143 (15) says If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12) of Section 143 of the Act, he shall be punishable with fine which shall not be less than Rs. One Lakh but which may extend to Rs. Twenty Five Lakh .

Fraud Reporting Procedure

Rule 13 of Companies (Audit and Auditors) Rules, 2014 contains the operational procedure for reporting of Fraud prescribed in Section 143(12) of the Act. If the statutory auditor detects any Fraud, it is his duty to inform the same to the Audit Committee or the Board of Directors, seeking their reply within forty-five days. After receiving the aforesaid reply, he has to forward his report to the Central Government within fifteen days of receipt of such reply or observations. Even in the case of no reply from the Audit Committee or the Board of Directors he has to forward his report along with his comments to the Central Government within stipulated time frame. Similar provisions of Fraud Reporting are applicable to the cost auditor and the secretarial auditor.

Serious Fraud Investigation Office (SFIO)

SFIO is a multi-disciplinary organization under Ministry of Corporate Affairs, consisting of experts in the field of accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation for detecting and prosecuting or recommending for prosecution white-collar crimes/frauds.

SFIO has head office in New Delhi and regional offices in Maharashtra, Andhra Pradesh, Tamil Nadu and West Bengal. Shri Amardeep Singh Bhatia, IAS is the present Director of SFIO.

It shares the information which it is having with police department, taxation authority or with the State Government or any other investigating authority as per the need of the time. SFIO also submit its report to the Central Government.

SFIO made its first arrest i.e. Neeraj Singal, erstwhile Promoter & Managing Director of Bhushan Steel Ltd. He was produced before Court of competent jurisdiction and sent to judicial custody. He was accused of siphoning off funds of over Rs 2000 crore from the loans availed by Bhushan Steel Limited using more than 80 companies.⁷

Secretarial Audit

Realizing the need to ensure compliance of laws in its letter and spirit on continuous basis by an independent professional, the Act has mandated the carrying out of secretarial audit for bigger companies.

Companies (Auditors Report) Order, 2016 (CARO)

Every report made by the auditor under Section 143 of the Act, on the accounts of every company examined by him to which CARO applies for the financial year commencing on or after, 1st April, 2014, should include the matters specified under CARO. The main objective being to detect fraud and inform about the same to the regulators.

The brief of above provisions clearly indicates that these stringent provisions in the Act would not only indicate the procedure to tackle the problem of Fraud, but has also provided the powers, roles and responsibilities of the professionals in conducting audit, reporting frauds and preventing frauds in the Corporates. Now, the stakeholders of a company can assure themselves of good corporate governance practices by the companies. In the event of any wrong doing enough ammunition is available under law to deal with the issues of Fraud. Company Secretaries through Forensic Audit inter alia would lead a corruption free new India.

7. Former Bhushan Steel MD Neeraj Singhal Arrested, *The Live Mint*, August 10, 2018.

Investigation Mechanism

A forensic auditor is required to have special training in forensic audit techniques and in the legalities of accounting issues. A forensic audit has additional steps that need to be performed in addition to regular audit procedures.

Forensic Audit could be done with the adoption of the procedure detailed below :⁸

Step 1 – Accepting the Investigation

A forensic audit is always assigned to an independent firm/group of investigators in order to conduct an unbiased and truthful audit and investigation. Thus, when such a firm receives an invitation to conduct an audit, their first step is to determine whether or not they have the necessary tools, skills and expertise to go forward with such an investigation. They need to do an assessment of their own training and knowledge of fraud detection and legal framework. Only when they are satisfied with such considerations, can they go ahead and accept the investigation.

Step 2 – Planning the Investigation

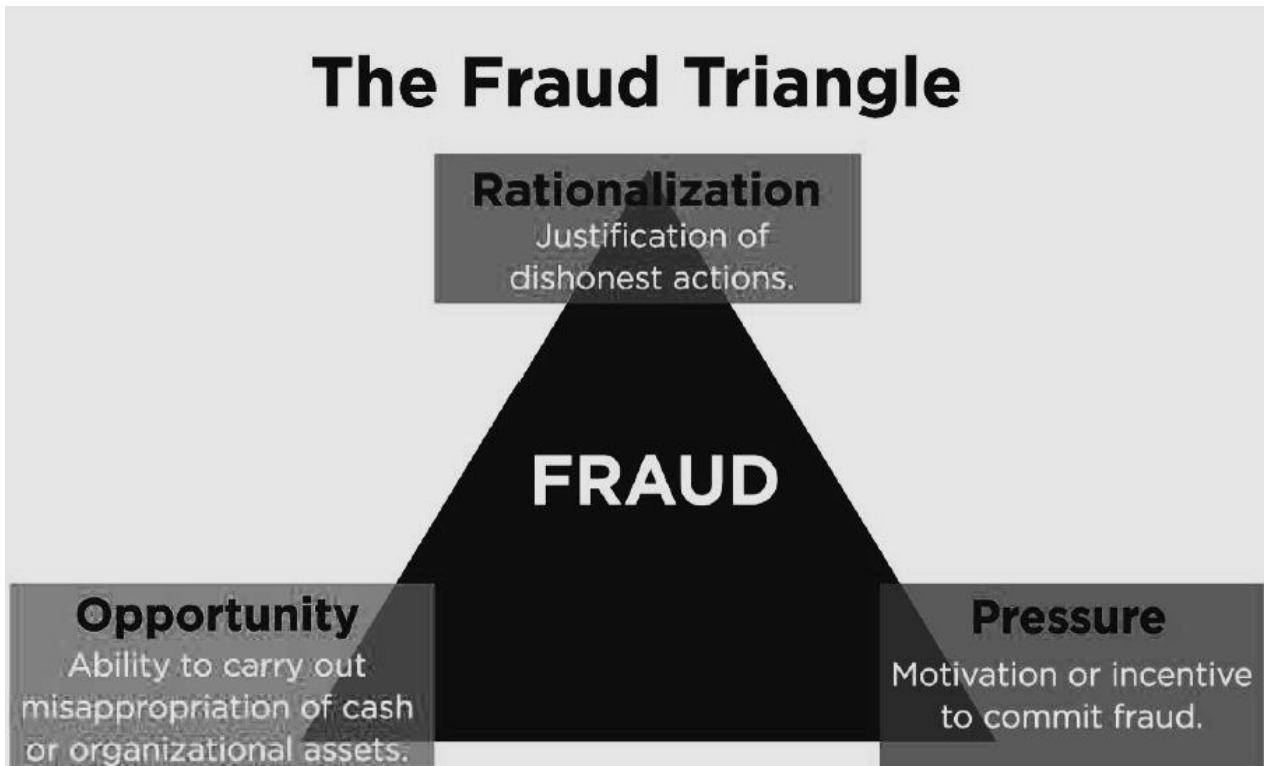
Planning the investigation is the key step in a forensic audit. The auditor(s) must carefully ascertain the goal of the audit so being conducted, and to carefully determine the procedure to achieve it, through the use of effective tools and techniques. Before planning the investigation, they should be clear on the final categories of the report, which are as follows,

- Identifying the type of fraud that has been operating, how long it has been operating for, and how the fraud has been concealed.
- Identifying the fraudster(s) involved.
- Quantifying the financial loss suffered by the client.
- Gathering evidence to be used in court proceedings.
- Providing advice to prevent the recurrence of the fraud.

Fraud Triangle and Fraud Risk

A fraud triangle is a tool used in forensic auditing that explains three inter-related elements that assist the commission of fraud: pressure (motive), opportunity (ability to carry out the fraud) and rationalization (justification of dishonest intentions). Fraud risk is the vulnerability, a company/organization has towards those who are capable of overcoming the three elements in the fraud triangle. Fraud risk assessment is the identification of fraud risks that exist in the company/organization. The planning involves the formulation of techniques and procedures that align with the fraud risk and fraud risk management.

8. Borthakur Shristi (2017), *What is Forensic Audit and How are they Done?* IPleaders.



ACFE Fraud Triangle

Planning also includes the identification of the best way/mode to gather evidence. Thus, it is necessary that ample research is done regarding certain investigative, analytical, and technology-based techniques, and also related legal process, with regard to the outcome of such investigation.

Step 3 – Gathering Evidence

In forensic auditing specific procedures are carried out in order to produce evidence. Audit techniques and procedures are used to identify and to gather evidence to prove, for example, how long have fraudulent activities existed and carried out in the organization, and how it was conducted and concealed by the perpetrators. In order to continue, it is pertinent that the planning stage has been thoroughly understood by the investigating team, who are skilled in collecting the necessary evidence.

The investigators can use the following techniques to gather evidence,

- Testing controls to gather evidence which identifies the weaknesses, which allowed the fraud to be perpetrated
- Using analytical procedures to compare trends over time or to provide comparatives between different segments of the business
- Applying computer-assisted audit techniques (CAATs)
- Discussions and interviews with employees
- Substantive techniques such as reconciliations, cash counts and reviews of documentation.

Forensic Data Analysis (FDA)

FDA is the technology used to conduct fraud investigations; the process by which evidence is gathered, summarized and compared with existing different sets of data. The aim here is to detect any anomalies in the

data and identify the pattern of such anomalies to indicate fraudulent activity. Such an analysis requires three kinds of expertise,

- Data analyst to perform the technical steps and write the queries
- Team member with extensive experience of the processes and internal controls in the relevant area of the investigated company
- A forensic scientist who is familiar with patterns of fraudulent behavior.

Step 4 – Reporting

The reporting stage is the most obvious element in a forensic audit. After investigating and gathering evidence, the investigating team is expected to give a report of the findings of the investigation, and also the summary of the evidence and conclusion about the loss suffered due to the fraud. It should also include the plan of the fraud itself, and how it unfolded, basically the whole trail of events, and suggestions to prevent such fraud in the future.

Step 5 – Court Proceedings

The last stage expands over those audits that lead to legal proceedings. Here the auditors will give litigation support as mentioned above. The auditors are called to jurisdictional Court, and also included in the advocacy process. The understanding here is that they are called in because of their skill and expertise in commercial issues and their legal process. It is important that they lay down the facts and findings in an easily understandable and objective manner for everyone to comprehend so that the desired action can be taken up. They need to simplify the complex accounting processes and issues for others to understand the evidence and its implications.

Types of Investigations⁹

Fraud Investigation

A fraud investigation tries to determine whether fraud has taken place and tries to detect evidence of fraud has occurred. Fraud is considered to involve misrepresentation with intent to deceive. If a company makes specific promises about a product, for example, in order to sell that product, they may be guilty of fraud if they are aware that the product does not work as advertised. Fraud is a very real and costly problem in today's world, and it causes not only loss of money but also loss of life and serious injuries. Most fraud investigations begin with a meeting between the investigator and the client. The person launching the investigation explains to their investigators why they suspect fraud has taken place and hand over any evidence they have to the investigator. A good fraud investigator will use this initial information to find more evidence and more facts. A fraud investigator may use surveillance, asset searches, background checks, employee investigations, business investigations, and other types of methods to get to the bottom of a case. In most cases, fraud investigations are investigations of white collar crime, which involves surveillance and careful consideration of complicated financial records.

The forensic auditor could be asked to investigate many different types of fraud. It is useful to categorize these investigations into following groups to provide an overview of the wide range of investigations that could be carried out. The three categories of frauds are corruption, asset misappropriation and financial statement fraud.

1. Corruption

There are three types of corruption fraud: conflicts of interest, bribery, and extortion. Research shows that corruption is involved in around one third of all frauds.

- In a conflict of interest fraud, the fraudster exerts their influence to achieve a personal gain which detrimentally affects the company. The fraudster may not benefit financially, but rather receives an

9. Oyedokun Godwin (2015), *Forensic Investigation and Forensic Audit Methodology in a Computerized Work Environment*, Research Gate.

undisclosed personal benefit as a result of the situation. For example, a manager may approve the expenses of an employee who is also a personal friend in order to maintain that friendship, even if the expenses are inaccurate.

- Bribery is when money (or something else of value) is offered in order to influence a situation.
- Extortion is the opposite of bribery, and happens when money is demanded (rather than offered) in order to secure a particular outcome.

2. Asset misappropriation

By far the most common frauds are those involving asset misappropriations, and there are many different types of fraud which fall into this category. The common feature is the theft of cash or other assets from the company, for example:

- Cash theft – the stealing of physical cash, for example petty cash, from the premises of a company.
- Fraudulent disbursements – company funds being used to make fraudulent payments. Common examples include billing frauds, where payments are made to a fictitious supplier, and payroll frauds, where payments are made to fictitious employees (often known as ‘ghost employees’).
- Inventory frauds – the theft of inventory from the company.
- Misuse of assets – employees using company assets for their own personal interest.

3. Financial statement fraud

This is also known as fraudulent financial reporting, and is a type of fraud that causes a material misstatement in the financial statements. It can include deliberate falsification of accounting records; omission of transactions, balances or disclosures from the financial statements; or the misapplication of financial reporting standards. This is often carried out with the intention of presenting the financial statements with a particular bias, for example concealing liabilities in order to improve any analysis of liquidity and gearing.

Methods of Investigations

As evident, a forensic investigation is a very specialist type of engagement, which requires highly skilled team members who have experience not only of accounting and auditing techniques, but also of the relevant legal framework.

Significance of Methods of Investigation

In the forensic audit, the auditor need to **plan the Investigation**, and with this he is required to understand what the focus of the audit is. For example, the organization might be suspicious about possible fraud in terms of quality of raw material supplied. The forensic auditor will plan their investigation to achieve objectives such as:

- Identify what fraud, if any, is being carried out
- Determine the time period during which the fraud has occurred
- Discover how the fraud was concealed
- Identify the perpetrators of the fraud
- Quantify the loss suffered due to the fraud
- Gather relevant evidence that is admissible in the court
- Suggest measures that can prevent such frauds in the company in future

Further after understanding the possible type of fraud that has been carried out and how it has been committed,

the auditor is required to support the evidence collected with adequacy, enough to prove the identity of the fraudster(s) in court, reveal the details of the fraud scheme, and document the amount of financial loss suffered and the parties affected by the fraud.

With this, Forensic auditors are required to take precautions to ensure that documents and other evidence collected are not damaged or altered by anyone.

Therefore the forensic audit need be done with specialized method of investigation so that the audit could rear the objective results.

Forensic Audit Investigation Methodology¹⁰

Forensic investigation is the utilization of specialized investigative skills in carrying out an inquiry conducted in such a manner that the outcome will have application to a court of law.

Umeraziz (2014) while discussing the methodology to be followed by fraud/forensic auditors/investigators opines that the examination could be approached from both the angels of whether the fraud could have occurred and whether it could not have occurred. The methodology which he believes that is straight forward as follows:

1. Analyzing data which is available
2. Creating a hypothesis based on such data
3. Testing the hypothesis
4. Refining and altering the hypothesis

Common techniques used for collecting evidence in a forensic audit include the following:

1. **Substantive Techniques** – For example, doing a reconciliation, review of documents, etc.
2. **Analytical Procedures** – Used to compare trends over a certain time period or to get comparative data from different segments
3. **Computer-Assisted Audit Techniques** – Computer software programs that can be used to identify fraud
4. **Understanding Internal Controls and Testing** them so as to understand the loopholes which allowed the fraud to be perpetrated.
5. **Interviewing and Interrogation-** Interview and Interrogation are two major techniques in investigation. That are used to elicit responses from the suspect or accused. It should however be noted that the investigator (interviewer or interrogator) cannot usurp the power of the court of competent jurisdiction by pronouncing the suspect or accused guilty. His/her role is to gather evidence that can be used to prove or disprove the act in issue (Fred, John, Joseph, Brian, 2004, Oyedokun, 2014).

Seven Investigative Tools:

To facilitate forensic audit procedures, there are seven recognized investigative tools and techniques used by forensic specialist / fraud examiners. (Richard 2013)¹¹

1. Public document reviews and background investigations
2. Interviews of knowledgeable persons (the witness and the accused)
3. Confidential sources and informants

10. Source: Oyedokun Godwin (2015), *Forensic Investigation and Forensic Audit Methodology in a Computerized Work Environment*, Research Gate.

11. Also See, *What Techniques Are Used in Forensic Audit*, Dun and Bradstreet, B2B.

4. Laboratory analysis of physical and electronic evidence (**Physical Forensic Analysis** which includes Handwriting analysis, fingerprint analysis, document dating, ink sampling , simulated forgery of signatures analysis, **Computer Forensics** which includes hard disk imaging, E-mail analysis, search for erased files, analyze use & possible misuse of office computers for personal use, ensure chain of custody for electronic evidence.)
5. Electronic and physical surveillance.
6. Undercover operations
7. Analytical procedures (using of ratio analysis, trend or time series analysis, horizontal and vertical analysis and use of work-back ratios techniques to analyze financial statement).

Reporting – A report is required so that it can be presented to a client about the fraud. The report should include the findings of the investigation, a summary of evidence, an explanation of how the fraud was perpetrated, and suggestions on how internal controls can be improved to prevent such frauds in future. The report needs to be presented to a client so that they can proceed to file a legal case if they so desire.

Finding Facts and Conducting Investigations : A Process Exemplified

International Anti-Corruption Resource Center, a Non-Profit Organization, headquartered in Washington DC has provided for some basic steps of a complex fraud and corruption investigation¹², that one can follow for finding facts in the case of fraud and alike.

The Basic Steps of a Complex Fraud and Corruption Investigation

The steps as provided below are generally applied to administrative investigations by international development agencies that lack law enforcement powers to compel evidence from third parties by subpoena or otherwise. Development organizations including corporates, can, however, expand their access to evidence by referring cases to law enforcement agencies for assistance, as discussed below.

(A) Preliminary Matters

Use the “Case Theory” approach to investigations

It is essential that every investigator or prosecutor develop and follow a “theory of the case” when investigating complex corruption and fraud offenses. The Case Theory approach to complex investigations is second nature to most investigators, at least the successful ones, but is misunderstood or neglected by others, with disastrous results. It is similar to the scientific method of experimentation, and involves the following steps:

- Analyze the available data to create an hypothesis;
- Test it against the available facts;
- Refine and amend it until reasonably certain conclusions can be drawn.

Expressed somewhat differently, the approach begins with an informed assumption or guess, based on the available evidence, of what the investigator thinks may have happened, which is then used to generate an investigative plan to test – prove or disprove – the assumption. It is best illustrated by example:

¹². Available at: <https://guide.iacrc.org/10-steps-of-complex-fraud-and-corruption-investigation/>

Example of the Case Theory Approach

Investigator One receives anonymous allegations of corruption in the award of government contracts. He pursues the case with no case theory or investigative plan. He asks a dozen witnesses if they have any knowledge of payoffs; none do (this is not unusual). He subpoenas the contract files and whatever else he can think of but sees no smoking gun as he flips through them (this is even less unusual). He confronts the suspect, who denies any wrongdoing. The investigator does not know what else to do. He has assembled a thick file and an impressive command of the contracts, but can prove nothing. Investigator Two pursues the same case, using the Case Theory approach:

- He analyzes the available data – the details of the allegations;
- Creates a simple, initial hypothesis or theory, e.g., company A is paying kickbacks to government official B for government work;
- Makes assumptions which can be used to test the theory – e.g., if the allegations are true, official B would be expected to:
 - Favor Company A in buying decisions
 - Bend or break the rules to award contract to Company A
 - Display sudden new wealth or have unexplained income

Investigator Two uses his hypothesis to organize the investigation, i.e., looks for evidence to confirm or rebut the theory (initially, this evidence is often the “red flags” of the suspected offense.)

The Case Theory approach generates the investigative plan (see if a, b or c occurred) and if the theory is correct, evidence of guilt. If not, the investigator may amend his theory, e.g., company C is paying official A, and try again. This approach also enables one to prove, to a certain extent that a suspected act did not occur. Investigator One, after inter-viewing a dozen witnesses, did not know if bribes had been paid or not, only that he could not prove it. Investigator Two, however, can have some assurance that the alleged acts did not take place, if no evidence appears in support of his test assumptions. Remember, the Case Theory approach is simply an investigative tool to generate a hypothesis that can organize and direct an investigation, based on the information available at the time. It should not be treated as evidence itself. Do not be too committed to any particular theory and be ready to amend or abandon it as necessary.

Learn the elements of proof for the suspected offenses

Memorize the elements of proof for each of the suspected offenses, based on your theory of the case, and use them to organize the investigation and test the sufficiency of the evidence. An investigator should know at every stage of the case what evidence he needs to obtain to prove an offense. Again, many investigators neglect this fundamental rule, with the result that too little (or too much irrelevant) evidence is collected.

Carefully organize and maintain the evidence

Use charts and graphs, spreadsheets and summaries as necessary to organize and analyze complex data, but be careful not to overdo this exercise at the expense of having time to pursue leads and pursue your theory of the case. Make sure that all evidence is properly logged in, secured and accounted for, including electronic evidence, and that the source of the evidence is recorded.

Prepare the case chronology

Preparing a Chronology of Events – putting the important facts in the order they occurred – is always helpful, particularly to prove knowledge and intent and to see how a case unfolds. Concisely record the date, the event

or document, and the source of information in separate columns. Include important meetings, telephone calls, email communications, travel, key documents and other potentially important events. Keep the chronology simple and focused on potentially relevant evidence – too much extraneous information will reduce its utility – and review and update it regularly. Add new information as the investigation proceeds and remove what is shown to be irrelevant.

(B) The Basic Steps of a Complex Investigation

Forensic auditor is more of a blood hound rather than a watch dog. The information below illustrates basic steps in a typical complex procurement fraud case. Most significant fraud and corruption cases occur in procurement.

Of course the steps are general suggestions that can be adjusted to one's situation. Some cases will require fewer steps, others perhaps more or different, such as requesting legal assistance, which is not addressed here.

The **TEN Steps** that are generally required for finding facts in a case of frauds and corruption are listed as below:

STEP ONE: Begin the case (respond to complaint, etc.)
STEP TWO: Evaluate the allegations or suspicions
STEP THREE: Conduct due diligence background checks
STEP FOUR: Complete the internal stage of the investigation
STEP FIVE: Check for predication and get organized
STEP SIX: Begin the external investigation
STEP SEVEN: Prove illicit payments
STEP EIGHT: Obtain the cooperation of an inside witness
STEP NINE: Interview the primary subject
STEP TEN: Prepare the final report

STEP ONE: Begin the case (respond to complaint, etc.)

If the case starts with a complaint or report, fully debrief the complainant, getting as much detail as possible. If the case starts with the discovery of a red flag, match the red flag to the potential scheme and then look for other red flags of the suspected schemes. An automated, "proactive" search for fraud indicators might be effective if the necessary data is available.

STEP TWO: Evaluate the allegations or suspicions

Determine whether the allegations or suspicions – the "Red Flags" – are specific and serious enough to justify an investigation, which can be time consuming, disruptive and costly.

If you determine that a complaint or report warrants further investigation, try to make a quick, preliminary assessment of the accuracy of the complaint. For example, if the complainant alleges that he or she was unfairly disqualified from a tender, examine the relevant project files to attempt to determine if this may have occurred. Use this information to prepare for the follow up interview of the complainant.

STEP THREE: Conduct due diligence background checks

Check on-line and other records on the suspect firms and individuals to evaluate the allegations and to look for other evidence of fraud or corruption, such as the presence of shell companies as subcontractors, prior debarments of a contractor or evidence that a project official is living beyond his means.

STEP FOUR: Complete the internal stage of the investigation

Complete the collection of documents, data and interviews within the investigating organization, For example:

- Look in the bidding documents for evidence of corrupt influence through the manipulation of the ***“SPQQD” factors – Selection, Pricing, Quantity, Quality and Delivery.***
- Carefully examine bids and proposals, CVs and other documents submitted by a suspect firm for possible fraudulent representations;
- Access, with the proper authority, the relevant e-mail and computer hard drive information;
- Determine if an early interview of the subject is warranted.

STEP FIVE: Check for predication and get organized

Review the results of the investigation to date to determine if there is adequate “predication” – a sufficient factual basis – to proceed. Decide or refine the initial “Case Theory” and organize the evidence according to the elements of proof of the potential claims. If law enforcement assistance is needed (e.g., to subpoena documents, exercise search warrants or to request legal assistance) take steps to ensure that there is sufficient “probable cause” to obtain such cooperation.

STEP SIX: Begin the external investigation

Conduct interviews of witnesses outside the investigating organization, proceeding from the disinterested, cooperative witnesses to “facilitators” to co-conspirators to the subjects. Request or compel documents from third parties and the suspect contractors through negotiated agreements, the exercise of contract audit rights or, if available with law enforcement assistance, subpoenas or search warrants.

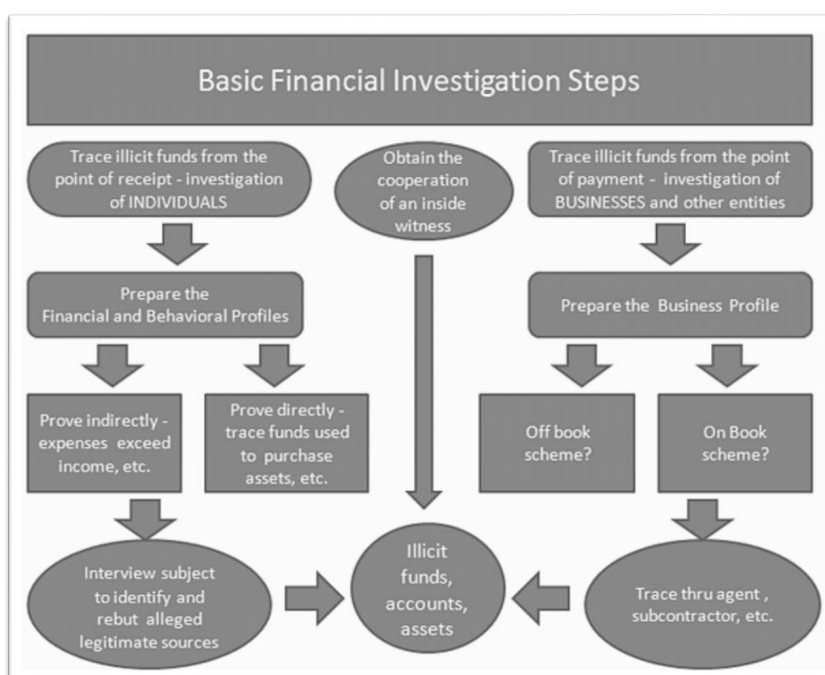
STEP SEVEN: Prove illicit payments

Determine the best strategy to prove illicit payments: out from the point of payment (by examining the contractor's records), or back from the point of receipt (from the suspect employee's records) and begin the tracing process. If it is not possible to prove the corrupt payments directly, try to prove them circumstantially by showing the subject displayed unexplained sudden wealth or expenditures.

The three primary ways to prove corrupt payments and fraudulent transfers¹³ are:

1. Out from the suspected point of payment, i.e., from an examination of the books, records and accounts of the entity suspected of paying bribes or making fraudulent transfers;
2. Back from the suspected point of receipt, i.e., from the accounts and financial records of the person suspected of receiving the illicit funds, or by
3. Obtaining the cooperation of an inside witness, such as a co-conspirator, middleman or the bribe payer. This approach may be necessary to find well-hidden or laundered payments.

The three approaches are also illustrated in the chart below:



Source: International Anti-Corruption Resource Center (IACRC)

STEP EIGHT: Obtain the cooperation of an inside witness

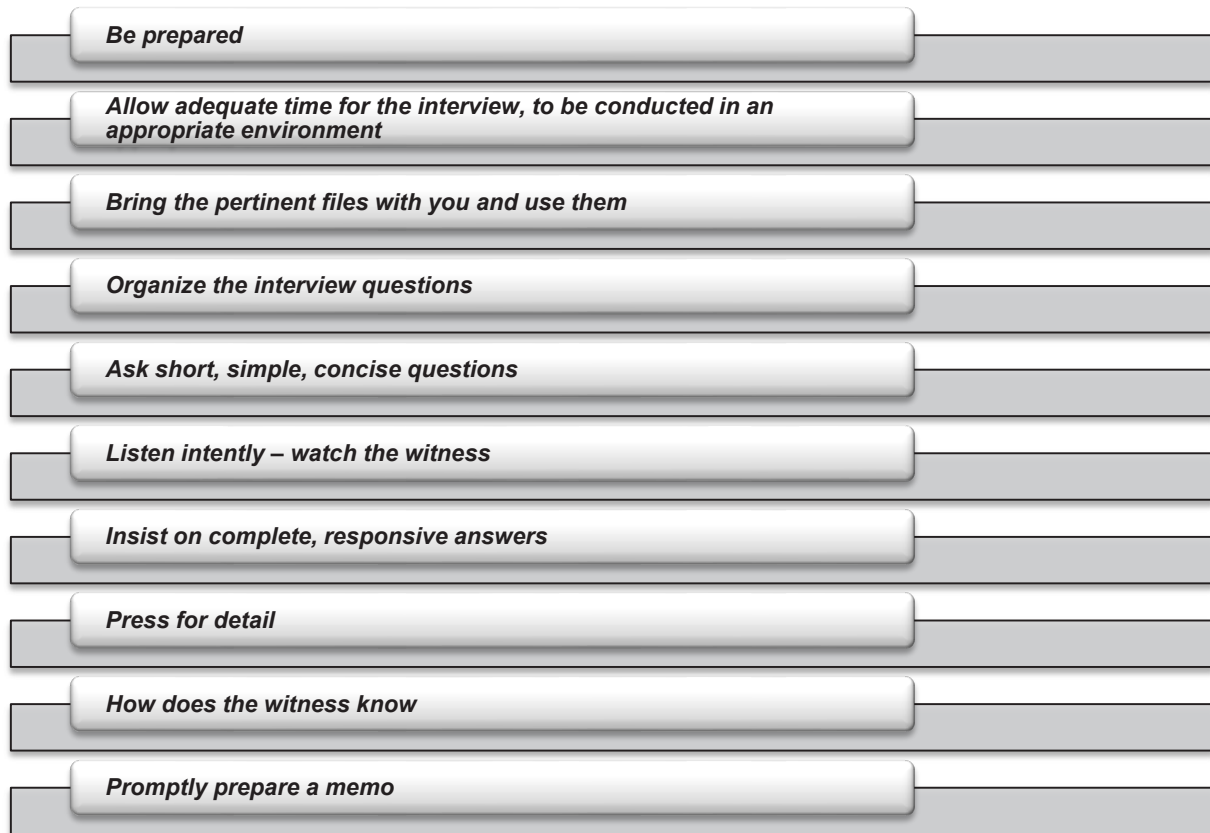
A Cooperative witness could be an honest inside observer or a lesser participant in the offense, such as a middleman or the smaller of several bribe payers. Decide the best strategy to obtain his or her cooperation.

Process of Interviewing a Cooperative Witness

The seemingly routine interviews in the early stages of a case are much more important, and not as easy, as they may seem. Therefore, one must organize or structure the way to interview the cooperative witness. A structured and result oriented interview would be one of the biggest strength of the Auditor in realizing rationalizing and proving the things with authentic evidences.

13. Available at: <https://guide.iacrc.org/step-seven-trace-illicit-payments/>

The Ten Most Important Points in Interviewing are listed as below:



1. Be prepared

Master the known facts of the case – review the case files and prior interviews – and decide what you need from the witness to prove the offense or fill gaps. Do not rush into an interview until you are fully prepared. Prepare an outline of the points you want to cover, but do not write out the questions. That will distract you from carefully listening to the witness's answers and generating useful follow up questions. As the interview progresses, the answers will suggest the next questions.

2. Allow adequate time for the interview, to be conducted in an appropriate environment

Be honest with the witness about how long the interview will take. Most interviews in complex cases take much longer than the witness anticipates. Conduct the interview in a professional environment; do not attempt to interview an important witness at lunch or in another social setting.

3. Bring the pertinent files with you and use them

If the relevant files are voluminous, do the interview where the files are located. As appropriate, show the witness the relevant documents and let him or her review them before answering. Otherwise very important points will be missed or forgotten.

4. Organize the interview questions

Go through the transactions in chronological order – as they occurred – or according to the documents, or in some other logical order, rather than just firing questions at random as they occur to you. If you are not organized there will be gaps in the questioning and you will inevitably forget to ask something important.

5. Ask short, simple, concise questions

Avoid the long, unfocused, repetitive stream of consciousness questions that are typical of an inexperienced or unprepared investigator. Train yourself to fully cover a particular topic by asking a series of short, simple questions. This is quite important but not easy to do. Short, clear questions make it easier for the witness to understand the question and for you to understand and evaluate the answer. And if the answers are not truthful, it will be easier to impeach the witness and rebut his or her claim that he misunderstood the question.

6. Listen intently – watch the witness

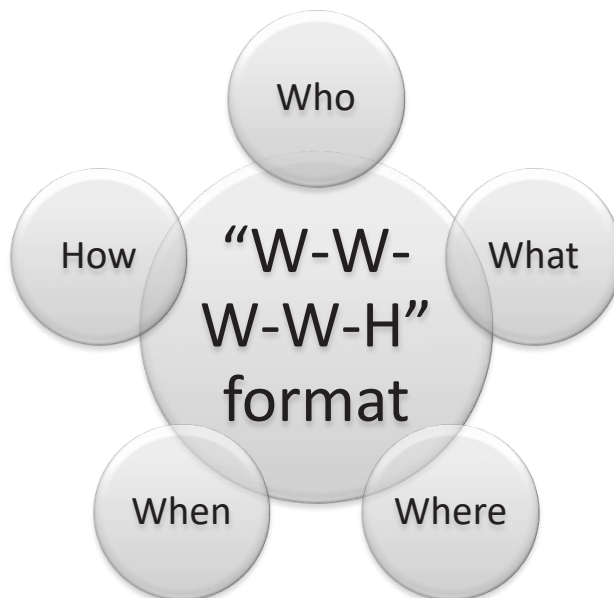
Good interviewers rely more on their eyes and ears than their mouth in interviews. If feasible, have a second investigator attend and take notes so you can concentrate on the witness. Look at the witness (not down at your notes) as he or she answers and think about the answer – is it responsive, complete, plausible? – before asking the next question. There is no need to rush. And don't interrupt the witnesses' answer unless he or she plainly does not understand the question.

7. Insist on complete, responsive answers

As noted above, listen carefully and think about the answer before asking the next question – did the witness really answer the question? Often even well-intentioned witnesses do not – keep asking until you get a proper answer.

8. Press for detail

Follow the journalistic “W-W-W-W-H” format (Who, What, Where, When and How.). These are the six faithful servants of the forensic auditor.



Always get the dates of key events, all the persons present at important meetings, what was actually said (as best the witness can recall, rather than just a summary of the statements) by whom, whether any record of the meetings, exist, and so on. Do not be afraid to ask the big or sensitive questions directly – ask politely, but do not beat around the bush for fear of embarrassing or upsetting the witness.

9. How does the witness know

Ask, politely, how the witness became aware of the information he or she is relating. This will reveal possible unreliable hearsay – uncorroborated information from a third party – and otherwise allow you to evaluate the reliability of the information.

Hearsay information is useful and acceptable during an investigation to generate leads and can lead to important evidence and witnesses. Eventually, however, investigators should try to obtain information from witnesses with direct knowledge of the facts. Direct knowledge means that the witness participated in the event, or observed it directly, or heard about it from the subject. The latter is known as an “admission,” is not hearsay, and often is the best evidence of knowledge and intent.

10. Promptly prepare a memo

Have the witness review and correct the memo if necessary, and to sign it if circumstances suggest he or she might later recant. Delays in preparing the memo can be used to impeach its credibility. Be consistent in your practice of keeping or discarding notes. If your memos do not include everything in your notes, keep them.

The above may not be necessary if the interview is recorded, although a summary memo of the most pertinent points will be useful if the interview is a lengthy one.

Most importantly, remember that even honest, disinterested witnesses can be concerned about retaliation and the personal and business consequences of cooperation. Their decision whether to cooperate, and if so, to what extent, often depends on their assessment of the professionalism, experience and trustworthiness of the interviewer. Present yourself accordingly, in appearance, preparation, poise and interest in what the witness is relating.

STEP NINE: Interview the primary subject

In a corruption case, conduct a thorough interview of the primary subject, usually the suspected bribe recipient. Ask about his role in the suspect contract award and relevant financial issues, such as his sources of income and expenditures. Decide if there is sufficient evidence to obtain a confession; if not, try to get helpful admissions and identify possible defenses (different objectives require different tactics.) Record the interview, if possible, and request all relevant financial and other records. In a fraud case, interview the person most knowledgeable and responsible for the suspected false statement or fraudulent document. Again, decide if there is sufficient evidence to obtain a confession and, if not, try to get helpful admissions and identify possible defenses. These typically include that any false statement was an honest mistake, or that another person was responsible for a fraudulent document. Record the interview if possible.

STEP TEN: Prepare the final report

Decide what action to recommend based on the results of the investigation – an administrative sanction or criminal referral, for example – and prepare a concise final report, organized according to the elements of proof for the relevant offenses.

Note: The steps discussed above assume that the case begins with a complaint about the procurement process, without any specific information about possible illegal payments or fraud. If so, the investigation would typically begin by examining the procurement process to identify leads and eventually evidence of bribery, collusion or other wrongdoing. This is the way most such cases begin and are organized.

In other cases the investigation may begin with reports that a public official is displaying unexplained wealth or living beyond means, suggesting possible corruption, without reference to any particular procurement abuses. In that case, the forensic auditor must reverse the investigation process by first identifying the illicit financial transactions and then tracing them back to the underlying procurement transactions, if necessary.

RED FLAGS¹⁴

Red flags are nothing but symptoms or indicator of situation of fraud. A red flag is a set of circumstances that are unusual in nature or vary from the normal activity. It is a signal that something is out of the ordinary and may need to be investigated further.

14. Source: CA Chaudhary Shiva (2015), *Red Flags in Forensic Accounting*, LinkedIn.

Definition of Red Flag for Forensic Audit

Red flags are nothing but symptoms or indicator of situation of fraud.

1. A red flag is a set of circumstances that are unusual in nature or vary from the normal activity.
2. It is a signal that something is out of the ordinary and may need to be investigated further.

Significance of Red Flags

Red Flags underscores Auditor's Responsibility to consider fraud and error:

1. Effective for all audits
2. When planning and performing audit procedures, evaluating and reporting the results thereof, the auditor should consider the risk of material misstatements in the financial statements resulting from fraud or error.
3. Two types of misstatements are relevant to the auditor's consideration of fraud:
 - Misstatements arising from misappropriation of assets.
 - Misstatements arising from fraudulent financial reporting.
4. Studies of fraud cases consistently show that red flags were present, but were either not recognized or were recognized but not acted upon by anyone.
5. Sometimes an error is just an error.

Common Types of Red flags

The most common types of Red Flags and fraudulent activity can be categorized as:

1. Employee Red Flags
2. Management Red Flags

Employee Red Flags are like:

- Employee lifestyle changes: expensive cars, jewellery, homes, clothes
- Significant personal debt and credit problems
- Behavioral changes: these may be an indication of drugs, alcohol, gambling, or just fear of losing the job
- High employee turnover, especially in those areas which are more vulnerable to fraud
- Refusal to take vacation or sick leave
- Lack of segregation of duties in the vulnerable area

Management Red Flags are like

- Reluctance to provide information to auditors
- Managers engage in frequent disputes with auditors
- Management decisions are dominated by an individual or small group
- Managers display significant disrespect for regulatory bodies
- There is a weak internal control environment

- Accounting personnel are lax or inexperienced in their duties
- Decentralization without adequate monitoring
- Excessive number of current accounts
- Significant downsizing in a healthy market
- Continuous rollover of loans
- Excessive number of year and transactions
- High employee turnover rate
- Unexpected overdrafts or declines in cash balances
- Refusal by company or division to use serial numbered documents (receipts)
- Compensation program that is out of proportion
- Any financial transaction that doesn't make sense - either common or business
- Service Contracts result in no product
- Photocopied or missing documents
- Frequent changes in banking accounts
- Frequent changes in external auditors
- Company assets sold at a value which is below market value

Green Flags

Above discussion on Red Flags says that red flags are symptoms or indicators of fraud, white collar crime or something detrimental to the interest of the organization. To the contrary there are other signals which could also imply the existence of fraud but do not activate alarm bells. Rather they may even lead to a greater sense of assurance and comfort in a scenario which may be potentially infused with fraud. These signals are referred as 'green flags'.

The instance of Green Flags could be¹⁵ helpful in identifying are unusual signs or inconsistencies, but apparently harmless or perhaps even helpful.

LESSON ROUND UP

- Forensic Auditing comprises three key ingredients:
 1. Forensic Audit Thinking or thinking forensically
 2. Forensic Audit Procedures—both proactive and reactive
 3. Appropriate use of technology and data analysis
- Forensic Data Analysis can be used to prevent, detect and control fraud along with other irregularities.
- Forensic data analysis is the process of gathering, summarizing, comparing, and aggregating existing different sets of data that organizations routinely collect in the normal course of business with the goal of detecting anomalies that are traditionally indicative of fraud or other misconduct.

15. Dalal and Bhakti (2017), *The Forensic Accountants Hand Book*, ICSI-WIRC Seminar on Frauds and Forensic Accounting.

- SFIO is a multi-disciplinary organization under Ministry of Corporate Affairs, consisting of experts in the field of accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation for detecting and prosecuting or recommending for prosecution white-collar crimes/frauds.
- The role of company secretaries is expanding in the era of forensic audit wherein they are crucially assisting in preventing, regulating and penalizing the instance of corporate frauds.
- Right from conducting forensic audit to examining the evidences, from finding the culprit behind the fraud to appearing in the court for submitted the testimony, a Company Secretary is apt in serving as a forensic auditor.
- Forensic audit is a detailed engagement which requires the expertise of not only accounting and auditing procedures but also expert knowledge regarding the legal framework, and a forensic auditor is required to have an understanding of various frauds that can be carried out and of how evidence needs to be collected.
- Section 143 of Companies Act, 2013 talks about the power and duties of auditors and auditing standards. This *mutatis mutandis* applies to Company Secretaries as well.
- A forensic auditor is required to have special training in forensic audit techniques and in the legalities of accounting issues. A forensic audit has additional steps that need to be performed in addition to regular audit procedures.
- A fraud triangle is a tool used in forensic auditing that explains three interrelated elements that assist the commission of fraud- Pressure (motive), opportunity (ability to carry out the fraud) and rationalization (justification of dishonest intentions). Fraud risk is the vulnerability, a company/organization has towards those who are capable of overcoming the three elements in the fraud triangle. Fraud risk assessment is the identification of fraud risks that exist in the company/organization. The planning involves the formulation of techniques and procedures that align with the fraud risk and fraud risk management.
- Red flags are nothing but symptoms or indicator of situation of fraud. A red flag is a set of circumstances that are unusual in nature or vary from the normal activity. It is a signal that something is out of the ordinary and may need to be investigated further.
- The instance of Green Flags could be helpful in identifying are unusual signs or inconsistencies, but apparently harmless or perhaps even helpful.

SELF-TEST QUESTIONS

1. Discuss the Role of Company Secretaries in Forensic Audit.
2. What are different methods of Investigation in Forensic Audit?
3. What are Red Flags and Green Flags? Discuss.
4. Write a Note on Field Investigations.

[illegible]

Lesson 4

Forensic Audit : Laws and Regulations

LESSON OUTLINE

- Indian Laws: Information Technology and Business Laws
- Companies Act, 2013
- Fraud Reporting under Companies Act, 2013
- Reporting of fraud by auditor
- Similar Provisions of Fraud Reporting applicable to Cost Auditor and Secretarial Auditor
- SEBI Act, 1992
- Information and Technology Act, 2000
- Insurance Act, 1938
- The Companies (Auditor's Report) Order, 2016
- Penalty under the Prevention of Corruption Act, 1988
- Income Tax Act, 1961
- Indian Penal Code, 1860
- International Laws
- United Nations Convention Against Corruption
- OECD Guidelines for Multinational Enterprises relating to Combating Bribery
- The Integrity Pact (IP)
- Foreign Corrupt Practices Act, 1977
- The United Kingdom Bribery Act, 2010
- The Fugitive Economic Offender Act, 2018
- ICSI Anti Bribery Code
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

A forensic audit is an examination and evaluation of a firm's or individual's financial information for use as evidence in the court of law. A forensic audit can be conducted in order to prosecute a party for fraud, embezzlement or other financial claims. In order to understand the legal consequences that a person attracts on being caught in a forensic audit, it is necessary to know about the various statutes that talk about the implementation of forensic audits in India. Therefore, this lesson aims at providing the basic understanding as to the laws, regulations and statutes, nationally as well as internationally, dealing with corporate laws and empowering forensic auditors in performing their duties in its true letter and spirit.

A forensic audit is an examination and evaluation of a firm's or individual's financial information for use as evidence in the court of law. A forensic audit can be conducted in order to prosecute a party for fraud, embezzlement or other financial claims.

In order to understand the legal consequences that a person attracts on being caught in a forensic audit, it is necessary to know about the various statutes that talk about the implementation of forensic audits in India.

Let us discuss the statutes dealing with corporate laws and empowering forensic auditors in performing their duties in its true letter and spirit. The detailed position of Laws and Regulations dealing with Corporate Fraud and also aids in achieving forensic audit would be discussed under the following heads:

1. Indian Laws
 - Information Technology and Business Laws
2. International Laws
 - UK Bribery Act
 - US Foreign Corrupt Practices Act
3. ICSI Anti Bribery Code.

1. Indian Laws : Information Technology and Business Laws

Companies Act, 2013

Considering the consequence of corporate frauds on the growth of Corporates and Economy, the Companies Act, 2013 lists down frauds and prescribes penalties and punishments for violations.¹

Section 447 of the Companies Act, 2013 often now referred to as one of the draconian provision of the new Act deals with provision relating to punishment for fraud.

Section 447: *"Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud:*

Where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years".

The Companies Act, 2013 has provided punishment for fraud as provided under Section 447 in around 20 sections of the Act e.g. u/s 7(5), 7(6), 8(11), 34, 36, 38(1), 46(5), 56(7), 66(10), 75, 140(5), 206(4), 213, 229, 251(1), 266(1), 339(3), 448 etc. for directors, key managerial personnel, auditors and/or officers of company. Thus, the new Act goes beyond professional liability for fraud and extends to personal liability if a company contravenes such provisions.

The following table includes some sections that attract liability u/s 447. These are cognizable offences and a person accused of any such offence under these sections shall not be released on bail or bond, unless subject to the exceptions provided u/s 212(6) of the Act :

¹ Companies Act, 2013: Fraud and Fraud Reporting, Tax Guru.

Section	Fraud With Respect To	Who will be penalised
7(5)	Registration of a company	A person furnishing false information or suppressing any material information of which he or she is aware.
36	Inducing persons to invest money	The person doing so.
75(1)	Acceptance of deposit with intent to defraud depositors or for any fraudulent purpose	Every officer of the company who accepted the deposit.
206(4)	Conducting business of a company for a fraudulent or unlawful purpose	Every officer of the company who is in default.
213	Other cases: <ul style="list-style-type: none"> ■ Business of a company being conducted with intent to defraud its creditors ■ Fraud, misfeasance or other misconduct of the company or any of its members ■ Company withholding information from members with respect to its affairs, which they may reasonably expect 	Every officer of the company who is in default and the person(s) concerned in the formation of the company or management of its affairs.
229	Furnishing false statement or mutilation or destruction of documents	Person required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or the officer or other employees, as required.
251(1)	Application for removal of name from register with the object of evading liabilities/intent to deceive	Persons in charge of management of the company.
339(3)	Conducting business of company with intent to defraud its creditors, any other persons or for any fraudulent purpose	Every person who was knowingly a party to the business in the aforesaid manner.
448	Making a false statement in any return, report, certificate, financial statement, prospectus, statement or other document required by or for the purpose of any of the provisions of this Act or the rules made thereunder	Person making such a statement etc.

Fraud Reporting under Companies Act, 2013

The new act casts onerous responsibility on the part of statutory auditor/cost auditor/secretarial auditor to report fraud to Board and Central Government. It would mean that even for a small fraud involving say Rs. 1000 in a large multi-locational enterprise would cast reporting fraud responsibility on the part of auditing professionals including CS/CA/CMA. This provision has mandated that the professionals like CS/CA/CMA appointed by the company under Section 139/148/204 to do direct reporting of frauds (to the Central Government) in addition to their existing responsibilities of reporting requirement to the shareholder/Board of company.

Section 143(12) to 143(15) of the Act contains provisions relating to reporting of fraud.



Fraud Reporting

Section 143(12) Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.

Action of Fraud Reporting in good faith

Section 143 (13) No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred to in sub-section (12) if it is done in good faith.

Similar Provisions applicable to Cost Auditor and Secretarial Auditor:

Section 143(14) the provisions of this section shall *mutatis mutandis* apply to –

- The Cost Accountant in practice conducting cost audit under section 148; or
- The Company Secretary in practice conducting secretarial audit under section 204.

Punishment for default

Section 143 (15) If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 25 lakh rupees.

Rule 13 of The Companies (Audit and Auditors) Rules, 2014 contains the operational procedure of Reporting of Fraud prescribed in Section 143(12) of the Act.

Reporting of fraud by auditor

Rule 13(1) For the purpose of sub-section 12 of Section 143, in case the auditor has sufficient reason to believe that an offence involving fraud, is being or has been committed against the company by officers or employees of the company, he shall report the matter to the Central Government immediately but not later than 60 days of his knowledge and after following the procedure indicated herein below:

First Fraud Report to Board/Audit Committee

- a. Auditor shall forward his report to the Board or the Audit Committee, as the case may be, immediately after he comes to knowledge of the fraud, seeking their reply or observations within 45 days;

Final Fraud Report to Central Government on receipt of First Fraud Report

- b. on receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within 15 days of receipt of such reply or observations;

Final Fraud Report to Central Government on failure of receipt of First Fraud Report

- c. in case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of 45 days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he failed to receive any reply or observations within the stipulated time.

Authority and Mode/Format of dispatching Final Fraud Report to Central Government

- Rule 13(2): The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed post followed by an e-mail in confirmation of the same.
- Rule 13(3): The report shall be on the letter-head of the auditor containing postal address, e-mail address and contact number and be signed by the auditor with his seal and shall indicate his Membership Number.
- Rule 13(4): The report shall be in the form of a statement as specified in Form ADT-4. This Form of Report is available as an annexure to The Companies (Audit and Auditors) Rules, 2014.

Similar Provisions of Fraud Reporting applicable to Cost Auditor and Secretarial Auditor

Rule 13(5): The provision of this rule shall also apply, mutatis mutandis, to a cost auditor and a secretarial auditor during the performance of his duties under Section 148 and section 204 respectively.

The new law has also bestowed legal status on the Serious Fraud Investigation Office, a probe agency under the Ministry of Corporate Affairs. Serious Fraud Investigation Office (SFIO) is established by Central Government to investigate frauds relating to a company.²

SEBI Act, 1992

Regulation 11 C of the SEBI Act, 1992 empowers the SEBI to direct any person to investigate the affairs of intermediaries or brokers associated with the securities market whose transactions in securities are being dealt with in a manner detrimental to the investors or the securities market.

2. Until such SFIO is established, the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated the 2nd July, 2003.

Information and Technology Act, 2000

Section 43 and 44 of the IT Act, 2000- lays down penalty for the following

- Unauthorized copying of an extract from any data.
- Unauthorized access and downloading files.
- Introduction of viruses or malicious programmes.
- Damage to a computer system or computer network.
- Denial of access to an authorized person to a computer system.
- Providing assistance to any person to facilitate unauthorized access to a computer.

Insurance Act, 1938

Section 33 of the Act empowers the IRDA to direct any person (Investigating Authority) to investigate the affairs of any insurer.

The Companies (Auditor's Report) Order, 2016

The Act requires the auditor to report to the effect that if a substantial part of fixed assets have been disposed of during the year, whether it has affected the going concern status.

In light of these statutory authorities, the following penalties may be faced by a person, if he/she is caught in a forensic audit, by way of white-collar penalties.

Penalty under the Prevention of Corruption Act, 1988 (PC Act)

Prevention of Money-Laundering Act, 2002– Section 3 of the Act defines the offence of money laundering as the involvement of a person in any process or activity connected with the proceeds of crime and projecting it as untainted property, where the scope of integrating forensic audits can be clearly seen.

The Prevention of Corruption (Amendment) Act, 2018: An Abridged

The Prevention of Corruption Act, 1988 (the "Act") was recently amended by the Prevention of Corruption (Amendment) Act, 2018 (the "Amendment Act"). Most of the amendments are aimed at tightening up the existing provisions in the Act and expanding the coverage of the offences. Prevention of Corruption (Amendment) Act 2018 as passed by Parliament in July 2018, which amended and brought about significant changes to the extant Prevention of Corruption Act 1988. Among other changes, the Amendment Act has made bribe giving a specific offence and has introduced the concept of corporate criminal liability for acts of bribery. Corporates may claim a defence if it can be proven that adequate procedures were in place to prevent persons associated with it from undertaking anything which may be an offence under the Prevention of Corruption Act. Such procedures must comply with guidelines, which are yet to be prescribed by the government.

Backdrop of the Amendment Act

In the wake of numerous scams being unearthed in India over the past decade, enforcement agencies have also been proactive in terms of monitoring compliance under relevant anti-corruption and bribery laws and taking action against violations.

In 2016 the government announced demonetisation of Rs 500 and Rs1000 bank notes in its attempt to combat unethical practices such as hoarding black money outside the formal economic system, tax evasion and using illicit or counterfeit cash to fund illegal activities. Consequently, on basis of information received from banks,

the tax authorities and other anti-corruption bodies have identified suspicious persons and entities and initiated action against them.

In 2017 the Ministry of Corporate Affairs voluntarily struck off 224,000 shell companies and imposed restrictions on the usage of their bank accounts and transference of company property.

Action was taken to disqualify directors who failed to comply with specific requirements under the Companies Act, 2013.

The ministry also announced that if any director or other authorized signatory of a struck-off company tried to siphon off money from the company's bank account, he or she will be punished with a prison term of between six months and 10 years, and where the fraud involved public interest, the minimum prison term will be at least three years and may also involve a fine of up to three times the amount involved.

The prime minister's office has created a special task force to oversee the drive against such defaulting companies with the help of various enforcement agencies.

Further, in 2018 an ordinance to the Companies Act 2013 was promulgated reintroducing the requirement to declare the commencement of business for newly incorporated companies, which may restrict the opening of shell companies.

The Central Vigilance Commission (CVC) has also taken certain proactive actions recently, such as advising all central government departments on quicker disposal of pending corruption cases. The CVC has an online complaint management system where individuals can register complaints in this regard.

Investigations Completed (FY wise)

Financial Year	Investigations Completed
2003-2004	1
2004-2005	3
2005-2006	8
2006-2007	17
2007-2008	1
2008-2009	7
2009-2010	12
2010-2011	13
2011-2012	20
2012-2013	22
2013-2014	22
2014-2015	39
2015-2016	60
2016-2017	87
Total	312

Source: <https://sfio.nic.in/archives.aspx>

The Serious Fraud Investigation Office (the investigative arm of the Ministry of Corporate Affairs) has increased the pace of its investigations over the past couple of years.

As per the information available on its website, it has completed investigation in 312 cases to date, 87 of which were completed during 2016 to 2017.

Moreover, the Supreme Court has expanded the ambit of the definition of 'public servant' (under the Prevention of Corruption Act 1988) to include all officials of private banks, as their duties are public in nature (Central Bureau of Investigation, Bank Securities and Fraud Cell v Ramesh Gelli, February 23, 2016) thereby bringing them under the purview of anti-corruption laws.

Highlights of the The Prevention of Corruption (Amendment) Act, 2018³

Definition of 'Undue Advantage': The Amendment Act provides that any public servant who accepts or attempts to accept from any person, any 'undue advantage', either for himself or for any other person, in lieu of performance of a public duty, shall be punishable with imprisonment for a minimum term of 3 (three) years and maximum of 7 (seven) years. The Amendment Act has defined 'undue advantage' to mean any gratification other than legal remuneration that a public servant is permitted to receive. Further, 'gratification' is not limited to

3. See, *Prakash et al (2018), Prevention of Corruption (Amendment) Act 2018 – Booster For The Honest Or The Corrupt?, Mondaq*

pecuniary gratifications or to gratifications estimable in money. By virtue of such an expansive definition, even non-monetary considerations such as a better posting, post-retirement benefits, gifts and favours not estimable in money can also be covered under the ambit of undue advantage.

Persons liable for offering a bribe to public servants: Previously, the PC Act did not contain a separate provision for a person who gives or promises to give an undue advantage, but the Amendment Act makes giving an undue advantage by a person to a public servant, a specific offence punishable by 7 (seven) years imprisonment or fine, or both. However, if a person is forced / coerced to give an undue advantage but reports the same to the concerned authority within 7 (seven) days of doing so, he shall not be liable for the same. Further, as per the PC Act, during a corruption trial, if a person made a statement that he gave an undue advantage to a public servant, it would not be used to prosecute him for the offence of abetment. The Amendment Act omits this provision. Effectively, it may become a potential risk for bribe givers to testify against the corrupt, and they may be discouraged from appearing as witnesses in a trial against public servants.

Offering of bribes by commercial organisations: The Amendment Act has defined 'commercial organisation' to mean not just a company or partnership incorporated in India and carrying on business in India or outside India, but also a body or partnership incorporated or formed outside India but carrying on business in India. Section 9 of the PC Act has been substituted by the Amendment Act to provide for a specific provision for offences committed by commercial organisations and persons associated with it. It provides that if a commercial organisation commits any of the offences listed out in the PC Act with the intention to obtain or retain business or obtain or retain an advantage in the conduct of its business, then such commercial organisation shall be punishable with fine, quantum of which is not prescribed in the Amendment Act.

The Amendment Act mandates the Central Government to formulate and prescribe guidelines to prevent persons associated with commercial organisations from bribing any public servant. A commercial organisation can defend itself when accused of any offence under the PC Act, if it proves that it had adequate procedures in place to ensure compliance with such guidelines issued by the Central Government to prevent persons associated with the commercial organisation from undertaking such conduct. The corporate sector in India will have to be swift in enacting its internal guidelines and ensure that its employees are well informed and abide by these guidelines to protect itself from any kind of prosecution under the PC Act, in the event of any associated person charged with the act of giving a bribe.

Further, if such an offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the organisation, then such person shall also be prosecuted under the PC Act.

Redefining criminal misconduct: Under the PC Act, criminal misconduct by a public servant inter alia included: (i) using illegal means to obtain any valuable thing or monetary reward for himself or any other person; (ii) abusing his position as a public servant to obtain a valuable thing or monetary reward for himself or any other person; and (iii) obtaining a valuable thing or monetary reward without public interest, for any person. The Amendment Act replaces this section with a truncated definition of criminal misconduct to include only the following two acts: (i) misappropriation or conversion for his own use, any property entrusted to or under the control of a public servant; and (ii) amassing assets disproportionate to known sources of income. To prove the latter, the intention to acquire assets disproportionate to income must also be proved, in addition to possession of such assets. Thus, the scope of criminal misconduct has been narrowed and the threshold to establish the offence of possession of disproportionate assets has been increased by the Amendment Act.

Prior sanction of appropriate government for investigation and prosecution: The PC Act required prior sanction of the appropriate government for prosecution of serving public officials. The Amendment Act extends this protection of requirement of prior approval to investigation prior to prosecution. Further, such protection is extended to former officials as well, for offences done while in office. The third proviso to Section 19(1) provides for a directory (not mandatory) time period of 3 (three) months within which the appropriate government must

convey the decision on such sanction. Additionally, the Central Government may prescribe guidelines for grant of sanction for prosecution.

Attachment of property: The Amendment Act has provided for application of the Prevention of Money Laundering Act 2002 and Criminal Law Amendment Ordinance 1944 for attachment and administration of property procured by means of an offence under the PC Act.

Time frame for trial: The PC Act did not provide a time frame within which the trial was to be completed. However, the Amendment Act now prescribes that the Special Judge shall endeavour to complete the trial within 2 (two) years. This period can be extended by 6 (six) months at a time and up to a maximum of 4 (four) years in aggregate subject to proper reasons for the same being recorded. The wording of the section is directory in nature and not mandatory, making it less likely that the courts will abide by such timelines.

Enhancement of Punishment: Punishment has been increased from a minimum imprisonment term of 6 (six) months to 3 (three) years, and from a maximum of 5 (five) years to 7 (seven) years, with or without fine. Punishment for abetment of offences has also been increased by the same quantum.

Income Tax Act, 1961

Though Income Tax Act does not deal with corruption directly but contains number of provisions which deal with ill-gotten money by an assessee.⁴

Cash Credits [Section 68]: As per the provision of Section 68 of the Act, any sum found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

Unexplained Investments [Section 69]: As per the provision of Section 69 of the Act, where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.

Unexplained Money [Section 69A]: As per the provision of Section 69A of the Act, where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or the valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.

Amount of investments, etc., not fully disclosed in books of account [Section 69B]: As per the provision of Section 69B of the Act, where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year.

Unexplained Expenditure [Section 69C]: As per the provision of Section 69C of the Act, where in any financial year an assessee has incurred any expenditure and offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory,

4. http://www.incometaxindia.gov.in/pages/acts/income_tax_act.aspx.

the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year.

Tax on income referred to in Section 68 or Section 69 or Section 69A or section 69B or Section 69C or section 69D is chargeable to tax under Section 115BBE which provides that on any such income the income-tax payable shall be the amount of income-tax calculated at the rate of 60%.

As per the provision of Section 271AAC of the Act, where the income determined includes any income referred to in Section 68, Section 69, Section 69A, Section 69B, Section 69C or Section 69D for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under Section 115BBE, a sum computed at the rate of 10% of the tax payable under Section 115BBE.

Indian Penal Code, 1860

- Section 168 of the IPC – Public servant unlawfully engaging in trade: “Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”
- Section 171 B – Bribery, read with Section 7 of the PC Act “Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. Provided that bribery by treating shall be punished with fine only” as per Section 171E.
- Section 403 – Dishonest Misappropriation of property
- Section 405 – Criminal Breach of Trust: “Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both” according to Section 406.
- Section 417 – Cheating
- Section 463 – Forgery “Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both” Penalties under Prevention of Money Laundering Act, 2002.

Penalties under Prevention of Money Laundering Act, 2002.

- Section 3 – Offence of money-Laundering.-Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.
- Section 4 – Punishment for money-laundering. –

Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees :

Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words “which may extend to seven years”, the words “which may extend to ten years” had been substituted.

2. International Laws⁵

Corruption is a political, social and economic issue at the global level. The issue of corruption cuts to the heart of modern ideas about politics, culture and democracy. Despite continuing concern and a multi-million dollar international industry committed to fighting it, corrupt practices often seem impervious to change. Today it is a major cause of global crises of poverty, human rights violation, injustice and insecurity.

5. Source: ICSI – Corporate Anti Bribery Code, The Institute of Company Secretaries of India, Version IX, 2017.

Many governments have been launched anticorruption policies and programmes in order to combat corruption. Although, over a period of time, the number of proposals and ideas on different ways and means to combat corruption has grown, the progress is less than satisfactory.

A less corrupt country likely to have more growth, improved foreign investments, higher per capita income, lower infant mortality, increased literacy, stronger property rights, increased business growth and many other additional benefits. The challenges are how to get from here to there. In this direction, let us take a brief look on the International Laws, Regulations and Treaties holding strong in preventing corruption from their system.

United Nations Convention Against Corruption (UNCAC)

The United Nations Convention against Corruption “UNCAC” is a multilateral treaty or agreement that has been negotiated by member states of the United Nations, “UN”, and promoted by the UN Office on Drugs and Crime, “UNODC”. It is one of the several legally binding international anti-corruption agreements that require state parties to abide by the treaty to implement several anti-corruption measures and mainly focus on five main areas as follows:

The UNCAC’s comprehensive approach and the mandatory character of many of its provisions act as evidences of this development. Most importantly, the UNCAC tackles the forms of corruption that had not been covered by many of the earlier international instruments, such as trading under influence, abuse of function, and various other types of corruption in the private sector. A further important significant development is the specific inclusion of a provision dealing with the recovery of stolen assets, which is a major concern for countries.⁶



OECD Guidelines for Multinational Enterprises⁷ relating to Combating Bribery

The Guidelines for Multi-National Enterprises (MNEs) prescribed by the OECD are the most wide-ranging set of government-supported recommendations on responsible business conduct in existence today. The Governments adhering to the guidelines aim to encourage and maximize the positive impact of the MNEs for sustainable development and enduring social progress. It provides guidance for responsible business conduct in areas, such as, labour rights, human rights, environment, information disclosure, combating bribery, consumer interests, competition, taxation, and intellectual property rights.

6. Source: ICSI – Corporate Anti Bribery Code, The Institute of Company Secretaries of India, Version IX, 2017

7. OECD Guideline for Multinational Enterprise : <http://www.oecd.org/corporate/mne/1922428.pdf>

The Integrity Pact (IP)⁸

The Integrity Pact is a tool developed and launched by the Transparency International to help different businesses, governments and civil societies in order to equip them to fight corruption in the field of public procurements and public contracting. The Transparency International had established mutual contractual rights and obligations to reduce the high cost and corruption involved in the public contracts. The main objective of the Integrity pact is to make the public procurement process transparent by binding both the parties to the contract. It also envisages a monitoring role for civil society who is the ultimate beneficiary of government action. IP should cover all activities related to the contract from pre-selection of bidders, bidding and contracting, implementation, completion and operation.

Foreign Corrupt Practices Act, 1977 (U.S.A.)⁹

The Foreign Corrupt Practices Act, 1977 “FCPA” is a United States’ federal law that contains two main provisions, *i.e.*, addresses accounting transparency requirements under the Securities Exchange Act of 1934 and concerning bribery of foreign officials. The Act was amended in 1988 and further in 1998. It includes both bribery and accounting provisions.

Applicability of the Act

- Any person who has a certain degree of connection with the United States and engages in foreign corrupt practices.
- Any act by U.S. businesses, foreign corporations trading securities in the U.S., American nationals, citizens, and residents acting in furtherance of a foreign corrupt practice whether or not they are physically present in the U.S.
- In the case of foreign natural and legal persons, the Act covers their deeds if they are in the U.S. at the time of the corrupt conduct.

The ideology of the FCPA is to make it illegal for companies and their supervisors to influence foreign officials with any personal payments or rewards. This Act was passed to make it unlawful for certain classes of people and entities to make payments to foreign government officials in order to assist in obtaining or retaining business. Further, the Act governs not only payments to foreign officials, candidates, and parties, but any other recipient if part of the bribe is ultimately attributable to a foreign official, candidate, or party. These payments are not restricted to monetary forms and may include anything of value. This is considered the territoriality principle of the Act.

Under the FCPA it must be proved that the person offering the bribe did so with a “corrupt” intent. Further, the FCPA only covers active bribery, that is to say the giving of a bribe. The taking of the bribe is not covered under the FCPA. The Act concerns the intent of the bribery rather than the amount, and therefore there is no requirement of materiality. Offering anything of value as a bribe, whether in the form of cash or non-cash items, is prohibited.

Accounting Provision: The FCPA also requires the companies whose securities are listed in the U.S. to meet its accounting provisions. These accounting provisions operate in tandem with the anti-bribery provisions of the FCPA, and requires respective corporations to prepare and keep books and records that accurately and fairly reflect the transactions of the corporation, and to devise and maintain an adequate system of internal accounting controls. An increasing number of corporations are taking additional steps to protect their reputation and reduce their exposure by employing the services of due diligence companies tasked with vetting third party intermediaries and identifying easily overlooked government officials embedded in otherwise privately held foreign firms.

8. Integrity Pact <http://cvc.gov.in/vscvc/intpact.pdf>.

9. FCPA : <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

Bribery and facilitation payment: With reference to payments to foreign officials, the act draws a distinction between bribery and facilitation or “grease payments”, which may be permissible under the FCPA, but may still violate local laws. The primary distinction is that grease payments or facilitation payments are made to officials to expedite their performance of the routine duties which they are already bound to perform. The exception focuses on the purpose of the payment rather than on its value.

Successor’s liability for the FCPA violation: The Act provides that U.S. Company acquiring a foreign firm could face successor liability for the FCPA violations committed by the foreign firm prior to being acquired. Generally, acquiring companies may be liable as a successor for pre-existing the FCPA violations committed by an acquired company where those violations were subject to the FCPA’s jurisdiction when committed.

Further, businesses increasingly focus on their core competencies, and as a result engage more third parties to provide critical business functions; businesses do not have direct control over their third parties and as such, are exposed to the regulatory and reputational risk of the third party FCPA violations. As per the FCPA, businesses bear accountability for activities involving both their internal and external relationships. Companies who operate internationally, or who engage third parties in countries with a high Corruption Perceptions Index are especially at risk. Many companies have now adopted “Anti-Bribery/Anti-Corruption” (ABAC) solutions to combat this risk and help protect themselves from fines and reputational damage.

Penalty

For offences committed under the FCPA¹⁰ an individual can be fined up to US \$ 250,000 per violation, and may also be given upto five years of imprisonment. A company guilty under the FCPA is liable for a fine of up to US \$ 2,000,000 per violation.

The United Kingdom Bribery Act, 2010¹¹

The Bribery Act, 2010 is an Act of the Parliament of the United Kingdom that covers the criminal law relating to bribery. The Act defines all the previous statutory and common law provisions in relation to bribery, the bribery of foreign public officials and the failure of a commercial organisation to prevent bribery on its behalf.

The objective of the Act is to provide a modern legislation that effectively deals with the increasingly sophisticated, cross-border use of bribery, and carry out the prosecution of bribery by individuals and organizations both within the UK and overseas easier. It applies to the United Kingdom of Great Britain and Northern Ireland.

Salient features of the Act¹²

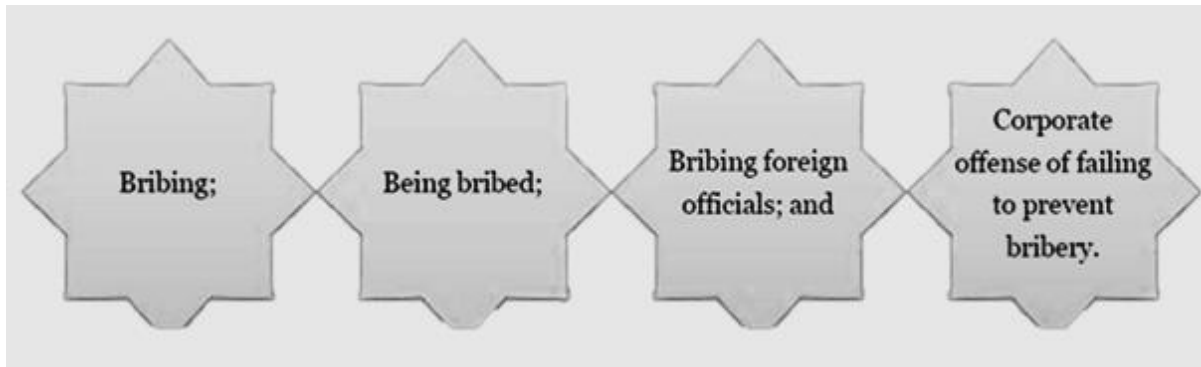
- It will criminalise both active and passive bribery, i.e., both bribing and being bribed.
- It will criminalise not just bribery of public officials, but also bribery entirely in the private sphere.
- It does not require proof of dishonesty or corruption.
- It will criminalise the failure to prevent bribery.
- It will, effectively, require those carrying on business in the UK to have in place “adequate procedures” to prevent bribery taking place, even if the bribery is unconnected with the UK.
- The offences will have extensive extra-territorial reach, criminalising activities which may take place entirely outside the UK.
- Committing offences could lead to imprisonment for up to 10 years (for individuals) and/or unlimited fines (for individuals and corporate bodies).

10. FCPA : <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

11. UK Bribery Act http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

12. <https://www.lw.com/thoughtLeadership/uk-bribery-act-2010-what-businesses-need-to-know>.

- There is no exception for “facilitation payments”.
- “Local customs and practices” will not necessarily provide a defence.
- The Act creates four offences of bribery such as:



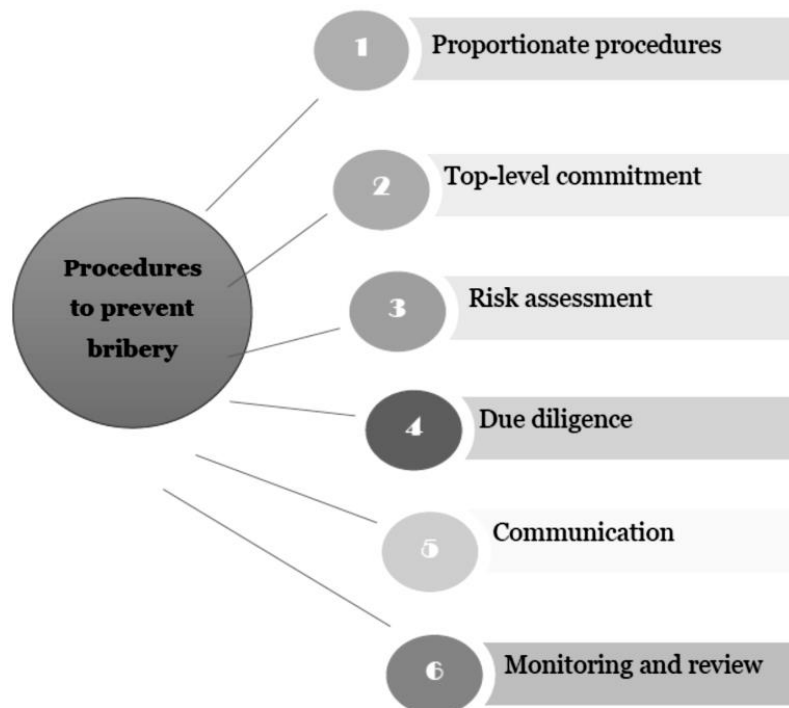
Bribing: Section 1 of the Act provides that it is an offence for a person to offer, promise or give a financial or other advantage for the purpose of bringing about an improper performance of a function or activity.

Being bribed: Section 2 of the Act provides that it is an offence to request, agree to or receive a financial or other advantage for the purpose of bringing about an improper performance of a function or activity or to request, agree to or receive a reward for having done so.

Bribery of Foreign Public Official: Section 6 of the Act provides that it is an offence to offer, promise or give a financial or other advantage to a foreign public official where such advantage is not permitted under the written law applicable to that foreign official. Further, the bribery giver must intend that the advantage given or offered would influence the foreign official in the performance of his/her duties as a public official and must intend to secure business, or to obtain a business advantage. However, the defence is available if the local laws of the country of the foreign official permit or require them to be influenced in that way.

Corporate offence of failing to prevent bribery: Section 7 of the Act provides that a commercial organisation commits an offence under the Act if a person associated with it bribes another person with an intention of obtaining or retaining either business or a business advantage for that organization. However, the commercial organisations will have an absolute defence to liability if they can show that they have put in place “adequate procedures” to prevent bribery. The personal liability can be put in place on senior company officers who turn a blind eye to such board-level bribery.

Adequate procedures to prevent bribery: The UK Bribery Act also specifies what could be considered as adequate procedure put in place to prevent bribery. This will include:



- *Proportionate procedures* – the procedures adopted should be proportionate to the risk faced.
- *Top-level commitment* – the company should adopt a culture of zero tolerance through a commitment by senior management.
- *Risk assessment* – the company should identify its bribery risks and priorities its actions in high risk areas.
- *Due diligence* – the company should take appropriate care when entering into relationships or markets where there is a risk of bribery.
- *Communication* – the company's policy should be clearly communicated to all relevant parties, supported by appropriate training and "speak up" procedures.
- *Monitoring and review* – the procedures put in place should be reviewed and updated as the company's risks change over time.

Penalties

An individual found to have committed an offence under the Bribery Act is liable to be awarded imprisonment for up to ten years and/or to an unlimited fine. A company found guilty is subject to an unlimited fine.

THE FUGITIVE ECONOMIC OFFENDERS ACT, 2018

Background

There have been several instances of economic offenders fleeing the jurisdiction of Indian courts, anticipating the commencement, or during the pendency, of criminal proceedings. The absence of such offenders from Indian courts has several deleterious consequences - first, it hampers investigation in criminal cases; second, it wastes precious time of courts of law, third, it undermines the rule of law in India. Further, most such cases of economic offences involve non-repayment of bank loans thereby worsening the financial health of the banking sector in India. The existing civil and criminal provisions in law are not entirely adequate to deal with the

severity of the problem. It is, therefore, felt necessary to provide an effective, expeditious and constitutionally permissible deterrent to ensure that such actions are curbed. It may be mentioned that the non-conviction-based asset confiscation for corruption-related cases is enabled under provisions of United Nations Convention against Corruption (ratified by India in 2011). The Act adopts this principle.

India has witnessed a number of scams and economic offences which have left an adverse impact on the Indian economy and also the banking industry. The most reported one has been the alleged fraud by owner of the now defunct Kingfisher Airlines, who has been out of India for quite a while now in order to evade trail for criminal offences. Indian Parliament recently enacted The Fugitive Economic Offenders Act, 2018 which was assented to by the President on 31st July, 2018 and is deemed to have come into force on 21st April, 2018.

The statute defines 'fugitive economic offender' as any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who (i) has left India so as to avoid criminal prosecution, or (ii) being abroad, refuses to return to India to face criminal prosecution. The Act also defines 'benami property' and assigns it the same meaning as provide under the Prohibition of Benami Property Transactions Act, 1988. This implies that the FEO Act, 2018 applies to any property which is the subject matter of a benami transaction and also includes the proceeds from such property. Further it also covers within its scope the transactions which are in nature of benami transactions under the Prohibition of Benami Transactions Act, 1988. One of the most prominent provision provided under the FEO Act, 2018 is the bar from putting forward or defending any civil claim once an individual has been declared a fugitive economic offender by the virtue of Section 12 of the Act by the Special Court.

Salient features of the Act:

- i. Application before the Special Court for a declaration that an individual is a fugitive economic offender;
- ii. Attachment of the property of a fugitive economic offender;
- iii. Issue of a notice by the Special Court to the individual alleged to be a fugitive economic offender;
- iv. Confiscation of the property of an individual declared as a fugitive economic offender resulting from the proceeds of crime;
- v. Confiscation of other property belonging to such offender in India and abroad, including benami property;
- vi. Disentitlement of the fugitive economic offender from defending any civil claim; and
- vii. An Administrator will be appointed to manage and dispose of the confiscated property under the Act.

Impact:

The Act re-establish the rule of law with respect to the fugitive economic offenders as they would be forced to return to India to face trial for scheduled offences. This would also help the banks and other financial institutions to achieve higher recovery from financial defaults committed by such fugitive economic offenders, improving the financial health of such institutions.

It is expected that the special forum to be created for expeditious confiscation of the proceeds of crime, in India or abroad, would coerce the fugitive to return to India to submit to the jurisdiction of Courts in India to face the law in respect of scheduled offences.

3. ICSI Anti Bribery Code

Indeed, we have plethora of legislations to fight against the menace of corruption and bribery, yet, if we hold a comparative analysis of legal measures India hold in effectively combating corruptions and bribery with the international practices of the related area, we find that though India has various anti-corruption legislations and anti-corruption institutions, yet the main legislation 'Prevention of Corruption Act, 1988' does not contain

any provision directly dealing with the offence of giving bribe. In the Companies Act, 2013, also the offence of corruption or bribery is not specified. It is only a matter of time that India will have a specific legislation (Act) to deal with bribery in the private sector. In international legislations like the Foreign Corrupt Practices Act, 1977 (FCPA) of USA and the United Kingdom Bribery Act, 2010 both, mandate corporate and other business entities to formulate and adopt anti-bribery policies in accordance with its requirements and provide protection to senior management if they have Anti-Bribery policy in place.

In a survey of the corporate sector by the ICSI, it was observed that due to absence of clear-cut guidelines, the private sector lacks a well-formulated policy to check corruption and the supply side of bribery emanating in their organisations.

Continuing with our deep-rooted perseverance in going hand in hand with the government's initiative towards the practices of good governance and inclusive growth of nation, the Institute is dedicating all its efforts in making India to quit corruption and bribery in its entirety. As a step forward in this dedication towards corruption free India, the Institute is recommending 'Corporate Anti-Bribery Code' (The Code) to apprise the stakeholders about the deep effect, impact of corruption on the growth of corporates and the laws to check and regulate the practices of bribery and corruption in the corporates.

Need for the Code

The main legislation 'Prevention of Corruption Act, 1988' dealing with corruption at present does not provide a definition of 'Corruption' itself. Also, in any corrupt transaction, there are two parties: the bribe-giver and the bribe-taker, but as per Section 24 of the Act, a statement made by a bribe-giver in any proceeding against a public servant for an offence, shall not subject him to prosecution under Section 12. This Act, also does not contain any provision directly dealing with active domestic bribery, *i.e.*, the offence of giving bribe. The Code seeks to curb the supply side of corruption prevalent in the private sector and also covers surrogate corrupt practices.

Objective

The objective of the Code is to ensure that neither the company nor any of its employees, directors or authorised representatives indulge in bribery in any of their actions taken for and on behalf of the company in the course of economic, financial or commercial activities of any kind.

Scope

'Corporate Anti-Bribery Code' (The Code), may be adopted voluntarily by the Corporates. The Code, once adopted by the Company, shall be applicable to the company and its:

- Board of Directors,
- Employees (full time or part-time or employed through any third party contract),
- Agents, Associates, Consultants, Advisors, Representatives and Intermediaries, and
- Contractors, Sub-contractors and Suppliers of goods and/or services.

ICSI Anti-Bribery Code: A Way Ahead

In the present scenario, when with a view to eradicate corruption from its core, people of the nation are called upon to leave the attitude of "*Chalta hai*" and to adopt the attitude of "*Badal Sakta hai*" for the inclusive growth of nation by 2022, a step forward would surely be a great association in the governments' fight against black money and corruption while establishing transparent governance at an upper end. It is beautifully said that everyone with their core strength hold the sky, then a sky of malicious act would never fall on the good of the people. In this line this Code would be a step forward in acquainting the stakeholders about the deep effect and impact

of corruption on the growth of corporates along with the laws to check and regulate the practices of bribery and corruption in the corporates. This would surely advance their proficiencies in assisting the government's initiative towards building a corruption free New India by 2022.

“There is no compromise, when it comes to corruption, you have to fight it”

LESSON ROUND UP

- The detailed position of Laws and Regulations dealing with Corporate Fraud and also aids in achieving forensic audit would be discussed under the following heads:
 1. Indian Laws
 2. Information Technology and Business Laws
 3. International Laws
 4. UK Bribery Act
 5. US Foreign Corrupt Practices Act
 6. ICSI Anti Bribery Code.
- Considering the consequence of corporate frauds on the growth of Corporates and Economy, the Companies Act, 2013 lists down frauds and prescribes penalties and punishments for violations.
- Section 447 of the Companies Act, 2013 often now referred to as one of the draconian provision of the new Act deals with provision relating to punishment for fraud.
- The Companies Act, 2013 has provided punishment for fraud as provided under Section 447 in around 20 sections of the Act e.g. u/s 7(5), 7(6), 8(11), 34, 36, 38(1), 46(5), 56(7), 66(10), 75, 140(5), 206(4), 213, 229, 251(1), 266(1), 339(3), 448 etc. for directors, key managerial personnel, auditors and/or officers of company.
- The new act casts onerous responsibility on the part of statutory auditor/cost auditor/secretarial auditor to report fraud to Board and Central Government.
- Section 143 (15) If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 25 lakh rupees.
- Rule 13 of The Companies (Audit and Auditors) Rules, 2014 contains the operational procedure of Reporting of Fraud prescribed in Section 143(12) of the Act.
- Rule 13(5): The provision of this rule shall also apply, mutatis mutandis, to a cost auditor and a secretarial auditor during the performance of his duties under Section 148 and section 204 respectively.
- Regulation 11 C of the SEBI Act, 1992 empowers the SEBI to direct any person to investigate the affairs of intermediaries or brokers associated with the securities market whose transactions in securities are being dealt with in a manner detrimental to the investors or the securities market.
- Section 33 of the Act empowers the IRDA to direct any person (Investigating Authority) to investigate the affairs of any insurer.
- Section 3 of the Act defines the offence of money laundering as the involvement of a person in any process or activity connected with the proceeds of crime and projecting it as untainted property, where the scope of integrating forensic audits can be clearly seen.
- Major International Laws covering this domain are:

1. United Nations Convention Against Corruption (UNCAC)
 2. OECD Guidelines for Multinational Enterprises relating to Combating Bribery
 3. The Integrity Pact (IP)
 4. Foreign Corrupt Practices Act, 1977
 5. The United Kingdom Bribery Act, 2010
- Continuing with our deep-rooted perseverance in going hand in hand with the government's initiative towards the practices of good governance and inclusive growth of nation, the Institute is dedicating all its efforts in making India to quit corruption and bribery in its entirety.
 - As a step forward in this dedication towards corruption free India, the Institute is recommending 'Corporate Anti-Bribery Code' (The Code) to apprise the stakeholders about the deep effect, impact of corruption on the growth of corporates and the laws to check and regulate the practices of bribery and corruption in the corporates.

SELF-TEST QUESTIONS

1. Discuss the Civil Remedies available against Fraud in India
2. Write a brief note on ICSI Anti – Bribery Code.
3. What are provisions in Information Technology to prevent and regulate Corporate Frauds in India?
4. Discuss the salient features of the Fugitive Economic Offenders Act, 2018.

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Lesson 5

Forensic Audit and Indian Evidence Law

LESSON OUTLINE

- Finding Facts
- Question of Law and Question of Fact
- Materiality and Facts-in-issue
- Relevant Facts
- Relevancy
- Types of Relevancy and Test to Determine Relevancy
- Admissibility and Weight of an Evidence
- Admission of Evidence
- Admission to be used as a whole and unambiguous
- Mode of proof of admissions
- Persons whose statements are admissions
- Statements of parties suing or sued in a representative character
- Methods to Prove Cases
- Oral Evidence
- Documentary Evidence
- Presumption of Documents
- Proving a Matter through Evidences On the Basis of Sources
- Direct evidence
- Circumstantial evidence
- Other kinds of evidence
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

In the selection of timely detection, prevention and regulation over corporate fraud and reference to due investigation, Forensic Audit is having an imperative role in assisting the corporates for maintaining efficiency and merit. On the larger parameters, Forensic audit as tool-mix of accounting and investigation is serving all the five E's of good governance and make the corporates to grow and develop on the parameters of being *Effective, Efficient, Easy, Empower, and Equity*'. In this background, where forensic audit is considered as a need of the hour for enhancing the corporate culture of India, this chapter covers the verve of the forensic audit including the meaning, definition, objectives and significance of forensic audit.

Finding Facts

Stephen long ago noted that legal usage of the term “evidence” is ambiguous. It sometimes refers to that which is adduced by a party at the trial as a means of establishing factual claims. (“Adducing evidence” is the legal term for presenting or producing evidence in court for the purpose of establishing proof.) This meaning of evidence is reflected in the definitional section of the Indian Evidence Act (Stephen 1872: 149).¹ When lawyers use the term “evidence” in this way, they have in mind what epistemologists would think of as “objects of sensory evidence” (Haack 2004: 48).

Evidence, in this sense, is divided conventionally into three main categories:

- oral evidence (the testimony given in court by witnesses),
- documentary evidence (documents produced for inspection by the court), and
- “real evidence”;

The first two are self-explanatory and the third captures things other than documents such as a knife allegedly used in committing a crime.²

The term “evidence” can, secondly, refer to a proposition of fact that is established by evidence in the first sense. This is sometimes called an “evidential fact”. That the accused was at or about the scene of the crime at the relevant time is evidence in the second sense of his possible involvement in the crime.

But the accused's presence must be proved by producing evidence in the first sense. For instance, the prosecution may call a witness to appear before the court and get him to testify that he saw the accused in the vicinity of the crime at the relevant time. Success in proving the presence of the accused (the evidential fact) will depend on the fact-finder's assessment of the veracity of the witness and the reliability of his testimony. *(The fact-finder is the person or body responsible for ascertaining where the truth lies on disputed questions of fact and in whom the power to decide on the verdict vests. The fact-finder is also called “trier of fact” or “judge of fact”. Fact-finding is the task of the jury or, for certain types of cases and in countries without a jury system, the judge.)*

Sometimes the evidential fact is directly accessible to the fact-finder. If the alleged knife used in committing the crime in question (a form of “real evidence”) is produced in court, the fact-finder can see for himself the shape of the knife; he does not need to learn of it through the testimony of an intermediary.

A third conception of evidence is an elaboration or extension of the second. On this conception, evidence is relational.

A factual proposition (in Latin, *factum probans*) is evidence in the third sense only if it can serve as a premise for drawing an inference (directly or indirectly) to a matter that is material to the case (*factum probandum*).

The fact that the accused's fingerprints were found in a room where something was stolen is evidence in the present sense because one can infer from this that he was in the room, and his presence in the room is evidence of his possible involvement in the theft. On the other hand, the fact that the accused's favorite color is blue would, in the absence of highly unusual circumstances, be rejected as evidence of his guilt: ordinarily, what a person's favorite color happens to be cannot serve as a premise for any reasonable inference towards his commission of a crime and, as such, it is irrelevant.

In the third sense of “evidence”, which conceives of evidence as a premise for a material inference, “irrelevant evidence” is an oxymoron: it is simply not evidence. Hence, this statement of Bentham³ quotes “To say that

1. Aitken, C., P. Roberts and G. Jackson, 2010, *Fundamentals of Probability and Statistical Evidence in Criminal Proceedings: Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnessess*, London: Royal Statistical Society.

2. Allen, R., 1986, “A Reconceptualization of Civil Trials”, *Boston University Law Review*, 66: 401–437.

3. Allen, R. and B. Leiter, 2001, “Naturalized Epistemology and the Law of Evidence”, *Virginia Law Review*, 87: 1491–1550

testimony is not pertinent, is to say that it is foreign to the case, has no connection with it, and does not serve to prove the fact in question; in a word, it is to say, that it is not evidence.”

There can be evidence in the first sense without evidence in the second or third sense. To pursue our illustration, suppose it emerges during cross-examination of the expert that his testimony of having found a finger-print match was a lie. Lawyers would describe this situation as one where the “evidence” (the testimony of the expert) fails to prove the fact that it was originally produced to prove and not that no “evidence” was adduced on the matter. Here “evidence” is used in the first sense—evidence as testimony—and the testimony remains in the court’s record whether it is believed or not. But lawyers would also say that, in the circumstances, there is no “evidence” that the accused was in the room, assuming that there was nothing apart from the discredited expert testimony of a fingerprint match to establish his presence there. Here, the expert’s testimony is shown to be false and fails to establish that the accused’s fingerprints were found in the room, and there is no (other) factual basis for believing that he was in the room. The factual premise from which an inference is sought to be drawn towards the accused’s guilt is not established.

Fourthly, the conditions for something to be received (or, in technical term “admitted”) as evidence at the trial are sometimes included in the legal concept of evidence. (These conditions are discussed in section 2 below.) On this conception, legal evidence is that which counts as evidence in law. Something may ordinarily be treated as evidence and yet be rejected by the court. Hearsay is often cited as an example. It is pointed out that reliance on hearsay is a commonplace in ordinary life. We frequently rely on hearsay in forming our factual beliefs. In contrast, “hearsay is not evidence” in legal proceedings (Stephen 1872: 4–5). As a general rule, the court will not rely on hearsay as a premise for an inference towards the truth of what is asserted. It will not allow a witness to testify in court that another person X (who is not brought before the court) said that p on a certain occasion (an out-of-court statement) for the purpose of proving that p.

In summary, at least four possible conceptions of legal evidence are in currency: as an object of sensory evidence, as a fact, as an inferential premise and as that which counts as evidence in law. The sense in which the term “evidence” is being used is seldom made explicit in legal discourse although the intended meaning will often be clear from the context.

Question of Law and Question of Fact

Question of Law

In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law.⁴ Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. Answers to questions of law are generally expressed in terms of broad legal principles and can be applied to many situations rather than be dependent on particular circumstances or factual situations. An answer to a question of law as applied to the particular facts of a case is often referred to as a “conclusion of law.”

In several civil law jurisdictions, the highest courts consider questions of fact settled by the lower court and will only consider questions of law. They thus may refer a case back to a lower court to re-apply the law and answer any fact-based evaluations based on their answer on the application of the law. International courts such as the Benelux Court of Justice and the European Court of Justice will only answer questions of law, asked by judges of national courts if they are not certain about the interpretation of the law of multilateral organizations.

While questions of fact are resolved by a trier of fact, which in the common law system is often a jury, questions of law are always resolved by a judge or equivalent. Whereas findings of fact in a common law legal system are rarely overturned by an appellate court, conclusions of law are more readily reconsidered.

4. Proffatt, John (1877). *A Treatise on Trial by Jury, Including Questions of Law and Fact* (1986 reprint ed.). Buffalo, NY: William S. Hein & Co.

Question of fact

In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a “finding of fact”) usually depends on particular circumstances or factual situations.⁵

All questions of fact are capable of proof or disproof by reference to a certain standard of proof. Depending on the nature of the matter, the standard of proof may require that a fact be proven to be “more likely than not” (there is barely more evidence for the fact than against, as established by a preponderance of the evidence) or true beyond reasonable doubt.

Answers to questions of fact are determined by a trier of fact such as a jury, or a judge. In many jurisdictions, such as the United Kingdom, appellate courts generally do not consider appeals based on errors of fact (errors in answering a question of fact). Rather, the findings of fact of the first venue are usually given great deference by appellate courts.⁶

The distinction between “law” and “fact” has proved obscure wherever it is employed. For instance, the common law used to require that a plaintiff’s complaint in a civil action only state the “facts” of his case, not any “legal conclusions.” Unfortunately, no one has ever been able to tell whether the allegation that “on November 9, the defendant negligently ran over the plaintiff with his car at the intersection of State Street and Chestnut Street” is a statement of fact or a legal conclusion. In fact, the distinction between law and fact is just the legal version of the philosophical distinction between “empirical” and “analytical” statements, a distinction on whose existence philosophers have been unable to agree to this day.... we will see that many defendants charged with impossible attempts are not in fact attempting the crime they are charged with attempting. They merely think they are committing a crime.... It would be merely foolish to assert that it is of no interest whatever to know that *The Disciples* is a forgery. But to the man who has never heard of either Vermeer or van Meegeren and who stands in front of *The Disciples* admiring it, it can make no difference whether he is told that it is a seventeenth-century Vermeer or a twentieth-century van Meegeren in the style of Vermeer. And when some deny this and argue vehemently that, indeed, it does make a great deal of difference, they are only admitting that they do know something about Vermeer and van Meegeren and the history of art and the value and reputation of certain masters. They are only admitting that they do not judge a work of art on purely aesthetic grounds, but also take into account when it was created, by whom, and how great a reputation it or its creator has.⁷

Materiality and Facts-in-issue

We have just considered the first condition of receivability, namely, relevance. That fact A is relevant to fact B is not sufficient to make evidence of fact A receivable in court. In addition, B must be a “material” fact. The materiality of facts in a particular case is determined by the law applicable to that case. In a criminal prosecution, it depends on the law which defines the offence with which the accused is charged and at a civil trial, the law which sets out the elements of the legal claim that is being brought against the defendant (Wigmore 1983a, 15–19; Montrose 1954: 536–537).

Imagine that the accused is prosecuted for the crime of rape and the alleged victim’s behaviour (fact A) increases the probability that she had consented to have sexual intercourse with the accused (fact B). On the probabilistic theory of relevance that we have considered, A is relevant to B. Now suppose that the alleged victim is a minor. Under criminal law, it does not matter whether she had consented to the sexual intercourse. If B is of no legal

5. “Question of fact”, *Legal Information Institute. Cornell University Law School*

6. Sharma, Riecha; Tacey, Sam. “The Decision is Final: English High Court Rules That There Can Be No Appeal against Arbitration Awards on Issues of Fact”. *edwardswildman.com. Edwards Wildman Palmer*.

7. Katz, Leo (1987). “The Crime That Never Was: a Fake Opinion in Case involving Facts”. *Bad Acts and Guilt Minds: Conundrums of Criminal Law. Chicago, IL: University of Chicago Press. pp. 276–293. ISBN 9780226425924*.

consequence, the court will not allow evidence of A to be adduced for the purpose of proving B: the most obvious reason is that it is a waste of time to receive the evidence.

Not all material facts are necessarily in dispute. Suppose the plaintiff sues the defendant for breach of contract. Under the law of contract, to succeed in this action, the plaintiff must prove the following three elements: that there was a contract between the parties, that the defendant was in breach of the contract, and that the plaintiff had suffered loss as a result of that breach. The defendant may concede that there was a contract and that he was in breach of it but deny that the plaintiff had suffered any loss as a result of that breach. In such a situation, only the last of the material facts is disputed. Following Stephen's terminology, a disputed material fact is called a "fact in issue" (Stephen 1872: 28).

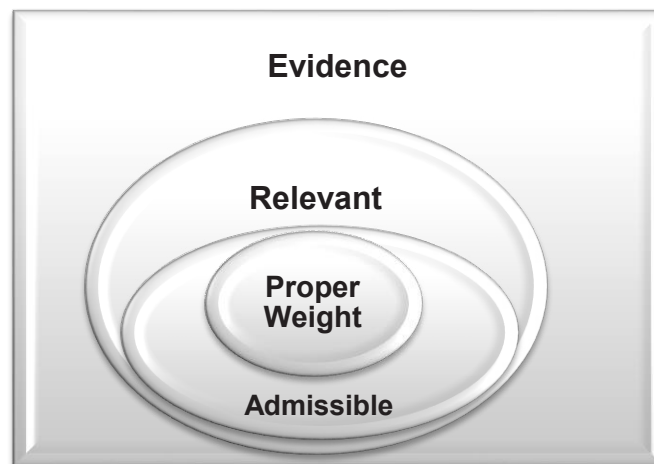
The law does not allow evidence to be adduced to prove facts that are immaterial or that are not in issue. "Relevance" is often used in the broader sense that encompasses the concepts under discussion. Evidence is sometimes described as "irrelevant" not for the reason that no logical inference can be drawn to the proposition that is sought to be proved (in our example, A is strictly speaking relevant to B) but because that proposition is not material or not disputed (in our example, B is not material). This broader usage of the term "relevance", though otherwise quite harmless, does not promote conceptual clarity because it runs together different concepts (see James 1941: 690–691; Trautman 1952: 386; Montrose 1954: 537).

Relevant Facts

In India, which is a common law country, we follow adversarial system of law. Judges do not question the parties and merely rely on evidence put forth by them. From such evidences, judges infer actual circumstances and therefore come to truth and deliver justice.

The word "evidence" is not too complicated to be defined in a lay man's language. But when it comes to solemn court proceedings the wheel turns and debate starts as to what is evidence and what can be considered as evidence to prove a fact. Thus, it becomes necessary that proper rules as to what can be considered as evidence holding value in the eyes of law are laid down properly. Thus for an evidence to have any value in the eyes of court of law and be relied upon on reaching the decision these few rules have to be kept in mind:

1. Relevancy
2. Admissibility
3. Weight



All these factors in determining the value of evidence will be dealt in this project. But before we start it is important to mention that not all evidences are relevant. And out of those relevant evidences only few of them are admissible in the eyes of law. Sometimes it may happen that evidence is admissible but it is outweighed

by several other considerations and hence get dismissed by the court. This consequence is due to balancing weight of evidence with costs of its admissions, which too will be dealt later in the project. And on all such factors it is determined whether evidence has any value with respect to fact in issue or not.

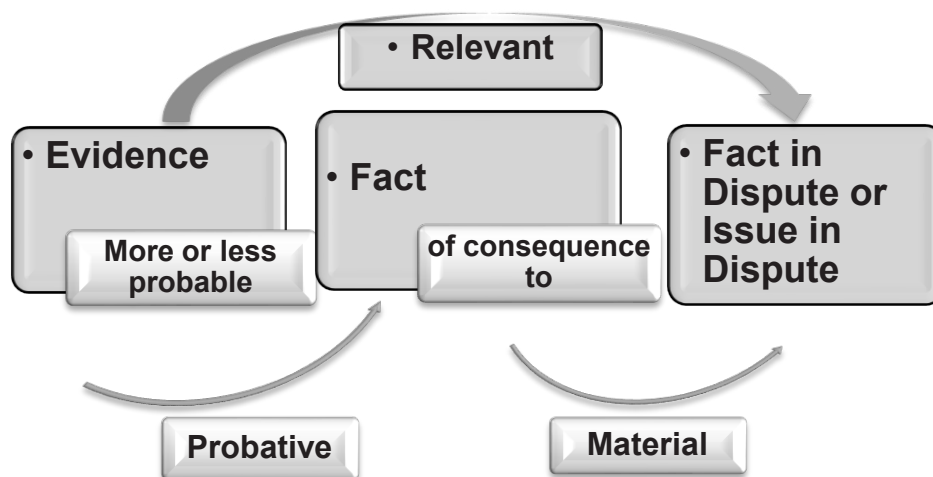
Relevancy

While defining a tree a person will describe its characteristics such as stems, leaves, branches, fruits etc. But what shade of green does the leaves of tree has or what colour of fruit it bears will be irrelevant unless it is asked to define a specific tree. Similarly while proving or disproving a fact in issue it becomes important that the evidence put forth is relevant. It is related to the fact in issue. Question now comes as to what is relevancy?

Indian Evidence is silent with respect to proper definition of the act. It however provides that a fact will be considered relevant if it is relevant according to rules given under the act.⁸ To define relevancy scholars resort to definition given by *Sir Stephens*⁹. According to him:

*“The word ‘relevant’ means that any **two facts** to which it is applied are **so related** to each other that according to the **common course of events**, one either taken by itself or in connection with other facts **proves or renders probable** the past, present or future existence or non existence of the other.”*

The definition can be understood by following diagrams¹⁰



Thus from the definition above we can infer two important ingredients:

1. **Material connection** (or relation to fact in issue or another fact.)

By material connection it means that the fact in issue and the fact to be produced must have some sort of connection or they should be related to each other. Something cannot exist without any reason. The state of one thing affects the formulation of another and thus the material connection defines that relation, effect, cause or reasoning.

2. **Probative value**

By the word probative we mean ‘capacity to prove something’. If we read Sir Stephens’ definition again we find that a relevant fact must ‘*prove*’ or ‘*render probable*’ the existence or non existence of fact in issue or other fact. It implies that either something is proved beyond doubt or the probability that something exists has grown higher by producing the evidence.

8. Section 3 and 5, Indian Evidence Act, 1872.

9. J.F. Stephen, *Digest of the Law of Evidence*, (12th edn. London, 1948), Art. 1.

10. George Fisher, *Evidence, University Case Book*, New York Foundation Press.

Both of the elements can be considered by the following example:

B, C and D are very good friends who trust each other a lot and often visit each other. D is kleptomaniac. He comes to visit B at his home along with C. They had come to greet B on his graduation. They had dinner together. All of them discussed about cricket league going on. After they leave B finds that his silver cutlery from table is missing.

Now the question comes who has stolen it? The discussion about cricket match is not anyway related to the fact of missing silverware. The visit of both D and C is material. But it does not prove or make probable anything as they often visit B. Also, the fact that D is kleptomaniac and possesses special interest in stealing silverware is material to show that he might have interest in the cutlery. It also makes it more probable that he has stolen the cutlery and not C. Thus the fact of D being kleptomaniac is material and makes his guilt more probable.

Types of Relevancy and Test to Determine Relevancy

Though, it is clear that for an evidence to be appreciable it has to be relevant. However, often it becomes difficult to draw a line between relevant and irrelevant material. In such circumstances it becomes necessary to lay down test of relevancy. The test can be considered by also having a look at two types of relevancy,

- *Logical Relevancy* and
- *Legal Relevancy*.

Logical Relevancy

To understand logical relevancy let us have a look at Stephens's definition again. It talks about '*common course of events*'. The reliance is to be proved on common stock of knowledge about the world that is logic, common sense and general experience.¹¹ Thus when we derive relevancy on the basis of logic it can be said logical relevancy. There are many ways to derive relevancy on the basis of logic for example syllogism.

Example 1: All Thieves are Criminals; A is a Thief; Therefore, A is a Criminal.



Example 2: Another example we can consider is of Cause and Effect relationship. If we find fresh blood on some weapon it can be inferred that some injury has happened. The injury is cause of blood.



11. I.H. Dennis, *The Law of Evidence*, Sweet & Maxwell, 1999.

There can be many other tests such as normal human behavior, general course of conduct, laws of nature or let it be experience. However Logical relevance is not necessarily be admissible in the court of law. If the legislature lays down guidelines to test relevancy then such guidelines will prevail over reasoning.

Legal Relevancy

By legal relevancy we mean that a fact should be relevant under the rules laid down by law. In India Section 5¹² provides that only those evidences can be given which are relevant under the act. That is from section 6 to 55. Hence, these provisions lay down what are the relevant facts to be considered while recording evidences. Any fact howsoever material not falling under the provisions will not be considered as evidence and hence not admissible. Thus, the actual test to determine relevancy becomes whether the fact is relevant under the provisions of the statute or not.

Admissibility and Weight of an Evidence

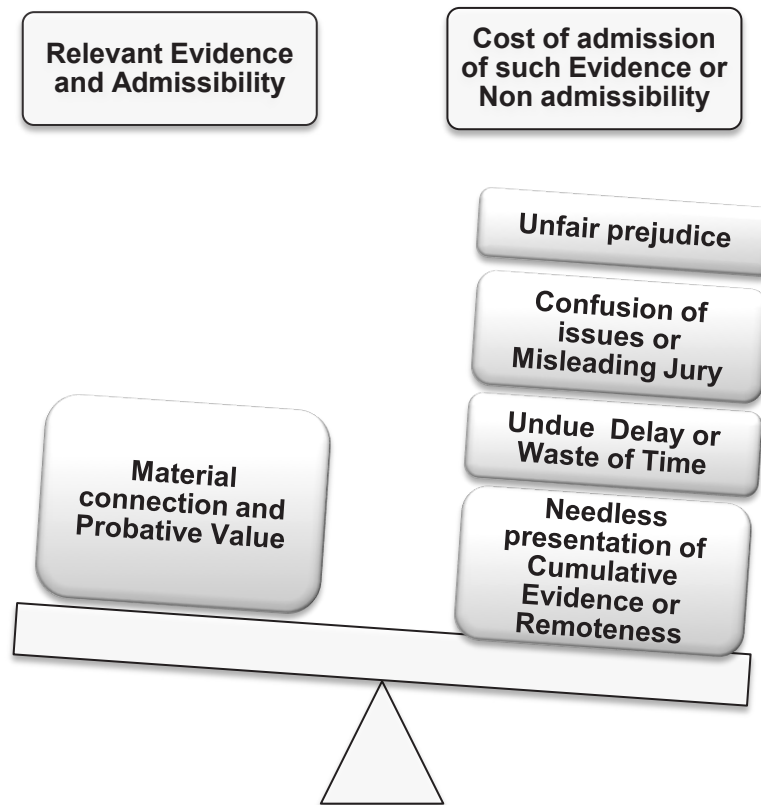
The court after deciding whether the fact is relevant or not decides upon the matter of admissibility. By admissibility we mean capability to be accepted. A fact may be highly relevant but to the chagrin of lawyers court refuses to admit the evidence because it is non-admissible for several reasons. Thus if an evidence is legally relevant and does not prejudice the trial then only it will be admissible in the court of law. Whether evidence outweighs costs of admission depends on the discretion of the court. Thus if admission has an adverse effect on the course of fair proceeding court will not admit it i.e., if admission of an evidence misleads a jury or causes undue delay in the proceedings or proves an already established fact then such an evidence will be rejected. Normally a trial judge would first determine the logical relevance of evidence and then weighs its potential probative value against the possible costs of admissions.

The above mentioned rules were to be decided by the jury or the trial judge. They used to have large discretion for admitting evidence on record. However, here in India the evidence act of 1872 lays down in detail all the tests of relevancy and admissibility of the facts to determine a fact in issue and pronounce the judgment. The act has incorporated in itself all these rules thereby narrowing down the scope for discretion of judges.

Admission of Evidence

Every case, whether civil or criminal, that comes before a court of law has a fact story behind it. Facts out of which cases arise keep happening in the ordinary course of life. There is a crowded road, for example, people are moving, vehicles are moving. Everyone is running at unmitigated speed suddenly two vehicles run against each other. The nature and cause of the accident would be in question. The facts which led up to the climax will have to be reconstructed before the court, so that the judge in the court is able to consider what really happened. Only then he will be able to apply the appropriate law to the fact to arrive at a solution about the right and liabilities of the parties. The practical reality is that the truth of a case is worth less unless they can be proved to the satisfaction of the judge and allows him to act on them. The means by which facts are proved are governed by the law of evidence. The function of the law of evidence is laid down rules according to which the facts of case can be proved or disproved before a court of law. The means which can be used to prove a fact are all controlled by the rules and principles lay down by the law of evidence. The law of evidence does not affect substantive right of parties but only lays down the law for facilitating the rules of evidence for the purposes of the guidance of the court. It is procedural law which provides how a fact is to be proved. The evidence means any things by which any alleged matter of facts is either establish or disproved. Evidence is of many kinds and one of the important ones is 'Admission'.

12. *Indian Evidence Act, 1872.*



In general, Admission is a voluntary acknowledgment of a fact. Importance is given to those admissions that go against the interests of the person making the admission. For example, when A says to B that he stole money from C, A makes an admission of the fact that A stole money from C. This fact is detrimental to the interests of A. The concept behind this is that nobody would accept or acknowledge a fact that goes against their interest unless it is indeed true. Unless A indeed stole money from C, it is not normal for A to say that he stole money from C. Therefore, an admission becomes an important piece of evidence against a person. On the other hand, anybody can make assertions in favor of themselves. They can be true or false. For example, A can keep on saying that a certain house belongs to himself, but that does not mean it is necessarily true. Therefore, such assertions do not have much evidentiary value. According to Black's Law Dictionary¹³, "A voluntary acknowledgment, confession, or concession of the existence of a fact or the truth of an allegation made by a party to the suit."

An admission is any statement made by a party to a lawsuit (either before a court action or during it) which tends to support the position of the other side or diminish his own position. For example, if a husband sues his wife for divorce on the grounds of adultery, and she states out of court that she has had affairs, her statement is an admission. Any admission made by a party is admissible evidence in a court proceeding, even though it is technically considered hearsay (which is normally inadmissible). Attorneys tell their clients not to talk to anyone about their case or about the events leading up to it in order to prevent their clients from making admissions. An admission is the testimony which the party admitting bears to the truth of a fact against himself. It is a voluntary act, which he acknowledges as true the fact in dispute. An admission and consent is, in fact, one and the same thing, unless indeed for more exactness we say, that consent is given to a present fact or agreement, and admission has reference to an agreement or a fact anterior for properly speaking, it is not the admission which forms a contract, obligation or engagement, against the party admitting. The admission is, by its nature, only the proof of a pre-existing obligation, resulting from the agreement or the fact, the truth of which is acknowledged.

13. 2nd Edition, *Roosevelt v. Smith*, 17 Misc. Kep. 323, 40 N. Y. Supp. 381.

This concept is governed by the rules and regulations mentioned under Indian Evidence Act, 1872, Section 17-23.

Section 17

Section 17 - *An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.*

An admission is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true. Admissions are admitted because the conduct of a party to a proceeding, in respect to the matter in dispute, whether by acts, speech or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue. Admissions are very weak kind of evidence and the Court may reject them if it is satisfied from other circumstances that they are untrue.¹⁴ The Supreme Court has observed: Admissions as defined in Sections 17 and 20 and fulfilling the requirements of Section 21 are substantive evidence. An admission is the best evidence against the party making it and, though not conclusive, shifts the onus to the maker on the principle that what a party himself admits to be true may be reasonable presumed to be true so that until the presumption is rebutted the fact admitted must be taken to be true.¹⁵ An assessee cannot resile from his admission made in tax return even at appellate stage.¹⁶ There is this observation in Phipson on Evidence¹⁷: "Subject to certain exceptions, the general rule, then both in civil and criminal cases, is that any relevant statement made by a party is evidence against himself. *R v. Erdheim*"¹⁸. The weight of the declaration is, of course, a totally different matter; this may vary with the circumstances and will not doubt, be greater if against interest at the time, than the contrary"

An admission is defined in Section 17, Indian Evidence Act, 1872, as a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances mentioned in the three succeeding sections. The section does not, therefore, contain a complete definition of the word "admission", in as much as it does not define the persons whose statements amount to admissions, nor the circumstances under which a statement must be made so that it may amount to an admission. This part of the definition of an admission is left to sections 18-20. Therefore, the question whether a statement amounts to an admission or not depends upon whether it was made by any of the persons, and in any of the circumstances, described in sections 18-20, and whether it suggests an inference as to a fact in issue or a relevant fact in the case. The fact that the statement suggests an inference in favor of the person who made the statement does not make the statement any the less an admission, as the question whether a statement is or is not an admission different from the question whether an admission may or may not be proved in favor of the person making it. So that a statement may be an "admission" in the sense in which this word is used in this set of sections, it must be an oral or documentary statement. A statement may be made otherwise than by word of mouth or writing,¹⁹ but such a statement can hardly be described as an oral or documentary statement.²⁰ Admissions by conduct are not governed by this set of sections, as inferences suggested by active or passive conduct are not oral or documentary statements. The proper section under which the relevancy of admissions by conduct must be established is the Section 8 of the Act, as a statement made by conduct will be admissible or inadmissible according to whether it falls or does not fall within «the terms of that section."

14. *Latafat Husain v. Lala Onkar Mal* (1934) 10 Luck 371.

15. *Thiru John v. Returning Officer*, AIR 1977 SC 1724.

16. *Federal Bank Ltd. v. State*, AIR 1995 Ker 62.

17. 9th Ed. 1952.

18. (1986) 2 QB 260.

19. *E.v. Nga Kyaing*, 3 R 656: 94 IC 706: 1926 R 112: 27 Cr LJ 658.

20. *Brij Nandan v. Emperor.*, 133 IC 154: 1931 A 9: 32 Cr LJ 1006.

Admission to be used as a whole and unambiguous.

An admission must be used either as a whole or not at all.²¹ When a statement which is sought to be given in evidence forms part of a longer statement, evidence shall be given of so much of the statement as is necessary to the full understanding of the nature and effect of the statement.²² Before any statement can be used as an admission, it must be shown to be unambiguous and clear on the point at issue.²³ If an admission is capable of two interpretations, an interpretation unfavorable to the person making it should not be put on his admission. The requirement is that an admission must be clear, precise, not vague or ambiguous.²⁴

Mode of proof of admissions

When an admission is intended to be relied upon, the admission must be regularly proved.²⁵ An admission may be proved in any of the ways in which a statement is permitted to be proved. The person who made the admission may be called and questioned as to his having made the alleged admission, or any person in whose presence the statement was made may be called and examined. If the admission is contained in a document, the document must be proved in any of the ways in which a document is provable. An admission contained in a plaint must be proved in one of the ways in which a statement contained in a document may be proved; and since a plaint is not a public document a certified copy of it is not the proper proof of an admission contained in it.²⁶

It has been held in several decisions that when an admission is sought to be given in evidence, the admission must be put to the party making it to enable him to explain the admission,²⁷ but it is submitted that this view is erroneous. The Privy Council decision in *Balgangadhar Tilak v. Shrinivas Pandit*,²⁸ which is relied on for this view²⁹ is no authority for the proposition that an admission in the usual sense must be put to the party making it. In that case, certain documents were used, and inferences drawn from them, by the High Court to discredit the testimony of persons who had been examined as witnesses, without those documents or inferences arising from them being put to the witnesses. This was, as held by the Privy Council, clearly contrary to the provisions of section 145 of the Evidence Act which provides that where it is intended to contradict a witness by a previous inconsistent statement of his, his attention must be drawn to that part of the statement by which it is intended to contradict him. But section 145 of the Evidence Act applies only to previous statements of witnesses and does not apply to admissions of parties. An admission is admissible, and is given in evidence as substantive evidence in the case and not for the purpose of contradicting the testimony of a witness. In other systems of evidence the rule requiring confrontation does not apply to admissions made by a party. Whether the party is called as a witness or not³⁰ and there is no reason why the same rule should not be followed here, there being nothing in the Act to point to the contrary. There are observations in some Indian decisions also to the effect that the rule of confrontation does not apply to admissions.³¹ The rule that an admission must be put to the party making it also conflicts with the well-recognized rule that an admission shifts onus and that it is for the party making the admission to get rid of it by showing that the admission was untrue.³² If, therefore, the onus of proving an admission to be untrue is on the party making it, it is no duty of his opponent to call him as a witness or to put the admission to him when and if he has called him. Further, a declaration, when admitted as an

21. *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, 1952 SCR 1091.

22. Section 39 of Indian Evidence Act, 1872.

23. *Paresh Nath v. Ghasi Ram*, AIR 1960 Pat 407.

24. *C. Koteswara Rao v. C. Subbarao*, AIR 1971 SC 1542

25. *Moni Lal Kar Chowdhry v. Uma Charan Chakravarty*, 25 IC 571: 19 Cr LJ 541

26. *Ahmad Khan v. Hurmuzi Khanam*, 61 IC 117

27. *Bombay Agarwal Co. v. Ramchand Diwanchand*, 1953 N 154: ILR 1952 N 700

28. *Gangacharan Tilak v. Srinivas Pandit*, 39 B 441

29. *Muharram Ali v. Barkat Ali*, 125 IC 886: 1930 L 695

30. *Andrews v. Askey*, (1837) 8 C&P 7

31. *Rameshwar Das v. Baldeo Singh*, 1936 P 588.

32. *Bibi Kaniz Ayesha v. Majibul Hasan Khan*, 1942 P 230.

admission, is original evidence and not hearsay. An admission may, therefore, be proved by any witness who heard it and the person making it need not be called at all.³³ If, therefore, the maker of the admission need not be examined as a witness, it is much less necessary to put the admission to him if and when called as a witness.

Section 18

Section 18 – Admission by party to proceeding or his agent; by suitor in representative character; by party interested in subject-matter; by person from whom interest derived - Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

By suitor in representative character - Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by - (1) by party interested in subject matter; persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding and who make the statement in their character of persons so interested; or (2) by person from whom interest derived; persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

Persons whose statements are admissions

If a statement possesses the requisite evidentiary qualification laid down by section 17, it must in order to amount to an admission be made by any one of the person mentioned in sections 18 to 21. With respect to the persons whose statements are receivable as admissions, the general rule is that the statement must be either of a party to the proceeding or of one identified in interest with the party to the proceedings. The word “proceeding” in section 18 refers to proceedings in which the matter stated by the party is in issue.³⁴ Therefore, a statement made in a previous suit by a person who is not a party to the subsequent suit is not admissible in the subsequent suit.³⁵ The identity of interest may arise by reason of the person making the statements being the agent³⁶ or referee³⁷ of the party against whom the statement is sought to be proved, or by reason of his having any proprietary or pecuniary interest in the subject of the litigation, or by reason of the suit having derived his interest in the subject of the suit from the person making the statements.

Section 18 postulates that statements made by a party to the proceeding or by an agent to any such party, whom the Court regards, under the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions. Equally: statement made by a person who has any proprietary or pecuniary interest in the subject matter of the proceedings or by persons having derivative interest during the continuance of the interest also is admissions.³⁸

Statements of parties suing or sued in a representative character

Statements, made by parties to suits suing or sued in a representative character, are not admissions, unless they are made while the party making them held that character.³⁹ An admission made by a member of a community does not bind the other members of his community, unless it is proved that the statement was made in a representative character.⁴⁰ Where a party sues or is sued in a representative capacity, e.g. as trustee, executor,

33. *Ali Moidin Raouthan v. Elayachanidathil Kombi Achen*, 5 M 239.

34. *Patel v. E.*, 6 R 113: 146 IC 653: 1933 R 292

35. *Ahmad Khan v. Jawahar Singh*, 84 IC 257

36. *Section 18, Indian Evidence Act, 1872.*

37. *Section 20, Indian Evidence Act, 1872.*

38. *Shrichand Gupta v. Gulzar Singh*, AIR 1992 SC 123

39. *Section 18, Changav. Bhagwan Dei*, 1949 A 493

40. *Changav. Bhagwan Dei*, 1949 A 493

administrator or the like, his representative capacity is distinct from his ordinary capacity, and only admissions made in the former capacity are receivable whereas statements made before he acquired the representative character are inadmissible.⁴¹ Thus, an admission by the trustee of a bankrupt, made before he acquired the character of a trustee, is not receivable against him when he is sued as a trustee.⁴² Conversely, an admission by a person in his representative capacity is not receivable against him as a party in his personal capacity. Cases are, however, conceivable where statements made by a person while holding a representative character may become admissible against him as an admission when subsequently sued in his personal capacity. Thus an affidavit of the guardian of an infant may be used against the guardian himself if he be afterward sued in his private capacity, for it is his own admission upon oath.⁴³ An admission made by a person in a written statement in a prior litigation in the character of a legal representative of a defendant as a legatee under his will is not binding on him in a subsequent suit by him as the reversioner to the estate of the deceased, because in the subsequent suit he is suing not only on his behalf but on behalf of all the reversioners.⁴⁴

Section 19

Section 19 - *Admissions by persons whose position must be proved as against party to suit- Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against the made if they are made whilst the person making them occupies such position or is subject of such liability.*

The object of this section is not to lay down that certain statements are relevant and admissible, but to add to the category of persons whose statements may amount to admissions. A statement, in order to be admissible under this section, must satisfy the evidentiary requirement laid down in section 17. When a statement falls within the terms of this section, it becomes by reason of section 21, provable against, and not in favour of, the party against whom the position or liability of the maker of the statement is necessary to be proved in the suit.⁴⁵ The statements of persons who are strangers to the suit are, in general, not admissible as admissions. There are, however, exceptions to this general rule, and one such exception is mentioned in the present section. When the issue is substantially upon the mutual rights which, at the time of the admission, were respectively possessed by a party to the record and the person who made such admission, such evidence will, in general, be let in as would be legally admissible in an action between the party and the person making the admission. An admission of the receipt of goods, made by a person for whom with regard to such goods a guarantee had been given by the defendant, is provable against the defendant.⁴⁶ In a suit by the principal against the agent and his surety, the settlement of accounts between the principal and the agent, after the termination of the agency, is admissible against the surety.⁴⁷ The admissions of a bankrupt before the act of bankruptcy are receivable in proof of the petitioning creditor's debts. A statement made by a servant is admissible in evidence against his master under section 19, both for the purpose of deciding whether he is a servant and also as regards his liability as such servant. «Occupying the position» of a servant does not involve, as an essential ingredient, acting in the course of his employment.⁴⁸ An agreement by party to marriage without ulterior motive made in 33 years old registered document proves marriage.⁴⁹

It is true that an admission contained in a pleading is binding on the party. It is binding in the sense that after making the admission the party cannot be permitted to take up a stand different from the one taken in the

41. *Sena Yasim Sahib v. Kadur Ekambara Iyer*, 54 IC 497

42. *Fenwick v. Thornton*, (1827) M&M 51

43. *Beasley v. Magrath*, (1804) 2 Sch & Lef 34

44. *Sarvabhotla Thotapale Chendikamba v. Kanala Indrakanti Vishwanathamavva*, 1939 M 446

45. *Appavu Chettiar v. Nanjappa Goundan*, 20 IC 792: 25 MLJ 329.

46. *Stephen's Digest*, Art. 17.

47. *Rambhajan v. Sheo Parshad*, 1970 AWN 293

48. *M.E. Moses v. Shaik Bakridhone Chowdhury*, 39 CWN 736

49. *Sivalingam v. Sakthivel*, AIR 1989 Mad 252

pleading. This however, does not mean that an admission made by a party in the pleadings of a suit cannot be relied upon as a piece of admissible evidence in subsequent proceedings. But the party concerned may show that the admission was made under some misapprehension or that it did not really convey what this admission purports to convey.⁵⁰

Section 20

Section 20 - Admission by persons expressly referred to by party to suit - Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

This section forms another exception to the rule that admissions by strangers to a suit are not relevant. Under it, the admissions of a third person are also receivable in evidence against, and have frequently been held to be in fact binding upon, the party who has expressly referred another to him for information in regard to an uncertain or disputed matter.

If a reference is made over a disputed matter to a third person, not in the nature of a submission to arbitration, but rather as an aid to the settlement of the differences existing between the parties and to enable the parties themselves to effect a settlement on the information, in such cases the party is bound by the declaration of the person referred to in the same manner and to the same extent as if it was made himself.⁵¹ If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it as much as if that had been said or done by himself.⁵² Therefore, where a party refers another to a third person for information or an opinion on a given subject, the information or opinion so given is receivable against the referee as an admission. It is immaterial whether the referee has, or has not, any peculiar knowledge on the subject, or whether the reference is made expressly, or by conduct evincing an intention to rely on the statement as correct. It is not necessary that the reference should be on questions of fact within the knowledge of the referee.⁵³ The word “information” in section 20 is not to be understood in the sense that the parties desired to know something which none of them had any knowledge of. Where there is a dispute as regards a certain question and the Court is in need of information regarding the truth on the point, any statement which the referee may make, though known to one or both of the parties, is nevertheless “information” within the meaning of section 20 of the Evidence Act.⁵⁴ Thus, in an action against executors, the defendant having written to the plaintiff that if she wished for further information as to the assets it could be obtained from a certain merchant the replies of the merchant were held receivable against the executors.⁵⁵ In an action for goods sold and delivered a statement by the defendant that he would pay for them if the plaintiff’s car man would say he had delivered them, and the answer of the car man asserting the delivery, are evidence of that fact against the defendant.⁵⁶ And, where A agrees to admit a claim provided B will make an affidavit in support of it, B’s affidavit is evidence against A.⁵⁷ The question being whether a horse in the defendant’s possession was identical with one lost by the plaintiff, and the latter having stated that if the former would swear the horse was his own he might keep it, the defendant’s statement on oath that the horse was his was received as evidence against the plaintiff.⁵⁸ So, A and B having agreed to abide by the decision of a barrister on a disputed question title, the opinion so given is evidence against both.⁵⁹ An admission by a person is, however, not admissible, unless an express reference was made to him, and it relates strictly to the subject on which the reference was made. The section does not apply where a master calls for a report from a servant regarding the conduct of another servant

50. *S.C. Misrav. State of Uttar Pradesh*, 1971 ALJ 1027

51. *Sloman v. Herne*, (1799) 2Esp. 695.

52. *Williams v. Innes*, 1 Camp 364

53. *Akbari Begam v. Rahmat Husain*, 146 IC 84: 1933 A 861 (FB).

54. *Ibid.*

55. *Halsbury’s laws of England*, Vol. 17, para 74.

56. *Daniel v. Pitt*, 1 Camp 366

57. *Llyod v. William*, 1 Esp 178

58. *Garnet v. Ball*, 3 Stark 160;

59. *Doons Cooper*, 2 QB 256; *Price v. Hollis*, 1 M&S 105

who is dismissed for misconduct, if there is nothing to indicate that in doing so the master intends to regard the servant's report as conclusive on the matter.⁶⁰

Section 21

Section 21 - *Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases: –*

(1) *An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.*

(2) *An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.*

(3) *An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.*

Sections 17-20 define admissions; the present section makes admissions relevant and provable.⁶¹ The rule of law which respect to "self-regarding" evidence is that, when in the "self-serving" form, it is not, in general, receivable, but that, in the "self-harming" form, it is, with few exceptions, receivable and is usually considered proof of a satisfactory kind. As a general rule, a man shall not be allowed to make, evidence for himself. But on the other hand, universal experience testifies that, as men consult their own interest and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears. The section, therefore, provides that admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or his representative in interest, except in the three cases mentioned in section.⁶² An admission in one's own favour has no evidentiary value.⁶³ A self-serving statement of a party can be of no avail to that party. The mere fact that it was repeated by the opposite party would not make in his admission.⁶⁴ A recital in a will in favour of a party to it cannot, under this section, be proved by the party in whose favour it is or by the representative in interest of such party.⁶⁵ Neither the declarations of the donor in a deed of gift nor those of the donee are admissible against a stranger to prove the transfer of possession.⁶⁶ An entry in the body of a bond that nothing is due from the, debtor is an admission in his favour and, therefore, not provable.⁶⁷ A mere allegation by a person in his application that he had made a prior application earlier would not by itself be evidence of the fact that such an application was given by him.⁶⁸ In a suit to enforce an equitable mortgage against an insolvent mortgagor and the official assignee, a statement by the mortgagee that he had told another person that the insolvent had deposited the title deeds with him as a security for the loan is inadmissible, being an admission in favour of the mortgagee.⁶⁹ A recital in a writ of attachment is inadmissible in favour of the maker of the recital,⁷⁰ and a statement to the rent payable, contained in the sale certificate of a holding granted to a landlord in execution of a decree against his tenant,

60. *M.D. Cruza v. Secretary of State*, 40 CWN 865; *S. Bhattacharjee v. Sentinel Assurance Co. Ltd.*, 1955 C 594

61. *Gulab Thakur v. Fadali*, 68 IC 566: 1921 N 153

62. Section 21, *Indian Evidence Act*, 1872.

63. *Mandal Ratanchand Shah v. Nanubhai, Jesinghai*, 1947 B 394

64. *Bans Narain v. Mst. Chandrani Kuer*, 1944 A 130

65. *Manglo Mal Sugno Mal v. Mst. Padibai*, 1936 S 217

66. *Mohammad Hyder v. Moti Lal*, 110 IC 26: 1928 O 414

67. *Gurditia Mal v. Nabi Baksh*, 93 IC 996: 1926 L 381

68. *Satyanarayana v. Ramineedi*, 1943 M 501

69. *Miller v. Madho Das*, 19 A 76

70. *Mohurruddin Khan v. Sunwra Giri*, 15 IC 540

is an admission in favour of the landlord and, therefore, not provable.⁷¹ Where the landlord produced certain counterfoils of receipts to show that the tenancy was monthly and not annual, the Supreme Court observed that the entry in the counterfoil being admission in favour of the landlord himself, it was not admissible against the tenant.⁷² The principal cannot prove his title to property by an admission of his agent in his favour.⁷³ A recital in a sale deed by a limited owner that the property was acquired with the money of the estate is against the interest of the vendor and, therefore, provable as an admission.⁷⁴ An admission of the receipt of interest by a creditor will, when no question of limitation arises, be a statement against him; but where such payment is sought to be proved to save the claim from being time-barred, it will be a statement in favour of the creditor and, therefore, not provable.⁷⁵ Statements, which are admissions in favour of a party, cannot be considered in a prosecution against him for a criminal offence, although he can tender evidence at the trial in support of the part of the statement which is in his favour.⁷⁶ Admissions, which would expose a man to a criminal prosecution must be regarded as admissions against his own interest, though they may, as the result of unusual circumstances, be in his favour at some subsequent time.⁷⁷

An inculpatory statement cannot be used against even the maker unless its maker offers himself as a witness in trial. Its limited use as an admission against its maker alone unless it does not amount to confession.⁷⁸

Section 22

Section 22 – Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

The contents of a document which is capable of being produced must be proved by the instrument itself and not by oral evidence.

Oral admissions as to contents of a document are excluded under this section. They are, however, admissible when the party is entitled to give secondary evidence of the contents of such document under Section 65 and 66. Such admissions are also admissible when the genuineness of the document produced is in question.

As to the validity of a gift deed, one of the donors stated that he was a minor at the time of its execution. But in the gift deed itself he admitted his age to be 22. This admission was contained in the registered deed. This was held to be binding on him unless he could show any vitiating circumstance like fraud, coercion etc.⁷⁹

Section 22A

Section 22A - Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.

This section has been inserted by the Information Technology Act, 2000. The purpose of this section is to provide for the circumstances in which an oral admission could be proved as to the contents of an electronic record. The section disallows the evidence of oral admission as to the contents of an electronic record. The section disallows the evidence of oral admission as to the contents of an electronic record. It then talks of an exceptional situation, which is that when the genuineness of the electronic record produced before the court is

71. *Ramani Pershad Narain Singh v. Mahanth Adaiya Gossain*, 31 C 380

72. *Idandas v. Anant Ramchandra*, AIR 1982 SC 127

73. *Maula Baksh v. Jafar Ali Khan*, 4 LLJ 437

74. *Ramayya v. Mahalakshmi*, 64 IC 481

75. *Ammalu Amma v. Narayanan Nair*, 51 M 549

76. *Narayana Swami v. E.*, 17 P 15

77. *Mahmood Khan v. E.*, 1942 S 106

78. *Atchuta Ramaiah v. State of Andhra Pradesh*, AIR 1997 SC 496

79. *Patel Prabhudas Hargovandas v. Heirs of Patel Babubhai Kachrabhai*, AIR 2007 Guj 148.

itself in question. The section says that oral admissions as to the contents of an electronic record may be proved in evidence when the genuineness of the record has been questioned.

Section 23

Section 23 - *In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.*

The section is applicable to civil as well as to criminal cases.⁸⁰ It consists of two distinct parts. Under the first part, an admission is not admissible in evidence, if it is made on the express condition that it is not to be given in evidence. If the admission is not made upon such condition, but the Court can infer that the person making the admission and the party to whom the admission was made had agreed that the admission would not be given in evidence, the admission thus made will be inadmissible under the second part of the section. Where an admission is made upon a condition that it is not to be given in evidence, it is usual, though not necessary, to describe it as “without prejudice”. Thus, where the plaintiff, to save limitation, relied upon a post card written by the defendant «without prejudice,” in which he promised to pay Rs. 30 and acknowledged his liability to pay any sum that may be due, the post card was held to be inadmissible in evidence under this section.⁸¹ An offer, made by the Government «without prejudice» to pay a certain amount for acquisition of land under the Land Acquisition Act is not admissible in evidence.⁸² It has been held in an Oudh case that a letter written “without prejudice” is not admissible in evidence as it merely shows a desire on the part of the writer to have the privilege, and not an agreement on the part of the other party to respect the privilege,⁸³ but it is submitted that such letter would be inadmissible under the first part of the section, as it amounts to an admission upon an express condition that it is not to be given in evidence. An admission contained in a draft of a compromise deed filed in Court must be excluded where the document provides that the parties to it would be free to repudiate any condition of the proposed compromise by which, in their opinion, their rights were prejudicially affected.⁸⁴

Methods to Prove Cases

Evidence is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.⁸⁵

Under Section 3 of the Evidence Act, Evidence means and includes –

- (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
- (2) All documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

Evidence, thus, signifies only the instrument by means of which relevant facts are brought before the Court and by means of which the Court is convicted of these facts.⁸⁶

The definition of “evidence” must be read together with the definition of “proved”; and the combined result of these two definitions is that “evidence”, as defined by the Act, is not the only medium of proof and that in addition to it, there are a number of other “matters” which the Court has to take into consideration when forming its conclusions.⁸⁷

80. *Abbas Peada v. Q.E.*, 25 C 736

81. *Madhavrav Ganeshpant Oze v. Gulabbhai Lallubhai*, 23 B 177

82. *Ranzor Singh v. Secretary of State*, 92 IC 319: 1926 L 509

83. *Lucknow Improvement Trust v. Jaitly & Co.*, 5 Luck 465

84. *Surendra Prasad Lahiri v. Gobinda Das*, 48 CWN 15.

85. *Stephen's Digest on Evidence*, Introduction. Page 3-4

86. *Gobarya v. E.*, 31 Cr LJ 881 (FB)

87. *Bhaironprasad v. Laxmi Narayan Das*, 79 IC 609: 1924 N 385

Thus, evidence is basically of two types- Oral Evidence and Documentary Evidence. These have been explained in the project.

Oral Evidence

Meaning

Oral evidence, as defined under Section 3 of the Evidence Act, means statements which the Court permits or requires to be made before it by witnesses in relation to matter of fact under inquiry.

As an Evidence

Oral evidence is as much less satisfactory medium of proof than documentary evidence.⁸⁸ But however fallible such evidence may be and however carefully it may have to be watched, justice can never be administered in the most important cases without recourse to it.⁸⁹

Oral evidence is generally is not subject to rule of presumption and is judged with reference to the conduct of the parties.⁹⁰

Falsus in Uno Falsus in Omnibus

It means - false in one particular, false in all.

This principle has no application in India. Even if major portion of evidence is found to be deficient, still residue is sufficient to prove guilt of an accused, notwithstanding acquitted of number of other co-accused persons. In *Gangadhar Beherav. State of Orissa*,⁹¹ it has been held that the maxim “falsus in uno falsus in omnibus” has no application in India and the witnesses cannot be branded as liar. This maxim is merely a rule of caution. In *Sucha Singh v. State of Punjab*,⁹² it has been held this maxim has no application in India.

The Supreme Court has even observed that “the principle of Falsus in uno falsus in omnibus does not apply to criminal trials and it is the duty of the court to separate, the grain from the chaff instead of rejecting the prosecution case on general grounds.”⁹³

Appreciation of Oral Evidence

Oral evidence should be approached with caution.⁹⁴ Following are among the most important points to be ascertained in deciding on the credibility of witnesses:

- a. Whether they have the means of gaining correct information;
- b. Whether they have any interest in concealing truth; and
- c. Whether they agree in their testimony.⁹⁵

The credibility of a witness is primarily to be decided by referring to his evidence and finding out as to how the witness was found in the cross-examination and what impression is created by his evidence taken in context of the other facts of the case.

In *State of Bihar v. Radha Krishna Singh*,⁹⁶ the Supreme Court observed: “in considering the oral evidence regarding a pedigree a purely mathematical approach cannot be made because where a long line of descent has to be proved

88. *Thomas Alexander Wise v. Jugbundoo Bose*, 4 MIA 431 (441)

89. *Bunw aree Lal v. Hetnarain Singh*, 7 MIA 148 (167)

90. *Mathoor Pandey v. Ram Ruchya Tew aree*, 11 WR 482

91. AIR 2002 SC 3633

92. AIR 2003 SC 3617

93. *Bhe Ram v. State of Haryana*, AIR (1980) 1 SCC 201

94. *Sardar Bibi v. Muhammad Bakhsh*, PLD 1954 L 480

95. Quoting from *Archbishop Whately's Historic Doubts relative to Napoleon Bonaparte*, 6th Edn., 14.

96. AIR 1983 SC 684

spreading over a century, it is obvious that the witnesses who are examined to depose to the genealogy would have to depend on their special means of knowledge which may have come to them through their ancestors but, at the same time, there is a great risk and a serious danger involved in relying solely on the evidence of witnesses given from pure memory because the witnesses who are interested normally have a tendency to draw more from their imagination or turn and twist the facts which they may have heard from their ancestors in order to help the parties for whom they are deposing. The court must, therefore, safeguard that the evidence of such witnesses may not be accepted as is based purely on imagination or an imaginary or illusory source of information rather than special means of knowledge as required by law. The oral testimony of the witnesses on this matter is bound to be hearsay and their evidence is admissible as an exception to the general rule".

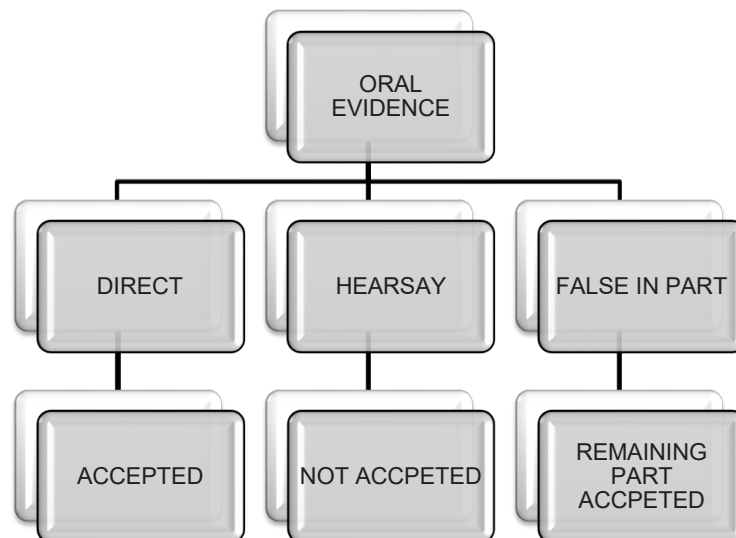
The rule is "that when there is conflict or oral evidence of the parties on any matter in issue, and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the Appellate Court should not interfere with the finding of the trial judge on a question of fact.... The duty of the appellate court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which in the opinion of the court outweigh such finding."⁹⁷

Oral Evidence Must Be Direct

Section 60 of Evidence Act requires that the oral evidence must, in all cases whatsoever, be direct. Where the testimony of the witness is entirely hearsay and on some matters hearsay of hearsay, it cannot be admitted in evidence. Where a witness gives evidence that he received information from other person and that person does not say about it, such evidence would be inadmissible being hearsay evidence.⁹⁸

Rejection of Hearsay Evidence

The reasons that hearsay evidence is treated as untrustworthy are that the original declarant of the statement which is offered in a second hand manner is not put on oath, nor is he subject to cross-examination, and the accused, against whom, such evidence is offered, loses his opportunity of examining into the means of knowledge of the original maker of the statement, the truth of the original statement is diminished in course of repetition of that statement, that admissibility of hearsay evidence would open up opportunities of weaker for stronger proof regarding proof of a fact in issue or a relevant fact.⁹⁹



97. *Madhusudan Das v. Narayani Bai*, AIR 1983 SC 114

98. *Kirtan Prasad v. State of Madhya Pradesh*, 2005 Cr LJ 69 MP

99. *Herbetus Oram v. State*, (1971) 37 CLT 477

Documentary Evidence

Meaning

Under Section 3 of the Evidence Act, all documents including electronic records produced for the inspection of the Court together constitutes to be documentary evidence.

The word 'Document' is again defined under Section 3 as- 'any matter expressed or described upon any substance by means of letter, figures or makes, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.'

In this part, I will try to explain the following:

1. Proof of document by primary or secondary evidence
2. Public and Private documents
3. Presumptions of the various documents

Proof by Primary and Secondary Evidence

The content of the document will be taken as evidence only when it is proved by some primary or secondary evidence.¹⁰⁰

Primary Evidence

*Primary evidence means documents presented in the Court itself for examination.*¹⁰¹

Explanation I of Section 62 states that- *Where a document is executed in counterparts, each part is primary evidence against the executing party and his privies; but, as against the non-executing party and his privies, it is only secondary evidence.*

Explanation II states that- *Printed, lithographic, photographic and other reproductions made by one uniform process are primary evidence of each other, but if, in the circumstances of a particular case, the original be not a reproduction but the document from which the reproduction was made, the reproduction would be merely secondary evidence of the original.*

For instance, if it is desired to prove the publication of a libel in a newspaper, any copy of the issue in which libel appeared would be primary evidence of the publication in all the other copies of that issue. But if it were necessary to prove the original libel from which the article was set up, the printed paper would not be primary, but only secondary, evidence of the manuscript and admissible only under the conditions, which render the reception of secondary evidence admissible.¹⁰² In the latter case there is no more guarantee of a printed copy being a true copy than of a written copy.

Section 64 of the Act makes it a rule to prove any document through primary evidence, unless they specifically fall under the category of documents to be proved by Secondary under Section 65.

Secondary Evidence

Section 63 of the Evidence Act defines the kinds of secondary evidence permitted by the Act; whereas section 65 defines the circumstances under which secondary evidence of the kind mentioned in Section 63 becomes admissible.

Section 63 mentions five kinds of secondary evidences. It includes:

- (1) Certified copies given under the provisions hereinafter contained

¹⁰⁰. Section 61 read with section 64 and 65

¹⁰¹. Section 62

¹⁰². *Prithi Chand v. State of Himachal Pradesh*, AIR 1989 SC 702

- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) Copies made from or compared with the original;
- (4) Counterparts of documents as against the parties who did not execute them;
- (5) Oral accounts of the contents of a document given by some person who has himself seen it.

The copy to be given in evidence must be proved to be a correct copy¹⁰³ by the evidence of someone who can swear to its being a true copy.¹⁰⁴ It is not necessary that the scribe of the copy should be produced. What is required to be proved is that the document produced is a true copy of the original.

Copies of original documents would not be admissible in evidence when the originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence.¹⁰⁵

Further, the Court in *Doerd Gilbert v. Ross*,¹⁰⁶ held that if a party cannot produce original document, then an oral evidence of it can be given provided they have some secondary evidence with them to prove the oral content.

Section 65 lays down the conditions, wherein specifically secondary evidences have to be given. It includes:

- (a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
- (b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) When the original is of such a nature as not to be easily movable;
- (e) When the original is a public document within the meaning of section 74;
- (f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence²;
- (g) When the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Under Section 67, where a document is written by one person and signed by another, the handwriting of the former and the signature of the latter have both to be proved in view of the section. Thus, the basic idea is that the document must be proved before it is admitted in the Court. This has been upheld by the Court in *Abdool Ali v. Abdoor Rushman*.¹⁰⁷

Section 68 further provides that if a document is required by law to be attested then it cannot be accepted as

103. *Sookram Sookul v. Ram Lal Sookul*, 9 WR 248

104. *Krishna Chaodhrani v. Kishori Lal Roy*, 14 C 487 (491)

105. *Baidya Nath Dutt v. Kaminikant Gupta*, 6 Cr LJ 572.

106. (1840) 19 L.J. Ex.210

107. (1874) 21 WR 429

evidence unless attested. However, it would not be necessary to call the attesting witness as evidence in the Court. However, if in case of will, which requires attesting witness to be called as an evidence under Section 68, but the attesting witness could not be found then it needs to be proved that the signature of atleast one attesting witness must be in his handwriting and that the document must have been signed by the person in his writing.¹⁰⁸

However, section 70 and 71 says that if the attesting witness fails to recall of the attestation of such documents by him then the documents may be proved by other means.

A record of the proceedings of a Court of Justice will be presumed to be genuine and accurate, if it is certified in the manner laid down in this section 86.

Private and Public Documents

Public Documents have been explained under Section 74 of the Evidence Act. It includes records of Sovereign Authority, tribunals and of public officers. Apart from these, all other documents constitute private documents under Section 75.

Such public documents may be produced as a proof of such documents by producing the certified copy, which has been certified by the public officer in control of such document, certifying them to be a true copy of the document.¹⁰⁹

Presumption of Documents

In general terms, presumption is an inference drawn from the contents of the document. Such presumption holds good unless they have been disproved by the other parties. The various kinds of presumptions have been explained under Section 4 of the Act.

Section 79 to 90 deals with the various types of presumption in evidences.

Section 79 says that the Court shall presume all certified copy to be evidence admissible in Court provided they have been certified in the manner prescribed by law.

Section 80 further provides that where any document is produced by the Evidence as part of his evidence, then such document, when accepted by the Court will qualify to be a part of the evidence so produced by the evidence and it shall be presumed that such evidence is genuine and the evidence in support of which it is presumed is also accepted in the Court.

Any maps, books or gazette printed and compiled by the Government are also presumed to be true under Section 81, 82 and 83.

Section 85 presumes that every power-of-attorney made before a notary is also true.

Under Section 85A, the Court shall presume that every electronic record purporting to be an agreement containing the electronic signature of the parties was so concluded by affixing the electronic signature of the parties.

Any certified copy of foreign judicial record is also presumed to be a valid document under section 86.

If any telegraphic message is sent, then the Court shall make no presumption with regards to the person who has been given the message merely for the purpose of transmission.¹¹⁰ The position is the same in case of electronic message under Section 88A. Here, the Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.

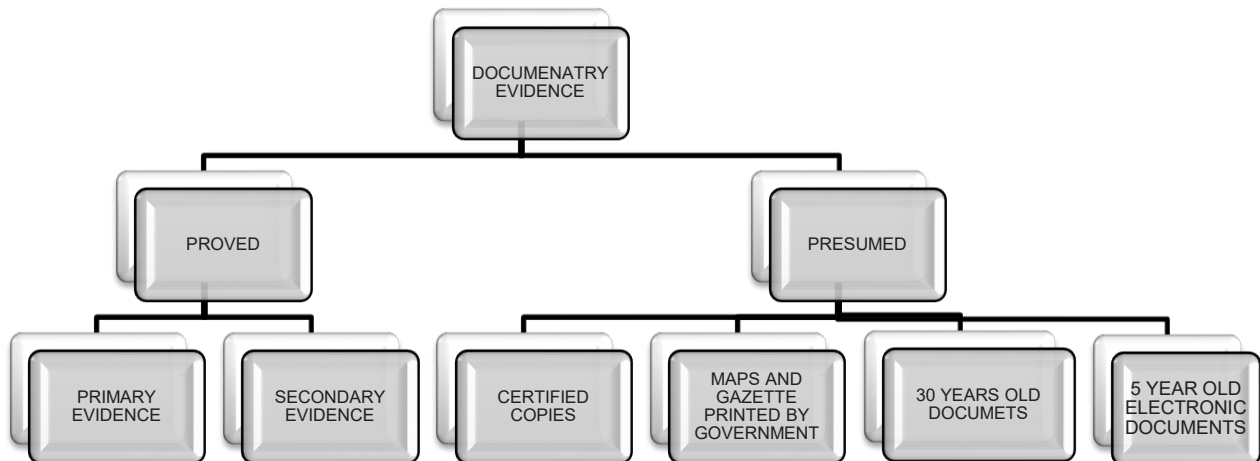
^{108.} Section 69 of the Act.

^{109.} Section 76 and Section 77

^{110.} Section 88 of the Act

Section 90 of the Act deals with the resumption of documents which are 30 years old. It says that Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Similar stand is taken for any electronic message which is 5 years old. It says that any such message is assumed to have been electronically signed by person or by someone authorized by him.¹¹¹



Section 91 forbids proving the contents of a writing otherwise than by writing itself. This is based on the best rule of evidence. Section 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of contract. (*Roop Kumar v. Mohan Thedani* AIR 2003 SC 2418)

Proving a Matter through Evidences On the Basis of Sources

Direct evidence

Evidence is either direct or indirect. Direct Evidence is that evidence which is very important for the decision of the matter in issue. The main fact when it is presented by witnesses, things and witnesses is direct, evidence whereby main facts may be proved or established that is the evidence of person who had actually seen the crime being committed and has described the offence. We need hardly point out that in the illustration given by us, the evidence of the witness in Court is direct evidence as opposed to testimony to a fact suggesting guilt. The statement before the police only is called circumstantial evidence of, complicity and not direct evidence in the strict sense. It directly related to the real point in issue.

For example, testimony of an eye witness will be treated as a direct evidence. In another example if one person is alleging that another person has breached the terms of the agreement and hence he is liable to pay compensation to the first person in such category the original document of the agreement will constitute a direct evidence.

Direct evidence is considered to be superior to circumstantial evidence because it creates a direct nexus between the evidence and fact in question.

Circumstantial evidence

There is no difference between circumstantial evidence and indirect evidence. Circumstantial Evidence attempts

to prove the facts in issue by providing other facts and affords an instance as to its existence. It is that which relates to a series of other facts than the fact in issue but by experience have been found so associated with the fact in issue in relation of cause and effect that it leads to a satisfactory conclusion.

According to Justice Fletcher Montem the acceptance of evidence and there appreciation thereof is not a rigid mathematical formulae and hence the circumstantial evidence qualifies a significant role in any matter before the court to make it possible that the court should reach to truth, reality and actual happenings of the things t the matter.

According to Justice Stetson, circumstantial evidence is like a light in the dark which slowly touches all corners of a matter and bring the reality in front of the adjudicator. He further observes that circumstantial evidence has to be appreciated with utmost caution because if light is strong enough to remove all darkness then it will uplift the justice in the matter but if the light is weak and removes darkness from some part of the matter it may result into grave injustice to both the parties.

In modern times, circumstantial evidence are given importance. It is seen as an evidence which relates to the series of the facts other than the fact in issue. Circumstantial evidence assumes importance in both categories when either direct evidence is *lacking* or the direct evidence is *not conclusive* of the fact in issue.

In *Hanumant Govind Nargundkar v. State of Madhya Pradesh (1952)*, The Hon'ble Supreme Court Observed, "In dealing with circumstantial evidence there is always the danger that suspicion may take the place of legal proof. It is well to remember that in cases where the evidence is of a circumstantial nature the circumstances from which the conclusion of guilt is to be drawn should in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. In other words there can be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused." The same has been reiterated in the case of *Sharad Birdichand Sarda v. State of Maharashtra (1984)*

In *State of U.P. v Ravindra Prakash Mitta*¹¹² Supreme Court had taken a strong stand while redefining and reframing the evidentiary value of circumstantial evidence. Court said that circumstantial evidence. Court said that circumstantial evidence will be treated as a good piece of evidence if it qualifies the following tests:

- a) The circumstances from which guilt is established must create a series of circumstances and must be fully proved.
- b) The circumstances must be of conclusive nature and tendency.
- c) Circumstantial evidence must not need any reasonable doubt regarding existence of fact.
- d) It should create the *hypothesis of guilt* in such a way which includes all possibilities that only accused has committed the crime and it should exclude all possibilities that any person other than the accused has committed the crime.

Other kinds of evidence

Real evidence

Real Evidence means real or material evidence. Real evidence of a fact is brought to the knowledge of the court by inspection of a physical object and not by information derived from a witness or a document. Personal evidence is that which is afforded by human agents, either in way of disclosure or by voluntary sign. It indicates the object in proving or disproving the facts for which it is given in the court of law.

For example, contempt of court, conduct of the witness, behaviour of the parties, the local inspection by the court. It can also be called as the most satisfactory witness.

¹¹². AIR 1992 SC 2045

Expert evidence

Section 45, 45A, 46 and 47 deal with expert evidence. It constitutes significant evidence in the court of law because it qualifies the test of reliability in the court of law. The expert evidence is considered to be reliable because an expert is having a much better knowledge in the specific area in comparison to other people outside that area.

For example, a legal professional will be a reliable source on the constitutionality of any provision in comparison to an engineer about the constitutional validity or invalidity of evidence in the court of law.

There are certain principles which make expert evidence admissible evidence in the court of law:

- a) The expert must be qualified in that discipline.
- b) The expert must be within the recognised field of his expertise.
- c) The evidence of the expert should be supported by his reliable and logical contentions.
- d) The expert should have acquired an expertise in these matters by his continuous work and continuous practice in the particular field.
- e) He has been duly channelized under the scheme of examination in the court of law.

Hearsay evidence

Hearsay Evidence is very weak evidence. It is only the reported evidence of a witness which he has not seen either heard. Sometime it implies the saying of something which a person has heard others say. In *Lim Yam Yong v. Lam Choon & Co.* The Hon'ble Bombay High Court adjudged "Hearsay Evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his counsel fails to take objection when the evidence is tendered." So finally we can assert that Hearsay Evidence is that evidence which the witness has neither personally seen nor heard, nor has he perceived through his senses and has come to know about it through some third person. There is no bar to receive hearsay evidence provided it has reasonable nexus and credibility. When a piece of evidence is such that there is no prima facie assurance of its credibility, it would be most dangerous to act upon it. Hearsay evidence being evidence of that type has therefore, to be excluded whether or not the case in which its use comes in for question is governed by the Evidence Act.

Primary evidence

Section 62 of The Indian Evidence Act says Primary Evidence is the top-Most class of evidences. It is that proof which in any possible condition gives the vital hint in a disputed fact and establishes through documentary evidence on the production of an original document for inspection by the court. It means the document itself produced for the inspection of the court. In *Lucas v. Williams* Privy Council held "Primary Evidence is evidence which the law requires to be given first and secondary evidence is the evidence which may be given in the absence of that better evidence when a proper explanation of its absence has been given."

Secondary evidence

Section 63 says Secondary Evidence is the inferior evidence. It is evidence that occupies a secondary position. It is such evidence that on the presentation of which it is felt that superior evidence yet remains to be produced. It is the evidence which is produced in the absence of the primary evidence therefore it is known as secondary evidence. If in place of primary evidence secondary evidence is admitted without any objection at the proper time then the parties are precluded from raising the question that the document has not been proved by primary evidence but by secondary evidence. But where there is no secondary evidence as contemplated by Section 66 of the Evidence Act then the document cannot be said to have been proved either by primary evidence or by secondary evidence."

Positive and Negative Evidence

Evidence was categorized as positive and negative in the case of *Rahim Khan vs. Khurshid Ahmad*. Positive evidence is any evidence which claims the existence of a fact while a negative evidence is an evidence that claims non-existence of a fact. The distinction lies on the fact that they guide the court towards the approach they have to take.

Evidence includes everything that is used to determine or demonstrate the truth of an assertion. Giving or procuring evidence is the process of using those things that are either (a) presumed to be true, or (b) which were proved by evidence, to demonstrate an assertion's truth. Evidence is the currency by which one fulfills the burden of proof.

In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lays. Admissible evidence is that which a court receives and considers for the purposes of deciding a particular case. Two primary burden-of-proof considerations exist in law. The first is on whom the burden rests. In many, especially Western, courts, the burden of proof is placed on the prosecution. The second consideration is the degree of certitude proof must reach, depending on both the quantity and quality of evidence. These degrees are different for criminal and civil cases, the former requiring evidence beyond reasonable, the latter considering only which side has the preponderance of evidence, or whether the proposition is more likely true or false. The decision maker, often a jury, but sometimes a judge, decides whether the burden of proof has been fulfilled. After deciding who will carry the burden of proof, evidence is first gathered and then presented before the court.

LESSON ROUND UP

- Sometimes the evidential fact is directly accessible to the fact-finder.
- A factual proposition (in Latin, *factum probans*) is evidence in the third sense only if it can serve as a premise for drawing an inference (directly or indirectly) to a matter that is material to the case (*factum probandum*).
- In summary, at least four possible conceptions of legal evidence are in currency: as an object of sensory evidence, as a fact, as an inferential premise and as that which counts as evidence in law. The sense in which the term “evidence” is being used is seldom made explicit in legal discourse although the intended meaning will often be clear from the context.
- In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law.
- In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a “finding of fact”) usually depends on particular circumstances or factual situations.
- The law does not allow evidence to be adduced to prove facts that are immaterial or that are not in issue. “Relevance” is often used in the broader sense that encompasses the concepts under discussion.
- Thus for an evidence to have any value in the eyes of court of law and be relied upon on reaching the decision these few rules have to be kept in mind:
 1. Relevancy

2. Admissibility

3. Weight

- There are Two types of relevancy, which includes:
 1. Logical Relevancy and
 2. Legal Relevancy.
- Every case, whether civil or criminal, that comes before a court of law has a fact story behind it. Facts out of which cases arise keep happening in the ordinary course of life.
- This concept is governed by the rules and regulations mentioned under Indian Evidence Act, 1872, Section 17-23.
- Oral evidence, as defined under Section 3 of the Evidence Act, means statements which the Court permits or requires to be made before it by witnesses in relation to matter of fact under inquiry.
- Under Section 3 of the Evidence Act, all documents including electronic records produced for the inspection of the Court together constitutes to be documentary evidence.
- In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lays. Admissible evidence is that which a court receives and considers for the purposes of deciding a particular case.
- Two primary burden-of-proof considerations exist in law.
- The first is on whom the burden rests. In many, especially Western, courts, the burden of proof is placed on the prosecution.
- The second consideration is the degree of certitude proof must reach, depending on both the quantity and quality of evidence.
- These degrees are different for criminal and civil cases, the former requiring evidence beyond reasonable, the latter considering only which side has the preponderance of evidence, or whether the proposition is more likely true or false.
- The decision maker, often a jury, but sometimes a judge, decides whether the burden of proof has been fulfilled. After deciding who will carry the burden of proof, evidence is first gathered and then presented before the court.

SELF-TEST QUESTIONS

1. What do you mean by Question in Law and Question in Fact? Discuss in detail.
2. Discuss the Relevancy of Evidence.
3. What do you mean by Admission of Evidences? Discuss the admission as per Indian Evidence law.
4. Discuss the Direct and Circumstantial Methods of Proving a Case.

Lesson 6

Cyber Forensics

LESSON OUTLINE

- Introduction to Cyber Crime
- Cyber Crime: Meaning and Definition
- International Guidance to Cyber Forensics Laws
- Necessity of International Standards
- WSSN (World Standards Services Network)
- Digital Forensics and Cyber Laws: Procedure for Investigation
- Policy and Procedure Development
- Evidence Assessment
- Evidence Acquisition
- Evidence Examination
- Documenting and Reporting
- Introduction to Data Extraction
- Ethical Hacking
- Technological Advances and Cyber Securities
- Cyber crime cases
- Official Website of Maharashtra Government Hacked
- CBI Website Hacked
- ICICI- Pune Bank Fraud case
- Pune Citibank Mphasis Call Center Fraud
- Parliament Attack Case
- Andhra Pradesh Tax Case
- Insulting Images of Chatrapati Shivaji Maharaj on Google - Orkut
- India's First ATM Card Fraud
- Chennai's Violation of Software Terms
- Napster Case
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

As it is said science is a necessary evil so is the case with Information and Communication Technology (ICT). It is a boon or a curse depending on how it is put to use by mankind. One of the major challenges of ICT is of an increasing number of cyber-crimes taking place in the World today so much so that a new branch of forensic audit called Cyber Forensics audit has emerged in the contemporary world.

This chapter aims to apprise the students with concepts like Cyber Crime; International Guidance to Cyber Forensics Laws; Digital Forensics and Cyber Laws; Data Extraction; Digital Forensics and Cyber Crime; Ethical Hacking and Digital Incident Response.

INTRODUCTION TO CYBER CRIME

It is reported that globally more than 4.39 billion people are now online, while unique mobile-cellular subscriptions have reached almost 5.11 billion worldwide.¹

As per the report published in The Indian Express², India has been ranked 131 out of 167 nations on a global index that measures the level of Information and Communication Technology access, even as the number of households with a computer and internet connection has increased to a good extent in the country over the last five years.

Everyone is getting increasingly dependent on consistent access of these communication channels. The internet users have increased significantly especially in the last ten years. Data³ shows that presently around 46% of the world population has an internet connection. In 1995 however, it was less than one percent of the present users of internet and today there are more than 3 billion internet users all over the world. As per the reports of Internet World Stat⁴, after China, India has the 2nd largest number of internet users in the world with more than 462 million users. The Internet penetration in India is 34.8% of the overall population and the growth that it has registered has seen a remarkable growth in the last decade.

This clearly indicates that the impact of information technology is very profound. Both society and the technology are operating in a way so as to harmonize with the pace of each other's growth. As the world is developing, newer technology is emerging with each passing day leading to further development in the society. All the facets of human life including education, health, entertainment and communication are being influenced by and have been impacted by the advent of the Information and Communication Technology (ICT).

This has several advantages like greater efficiency; increased communication channels through email, discussion groups and chat rooms; beneficial motivational influence on learning and knowledge; e-governance and citizens contribution; expanding global business and so on.

With merits comes the shortcomings and ICT is no exception to this rule. Along with abundant opportunities that it has brought about, there are also some challenges. Broadly speaking, it has posed certain major concerns like privacy threat, over riding cultural impact, more reliance on technology, reduction of societal engagements, computer virus, malware, spam phishing, uncensored content and many more. One of the major challenges in this era of ICT is of an increasing number of cyber crimes taking place in the world today.

The tremendous growth in the field of ICT coupled with an increased frequency of use of internet for different activities has also given rise to several mischievous activities taking place in the form of Cyber Crimes. To put in a layman's language, Cyber Crime is a technology based crime committed by the technocrats savvy cyber criminals. In a recent data⁵ published, it is stated that *"with increasing mobile and internet penetration in the country, cyber crimes have also increased proportionately. Between 2011 and 2015, more than 32000 cyber crimes were reported across the country. More than 24000 of these cases are registered under the IT Act and the remaining under the various sections of IPC and other State Level Legislations."*

As per the Data given by the report of National Crime Report Bureau⁶, a total of 7,201 cases were registered under the IT Act during the year 2014 as compared to 4,356 cases during the previous year (2013), showing an increase of 65.3% in 2014 over 2013. 77% (5,548 cases) of the total 7,201 cases under the IT Act were computer related offences (under section 66A – revoked by the Hon. Supreme Court in 2015, 66B, 66C, 66D

1. <https://wearesocial.com/blog/2019/01/digital-2019-global-internet-use-accelerates>

2. Indian Express. Report on "India Ranks 131 on Global Index of Information And Communication Technology Access" Available at <http://indianexpress.com/article/india/india-news-india/india-ranks-131-on-global-index-of-information-and-communication-technology-access-report/>.

3. Internet Live Data, Available at <http://www.internetlivestats.com/internet-users/>.

4. Internet World Stat – Usage and Population Statistics, Available at <http://www.internetworldstats.com/top20.htm>.

5. See <https://factly.in/cyber-crimes-in-india-which-state-tops-the-chart/>.

6. -NCRB Report on Cyber Crime. Available at <http://ncrb.nic.in/StatPublications/CII/CII2014/chapters/Chapter%2018.pdf>.

and 66E of Information Technology Act, 2000) followed by 10.5% (758 cases out of 7,201 cases) related to publication/transmission of obscene/sexually explicit content (under section 67A, 67B and 67C of IT Act). In the year 2017, 21,796 cyber crime cases were reported.

Along with it, the global spam rate, malware rate and phishing rate is increasing rapidly and there is a potential impact of cyber crimes on the economy, consumer trust and production time. The counter measures in the form of GPRS Security Architecture, Intrusion Detection and Prevention System and Agent Based Distributed Intrusion Detection Systems have thus been employed for security purposes.

Considering the significant increase in number of Cyber Crimes reported these days, it becomes important and imperative to enquire as to meaning of the term Cyber Crime, the kinds of Cyber Crimes, their impacts and effects on the society at large, the laws dealing with cyber crimes in India and the deterrent effect of law on cyber crimes in India.

Therefore, this lesson deals with (a) the meaning and variants of cyber crimes like Salami Attack, Packet Sniffing, Tempest Attacks, and Bot Networks; (b) the real world cyber crime cases, their scenario as well as the modus operandi employed for commission of such crimes.

It also focuses on the legal regime on the subject of cyber crimes in India and its strong analysis leading to the viable recommendations towards effective legal protection against cyber crimes in India.

Cyber Crime : Meaning and Definition

Crime is not *per se* a legal term. It derives its meaning and has a connotation in the background of a society and the State as such. Thus, it defies an attempt to lay down a strait jacket definition with clearly defined boundaries. However, usually it is put synonymous to something which is “a wrong”, “an offence”, “a misdemeanour” or “a felony”. Crime is both a social and an economic phenomenon. It is as old and historical as the human society itself. Many ancient books, right from the pre-historic days, and mythological stories have spoken about crimes being committed by individuals; be it committed against an individual like ordinary theft and burglary or against the nation at large like the crimes of spying, treason, *etc.*

Kautilya's Arthashastra, a document written around in the 350 BC is considered to be one of the most authentic administrative treatises in India which discusses the various crimes committed in the society, security initiatives to be taken by the rulers to curb them, possible crimes in a State, *etc.* It also advocates awarding different punishments for different offences listed therein. Further, the concept of restoration of loss to the victims has also been discussed in it.

Chanakya in his theory of probable crime, has discussed as to how with the changes in society, different crimes emerge. To illustrate the weak position of women in the society it lays down that the crimes against women will increase in the society; with the strong position of a specific sector, the abuse of power will result in commission of crimes associated with the power-play.

Certainly, the advent of Information and Communication Technology has lead to the emergence of a new kind of crime called the Cyber Crime.

In a cyber-crime, the computer or the data itself is either a target or the object of an offence or a tool employed in committing some offence, and thus providing the necessary inputs for that offence. All such acts of crime come under the broad definition of the term Cyber Crime.

Cyber-crimes are technology based crimes wherein the computer or internet itself is used as a weapon or means to commit such crimes. They are organized and white collar crimes like cyber frauds, hacking, data theft, phishing, identity theft, *etc.* Cyber-crimes are committed with the help of technology and cyber criminals have a deep understanding of technology. In fact, cyber criminals are technocrats who understand the intricacies of information technology. Cyber-crimes do not know or recognise any territorial boundary or barrier.

In general, a cyber crime can be classified into the following three categories:

1. **Target cyber crime:** It is a crime wherein a computer is the target of the offence.
2. **Tool cyber crime:** It is a crime wherein a computer is used as a tool in committing the offence.
3. **Computer incidental:** It is a crime wherein the computer plays only a minor role in the commission of the offence.

Accordance to the Information Technology Act, 2000 a Cyber Crime can be defined as “an act or omission that is punishable under the Information Technology Act, 2000”. This however is not an exhaustive definition as the Indian Penal Code also covers certain cyber-crimes, such as email spoofing and cyber defamation, sending threatening emails, *etc.*

Cyber offences under the Act are tabulated below:

Section	Offence	Description
65	Tampering with computer source documents	If a person knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force.
66	Hacking with computer system	If a person with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hack.
66B	Receiving stolen computer or communication device	A person receives or retains a computer resource or communication device which is known to be stolen or the person has reason to believe is stolen.
66C	Using password of another person	A person fraudulently uses the password, digital signature or other unique identification of another person.
66D	Cheating using computer resource	If a person cheats someone using a computer resource or communication.
66E	Publishing private images of others	If a person captures, transmits or publishes images of a person's private parts without his/her consent or knowledge.
66F	Acts of cyberterrorism	If a person denies access to an authorised personnel to a computer resource, accesses a protected system or introduces contaminant into a system, with the intention of threatening the unity, integrity, sovereignty or security of India, then he commits cyberterrorism.
67	Publishing information which is obscene in electronic form.	If a person publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
67A	Publishing images containing sexual acts	If a person publishes or transmits images containing a sexual explicit act or conduct.

67B	Publishing child porn or predating children online	If a person captures, publishes or transmits images of a child in a sexually explicit act or conduct. If a person induces a child into a sexual act. A child is defined as anyone under 18.
67C	Failure to maintain records	Persons deemed as intermediary (such as an ISP) must maintain required records for stipulated time. Failure is an offence.
68	Failure/refusal to comply with orders	The Controller may, by order, direct a Certifying Authority or any employee of such Authority to take such measures or cease carrying on such activities as specified in the order if those are necessary to ensure compliance with the provisions of this Act, rules or any regulations made thereunder. Any person who fails to comply with any such order shall be guilty of an offence.
69	Failure/refusal to decrypt data	If the Controller is satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence, for reasons to be recorded in writing, by order, direct any agency of the Government to intercept any information transmitted through any computer resource. The subscriber or any person in charge of the computer resource shall, when called upon by any agency which has been directed, must extend all facilities and technical assistance to decrypt the information. The subscriber or any person who fails to assist the agency referred is deemed to have committed a crime.
70	Securing access or attempting to secure access to a protected system	The appropriate Government may, by order in writing, authorise the persons who are authorised to access protected systems. If a person who secures access or attempts to secure access to a protected system, then he is committing an offence.
71	Misrepresentation	If anyone makes any misrepresentation to, or suppresses any material fact from, the Controller or the Certifying Authority for obtaining any license or Digital Signature Certificate.

INTERNATIONAL GUIDANCE TO CYBER FORENSICS LAWS⁷

Moore's law predicts that computing power doubles every 18 months. This ever increasing power enables humans to undertake tasks that are more complex and resource intensive. With the boom of Information Technology (IT) and enhanced technological developments, the IT environment evolved to the specialised Information Security (IS) discipline. This, in turn, acted as a catalyst for the development of the digital forensics discipline.

The intention of these technology advances is to make human lives easier and more fulfilling: hand biometric applications can ensure that only authorised people can operate guns; online social communities such as Facebook, Twitter and Instagram can globally connect people; and iris recognition can lead to a keyless environment.

Computers enable humans to have an inconceivable amount of power. However, not all humans can suitably handle power. Accordingly, it is necessary to incorporate digital forensics in everyday business environment to address the collection and acquisition of digital evidence dispersed through digital systems. The eventual purpose of this evidence collection might be either internal organisational investigations, or prosecution in a court of law.

7. Grobler M (2010), *Digital Forensic Standards: International Progress*,

Since internal investigations and prosecutions in a court of law may span more than one organisation (in the case of multiple branches) or more than one continent, the need for international agreement on a number of digital forensic aspects are paramount. Thus, the worldwide interoperability of information systems and the cross-border nature of digital crime necessitate the drive to formulate substantial and procedural rules against digital crime with regard to digital evidence, both on a local and international level. The digital forensic discipline developed rather rapidly, but up to date has very little international standardisation with regard to processes, procedures or management.

Digital forensics, as a developing discipline, presents a number of opportunities for international standardisation.

Necessity of International Standards

Generally when procedures are standardised, the associated costs are lower, training is simplified and consumers accept products and services more readily.

“Standards are also the key to enhancing our global competitiveness, attracting investment and encouraging and supporting innovation”

Some standardisation benefits include :

- improving the suitability of products, processes and services for their intended purposes;
- preventing barriers to international trade; and
- preventing unsafe products and procedures from reaching consumers through the regulatory use of safety standards.

By adopting internationally recognised standards, member countries are assured of a high quality and trusted reference with input and insight from a number of international subject experts, as well as the widespread applicability of the standards.

In general, standard adoption is voluntary and standards are developed in response to market demand. The standards are developed through international participation and are based on consensus among interested parties.

A number of standardisation bodies exist, few of them are introduced as below:

WSSN (World Standards Services Network)

WSSN is a publicly accessible network of standards organisations around the world. (WSSN 2006). The three main standards organisations listed on this site are the International Organization for Standardization (ISO), the International Electro-technical Commission (IEC) and the International Telecommunication Union (ITU).

IEC and ITU ensures that where appropriate, ISO has liaison agreements with IEC to provide technical input on matters pertaining to specific IT-related international standards. The WSSN website www.wssn.net also links to a complete list of the international standardising bodies, regional standardising bodies, as well as national members of ISO and IEC.

ISO (International Organization for Standardization)

ISO is the world's largest developer and publisher of international standards. This organisation is a network of the national standards institutes of 162 countries, one member per country.

The ISO secretariat is situated in Switzerland and coordinates the interaction between member countries' mandates (some countries are mandated by government, whilst other are mandated by the private sector). As a result, ISO facilitates consensus between member bodies on solutions that meet both the requirements of business and the broader needs of society. ISO, in collaboration with IEC (through JTC 1), published a

whole portfolio of standards related to generic methods, techniques and guidelines for information, IT and communication security.

This includes the digital forensic domain and will accordingly be the main focus of the remainder of the article.

ISO and IEC standards are developed industry wide, with consensus of member countries that volunteer contributions. This ensures global solutions to satisfy industries and customers worldwide, the views of all interests are taken into account, and a market driven approach is adopted based on voluntary involvement of all interests in industry.

SABS (South African Bureau of Standards)

The SABS is the recognised national institution for the promotion and maintenance of standards in South Africa. It is an autonomous body established through legislation in 1969. The SABS prepares and publishes South African National Standards (identified by the letters SANS) that reflects national consensus on a wide range of subjects. It administers more than 450 technical committees and sub-committees to produce standards. The SABS is committed to providing standardisation services that improve the competitiveness of South Africa through the understanding and development of standardisation products and services within South Africa and internationally.

Digital Forensics and Cyber Laws: Procedure for Investigation

The field of computer forensics investigation is growing, especially as law enforcement and legal entities realize just how valuable information technology (IT) professionals are when it comes to investigative procedures. With the advent of cyber-crime, tracking malicious online activity has become crucial for protecting private citizens, as well as preserving online operations in public safety, national security, government and law enforcement. Tracking digital activity allows investigators to connect cyber communications and digitally-stored information to physical evidence of criminal activity; computer forensics also allows investigators to uncover premeditated criminal intent and may aid in the prevention of future cyber-crimes. For those working in the field, there are five critical steps in computer forensics, all of which contribute to a thorough and revealing investigation.

Policy and Procedure Development

Whether related to malicious cyber activity, criminal conspiracy or the intent to commit a crime, digital evidence can be delicate and highly sensitive. Cybersecurity professionals understand the value of this information and respect the fact that it can be easily compromised if not properly handled and protected. For this reason, it is critical to establish and follow strict guidelines and procedures for activities related to computer forensic investigations. Such procedures can include detailed instructions about when computer forensics investigators are authorized to recover potential digital evidence, how to properly prepare systems for evidence retrieval, where to store any retrieved evidence, and how to document these activities to help ensure the authenticity of the data.

Law enforcement agencies are becoming increasingly reliant on designated IT departments, which are staffed by seasoned cybersecurity experts who determine proper investigative protocols and develop rigorous training programs to ensure best practices are followed in a responsible manner. In addition to establishing strict procedures for forensic processes, cybersecurity divisions must also set forth rules of governance for all other digital activity within an organization. This is essential to protecting the data infrastructure of law enforcement agencies as well as other organizations.

An integral part of the investigative policies and procedures for law enforcement organizations that utilize computer forensic departments is the codification of a set of explicitly-stated actions regarding what constitutes evidence, where to look for said evidence and how to handle it once it has been retrieved. Prior to any digital investigation, proper steps must be taken to determine the details of the case at hand, as well as to understand

all permissible investigative actions in relation to the case; this involves reading case briefs, understanding warrants, and authorizations and obtaining any permissions needed prior to pursuing the case.

Evidence Assessment

A key component of the investigative process involves the assessment of potential evidence in a cyber-crime. Central to the effective processing of evidence is a clear understanding of the details of the case at hand and thus, the classification of cyber-crime in question. For instance, if an agency seeks to prove that an individual has committed crimes related to identity theft, computer forensics investigators use sophisticated methods to shift through hard drives, email accounts, social networking sites, and other digital archives to retrieve and assess any information that can serve as viable evidence of the crime. This is, of course, true for other crimes, such as engaging in online criminal behavior like posting fake products on eBay or Craigslist intended to lure victims into sharing credit card information. Prior to conducting an investigation, the investigator must define the types of evidence sought (including specific platforms and data formats) and have a clear understanding of how to preserve pertinent data. The investigator must then determine the source and integrity of such data before entering it into evidence.

Evidence Acquisition

Perhaps the most critical facet of successful computer forensic investigation is a rigorous, detailed plan for acquiring evidence. Extensive documentation is needed prior to, during, and after the acquisition process; detailed information must be recorded and preserved, including all hardware and software specifications, any systems used in the investigation process, and the systems being investigated. This step is where policies related to preserving the integrity of potential evidence are most applicable. General guidelines for preserving evidence include the physical removal of storage devices, using controlled boot discs to retrieve sensitive data and ensure functionality, and taking appropriate steps to copy and transfer evidence to the investigator's system.

Acquiring evidence must be accomplished in a manner both deliberate and legal. Being able to document and authenticate the chain of evidence is crucial when pursuing a court case, and this is especially true for computer forensics given the complexity of most cybersecurity cases.

Evidence Examination

In order to effectively investigate potential evidence, procedures must be in place for retrieving, copying, and storing evidence within appropriate databases. Investigators typically examine data from designated archives, using a variety of methods and approaches to analyze information; these could include utilizing analysis software to search massive archives of data for specific keywords or file types, as well as procedures for retrieving files that have been recently deleted. Data tagged with times and dates is particularly useful to investigators, as are suspicious files or programs that have been encrypted or intentionally hidden.

Analyzing file names is also useful, as it can help determine when and where specific data was created, downloaded, or uploaded and can help investigators connect files on storage devices to online data transfers (such as cloud-based storage, email, or other Internet communications). This can also work in reverse order, as file names usually indicate the directory that houses them. Files located online or on other systems often point to the specific server and computer from which they were uploaded, providing investigators with clues as to where the system is located; matching online filenames to a directory on a suspect's hard drive is one way of verifying digital evidence. At this stage, computer forensic investigators work in close collaboration with criminal investigators, lawyers, and other qualified personnel to ensure a thorough understanding of the nuances of the case, permissible investigative actions, and what types of information can serve as evidence.

Documenting and Reporting

In addition to fully documenting information related to hardware and software specifications, computer forensic investigators must keep an accurate record of all activity related to the investigation, including all methods used for testing system functionality and retrieving, copying, and storing data, as well as all actions taken to acquire, examine and assess evidence. Not only does this demonstrate how the integrity of user data has been preserved, but it also ensures proper policies and procedures have been adhered to by all parties. As the purpose of the entire process is to acquire data that can be presented as evidence in a court of law, an investigator's failure to accurately document his or her process could compromise the validity of that evidence and ultimately, the case itself.

For computer forensic investigators, all actions related to a particular case should be accounted for in a digital format and saved in properly designated archives. This helps ensure the authenticity of any findings by allowing these cybersecurity experts to show exactly when, where, and how evidence was recovered. It also allows experts to confirm the validity of evidence by matching the investigator's digitally recorded documentation to dates and times when this data was accessed by potential suspects via external sources.

Now more than ever, cybersecurity experts in this critical role are helping government and law enforcement agencies, corporations and private entities improve their ability to investigate various types of online criminal activity and face a growing array of cyber threats head-on. IT professionals who lead computer forensic investigations are tasked with determining specific cyber security needs and effectively allocating resources to address cyber threats and pursue perpetrators of same. A master's degree in Information Security and Assurance has numerous practical applications that can endow IT professionals with a strong grasp of computer forensics and practices for upholding the chain of custody while documenting digital evidence. Individuals with the talent and education to successfully manage computer forensic investigations may find themselves in a highly advantageous position within a dynamic career field.

INTRODUCTION TO DATA EXTRACTION

Data extraction is the act or process of retrieving data out of (usually unstructured or poorly structured) data sources for further data processing or data storage (data migration). The import into the intermediate extracting system is thus usually followed by data transformation and possibly the addition of metadata prior to export to another stage in the data workflow.

Usually, the term data extraction is applied when (experimental) data is first imported into a computer from primary sources, like measuring or recording devices. Today's electronic devices will usually present an electrical connector (e.g. USB) through which 'raw data' can be streamed into a personal computer.

Ever since the World Wide Web has been expanding at an exponential rate in terms of data size and quality, data entry and extraction experts have been looking for new methods to pull data from the web. They understand the importance of data extraction in businesses and hence try to identify the most suitable extraction tool based on the business. To make things easy, one may use following data extraction tools for professionals as well as beginners –

OutWitHub

OutWithub is one of the most popular web scraping tools available in the market. It usually segregates the web pages into different elements and then navigates from page to page to extract the relevant data from the website. This tool has an extension for Mozilla Firefox and Chrome which makes it easy to access and is mainly used to extract links, email ids, data tables, images, etc.

Web Scraper

This is a very simple and easy-to-use web scraping tool available in the industry. It has the unique ability to login to external pages and is mainly used by companies for document extraction, web data scraping, email id extraction, pricing extraction, contact detail extraction, image extraction, etc.

Spinn3r

This is a web service which is used to index the blogs around the world. It provides access to every blog that is published in real-time and is mainly used by organizations to get information from social media, forums, web blogs, reviews, comments, mainstream news monitoring, etc.

Fminer

This is another popular tool used by companies which mainly acts as a visual web scraping tool, web data extractor, and a macro recorder. It is mainly used for disparate web scraping, email id extraction, phone number extraction, image extraction, document extraction, etc.

ParseHub

This is one of the most well-known visual extraction tools in the market which can be used by anyone to extract data from the web. The tool is mainly used to extract images, email ids, documents, web data, contact info, phone numbers, pricing details, etc.

Octaparse

This is one of the most powerful web scraping tools which can grab all the open data from any website and also save the user the effort of copy-pasting the information or any kind of further coding. This is mainly used to extract IP addresses, disparate data, email addresses, phone numbers, web data, etc.

Table Capture

This tool is an extension to the Chrome browser which helps to capture the data from the website while navigating through the web pages without any hassles. It easily scrapes the data from an HTML table of any website copies it to a clip board and converts it into any of the data formats such as Google spreadsheets, CSV, or Excel.

Scrapy

This is an open source code development framework which performs data extraction with Python. This tool allows developers to program crawlers to extract and track information for one or many websites at once.

Tabula

This is a desktop application for Mac OSX, Windows, and Linux, which helps companies and individuals to convert PDF files into an Excel or CSV file which can be easily edited. This is one of the most used extraction tools in data journalism.

Dexi.io

This web scraping tool doesn't need any kind of download and is a browser-based tool. This tool allows you to set up crawlers and fetch web data in real-time and also allows you to save the gathered information directly in the Google Drive or export it through CSV or JSON. One unique feature of this tool is that the data can be extracted anonymously using different proxy servers.

Advantages of Using Data Extraction Tools

The internet is a massive pool of data and it is important for businesses to access relevant information and derive useful insights to ensure their success in this fast-paced world. Some of the key benefits of using data extraction tools include -

- **Improves accuracy** - Using data extraction tools automates time-consuming manual process, reduces repetitive tasks and helps improve accuracy of the extracted data
- **Saves time** - These tools quickly extract huge sets of relevant data within a short time. Therefore, it is

important to correctly identify the right data scraping tool as per your requirement which will help you save time to focus on other core tasks

- **Increases productivity** - With appropriate tools in place, your employees are spending more time on tasks which add value to your business and hence their overall productivity is drastically increased
- **Improves visibility** - These tools provide the staff with full visibility of all the records and make the management of stored data easy
- **Saves costs** - By automating time consuming and cumbersome tasks, companies need not hire extra staff and hence save on overhead costs considerably

ETHICAL HACKING

An ethical hacker, also referred to as a white hat hacker, is an information security expert who systematically attempts to penetrate a computer system, network, application or other computing resource on behalf of its owners -- and with their permission -- to find security vulnerabilities that a malicious hacker could potentially exploit.

Hacking Computer System: Hacktivism attacks those included famous Twitter, blogging platform by unauthorized access/control over the computer. Due to the hacking activity there will be loss of data as well as computer. Also research especially indicates that those attacks were not mainly intended for financial gain too and to diminish the reputation of particular person or company.

A hacker is an unauthorized user who attempts to or gains access to an information system. Hacking is a crime even if there is no visible damage to the system, since it is an invasion in to the privacy of data. There are different classes of Hackers.

- a) White Hat Hackers - They believe that information sharing is good, and that it is their duty to share their expertise by facilitating access to information. However there are some white hat hackers who are just "joy riding" on computer systems.
- b) Black Hat Hackers - They cause damage after intrusion. They may steal or modify data or insert viruses or worms which damage the system. They are also called 'crackers'.
- c) Grey Hat Hackers - Typically ethical but occasionally violates hacker ethics Hackers will hack into networks, stand-alone computers and software. Network hackers try to gain unauthorized access to private computer networks just for challenge, curiosity, and distribution of information. Crackers perform unauthorized intrusion with damage like stealing or changing of information or inserting malware (viruses or worms).

TECHNOLOGICAL ADVANCES AND CYBER SECURITY

Moore's law about increase in computing power needs to be proactively harnessed to counter cyber crimes and frauds. Big Data, Blockchain, Cloud computing, Artificial Intelligence (AI), Robotics, Virtual Reality (VR) and Internet of Things (IoT) are adding more colours to the cyber security canvass.

Here are some ways how blockchain technology is helping to boost cyber security in this evolving age of technology(adapted from <https://www.analyticsinsight.net/how-can-blockchain-technology-be-used-to-boost-cybersecurity/>)

1. DDoS Protection

DDoS attack is an attack in which several compromised computer systems attack a target, like a server, website, or some network resources, and cause a denial of service for users of the targeted support. By implementing blockchain technology, the Domain Name System (DNS) becomes fully decentralized and disturbs the contents

to a large number of nodes and make it impossible for hackers attack.

2. Fraud & Identity Theft Protection

Identity theft is becoming a severe problem in the present age. The cyber-criminals are using this identity to commit crimes, but with the incorporation of blockchain technology, this practice can be prevented.

Within the decentralized environment, the activities and the transactions will get accessed from your device by using the Decentralized Identity App. By doing so, every completed transaction will keep on record and everyone will have access to either approve or disapprove it. If there is disapproval, the transaction will not be legal and acceptable.

3. Proving the Validity of Software Updates

Trojan horses, worms, and viruses that invade computers appear in different forms. Blockchain steps in to allocate exclusive hashes for updates and downloads. This significantly reduces the chances of infecting your system with viruses that are well masked.

4. IoT Security

Blockchain technology can protect the data exchanges which happen among the IoT devices. Moreover, it can also be used to gain real-time secure data transmissions and ensure timely communication between devices located miles apart.

5. Incorporating Security in Messaging Apps

A lot of metadata is being obtained from customers during exchanges on social media. While several messaging systems are using end-to-end encryption, others are starting to use blockchain to keep that information secure and protected.

CYBER CRIME CASES

1. Official Website of Maharashtra Government hacked

On September, 2007 in Mumbai the official website of the government of Maharashtra was hacked.

Cyber Crime Branch police got active in investigating the matters and tracking down the hackers. For a day the website, <http://www.maharashtragovernment.in>, remained blocked.

The state government website contains detailed information about government departments, circulars, reports, and several other topics. IT experts who worked on restoring the website told that they fear that the hackers may have destroyed all of the website's contents.

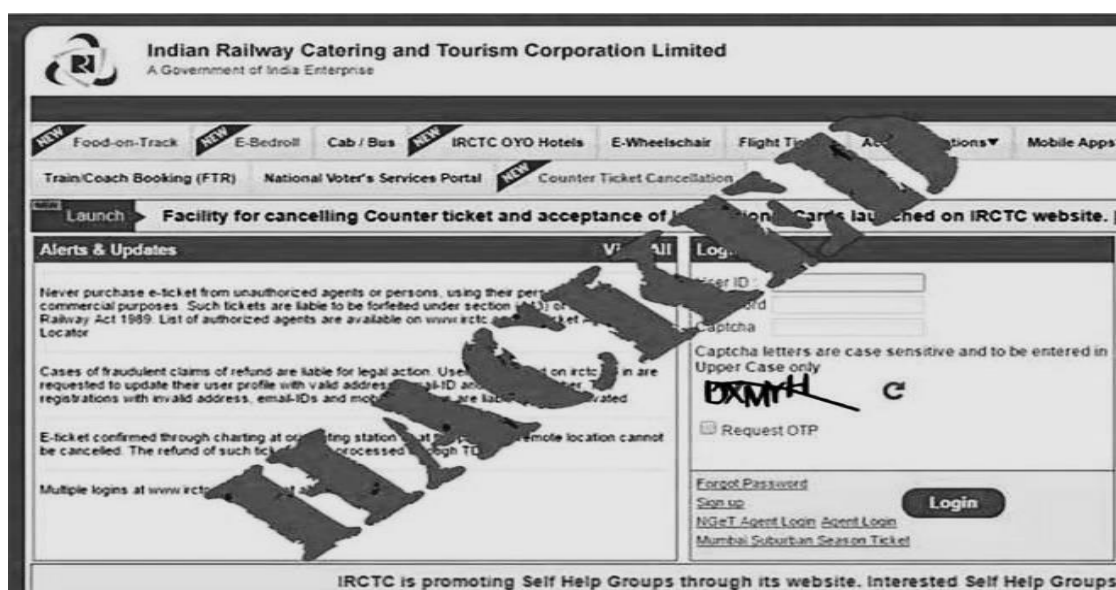
According to sources, the hackers may be from Washington. IT experts said that the hackers had identified themselves as "Hackers Cool Al-Jazeera" and claimed they were based in Saudi Arabia. They added that this might be a red herring to throw investigators off their trail.

The official website has been affected by viruses on several occasions in the past, but was never hacked. It was found that the website had no firewall.

2. Official Website of IRCTC hacked

Another incidence of cyber-crime was reported when the official website of IRCTC was hacked and around one crore customer's details were put at risk.⁸

⁸ IRCTC Website Hacked, Personal Data of 1 Crore User at Risk. Source : <http://daily.bhaskar.com/news/TOP-irctc-website-hacked-data-of-lakhs-leaked-5316549-PHO.html?ref=bkh>



3. CBI Website hacked

In an incidence, it was reported in the year 2013 that the official website of CBI was hacked for few hours.⁹



4. ICICI- Pune Bank Fraud case

Three people held guilty in online credit card scam. Customer's credit card details were misused through online means for booking air-tickets. These culprits were caught by the city cyber crime Investigation Cell in Pune. It was found that details misused were belonging to 100 people. Mr. Parvesh Chauhan, ICICI Prudential Life Insurance officer had complained on behalf of one of his customer. In this regard Mr. Sanjeet Mahavir Singh Lukkad, Dharmendra Bhika Kale and Ahmead Sikandar Shaikh were arrested. Lukkad being employed at a private institution, Kale was his friend. Sheikh was employed in one of the branches of State Bank of India.

9. Inside Story: Government Websites at the mercy of hackers. Source : <http://www.rediff.com/news/slide-show/slide-show-1-inside-story-govt-websites-at-the-mercy-of-hackers/20130314.htm>

According to the information provided by the authorities, one of the customers received a SMS based alert for purchasing of the ticket even when the credit card was being held by him. Customer was alert and came to know something was fishy; he enquired and came to know about the misuse. He contacted the Bank in this regard.

The tickets were book through online means. Police requested for the log details and got the information of the private institution. Investigation revealed that the details were obtained from State Bank of India. Sheikh was working in the credit card department; due to this he had access to credit card details of some customers. He gave that information to Kale. Kale in return passed this information to his friend Lukkad. Using the information obtained from Kale, Lukkad booked tickets. He used to sell these tickets to customers and get money for the same. He had given few tickets to various other institutions.

Cyber Cell was involved in eight days of investigation and finally caught the culprits.

5. Pune Citibank Mphasis Call Centre fraud

It is a case of sourcing engineering. US\$ 3,50,000 from Citibank accounts of four US customers were dishonestly transferred to bogus accounts in Pune, through internet. Some employees of a call centre gained the confidence of the US customers and obtained their PIN numbers under the guise of helping the customers out of difficult situations. Later they used these numbers to commit fraud. Highest security prevails in the call centres in India. The call centre employees are checked when they go in and out so they cannot copy down numbers and therefore they could not have noted these down. They must have remembered these numbers, gone out immediately to a cyber café and accessed the Citibank accounts of the customers. All accounts were opened in Pune and the customers complained that the money from their accounts was transferred to Pune accounts and that's how the criminals were traced. Police has been able to prove the honesty of the call centre and has frozen the accounts where the money was transferred.

6. Parliament attack case

Bureau of Police Research and Development at Hyderabad had handled some of the top cyber cases, including analyzing and retrieving information from the laptop recovered from seized from the two terrorists, who were gunned down when Parliament was under siege on December 13, 2001, was sent to Computer Forensics Division of BPRD. The laptop contained several evidences that confirmed of the two terrorists' motives, namely the sticker of the Ministry of Home that they had made on the laptop and pasted on their ambassador car to gain entry into Parliament House and the fake ID card that one of the two terrorists was carrying with a Government of India emblem and seal. The emblems (of the three lions) were carefully scanned and the seal was also crafty made along with residential address of Jammu and Kashmir. But careful detection proved that it was all forged and made on the laptop.

7. Andhra Pradesh tax case

The owner of a plastics firm in Andhra Pradesh was arrested and Rupees Twenty Two crore cash was recovered from his house by the Vigilance Department. They sought an explanation from him regarding the unaccounted cash. The accused person submitted 6,000 vouchers to prove the legitimacy of trade, but after careful scrutiny of vouchers and contents of his computers it revealed that all of them were made after the raids were conducted. It was revealed that the accused was running five businesses under the guise of one company and used fake and computerized vouchers to show sales records and save tax. Thus the dubious tactics of the prominent businessman from Andhra Pradesh was exposed after officials of the department got hold of computers used by the accused person.

8. Insulting Images of Chatrapati Shivaji Maharaj on Google - Orkut

An Indian posts 'insulting images' of respected warrior-saint Shivaji on Google's Orkut. Indian police come

knocking at Google's door demanding the IP address (IP uniquely identifies every computer in the world) which is the source of this negative image. Google, India hands over the IP address leading to the culprit

9. India's first ATM Card fraud

The Chennai City Police busted an international gang involved in cyber-crime, with the arrest of Deepak Prem Manwani (22), who was caught red-handed while breaking into an ATM in the city. The dimensions of the city cops' achievement can be gauged from the fact that they have netted a man who is on the wanted list of FBI, USA.

At the time of his detention, he had with him Rs 7.5 lakh knocked off from two ATMs in T Nagar and Abiramipuram in the city. Prior to that, he had walked away with Rs 50,000 from an ATM in Mumbai. While investigating Manwani's case, the police stumbled upon a cyber-crime involving scores of persons across the globe.

Manwani is an MBA drop-out from a Pune college and served as a marketing executive in a Chennai-based firm for some time. Interestingly, his audacious crime career started in an Internet cafe. While browsing the internet one day, he got attracted to a site which offered him assistance in breaking into the ATMs. His contacts, sitting somewhere in Europe, were ready to give him credit card numbers of a few American banks for \$5 per card. The site also offered the magnetic codes of those cards, but charged \$200 per code.

The operators of the site had devised a fascinating idea to get the personal identification number (PIN) of the card users. They floated a new site which resembled that of a reputed telecom company's website. That company has millions of subscribers. The fake site offered the visitors to return \$11.75 per head which, the site promoters said, had been collected in excess by mistake from them. Believing that it was a genuine offer from the telecom company in question, several lakh subscribers logged on to the site to get back that little money, but in the process parted with their PINs.

Armed with all requisite data to hack the bank ATMs, the gang started its systematic looting. Apparently, Manwani and many others of his ilk entered into a deal with the gang behind the site and could purchase any amount of data, of course on certain terms, or simply enter into a deal on a booty-sharing basis. Meanwhile, Manwani also managed to generate 30 plastic cards that contained necessary data to enable him to break into ATMs. He was so enterprising that he was able to sell away a few such cards to his contacts in Mumbai. The police are on the lookout for those persons too.

On receipt of large-scale complaints from the billed credit card users and banks in the United States, the FBI started an investigation into the affair and also alerted the CBI in New Delhi that the international gang had developed some links in India too.

Manwani has since been enlarged on bail after interrogation by the CBI. But the city police believe that this is the beginning of the end of a major cyber crime.

10. Chennai's Violation of Software Terms

Two managers of Chennai based Radiant Software a Computer Education Company was arrested for an alleged violation of the licensing terms of Software. The top management team had to obtain anticipatory bail to avoid arrests until a compromise was worked out.

11. Napster case

Napster, a very successful E-Venture was hauled to the Court and beaten to death for having caused violation of Copyright of music companies. Despite willing customers and working technology, the business of the Company had to be shelved under an enormous loss to the promoters. There are many websites in India which could be held to be infringing the Patent rights of somebody abroad and asked to shut down or pay compensation putting an end to their entrepreneurial dreams.

12. Cosmos Bank loses INR 94 Crore to cyber attack (Aug., 2018)

Hackers managed to embezzle over Rs. 90 Crore through a malware attack on the server of the bank and cloning thousands of debit cards.

Malware refers to a malicious software, that is normally sent as a link to the intended target. Once clicked, it can install executable codes and scripts. To keep malware at bay, organisations install anti-malware and antivirus software, and firewalls. In the case of Cosmos bank, the malware compromised a digital system responsible for settling cash dispensation requests raised at ATMs.

When depositors withdraw money at ATMs, as soon as one swipes a card, a request is transferred to the respective bank's core banking system (CBS). If the account has sufficient balance, the CBS will allow the transaction. In the case of Cosmos bank, the malware created a proxy system that bypassed the CBS. Following this, a series of fraudulent transactions got approved.

13. Phishing attack at Wipro (April 2019)

Many Wipro employees and clients were victims of the attack and the attackers had gained access to over hundred Wipro computer systems.

Interestingly, many legitimate security applications were abused during this attack. For example, the phishing templates used to bluff victims inside Wipro match those provided by a security awareness training provider.

The attackers also dropped remote access tool ScreenConnect on the machines compromised inside Wipro. Meanwhile, some of the domains used in the attack were hosting powerkatz (a PowerShell version of Mimikatz, a post-exploitation tool able to search memory for credentials, tokens and other things related to authentication). There was also evidence of attempts to spread malware called Imminent Monitor, a remote administration tool.

14. ONGC & Aramco (Sep., 2015)

The Oil and Natural Gas Corporation Limited (ONGC) lost nearly Rs 200 crore to a scam, so disarmingly simple, that it's a testimony to how little the alleged fraudsters must think of the collective intelligence of two of the largest oil companies in the world, to even implement such a scheme.

ONGC had agreed in September to deliver 36000 tonnes of naptha to Saudi Arabia-based oil company Aramco for Rs 100 crore. The delivery was facilitated on behalf of ONGC from the email address 'patel_dv@ongc.co.in.'

The company usually got money into its State Bank of India account and officials were perturbed that Aramco hadn't paid up several days after deadline. On checking up, ONGC was told that public holidays had delayed payment, to which the benignly-trusting company responded by sending a new consignment of naptha--worth Rs 97 crore--to Aramco.

On October 7, ONGC got an email from Aramco saying that their money had been transferred to Bangkok Bank Public Company Limited "on the request of ONGC."

The frazzled ONGC contacted the cyber wing of the Mumbai police from where it emerged that Aramco had been communicating with patel_dv@ognc.co.in, ostensibly a fraud website and merely two alphabets in the URL interchanged.

The moral of the story is that cyber crime doesn't always involve sophisticated geeks hacking into Mission Impossible-style fortresses. Sometimes people like leaving their vaults unlocked.

LESSON ROUND UP

- Everyone is getting increasingly dependent on consistent access and accuracy of these communication channels. The internet users have increased significantly especially in the last 15 years.
- This clearly indicates that the impact of Information Technology is very profound.
- Both Society and the Technology are operating in a way so as to harmonize with the pace of each other's growth.
- With boon comes the bane and thus the World of ICT is no exception to this rule. Along with abundant opportunities that it has brought about, there are also some challenges.
- Broadly speaking, it has posed certain major concerns like privacy threat, over riding cultural impact, more reliance on technology, boycott of societal engagements, computer virus, malware, spam phishing and many more.
- One of the major challenges in this era of ICT is of an increasing number of cyber crimes taking place in the World today.
- Cyber-crimes are technology based crimes wherein the computer or internet itself is used as a weapon or means to commit such crimes. They are organized and white collar crimes like cyber frauds, hacking, data theft, phishing, identity theft, etc.
- Digital forensics, as a developing discipline, presents a number of opportunities for international standardisation.
- Generally when procedures are standardised, the associated costs are lower, training is simplified and consumers accept products and services more readily.
- Some standardisation benefits include:
 1. Improving the suitability of products, processes and services for their Intended purposes;
 2. Preventing barriers to international trade; and
 3. Preventing unsafe products and procedures from reaching consumers through the regulatory use of safety standards.
- A number of standardisation bodies exist, few of them are introduced as below:
 1. WSSN (World Standards Services Network)
 2. ISO (International Organization for Standardization)
 3. SABS (South African Bureau of Standards)
- Cybersecurity professionals understand the value of this information and respect the fact that it can be easily compromised if not properly handled and protected.
- A key component of the investigative process involves the assessment of potential evidence in a cyber-crime.
- In order to effectively investigate potential evidence, procedures must be in place for retrieving, copying, and storing evidence within appropriate databases.
- Data extraction is the act or process of retrieving data out of (usually unstructured or poorly structured) data sources for further data processing or data storage (data migration).
- An ethical hacker, also referred to as a white hat hacker, is an information security expert who systematically attempts to penetrate a computer system, network, application or other computing

resource on behalf of its owners -- and with their permission -- to find security vulnerabilities that a malicious hacker could potentially exploit.

SELF-TEST QUESTIONS

1. What do you mean by Cyber Crime?
2. Write a brief note International Guidance to Cyber Forensics Laws.
3. What do you mean Data Extraction? Discuss the concept with examples.
4. Discuss the Concept of Ethical Hacking.

[illegible]

Lesson 7

Case Laws, Case Studies and Practical Aspects

LESSON OUTLINE

- Case Laws
- Sahara Group Scam
- Satyam Computers
- Saradha Chit Fund
- Ketan Parekh Scam
- Case Studies: Practical Aspects
- Case Study – 1: Collusive Bidding by Contractors
- Case Study – 2: NSEL – FTIL Case
- Case Study – 3: Bank Fraud Case
- Case Study – 4: Corruption and Bribe Case
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

In order to apprise the students, with the applied issue of Forensic Audit and its procedure in the legal regime in India, the chapter aims providing the gist of some leading case laws related to Forensic Audit. It also provide a glimpse of practical aspects of the Forensic Audit and its procedure with the discussion of a case study too.

Case Laws

Sahara Group Scam

Sahara Group chairman Subrata Roy and Vijay Mallya had a lot in common. Both successful businessmen had a passion for sports. The two also had their own IPL teams, Sahara Pune Warriors and Royal Challengers Bangalore (after resigning as the chief of UB Group Mallya is technically not the owner of RCB). In fact, the duo jointly owns the Sahara Force India Formula 1 team.

Sahara Group was accused of failing to refund over Rs. 20,000 crore to its more than 30 million small investors which it collected through two unlisted companies of Sahara.

In 2011, SEBI ordered Sahara to refund this amount with interest to the investors, as the issue was not in compliance with the requirements applicable to the public offerings of securities.

Roy was arrested on 28th February 2014 and remained behind bars as an under-trial. His proposal to settlement of the matter was rejected by the court and SEBI.

Satyam Computers

B Ramalinga Raju, the founder of Satyam Computers, got into trouble after he admitted to inflating the company revenue, profit and profit margins for every single quarter over a period of 5 years, from 2003-2008. The amount misappropriated in this case is estimated to be around Rs. 7,200 crore.

In April 2015, Ramalinga Raju and his brothers were sentenced to 7 years in jail, and fined Rs. 5.5 crore.

Following are the common governance problems, which have been noticed in the collapse of Satyam:

- ***Unethical conduct*** - Founders wanted to make money by avoiding paying taxes, cooking books, and pay offs; revealed some alarming truths that he was concealing for a long period by confessing to a fraud of Rs 7,800 crores (\$1.47 billion) on Satyam's balance sheet.
- ***A case of false books and bogus accounting***-These figures of accrued interest were shown in balance sheets in order to suppress the detection of such non-existent fixed deposits on account of inflated profits. The investigations also detailed that the company had deliberately paid taxes of about 186.91 crores on account of the non-existent accrued interests of Rs 376 crores, which was a considerable loss for the company.
- ***Unconvinced role of independent Directors*** -The Satyam episode has brought out the failure of the present corporate governance structure that hinges on the independent directors, who are supposed to bring objectivity to the oversight function of the board and improve its effectiveness. They serve as watchdogs over management, which involves keeping their eyes and ears open at Board deliberations with critical eye raising queries when decisions went wrong
- ***Questionable role of Audit Committee*** -The true role of audit committee in précis is to ensure transparency in the company, that financial disclosures and financial statements provide a correct, sufficient and creditable picture and that, cases of frauds, irregularities, failure of internal control system within the organization, were minimized, which the committee failed to carry out.
- ***Dubious Role of Rating Agencies*** - Credit rating agencies have been consistently accused of their lax attitude in assessing issuers and giving misleading ratings without thorough analysis they failed to warn market participants about the deteriorating condition of company.
- ***Questionable Role of Banks*** - While sanctioning short term loans why not the banks posed any question as to why the company which was supposedly cash rich as per the financial statements was taking loans from them.

- **Fake Audit** - PricewaterhouseCoopers (PwC)'s audit firm, Price Waterhouse, was in the auditor for Satyam and have been auditing their accounts since 2000-01. The fraudulent role played by the PricewaterhouseCoopers (PwC) in the failure of Satyam matches the role played by Arthur Anderson in the collapse of Enron. Partners of PwC according to the SFIO findings, had admitted they did not come across any case or instance of fraud by the company. However, founder admission of having fudged the accounts for several years put the role of these statutory auditors on the dock.

Saradha Chit Fund

Saradha group which ran a chit fund in West Bengal had collected around ₹200 to 300 billion from investors with a promise of high returns for their investments.

The company which enjoyed strong political backings collapsed in April 2013. The amount investors lost is estimated to be between Rs. 2060 – 2400 crores.

Ketan Parekh Scam

Parekh was involved in circular trading and stock manipulation through 1999-2001 in a host of companies. He borrowed from banks like Global Trust Bank and Madhavpura Mercantile Co-operative bank, and manipulated a host of stocks popularly known as K-10 stocks.

Among others, PNB and Satyam are clear audit failures. In Satyam direct confirmation from bank was not sought despite the materiality of the same. IN PNB, Swift messages serial number wise should have traced to the transaction entry in the general ledger at least on test check basis and the scam would have come to light automatically much earlier.

Case Studies: Practical Aspects

Case Study – 1: Collusive Bidding by Contractors

Facts

- A major infrastructure company had been awarded a road construction contract by the government under the PPP model.
- For execution of the project, the company had sub-divided the geographies and execution areas and invited bids for the sub -contracting.
- The company had publicized a whistle blower policy and received a complaint from one of the bidders about possible collusion between certain bidders.
- The matter was sought to be investigated by the management of the company.

Red Flag Indicators

- Winning bids too low when benchmarked against the company estimates, past experience and industry standards.
- 6 out of 10 bids shortlisted had very close price range, similar experience tenure, consistent in terms, conditions and technical specifications.
- 5 of these 6 operated from same commercial complex building with adjoining office numbers.
- Some of the qualified bidders who failed to make it to short list were internally rated good for performance, based on past experience and their marked reputation.

Investigation

- Prepare a questionnaire for interviewing the complainants and those who failed but rated good.
- Interviewing complainants and confidential sources.
- Data collection paper trail: bid documents, requests for bids, bid comparison documents prepared internally, Bill of Quantities (BoQs) comparison line item wise and bid securities.
- Identify physical similarities in the bid documents like paper quality, colour schemes, type, faces, formatting, language, etc.
- Connection between bidders on inter-company connections, common address, contact details, etc.
- Unusual bidding patterns comparing the financial and quantity data line item wise. Test whether they are exact percentages or value apart.
- Background check on all the final shortlisted bidders to check for common ownership, employees, affiliations or prior involvement in the other collusive bidding schemes.
- Review the bid security details - whether issued by same bank branch to group of bidders, or issued to bidders by bank on same day.
- Interview complainants and likely bidders who lost.
- Most bid documents have a special enquiry / audit enabler clause. Exercising that right on the winning bidder is conducted as a routine formality. Instead, a detailed inquiry can be made into the business of the winning bidder.
- Interviewing the winning bidder based on the information collected and collated from the above processes.

Case Study – 2: NSEL – FTIL Case¹

Facts

- Creation of NSEL was ideated on concept that it would provide a platform for farmers to sell their produce and on the other hand processors, exporters, traders and investors to buy produce electronically.
- This in theory would help price discovery in efficient way. NSEL was supposed to help the farmers to access the national market and get the best price for their commodities
- It was also envisaged that with the creation of holding capacity, the farmers would be able to raise funds under warehouse receipt financing by the banks.
- Under Forward Contracts Regulation Act, a spot contract shall be settled within 11 days including payment and physical delivery of goods i.e. in T+11 days.
- Spot contracts are out of Forward Market Commission which is the regulatory authority.
- Also as per concerned government departments notification in 2007 the spot contracts were deemed to be out of FMC if settled in T+2 days.
- NSEL somehow managed to ensure 'sell' contracts at T+25 / T+35 and 'buy' at T+2 providing major players wide window for 'arbitrage'.
- Eventually, it was found that NSEL could not honor their T+25/35 obligations as it neither had money nor commodities.

¹. Case study available at IOSR Journal of Business and Management, IES MCRC International Case Study Conference.

- NSEL had also lent money to 24 borrowers without underlying commodity deposited by them – Warehouse receipt financing.
- Exchange allowed trading in stocks without verifying existence of the same.
- FMC found trading in contracts exceeding 11 days which was breach of provisions of FCRA, 1952. This led to unsettled payouts ballooning to Rs. 5400 crore.
- It was found that the commodity stockists were selling warehouse receipts to investors for immediate payments.
- The investors entered into buyback arrangements by selling back the commodity to stockists after 25-35 days without verifying the actual commodity stock.
- These investors later actually sold commodities without proof of underlying stock.
- The NSEL scam has once again raised doubts over investing opportunities and investment safety.

Red Flags / Questions

- How did central government allow NSEL to not follow demutualization rule?
- Why there is no regulatory authority or monitoring mechanism for spot contracts in commodities?
- Why were no red flags raised when liquidity was diminishing?
- Why were no red flags raised when only few members of the exchange did the actual business for so many years?

Investigation Process

- Prepare a questionnaire for interviewing the complainants. Interviewing complainants and confidential sources.
- Data collection paper trail: agreements between NSEL, brokers, stockists, brokers, contract notes, warehouse receipts, financial and non-financial records.
- Data collection IT: email backups, electronic data from the computer device of all the suspects, server data, trade data, etc.
- Connections between brokers, investors, warehouse owners, exchange shareholders on inter-company connections, common address, contact details, etc.
- Data analytics: identify relevant statistics - significant increase in business of certain brokers, investors, warehouse owners, etc.
- Data analytics: correlate the data based on trade time stamps, spurt in volumes, cartel of brokers, investors, warehouse owners, speculators, etc. based on Time-Space Analysis.
- Forensic analysis of financial records of the exchange, its holding company, brokers, investors, warehouse owners and all major traders in the exchange.
- Specific focus on regulatory compliances and filings – both in terms of timely reporting and quality of the information reported.

Case Study – 3: Bank Fraud Case

Facts

- The fraudster posed as banker's representative to various PSUs and Corporates for making fixed deposits with the bank.

- PSUs and Corporates believed that they would be anyhow be dealing with the Bank and transactions would happen via regular banking channels, hence remain unsuspecting and trusting.
- The fraudster would change his role when he visited the Banks and offered to bring huge deposits from companies. He acted as representative of PSUs and Corporates.
- In the Bank Fraud Case, upon transfer of Rs. 110 cr. by ABC Private Company to the Bank for creating of FD, the fraudster asked the banker to immediately transfer the amount to his accomplice's account KBP International via a FAX communication.
- Immediately, that transfer was followed by another trench of Rs. 70 cr. for FD creation.
- The Bank again received instructions to transfer the amount to the accomplice's account via FAX message.
- Meanwhile, ABC Private Company directly contacted Bank to enquire why FD Receipts were not yet delivered to the company. It was then, they and Bankers realized that fraud has been perpetrated on them.
- The last trench of transfer was saved, but the earlier transfer of money is yet to be recovered.
- *In another Bank Fraud case*, the Bank received bulk deposits from Corporates and PSUs between 30 January 2017 and 5 May 2017.
- The modus operandi was similar.
- The fraudster represented organizations and as banker to the other.
- Fraudster convinced the organizations to create FD with the Bank and collected the KYC documents, obtaining signatures on forms, filled them and helped them through the entire process.
- Fraudster then submitted forged documents with the Bank and obtained FDRs of Rs. 256.69 cr.
- The originals were collected by the fraudster as representative of the organizations.
- The FDRs were subsequently pledged with the Bank by the 'same signatories' against which overdraft facilities of Rs. 223.25 crore were obtained.
- The funds were then surreptitiously transferred out of bank.
- The Banks also lost their stocks by 5% and stock lost 3.5% upon these revelations.
- Bank FD scam gets bigger, 9 FIRs filed, estimated fraud at least Rs. 700 cr.
- Preliminary inquiry by EOW has been initiated in another 10 cases.
- Finance Ministry has ordered a forensic audit in these PSU Banks.
- Both the banks have complained to the CBI, which has also looking into the matter.

Red Flags

- Middle man
- Audience participation and
- Another involvements

Investigation Process

In addition to the usual,

- Document forensics: Paper and ink analysis, handwriting analysis, signature analysis.

- Following regulatory channels, analyzing the email and telephone call data records.
- Establishing the linkages between the fraudster's location while perpetrating fraud, communications with people within the organization and banks, etc.
- Mapping the procedural role of banking officials and the PSUs-Corporates officials with their job description and the standard operating practices / rules governing their duties.

Case Study – 4: Corruption and Bribe Case

Facts

- HR department observed that a certain officer in the Purchase department was resented by his colleagues and juniors as being arrogant and asocial.
- Upon enquiries it was revealed that in last few years, some vendors with whom business was low were delivering to this particular officer sweets and gifts and sometimes for the entire department. Few of such suppliers were not in approved list with the company.
- At annual HR review the employee was generally asked about his life and family where he proudly stated that his daughter stood first in her class. Interestingly the school he revealed was one of the expensive international schools in the city. Lifestyle improvements were also observed i.e. use of branded products, travel by radio taxi on daily basis for commuting, etc.
- An inquiry into the matter was sought when at the annual Departmental Head meeting, the HR and Purchase Heads accidentally discussed the employee in question at tea break, which was then escalated for approval by the management.

Red Flag Indicators

- Disproportionate increase in wealth of the procurement official.
- Frequent receipt of gifts
- Non-competitive selection of a contractor, unjustified favoritism.

Investigation Process

- Data collection IT: email backups, company mobile devices as per the company policy and applicable law, electronic data from the computer device of the suspect.
- Data collection paper based: suppliers documentation since pre-vendor creation stage, quotes, bids, invoices, payments, delivery acknowledgements, revisions to contracts, etc. for the alleged suspects tenure with the company.
- Data collection paper based: suppliers documentation since pre-vendor creation stage, quotes, bids, invoices, payments, delivery acknowledgements, revisions to contracts, etc. for the alleged suspects tenure with the company.
- Data analytics will help identify relevant statistics - significant increase in business. Significant increase indicate most likely vendors who could have received business by paying kickbacks.
- Reviewing transactions thoroughly including bidding documents, order placements, contractual agreements, per unit prices, quality of goods and services, etc.
- Background search on suspect vendors for their location, publicly available financial information via MCA or Financial database software's like Prowess or Capitalline, litigations against them, ownership structure, and overall market reputation.
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MCA or Financial database software's like Prowess or Capitalline, litigations against them, ownership structure, and overall market reputation.

- Background search on the suspected procurement officer about his reputation in the department, increase in his assets, changes in his lifestyle, etc.
- If significant indicators point towards fraud by the employee, asset trace investigation can be conducted to help recover the loss.
- From data analytics, identification of vendors whose business has suddenly decreased or were removed from the approved list during this tenure needs to be identified. Informal discussions and discrete inquiries can be made with them. It is very likely that concrete information can come from such disgruntled vendors.
- Combined analysis of data analytics, background checks, document reviews, discrete enquiries with vendors no longer being favored will give a good understanding of situation as to what is going on and who is involved.

Case Study – 5: PMC Bank Fraud Case:

The banking sector has huge Non Performing Assets (NPA). In this tough time another bank fraud came in the light in the name of Punjab & Maharashtra Cooperative (PMC) Bank. This bank was established on February 13, 1984 as a single branch cooperative Bank. Punjab & Maharashtra Cooperative (PMC) Bank is a Scheduled Urban Co-operative Bank with its area of operation in the States of Maharashtra, Gujarat, Delhi, Goa, Karnataka, Madhya Pradesh and Andhra Pradesh.

The summary of this bank fraud is that the higher management of the PMC bank has given huge loan to the Housing Development and Infrastructure Ltd (HDIL) and its group entities. This fraud case is related to transfer of 70% of the total credit facilities of the PMC bank to HDIL and its associated companies. If i talk about the total amount of the bank fraud then it was Rs 4,355 cr. Now the total NPA of the bank has grown to 73%.

The PMC bank allegedly favoured to the promoters of Housing Development and Infrastructure Ltd (HDIL) and allowed them to operate password protected 'masked accounts'.

It is found that around 21,049 bank accounts were opened by bogus names to conceal 44 loan accounts. The bank's software was also tampered to conceal these loan accounts.

This bank fraud case is busted by a bunch of women employees of the credit department of the PMC bank. These employees told to the RBI that they were aware of the ghost accounts. When this case came in the light; then customers of the PMC bank rushed to the PMC bank to withdraw their hard earned money but they were refused to give their deposited money and withdrawal limit is set by the bank.

Now the Enforcement Directorate (ED) has sealed the assets of Rs 3,500 cr of the HDIL group and the HDIL chief Rakesh Wadhawan and his son Sarang Wadhawan have been arrested by the Mumbai Police.

Now it the need of the hour that the central government need to make some strict policies to prevent such banking frauds in the country. The most important measure I would suggest is to restrict the political intervention in the functioning of the Indian bank.

Case Study – 6: The Punjab National Bank Fraud Case

It relates to fraudulent letter of undertaking worth ₹11,356.84 crore (US\$ 1.4 billion) issued by the Punjab National Bank at its Brady House branch in Fort, Mumbai; making Punjab National Bank liable for the amount. The fraud was allegedly organized by jeweller and designer Nirav Modi. Nirav, his wife Ami Modi, brother Nishal Modi and uncle Mehul Choksi, all partners of the firms, M/s Diamond R US, M/s Solar Exports and M/s Stellar Diamonds; along with PNB officials and employees, and directors of Nirav Modi and Mehul Choksi's firms have

all been named in a chargesheet by the CBI. Nirav Modi and his family absconded in early 2018, days before the news of the scam broke in India.

The case came to light on January 16, after diamond jeweler Nirav Modi's company sought a fresh loan early last month. By then the PNB official they had allegedly been working in collusion with, had retired. The new official who took charge noticed the fraud and wrote to the CBI on January 29, 2018 naming two PNB officials. The details are revealed in a complaint by PNB. The letter by the PNB official to the CBI also said Modi had claimed to need the cash to pay his import bills but the Rs 280 crore raised weren't used for this purpose in many cases but there were no more details on the same.

Since there was no sanctioned limit in the name of Modi's companies, PNB said it asked for 100 percent cash margin to issue the letters of understanding. When Modi's companies insisted they had used the facility before, PNB said it started digging.

In 2011, a letter of undertaking (LoU) was opened at PNB's Brady House, Fountain branch in Mumbai, by the alleged jeweller Nirav Modi and his partnership firms -- Diamond US, Stellar Diamonds and Solar Exports -- having partners Nirav Modi, Nishal Modi, Ami Nirav Modi and Mehul Chinubhai Chokshi.

In tandem with two PNB officials, they got unauthorized LOUs and discounted these with foreign branches of banks such as Axis Bank, Allahabad Bank, Union Bank of India and Bank of India. These banks transferred the money to PNB's Nostro account to be given to the jeweller to pay import bills to their foreign suppliers.

Case Study – 7: Amrapali Group Case: (Bikram Chatterji vs Union Of India on 23 July, 2019)

This case comprises of the writ petitions pertaining to the projects of various companies of Amrapali Group in the Noida and Greater Noida. It is submitted on behalf of the petitioners that in 2011 in Noida and Greater Noida various real estate projects for housing were started. In the various projects, the Amrapali Group of Companies proposed to construct approximately 42,000 flats. Various brochures were published and it was assured that the delivery of possession shall be made in 36 months and other world-class amenities were also promised. Various home buyers booked their apartments during the period 2010-2014. The buyers signed the Standard Form of Allotment-cum-Flat Buyers Agreement and even after payment of 40 to 100 percent of total consideration, they are faced with the threat of forfeiture of huge booking amount. The agreement contained specific terms as to interest. Under Clause 14 of the agreement, the builder authorised itself to finance loan from any financial institution by way of mortgage/charge/securitization of receivable of the land and flats and the allottees will have no objection in this regard. Clause 15 also authorised the builder to keep full authority over the flat depriving the allottees of any lien or interest despite payment of entire amount thereof.

The builder under Clause 19(a) was obliged to complete the flats of M/s. Amrapali Centurion Park Private Limited within 30 months from the date of commencement of excavation/signing of the agreement, which may vary for plus/minus 6 months. Under Clause 19(c), builder fixed a paltry sum of Rs.5 per square feet super area per month for the period of delay, which would include any/all damages, compensation, claims for delayed possession.

The buyers invested their life savings and some of them had obtained the loan from the Bank. Most of the buyers have made the payment to the extent of 50 percent to 100 percent abiding by the payment schedule. The dreams of the buyers of obtaining house were given serious jolts when M/s. Amrapali Silicon City Private Limited and M/s. Amrapali Centurian Park Private Limited, respondent Nos.3 and 4 herein respectively were found in serious breach of their obligation to deliver the flats within 36 months. They did not pay the amount either to the Noida or Greater Noida Authority and also to the Banks. Several revised dates of possession were fixed unilaterally, but they failed to deliver the flats. The Amrapali Group has failed to comply with its obligation under the subvention scheme, the tenure of which was approved by the bank/financial institution. The builder had failed to comply with the abovementioned scheme as the buyer making the payment of EMIs to the banks, thereby causing a double loss. Some of the consumers approached the National Consumer Dispute Redressal

Commission (for short, 'the NCDRC') by filing Consumer Complaint No.213 of 2017 under Section 12(1)(c) of the Consumer Protection Act, 1986.

The matter projects the issue of larger public interest. The real estate business has developed and it mainly survived by the money invested by the buyer for the purchase of the house. They have the right to obtain houses. The facts of the instant case project that Noida and Greater Noida have allotted huge plots to the builders by charging a sum of approximately 10 percent and in most of the cases, thereafter no money has been paid. The large number of projects which have come up not only in Noida and Greater Noida, but most of them have not been completed by the builders/promoters and they have siphoned buyers' money in large scale. No action has been taken by the Noida and Greater Noida Authorities against builders for cancellation of leases due to violation to fulfil their obligation. Bankers have financed to builder certain loan on the condition to invest in the projects, but they have also permitted the money to be used as for other purposes as apparent from the report of the Forensic Audit in the instant case which had been submitted by Auditors - Mr. Pawan Kumar Aggarwal and Mr. Ravinder Bhatia. The facts which are projected in the Forensic Auditor Report speaks for itself.

The Court appointed Mr. Ravi Bhatia of M/s. Bhatia & Co. and Mr. Pawan Kumar Aggarwal of M/s. Sharp & Tannan Company to conduct the forensic audit, which was ordered to be conducted with effect from the year 2008 till date, to be completed within two months. On 12.9.2018, a list of properties was submitted which was to be sold by the Debt Recovery Tribunal, Delhi, (DRT) and the details of properties, title deeds and maps were to be submitted to the DRT. This Court directed statutory Auditor, Mr. Anil Mittal, to hand over the original records of Amrapali group of companies vide order dated 12.9.2018. This Court also directed remaining records from 2008 till date, be handed over within 10 days. Amrapali group of companies were also directed to hand over the documents required by the forensic auditors.

In the opinion of the Court, considering the serious kind of fraud unearthed on the forensic audit, formation of dummy companies, violation of norms of foreign investment, violation of FEMA, siphoning off the money of home buyers, making payment of dividend without profits and a methodology had been devised of valuing the shares on an unreasonable higher basis so as to siphon out the money of the home buyers to J.P. Morgan etc. The creation of a large number of assets with the help of money of the home buyers. The Forensic Audit unfolds the true story of Amrapali Group the Court observed.

**PROFESSIONAL PROGRAMME
FORENSIC AUDIT (PAPER 9.4)**

PP-FA

WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

“27. Suspension and cancellation of examination results or registration.

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as student, or debar him from re-registration as a student, or take such action as may be deemed fit.

PROFESSIONAL PROGRAMME

FORENSIC AUDIT (PAPER 9.4)

TEST PAPER

[This Test Paper is for recapitulate and practice for the students. Students need not to submit responses/ answers to this test paper to the Institute.]

Time Allowed: 3 Hours

Maximum Marks: 100

All questions are compulsory

Marks for each question is indicated alongside of the question.

1. (i) What is Fraud? Discuss the definition of fraud as provided under Companies Act, 2013. (10 Marks)
- (ii) Discuss in detail the elements of Fraud. Support your answer with relevant legal provisions and examples. (10 Marks)
- (iii) What do you mean by Corporate Fraud? Discuss any two examples of Corporate Fraud. (10 Marks)
- (iv) Write a brief note on the Significance of Forensic Audit (5 Marks)

2. Modbury India Pvt Ltd. was involved in an accounting scandal that saw the over statement of the company's profit by over 13billion Indian Rupee between the period 2013 and 2016. The Securities and Exchange Board of India has investigated the scandal and issued a report.

In a similar vein, a forensic audit of the Company was commissioned and an interim report was issued.

Major Contents of the Interic Report are listed as below:

- The results of the reports indicate that all three common types of fraud were present in the cases.
- In the case of Modbury India Pvt Ltd., the financial statements were overstated by over thirteen billion Indian rupees. Although the extent of exact overstatement/ understatement cannot be readily ascertained, yet the duplication of payments, reclassification of expenses, questionable write offs and overstatement of expenses ensured that the financial statements of the company were manipulated. Modbury management had an off shore account completely omitted from the books of the company that was used to top up the salaries of the executive directors. Approval of the remuneration committee of the board was not obtained to make such payments to the directors. This was a clear case of asset misappropriation and conflict of interest.
- In the further investigation it was also revealed that, the top management of the bourse had a field day converting the assets of the organization into their personal properties through questionable write offs. Also conflicts of interest were rife in the organization as contracts were awarded to companies fronted by top management staff. Interestingly, misappropriation of assets of an organization is usually ascribed to employees in the lower rung of the ladder but here it is a case of top management being deeply involved in the infractions. Even the non-executive directors were engaged in conflicts of interest and misappropriation of the assets of the organization by way of productivity bonuses which they were not entitled to. The cooks were top management of organisations. There was marked differences in the recipes. While Modbury India Pvt Ltd relied on stock buy backs, cost deferrals and allied techniques, there non-executives relied on booking of questionable expenses, questionable asset write offs and misclassification of transactions. In the area of monitoring, the non- executive members of the board of Modbury were passive. The audit committee was ineffective while the internal auditor was compromised. Collusion among some members of top management ensured internal control override.

- For the organization, the external auditors did not raise a whimper.
- Indeed, in this case of fraud, members of the public, employees of the organization and the investing public were at the receiving end.
- Costly litigation has also resulted for organization.

Based on the above facts, answer the following

- (i) If you to conduct a Forensic Audit, then what investigation mechanism you would follow to detect the real culprits behind this Corporate Fraud. (10 marks)
 - (ii) In the above case, it is mentioned that three kind of frauds has happened in the organization. In the light of this statement, describe the kind of Fraud and what would have been the probable three kinds of fraud in the present case. Support your answers with reasons and rationale. (10 marks)
 - (iii) Once the Culprit is identified, what should have been the penalty and punishment for him or her as per the Indian laws? Describe in Brief. (5 marks)
3. (i) What are the Powers and Duties of Company Secretaries by virtue of Section 143 of Companies Act, 2013? (5 marks)
 - (ii) What is the punishment for fraud by virtue of Companies Act, 2013 (5 marks)
 4. (i) Write a detailed note on Fraud Triangle (5 marks)
 - (ii) Discuss in brief, the Concept of Green Flags. (5 marks)
 5. (i) What is the process of Fraud Reporting by Auditor (5 marks)
 - (ii) Discuss in brief the role of audit under Companies (Auditor's Report) Order, 2016. (5 marks)
 6. Write Short Note on any Two of the following:
 - (i) OECD Guidelines for Multinational Enterprises relating to Combating Bribery
 - (ii) The Integrity Pact (IP)
 - (iii) Question of Fact

(5 Marks each)

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