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India redrafted its economic policy in the year 1991 to usher in a new era of deregulation, liberalisation and global integration. Since then significant policy initiatives have been introduced, to provide stimulus for accelerated growth, industrial efficiency and international competitiveness. As part of reform process, the Government has also initiated legislative reforms in the area of economic laws. The Government enacted Foreign Exchange Management Act, The Competition Act replacing the MRTP Act and amended the Consumer Protection Act in the year 2002. The Legal Metrology Act, 2009 replacing Standards of Weights and Measures Act, 1976 and Foreign Contribution (Regulation) Act, 2010 replacing Foreign Contribution (Regulation) Act, 1976. In the area of Intellectual property, the Government has enacted Trade Marks Act and Designs Act, and amended the Patents Act and the Copyright Act. In this regard the Government has further amended the Patents Act in 2005 and notified Trade Mark Rules, 2002 and Patents Rules, 2003 as amended in 2005. The Foreign Trade Policy 2009-14 has also been announced in line with the reform agenda and amended from time to time. Further, the Prevention of Money Laundering Act to deal with new categories of economic offences, has also been made effective w.e.f. 1st July, 2005. Similarly, in the area of environment, and labour laws, the process of reforms is going on.

In the light of above developments, this study material has been prepared to provide an understanding of certain economic and labour legislations which have direct bearing on the functioning of companies. The study material has been divided into two parts consisting of twenty four study lessons. Part A dealing with Economic Laws consists of Study Lessons I to XII, whereas Part B dealing with Labour Laws consists of Study Lessons XIII to XXII.

This study material has been published to aid the students in preparing for the Economic and Labour Laws paper of the CS Executive Programme. It is part of the education kit and takes the students step by step through each phase of preparation stressing key concepts, pointers and procedures. Company Secretarialship being a professional course, the examination standards are set very high, with emphasis on knowledge of concepts, applications, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The material may, therefore, be regarded as the basic material and must be read alongwith the original Bare Acts, Rules, Regulations, Case Law, as well as recommended readings given with each study lesson.
As the area of economic laws undergoes frequent changes, it becomes necessary for every student to constantly update himself with the various legislative changes made as well as judicial pronouncements rendered from time to time by referring to the Institute’s journal ‘Chartered Secretary’ as well as other law/professional journals.

The legislative changes made upto September 20, 2011 have been incorporated in the study material. However, it may so 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 Student Company Secretary and other publications for updation of the study material.

In the event of any doubt, students may write to the Directorate of Academics and Professional Development in the Institute for clarification. 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, omissions and/or discrepancies or any action taken in that behalf.

Should there be any discrepancy, error or omission noted in the study material, the Institute shall be obliged if the same are brought to its notice for issue of corrigendum in the ‘Student Company Secretary’.
EXECUTIVE PROGRAMME
SYLLABUS
FOR
MODULE II - PAPER 5
ECONOMIC AND LABOUR LAWS

Level of knowledge: Working knowledge.

Objective: To provide an understanding of –

(i) certain economic laws; and
(ii) important labour laws which have direct relevance to the functioning of companies.

Detailed contents:

PART-A: ECONOMIC LAWS (60 MARKS)

1. Industries Development and Regulation

2. Foreign Trade Policy and Procedures
   Main features; served from India scheme; export promotion council; vishesh krishi and gram udyog yojana; focus market scheme; duty exemption and remission schemes; advance authorisation scheme and DFRC, DEPB, EPCG, etc; EOUs, EHTPs, STPs, BPTs and SEZs.

3. Trade, Competition and Consumer Protection
   Concept of competition, development of competition law, overview of MRTP Act; Competition Act, 2002 - anti competitive agreements, abuse of dominant position, combination, regulation of combinations, Competition Commission of India; Appearance before Commission, compliance of Competition Law.

   Consumer protection in India, genesis of the law; objects; rights of consumers; nature and scope of remedies; appearance before Consumer Dispute Redressal Forums.

4. Essential Commodities and Standards of Weights and Measures
   Objects; powers of Central Government, seizure and confiscation of essential commodities; summary trial; Standards of Weights and Measures Act, 1976.

5. Management of Foreign Exchange Transactions
   Objectives and definitions under FEMA. Current account transactions, Capital account transactions, foreign direct investment in India and abroad, acquisition and transfer of immovable property; Establishment in India of branch, office etc; Export of goods and services; Realisation and repatriation of foreign exchange,
authorised person, penalties and enforcement.

Foreign contributions and hospitality; Exemptions, powers of Central Government, adjudication and appeal; offences and penalties.

6. Pollution Control and Environmental Protection
   Concept of sustainable development, Government policy regarding environment, law relating to Prevention and Control of Air Pollution and Water pollution, Environment (Protection) Law; Appearance before Environment Tribunal/Authority.

7. Management of Intellectual Property Rights
   Concept and development of intellectual property law in India. Law and procedure relating to patents, trade marks and copyrights; Overview of laws relating to other related intellectual property rights.

   Intellectual Property Appellate Board

8. Prevention of Money Laundering
   Genesis, concept and definitions, various transactions, etc. obligations of banks and financial institutions, RBI Guidelines on KYC.

   PART-B : LABOUR LAWS (40 MARKS)

9. Minimum Wages Act, 1948
   Object and scope; Minimum Wages Act, Advisory Board, Central Advisory Board; Authority and claims, compliances, offences and penalties.

10. Payment of Bonus Act, 1965
    Object, application and major provisions; Exemption; compliances, offences and penalties.

11. Payment of Gratuity Act, 1972
    Application and major provisions; Controlling Authority and the Appellate Authority, obligations and rights of employers and employees and compliances.

12. Employees’ Provident Funds and Miscellaneous Provisions Act, 1952
    Application and major provisions; Exemption and compliances.

13. Employees’ State Insurance Act, 1948
    Application and major provisions; Employees’ State Insurance, Employees’ State Insurance Corporation, Employees’ Insurance Court; Exemptions and compliances.

14. Workmen’s Compensation Act, 1923
    Object, scope and major provisions including proceedings before the Commissioner, appeals, compliances, penalties, special provisions.

15. Contract Labour (Regulation and Abolition) Act, 1970
Application, scope and major provisions including Advisory boards, registration of establishments, appointment of licensing officer; Welfare and health; compliances; penalties and procedure and inspectors.

16. **Industrial Disputes Act, 1947**
   Concept, objective, and significance, Authorities; procedure and powers; unfair labour practices, penalties.

17. **Industrial Employment (Standing Orders) Act, 1946**
   Object, scope and major provisions of the Act and compliances.

18. **Factories Act, 1948**
   Object, scope and major provisions; Authorities, compliances and penalties.
# LIST OF RECOMMENDED BOOKS

## ECONOMIC AND LABOUR LAWS

**Recommended Readings and References:**


6. **Dr. V.K. Aggarwal** : Consumer Protection Law and Practice; Bharat Law House, 22, Tarun Enclave, Pitampura, New Delhi - 110 034.


9. **Sumeet Malik** : Environmental Law; Eastern Book Company, Lucknow.


11. **Lall’s** : Commentaries on Water and Air Pollution Laws; Delhi Law House, Delhi.


15. **Bare Act** : Foreign Exchange Management Act.
<table>
<thead>
<tr>
<th></th>
<th>Title</th>
<th>Author</th>
</tr>
</thead>
<tbody>
<tr>
<td>17.</td>
<td>The Law of Trademarks, Copyright, Patents and Design.</td>
<td>S.K. Roy Chaudhary &amp; H.K. Saharay</td>
</tr>
<tr>
<td>18.</td>
<td>Law Relating to Patents, Trademarks, Copyright, Designs and Geographical Indications.</td>
<td>B.L. Wadehra</td>
</tr>
<tr>
<td>19.</td>
<td>Law of Trademarks in India.</td>
<td>Aswani Kr. Bansal</td>
</tr>
<tr>
<td>22.</td>
<td>Industrial Law; Eastern Book Company; 34, Lalbagh, Lucknow.</td>
<td>P.L. Malik</td>
</tr>
</tbody>
</table>

**Note:**

(i) Students are advised to read the relevant Bare Acts.

(ii) The latest available editions of the books referred to above may be read.

(iii) Students may refer Student Company Secretary regularly for academic guidance.
ARRANGEMENT OF STUDY LESSONS

<table>
<thead>
<tr>
<th>Study No.</th>
<th>Subject</th>
</tr>
</thead>
<tbody>
<tr>
<td>PART A</td>
<td></td>
</tr>
<tr>
<td>I</td>
<td>Industries Development and Regulation</td>
</tr>
<tr>
<td>II</td>
<td>Foreign Trade Policy and Procedure</td>
</tr>
<tr>
<td>III-IV</td>
<td>Trade, Competition and Consumer Protection</td>
</tr>
<tr>
<td>V</td>
<td>Regulation of Production, Supply and Distribution of Essential Commodities</td>
</tr>
<tr>
<td>VI</td>
<td>Standards of Weights and Measures</td>
</tr>
<tr>
<td>VII-VIII</td>
<td>Management of Foreign Exchange Transactions</td>
</tr>
<tr>
<td>IX-X</td>
<td>Pollution Control and Environmental Protection</td>
</tr>
<tr>
<td>XI</td>
<td>Management of Intellectual Property Rights</td>
</tr>
<tr>
<td>XII</td>
<td>Prevention of Money Laundering</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>PART B</td>
<td></td>
</tr>
<tr>
<td>XIII</td>
<td>Minimum Wages Act, 1948</td>
</tr>
<tr>
<td>XIV</td>
<td>Payment of Bonus Act, 1965</td>
</tr>
<tr>
<td>XV</td>
<td>Payment of Gratuity Act, 1972</td>
</tr>
<tr>
<td>XVI</td>
<td>Employees’ Provident Funds and Miscellaneous Provisions Act, 1952</td>
</tr>
<tr>
<td>XVII</td>
<td>Employees’ State Insurance Act, 1948</td>
</tr>
<tr>
<td>XVIII</td>
<td>Workmen’s Compensation Act, 1923</td>
</tr>
<tr>
<td>XIX</td>
<td>Contract Labour (Regulation and Abolition) Act, 1970</td>
</tr>
<tr>
<td>XX</td>
<td>Industrial Disputes Act, 1947</td>
</tr>
<tr>
<td>XXI</td>
<td>Industrial Employment (Standing Orders) Act, 1946</td>
</tr>
<tr>
<td>XXII</td>
<td>Factories Act, 1948</td>
</tr>
<tr>
<td></td>
<td>TEST PAPERS</td>
</tr>
</tbody>
</table>
## Contents

### Part A – Economic Laws

#### Study I

**Industries Development and Regulation**

Section I

<table>
<thead>
<tr>
<th>Learning Objectives</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning Objectives</td>
<td>1</td>
</tr>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
</tbody>
</table>

- **Industrial Policy Resolution, 1948**: 2
- **Industrial Policy Resolution, 1956**: 2
- **New Industrial Policy, 1991**: 3

**The Industries (Development and Regulation) Act, 1951**: 4

- **Definitions**: 6
- **Central Advisory Council**: 9
- **Development Council**: 9

- **Regulation of Scheduled Industries**: 11
  - Registration of existing industrial undertakings: 11
  - Issue of Certificate of Registration: 11
  - Circumstances when registration is not necessary: 12
  - Penalty for failure to register: 12
  - Power to revoke registration: 12

- **Licensing of industrial undertakings**: 12
  - What is an industrial licence: 12

- **Power of the Central Government to revoke/amend licences in certain cases**: 14

- **Investigation**: 15
  - Investigation into Scheduled Industries/Industrial Undertakings: 15
  - Investigation into the affairs of a company in liquidation: 16
  - Directions after investigation: 17

- **Takeover of Industrial Undertakings**: 17
  - Take over after investigation: 18
  - Effect of notified order: 18
  - Contracts in bad faith to be cancelled or varied: 19
  - Take-over without investigation: 20

- **Sections 18A and 18AA - Comparison**: 21

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Notice before passing an order under Section 18AA – whether necessary  
Take-over of industrial undertaking owned by company in liquidation  
Cancellation of the notified order  
Preparation of inventory of assets and liabilities, List of Members etc.  
Power to provide relief to certain industrial undertakings  
Liquidation or reconstruction of companies  
Sale of industrial undertaking as running concern  
Reconstruction of the company owning the industrial undertaking  
Power to control supply, distribution, price, etc. of certain Articles  
General prohibition of taking over management or control of industrial undertakings by State Government  
Power to exempt in special cases  
Constitution of Advisory Committee  
Penalties  
Penalty for False Statements  
Cognizance of Offences  
Certain other important provisions  
Registration and Licensing of Industrial Undertakings Rules, 1952  
LESSON ROUND-UP  
SELF-TEST QUESTIONS

SECTION II

THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006

Learning Objectives  
Introduction  
Definitions  
National Board for Micro, Small and Medium Enterprises  
Measures for Promotion, Development and Enhancement of Competitiveness  
Delayed Payments to Micro and Small Enterprises  
LESSON ROUND-UP  
SELF-TEST QUESTIONS
<table>
<thead>
<tr>
<th>Learning Objectives</th>
<th>...</th>
<th>51</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>...</td>
<td>51</td>
</tr>
<tr>
<td>Duration and Applicability of Foreign Trade Policy</td>
<td>...</td>
<td>52</td>
</tr>
<tr>
<td>Transitional Arrangements</td>
<td>...</td>
<td>52</td>
</tr>
<tr>
<td>Special Focus Initiatives</td>
<td>...</td>
<td>52</td>
</tr>
<tr>
<td>Market Diversification</td>
<td>...</td>
<td>53</td>
</tr>
<tr>
<td>Technological Upgradation</td>
<td>...</td>
<td>53</td>
</tr>
<tr>
<td>Support to Status holders</td>
<td>...</td>
<td>53</td>
</tr>
<tr>
<td>Agriculture Sector and Village Industries</td>
<td>...</td>
<td>54</td>
</tr>
<tr>
<td>Handloom Sector</td>
<td>...</td>
<td>54</td>
</tr>
<tr>
<td>Handicraft Sector</td>
<td>...</td>
<td>54</td>
</tr>
<tr>
<td>Gems &amp; Jewellery Sector</td>
<td>...</td>
<td>55</td>
</tr>
<tr>
<td>Leather and Footwear Sector</td>
<td>...</td>
<td>55</td>
</tr>
<tr>
<td>Marine Sector</td>
<td>...</td>
<td>56</td>
</tr>
<tr>
<td>Electronics and IT Hardware Manufacturing Industries</td>
<td>...</td>
<td>56</td>
</tr>
<tr>
<td>Green products and technologies</td>
<td>...</td>
<td>56</td>
</tr>
<tr>
<td>Incentives for Export from the North Eastern Regions</td>
<td>...</td>
<td>56</td>
</tr>
<tr>
<td>Board of Trade</td>
<td>...</td>
<td>57</td>
</tr>
<tr>
<td>General Provisions Regarding Imports and Exports</td>
<td>...</td>
<td>57</td>
</tr>
<tr>
<td>Interpretation of Policy</td>
<td>...</td>
<td>57</td>
</tr>
<tr>
<td>Application for Exemption from Policy/Procedure</td>
<td>...</td>
<td>58</td>
</tr>
<tr>
<td>Principles of Restriction</td>
<td>...</td>
<td>58</td>
</tr>
<tr>
<td>Export and Import of Restricted Goods</td>
<td>...</td>
<td>59</td>
</tr>
<tr>
<td>Terms and Conditions of a Licence/Certificate/Permission/Authorisation</td>
<td>...</td>
<td>59</td>
</tr>
<tr>
<td>Importer Exporter Code Number (IEC No)</td>
<td>...</td>
<td>60</td>
</tr>
<tr>
<td>IEC No: Exempted Categories</td>
<td>...</td>
<td>60</td>
</tr>
<tr>
<td>Application for Grant of IEC Number</td>
<td>...</td>
<td>61</td>
</tr>
<tr>
<td>Duplicate Copy of IEC No.</td>
<td>...</td>
<td>61</td>
</tr>
<tr>
<td>Surrender of IEC No.</td>
<td>...</td>
<td>61</td>
</tr>
<tr>
<td>Promotional Measures</td>
<td>...</td>
<td>61</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
<td>...</td>
<td>65</td>
</tr>
<tr>
<td>SELF TEST QUESTIONS</td>
<td>...</td>
<td>65</td>
</tr>
<tr>
<td>Learning Objectives</td>
<td>...</td>
<td>66</td>
</tr>
<tr>
<td>Salient Features</td>
<td>...</td>
<td>67</td>
</tr>
</tbody>
</table>
## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitions</td>
<td>67</td>
</tr>
<tr>
<td>Establishment of Special Economic Zone</td>
<td>69</td>
</tr>
<tr>
<td>Establishment, Approval and Authorization to Operate Special Economic Zone</td>
<td>70</td>
</tr>
<tr>
<td>Special Economic Zone</td>
<td>70</td>
</tr>
<tr>
<td>Guidelines for notifying Special Economic Zone</td>
<td>70</td>
</tr>
<tr>
<td>The Processing and Non-Processing areas</td>
<td>70</td>
</tr>
<tr>
<td>Exemption from taxes, duties or cess</td>
<td>71</td>
</tr>
<tr>
<td>Constitution of Board of Approval</td>
<td>71</td>
</tr>
<tr>
<td>Duties, powers and functions of Board of Approval</td>
<td>71</td>
</tr>
<tr>
<td>Suspension of letter of approval and transfer of Special Economic Zone in certain cases</td>
<td>71</td>
</tr>
<tr>
<td>Development Commissioner</td>
<td>72</td>
</tr>
<tr>
<td>Functions of the Development Commissioner</td>
<td>72</td>
</tr>
<tr>
<td>Constitution of Approval Committee</td>
<td>73</td>
</tr>
<tr>
<td>Powers and Functions of Approval Committee</td>
<td>73</td>
</tr>
<tr>
<td>Setting up of Unit</td>
<td>74</td>
</tr>
<tr>
<td>Cancellation of letter of approval granted to entrepreneur</td>
<td>74</td>
</tr>
<tr>
<td>Setting up and operation of Offshore Banking Unit</td>
<td>75</td>
</tr>
<tr>
<td>Setting up of International Financial Services Centre</td>
<td>75</td>
</tr>
<tr>
<td>Single application form, return, etc.</td>
<td>75</td>
</tr>
<tr>
<td>Agency to inspect</td>
<td>75</td>
</tr>
<tr>
<td>Single enforcement officer or agency for notified offences</td>
<td>76</td>
</tr>
<tr>
<td>Investigation, Inspection, Search or Seizure</td>
<td>76</td>
</tr>
<tr>
<td>Designated Courts to try suits and notified offences</td>
<td>76</td>
</tr>
<tr>
<td>Appeal to High Court</td>
<td>76</td>
</tr>
<tr>
<td>Offences by Companies</td>
<td>76</td>
</tr>
<tr>
<td>Exemptions, drawbacks and concessions to every Developer and entrepreneur</td>
<td>77</td>
</tr>
<tr>
<td>Application of the provisions of the Income Tax Act, 1961 with certain modifications in relation to Developers and entrepreneurs</td>
<td>77</td>
</tr>
<tr>
<td>Duration of goods &amp; services in Special Economic Zones</td>
<td>77</td>
</tr>
<tr>
<td>Transfer of ownership and removal of goods</td>
<td>77</td>
</tr>
<tr>
<td>Domestic clearance by Units</td>
<td>78</td>
</tr>
<tr>
<td>Special Economic Zone Authority</td>
<td>78</td>
</tr>
<tr>
<td>Functions of Authority</td>
<td>78</td>
</tr>
<tr>
<td>Directions by the Central Government</td>
<td>78</td>
</tr>
<tr>
<td>Returns and reports by the Authority</td>
<td>79</td>
</tr>
<tr>
<td>Power of the Central Government to Supersede Authority</td>
<td>79</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Reference of Dispute and Limitation</th>
<th>...</th>
<th>79</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person to whom a communication to be sent</td>
<td>...</td>
<td>80</td>
</tr>
<tr>
<td>Identity card</td>
<td>...</td>
<td>80</td>
</tr>
</tbody>
</table>

| Power of the Central Government to modify provisions of the Act or other enactments in relation to Special Economic Zones | ... | 80 |
| Power of State Government to grant exemption | ... | 80 |
| The Act to have overriding effect | ... | 80 |
| Special Economic Zones to be ports, airports inland container depots, land stations etc. in certain cases | ... | 81 |
| Special Economic Zones Rules, 2006 | ... | 81 |
| LESSON ROUND-UP | ... | 81 |
| SELF-TEST QUESTIONS | ... | 82 |

## STUDY III

**TRADE, COMPETITION AND CONSUMER PROTECTION**

(*THE COMPETITION ACT, 2002*)

<p>| Learning Objectives | ... | 83 |
| Introduction | ... | 83 |
| Definition of Competition | ... | 84 |
| Competition and Economic Efficiency | ... | 85 |
| Competition Law and Policy | ... | 86 |
| Competition Regime in India | ... | 87 |
| Economic Reforms and Competition | ... | 88 |
| Competition Law—Evaluation and Development | ... | 88 |
| Background to the MRTP Act, 1969 | ... | 89 |
| MRTP (Amendment) Act, 1991 | ... | 91 |
| Scope and Applicability of the Act | ... | 92 |
| Competition Act, 2002 | ... | 98 |
| Definitions | ... | 99 |
| Anti Competitive Agreements | ... | 104 |
| Prohibition of abuse of Dominant Position | ... | 108 |
| Combinations | ... | 109 |
| Regulation of Combinations | ... | 112 |
| Competition Commission of India | ... | 113 |
| Inquiry into certain agreements and dominant position of enterprise | ... | 117 |
| Inquiry into Combination by Commission | ... | 119 |
| Reference by a statutory authority | ... | 120 |
| Meetings of Commission | ... | 121 |</p>
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedure for inquiry on complaints under section 19</td>
<td>121</td>
</tr>
<tr>
<td>Procedure for investigation of combination</td>
<td>123</td>
</tr>
<tr>
<td>Inquiry into disclosures under Section 6(2)</td>
<td>124</td>
</tr>
<tr>
<td>Orders of Commission on certain combinations</td>
<td>124</td>
</tr>
<tr>
<td>Appearance before Commission</td>
<td>126</td>
</tr>
<tr>
<td>Power of Commission to regulate its own procedure</td>
<td>127</td>
</tr>
<tr>
<td>Rectification of orders</td>
<td>128</td>
</tr>
<tr>
<td>Execution of orders of the Commission Imposing Monetary Penalty</td>
<td>128</td>
</tr>
<tr>
<td>Duties of Director General</td>
<td>129</td>
</tr>
<tr>
<td>Penalties</td>
<td>130</td>
</tr>
<tr>
<td>Compensation in case of Contravention of Orders of Commission</td>
<td>130</td>
</tr>
<tr>
<td>Contravention by companies</td>
<td>131</td>
</tr>
<tr>
<td>Competition Advocacy</td>
<td>132</td>
</tr>
<tr>
<td>Finance, Accounts and Audit</td>
<td>132</td>
</tr>
<tr>
<td>Competition Appellate Tribunal</td>
<td>133</td>
</tr>
<tr>
<td>Appeal to Appellate Tribunal</td>
<td>134</td>
</tr>
<tr>
<td>Composition of Appellate Tribunal</td>
<td>134</td>
</tr>
<tr>
<td>Procedures and Powers of Appellate Authority</td>
<td>136</td>
</tr>
<tr>
<td>Appeal to Supreme Court</td>
<td>138</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>138</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
<td>146</td>
</tr>
<tr>
<td>SELF-TEST QUESTIONS</td>
<td>147</td>
</tr>
</tbody>
</table>

**STUDY IV**

**TRADE, COMPETITION AND CONSUMER PROTECTION**

(CONSUMER PROTECTION - LAW AND PRACTICE)

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning Objectives</td>
<td>148</td>
</tr>
<tr>
<td>Introduction</td>
<td>148</td>
</tr>
<tr>
<td>Genesis of Consumer Protection Laws</td>
<td>149</td>
</tr>
<tr>
<td>Objects of the Consumer Protection Act, 1986</td>
<td>149</td>
</tr>
<tr>
<td>Definitions</td>
<td>150</td>
</tr>
<tr>
<td>Consumer Protection Councils</td>
<td>158</td>
</tr>
<tr>
<td>Redressal Machinery under the Act</td>
<td>159</td>
</tr>
<tr>
<td>District Forum</td>
<td>159</td>
</tr>
<tr>
<td>State Commission</td>
<td>160</td>
</tr>
<tr>
<td>National Commission</td>
<td>163</td>
</tr>
<tr>
<td>Complaints before the District Forum and State Commission</td>
<td>164</td>
</tr>
<tr>
<td>Limitation period for filing of complaint</td>
<td>166</td>
</tr>
<tr>
<td>Powers of the Redressal Agencies</td>
<td>167</td>
</tr>
<tr>
<td>Nature and scope of remedies under the Act</td>
<td>168</td>
</tr>
</tbody>
</table>
STUDY V

REGULATION OF PRODUCTION, SUPPLY AND DISTRIBUTION OF ESSENTIAL COMMODITIES

Learning Objectives ... 178
Introduction ... 178
Object and scope of the Act ... 179
Definitions ... 179
Essential Commodities ... 179
Authorities responsible to administer the Act ... 181
Powers of the Central Government to control production, supply and distribution etc., of essential commodities ... 182
- Power to issue orders ... 182
- Fixing the price of essential commodities being sold to Government ... 184
- Fixing the price of essential commodities during emergency ... 184
- Payment of procurement price for food grains and edible oils ... 185
- Fixing price for sugar to be paid to producer ... 185
- Power to appoint Authorised Controller ... 186
- Imposition of duties on State Government ... 187
Delegation of powers ... 187
Nature of Order passed under the Act ... 187
Effect of the Order ... 188
Presumption as to Orders ... 188
Burden of proof in certain cases ... 188
Protection for acts done in pursuance of order ... 188
Confiscation of essential commodities ... 189
Seizure and confiscation of essential commodities ... 189
Sale of the confiscated commodity ... 192
Disposal of sale proceeds of confiscated goods ... 192
Issue of show cause notice before confiscation of essential commodity ... 192
Appeal against confiscation order ... 193
Confiscation and punishment ... 193
Bar of Jurisdiction in the matters of confiscation ... 193
Offences and Penalties ........................................... 194
Cognizance of Offences ........................................... 194
Prosecution of Public Servants ................................. 194
Penalties ............................................................... 194
Mens rea (Sections 6A and 7) ...................................... 195
Attempt and Abetment ............................................. 196
False Statement ..................................................... 197
Offences by Companies ......................................... 197
Publication of names of convicted companies by Court 197
Special Courts under the Act ..................................... 197
Grant of Injunction by Civil Courts ............................. 198
LESSON ROUND-UP .................................................. 198
SELF-TEST QUESTIONS .......................................... 199

STUDY VI
STANDARDS OF WEIGHTS AND MEASURES
THE LEGAL METROLOGY ACT, 2009

Learning Objectives ............................................. 200
Introduction ......................................................... 200
Legal Metrology ..................................................... 201
International Organization of Legal Metrology (OIML) 201
OIML Certificate System for Measuring Instruments 202
Definitions ........................................................... 202
Standard weights and measures ................................ 205
Power of inspection, seizure .................................... 207
Forfeiture ............................................................. 207
Manufacturers, etc., to maintain records and registers 208
Declarations on pre-packaged commodities ................ 208
Registration for importer of weight or measure ............ 208
Approval of model .................................................. 208
Prohibition manufacture, repair or sale of weight or 208
measure without licence ...........................................
Offences and penalties .......................................... 209
Penalty for counterfeiting or seals .............................. 211
Compounding of offence ........................................ 212
Offences by companies .......................................... 212
Power of the Central Government to make rules ........ 213
Power of State Government to make rules ................. 213
<table>
<thead>
<tr>
<th>STUDY VII</th>
</tr>
</thead>
<tbody>
<tr>
<td>MANAGEMENT OF FOREIGN EXCHANGE TRANSACTIONS</td>
</tr>
<tr>
<td>(FOREIGN EXCHANGE MANAGEMENT – LAW AND PRACTICE)</td>
</tr>
<tr>
<td>Learning Objectives</td>
</tr>
<tr>
<td>Introduction</td>
</tr>
<tr>
<td>Definitions</td>
</tr>
<tr>
<td>Current Account Transactions</td>
</tr>
<tr>
<td>Capital Account Transaction</td>
</tr>
<tr>
<td>Foreign Direct Investment in India</td>
</tr>
<tr>
<td>Origin of Investment in India</td>
</tr>
<tr>
<td>Type of Instruments</td>
</tr>
<tr>
<td>Eligibility of FDI in Resident entity</td>
</tr>
<tr>
<td>Conditions on issue/transfer of shares</td>
</tr>
<tr>
<td>Issue of Instrument</td>
</tr>
<tr>
<td>Remittance and Repatriation</td>
</tr>
<tr>
<td>Foreign Direct Investment Reporting</td>
</tr>
<tr>
<td>Consequences of Violation</td>
</tr>
<tr>
<td>Prohibition on Investment in India</td>
</tr>
<tr>
<td>Direct Investment Outside India</td>
</tr>
<tr>
<td>Prohibition</td>
</tr>
<tr>
<td>General Permission</td>
</tr>
<tr>
<td>Automatic Route</td>
</tr>
<tr>
<td>Method of Funding</td>
</tr>
<tr>
<td>Approval of RBI</td>
</tr>
<tr>
<td>Overseas investment by proprietorship concerns</td>
</tr>
<tr>
<td>Acquisition and Transfer of Immovable Property Outside India</td>
</tr>
<tr>
<td>Acquisition and Transfer of Immovable Property in India</td>
</tr>
<tr>
<td>Establishment in India of Branch or Office or Other Place of Business</td>
</tr>
<tr>
<td>Export of Goods and Services</td>
</tr>
<tr>
<td>Realisation, Repatriation and Holding of Foreign Currency</td>
</tr>
<tr>
<td>Possession and Retention of Foreign Currency or Foreign Coins</td>
</tr>
<tr>
<td>Authorised Person</td>
</tr>
<tr>
<td>Contravention and Penalties</td>
</tr>
<tr>
<td>Enforcement of the Orders of Adjudicating Authority</td>
</tr>
<tr>
<td>Compounding of Contraventions</td>
</tr>
<tr>
<td>Powers of Reserve Bank to Compound Contravention</td>
</tr>
<tr>
<td>Powers of Enforcement Directorate to compound contravention</td>
</tr>
<tr>
<td>Payment of Compounded Amount</td>
</tr>
<tr>
<td>Adjudication and Appeal</td>
</tr>
<tr>
<td>Topic</td>
</tr>
<tr>
<td>------------------------------------------------------</td>
</tr>
<tr>
<td>Appointment of Adjudicating Authority</td>
</tr>
<tr>
<td>Appeal to Special Director (Appeals)</td>
</tr>
<tr>
<td>Establishment of Appellate Tribunal</td>
</tr>
<tr>
<td>Appeal to High Court</td>
</tr>
<tr>
<td>Directorate of Enforcement</td>
</tr>
<tr>
<td>Investigation</td>
</tr>
<tr>
<td>Contravention by Companies</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
</tr>
<tr>
<td>SELF-TEST QUESTIONS</td>
</tr>
</tbody>
</table>

**STUDY VIII**

**FOREIGN CONTRIBUTION (REGULATION) ACT, 2010**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning Objectives</td>
<td>272</td>
</tr>
<tr>
<td>Introduction</td>
<td>272</td>
</tr>
<tr>
<td>Definitions</td>
<td>273</td>
</tr>
<tr>
<td>Prohibition to accept foreign contribution</td>
<td>276</td>
</tr>
<tr>
<td>Person to whom section 3 does not apply</td>
<td>277</td>
</tr>
<tr>
<td>Procedure to notify an organization of a political nature</td>
<td>277</td>
</tr>
<tr>
<td>Restriction on acceptance of foreign hospitality</td>
<td>278</td>
</tr>
<tr>
<td>Prohibition to transfer foreign contribution to other person</td>
<td>278</td>
</tr>
<tr>
<td>Utilization of foreign contribution</td>
<td>278</td>
</tr>
<tr>
<td>Power of Central Government to prohibit receipt of foreign contribution</td>
<td>279</td>
</tr>
<tr>
<td>Power to prohibit payment of currency received in contravention of the Act</td>
<td>279</td>
</tr>
<tr>
<td>Registration of certain persons with Central Government</td>
<td>279</td>
</tr>
<tr>
<td>Grant of certificate of registration</td>
<td>280</td>
</tr>
<tr>
<td>Suspension of certificate</td>
<td>282</td>
</tr>
<tr>
<td>Cancellation of certificate</td>
<td>282</td>
</tr>
<tr>
<td>Management of foreign contribution of person whose certificate has been cancelled</td>
<td>283</td>
</tr>
<tr>
<td>Renewal of certificate</td>
<td>283</td>
</tr>
<tr>
<td>Application for Renewal</td>
<td>283</td>
</tr>
<tr>
<td>Foreign contribution through scheduled bank</td>
<td>283</td>
</tr>
<tr>
<td>Intimation</td>
<td>284</td>
</tr>
<tr>
<td>Maintenance of accounts</td>
<td>284</td>
</tr>
<tr>
<td>Order for Audit of accounts</td>
<td>284</td>
</tr>
<tr>
<td>Intimation by candidate for election</td>
<td>284</td>
</tr>
<tr>
<td>Disposal of assets created out of foreign contribution</td>
<td>285</td>
</tr>
<tr>
<td>Seizure of accounts or records</td>
<td>285</td>
</tr>
<tr>
<td>Adjudication of confiscation</td>
<td>285</td>
</tr>
<tr>
<td>Appeal</td>
<td>285</td>
</tr>
<tr>
<td>Penalty and Punishment</td>
<td>286</td>
</tr>
<tr>
<td>Offences by companies</td>
<td>286</td>
</tr>
<tr>
<td>Composition of certain offences</td>
<td>287</td>
</tr>
</tbody>
</table>
### LESSON ROUND-UP

... 287

### SELF TEST QUESTIONS

... 288

---

#### STUDY IX

**POLLUTION CONTROL AND ENVIRONMENTAL PROTECTION**

**(GOVERNMENT POLICY AND REGULATORY FRAMEWORK)**

#### SECTION I

- **Learning Objectives** ... 289
- **Introduction** ... 289
- **Concept of Sustainable Development** ... 290

---

- **Principles of Sustainable Living** ... 290
- **Government Policy Regarding Environment** ... 292
- **Environmental Protection in India – Regulatory Framework** ... 293
- **The Environment (Protection) Act, 1986** ... 294
- **Scope and scheme of the Act** ... 294
- **Definitions** ... 294
- **General powers of the Central Government** ... 295
- **Nature and type of regulation** ... 298
- **Power to enter, inspect, take samples, etc.** ... 298
- **Environmental Laboratories** ... 300
- **Functions of Environmental Laboratories** ... 300
- **Offences and penalties** ... 300
- **Environmental clearance and location of industries** ... 301
- **Environmental Audit** ... 302
- **Liability for pollution** ... 302

---

- **LESSON ROUND UP** ... 306
- **SELF TEST QUESTION** ... 307

---

#### SECTION II

**PUBLIC LIABILITY INSURANCE ACT, 1991**

- **Learning Objectives** ... 308
  - **Definitions** ... 309
- **Compulsory Insurance** ... 310
- **Application for claim for Relief** ... 310
- **Establishment of Environmental Relief fund** ... 311
- **Offences and Penalties** ... 312

---

- **LESSON ROUND UP** ... 312
- **SELF TEST QUESTIONS** ... 313

---

#### SECTION III

**THE NATIONAL GREEN TRIBUNAL ACT, 2010**
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning Objectives</td>
<td>314</td>
</tr>
<tr>
<td>Definition</td>
<td>314</td>
</tr>
<tr>
<td>Establishment of the tribunal</td>
<td>316</td>
</tr>
<tr>
<td>Composition of the tribunal</td>
<td>316</td>
</tr>
<tr>
<td>Jurisdiction, Powers and Proceedings of the Tribunal</td>
<td>316</td>
</tr>
<tr>
<td>Tribunal to Settle Dispute</td>
<td>316</td>
</tr>
<tr>
<td>Relief, Compensation and Reconstitution</td>
<td>317</td>
</tr>
<tr>
<td>Tribunal to have Appellate Jurisdiction</td>
<td>318</td>
</tr>
<tr>
<td>Liability to pay relief or compensation</td>
<td>319</td>
</tr>
<tr>
<td>Application or Appeal to the Tribunal</td>
<td>319</td>
</tr>
<tr>
<td>Procedure and Powers of Tribunal</td>
<td>320</td>
</tr>
<tr>
<td>Tribunal to Apply Certain Principle</td>
<td>321</td>
</tr>
<tr>
<td>Appeal to the Supreme Court</td>
<td>321</td>
</tr>
<tr>
<td>Penalty for failure to comply with order of the Tribunal</td>
<td>321</td>
</tr>
<tr>
<td>Offence by Companies</td>
<td>322</td>
</tr>
<tr>
<td>Offence by Government Department</td>
<td>322</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
<td>323</td>
</tr>
<tr>
<td>SELF-TEST QUESTIONS</td>
<td>324</td>
</tr>
<tr>
<td><strong>STUDY X</strong></td>
<td></td>
</tr>
<tr>
<td><strong>POLLUTION CONTROL AND ENVIRONMENTAL PROTECTION</strong></td>
<td></td>
</tr>
<tr>
<td>(PREVENTION AND CONTROL OF AIR AND WATER POLLUTION)</td>
<td></td>
</tr>
<tr>
<td><strong>SECTION I</strong></td>
<td></td>
</tr>
<tr>
<td><strong>PREVENTION AND CONTROL OF AIR POLLUTION</strong></td>
<td></td>
</tr>
<tr>
<td>Learning Objectives</td>
<td>325</td>
</tr>
<tr>
<td>Introduction</td>
<td>325</td>
</tr>
<tr>
<td>Definitions</td>
<td>326</td>
</tr>
<tr>
<td>Central and State Pollution Control Boards</td>
<td>327</td>
</tr>
<tr>
<td>Composition of State Board</td>
<td>327</td>
</tr>
<tr>
<td>Powers and functions of Central Board</td>
<td>329</td>
</tr>
<tr>
<td>Functions of State Board</td>
<td>330</td>
</tr>
<tr>
<td>Prevention and control of Air Pollution</td>
<td>331</td>
</tr>
<tr>
<td>Restrictions on use of certain industrial plants</td>
<td>332</td>
</tr>
<tr>
<td>Furnishing of information to State Board and other agencies in certain cases</td>
<td>334</td>
</tr>
<tr>
<td>Power of entry and inspection</td>
<td>334</td>
</tr>
</tbody>
</table>
SECTION II
PREVENTION AND CONTROL OF WATER POLLUTION

Learning Objectives ... 342
Definitions ... 342
Constitution of Central Pollution Control Board ... 343
Constitution of State Pollution Control Board ... 344
Disqualifications ... 345
Constitution of Joint Board ... 345
Special provisions relating to giving of directions ... 347
Functions of Central Board ... 347
Functions of State Board ... 348
Prevention and Control of Water Pollution ... 350
Power to obtain Information ... 350
Power to take Samples of Effluents ... 350
Reports of analysis of samples ... 351
Powers of entry and inspection ... 351
Prohibition on use of Stream or Well for disposal of polluting matter ... 352
Restriction on New Outlets and New Discharges ... 352
Refusal or Withdrawal of consent by a State Board ... 354
Appeal ... 354
Power of the State Boards to carry out certain works ... 354
Furnishing of Information to State Board and other Agencies ... 355
Emergency measures in case of pollution of Stream or Well ... 355
Board's Power to make application to Courts ... 355
Power to give directions ... 356
Penalties and Procedure ... 356
Offences by companies ... 357
Power to Supersede the Board ... 358
Water (Prevention and Control of Pollution) Cess Act, 1977 ... 358
LESSON ROUND-UP ... 358
SELF-TEST QUESTIONS ... 359

STUDY XI
MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS

SECTION I
PATENT LAW AND ENFORCEMENT

| Learning Objectives | ... 360 |
| Concept of Patent | ... 360 |
| Definitions | ... 360 |
| What are not inventions | ... 363 |
| Persons Entitled to make Application for Patent | ... 364 |
| Form of Application and Provisional & Complete Specification | ... 364 |
| Contents of Specifications | ... 365 |
| Publication of Applications | ... 366 |
| Request for Examination | ... 367 |
| Examination of Application | ... 367 |
| Search for Anticipation by Previous Publication and by Prior Claim | ... 367 |
| Consideration of the Report of Examiner by Controller | ... 368 |
| Power of Controller to Refuse or Require Amended Application in Certain matters | ... 368 |
| Power of Controller to make Orders Respecting Dating of Application and Cases of Anticipation | ... 368 |
| Potential infringement | ... 369 |
| Substitution of applicants etc. | ... 369 |
| Time for Putting Application in Order for Grant | ... 370 |
| Opposition to the Patent | ... 371 |
| Controller to Treat Application as Application of Opponent | ... 373 |
| Constitution of Opposition Board and its proceeding | ... 374 |
| Secrecy of Certain Inventions | ... 374 |
| Secrecy Directions for Defence Purposes | ... 374 |
| Review of Secrecy directions | ... 374 |
| Residents not to Apply for Patents Outside India Without Prior Permission | ... 375 |
| Grant of Patents | ... 375 |
Grant of patents subject to conditions ... 375
Term of Patent ... 376
Patents of Addition ... 376
Restoration of Lapsed Patents ... 377
Procedure for disposal of applications for restoration of lapsed patents ... 377
Rights of patentees of lapsed patents which have been restored ... 378
Surrender and Revocation of Patents ... 378
Working of Patented Inventions – General Principles ... 378
Compulsory Licences ... 379
Revocation of Patents by the Controller for Non-Working ... 380
Procedure for dealing with applications ... 381
Powers of Controller in granting compulsory licences ... 381
Terms and conditions of compulsory licences ... 382
Licensing of Related Patents ... 383
Compulsory licences on Notifications by Central Government ... 383
Compulsory Licence for Export of Patented Pharmaceutical Products in Certain Exceptional Circumstances ... 383
Termination of compulsory licence ... 384
International Arrangements ... 384
Patent Agent ... 385
Qualifications for Registration as Patent Agent ... 385
Rights and Powers of the Patent Agent ... 386
LESSON ROUND UP ... 386
SELF TEST QUESTIONS ... 387

SECTION II
TRADE MARK LAW AND ENFORCEMENT

Learning Objectives ... 388
Scheme of the Act ... 388
Definitions and interpretations ... 389
Appointment of Registrar and Trade Mark Registry ... 390
Absolute Grounds for Refusal of Registration ... 391
Procedure for Registration ... 392
Duration, Renewal, Removal and Restoration of Registration ... 392
Infringement of Registered Trade Marks ... 393
Limits on Effect of Registered Trade Mark ... 393
Assignment and Transmission ... 395
Proposed Use of Trade Mark by Company to be formed etc. ... 396
Removal of Trade Mark for Non-Use ... 396
(xxvi)

Registered User ... 396
Collective Marks ... 397
Certification Trade Mark ... 397
Intellectual Property Appellate Board ... 397
Offences and Penalties ... 398
Offences by Companies ... 399
Trade Mark Agent ... 399
LESSON ROUND-UP ... 400
SELF TEST QUESTIONS ... 401

SECTION III
COPYRIGHT LAW AND ENFORCEMENT

Learning Objectives ... 402
Definitions ... 404
Meaning of copyright ... 405
Term of copyright ... 406
Copyright board ... 406
Functions of the copyright board ... 407
Assignment of copyright ... 407
Licences ... 408
Copyright Societies ... 410
Rights of broadcasting organisation and performers ... 411
International copyright ... 411
Registration of copyright ... 413
Infringement of copyright ... 414
Statutory exceptions ... 414
Remedies against infringement of copyright ... 418
Author's special rights ... 418
Offences and penalties ... 419
Power of police to seize infringing copies ... 419
LESSON ROUND-UP ... 420
SELF-TEST QUESTIONS ... 421

STUDY XII
PREVENTION OF MONEY LAUNDERING

Learning Objectives ... 422
Introduction ... 422
What is Money Laundering? ... 423
How is Money laundered? ... 423
### Impact of Money laundering on the Development

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prevention of Money laundering—Global Initiatives</td>
<td>424</td>
</tr>
<tr>
<td>Prevention of Money laundering—Indian Initiatives</td>
<td>428</td>
</tr>
<tr>
<td>Major Provisions of the Act</td>
<td>429</td>
</tr>
<tr>
<td>Definitions</td>
<td>429</td>
</tr>
<tr>
<td>Adjudicating Authority</td>
<td>431</td>
</tr>
<tr>
<td>Obligation of Banking Companies, Financial Institution and Intermediaries</td>
<td>431</td>
</tr>
<tr>
<td>Summon, Searches and Seizures etc.</td>
<td>432</td>
</tr>
<tr>
<td>Retention of Property</td>
<td>432</td>
</tr>
<tr>
<td>Presumption in inter-connected transactions</td>
<td>433</td>
</tr>
<tr>
<td>Appellate Tribunal</td>
<td>433</td>
</tr>
<tr>
<td>Appeal to High Court</td>
<td>433</td>
</tr>
<tr>
<td>Special Courts</td>
<td>433</td>
</tr>
<tr>
<td>Offences triable by Special Courts</td>
<td>433</td>
</tr>
<tr>
<td>Offences to be cognizable and non-bailable</td>
<td>433</td>
</tr>
<tr>
<td>Power of Central Government to issue directions</td>
<td>434</td>
</tr>
<tr>
<td>Agreement with Foreign Countries</td>
<td>434</td>
</tr>
<tr>
<td>Assistance to a Contracting state in Certain Cases</td>
<td>434</td>
</tr>
<tr>
<td>Reciprocal arrangements for Processes and assistance for transfer of accused Persons</td>
<td>434</td>
</tr>
<tr>
<td>Attachment, Seizure and Confiscation of Property</td>
<td>435</td>
</tr>
<tr>
<td>Know Your Customer Guidelines</td>
<td>435</td>
</tr>
<tr>
<td>Objective of KYC Guidelines</td>
<td>436</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
<td>438</td>
</tr>
<tr>
<td>SELF-TEST QUESTIONS</td>
<td>439</td>
</tr>
</tbody>
</table>

### PART B – LABOUR LAWS

#### STUDY XIII

**MINIMUM WAGES ACT, 1948**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning Objectives</td>
<td>440</td>
</tr>
<tr>
<td>Object and Scope</td>
<td>440</td>
</tr>
<tr>
<td>Important Definitions</td>
<td>441</td>
</tr>
<tr>
<td>Fixation of minimum rates of wages</td>
<td>443</td>
</tr>
<tr>
<td>Revision of minimum wages</td>
<td>444</td>
</tr>
<tr>
<td>Manner of fixation/revision of minimum wages</td>
<td>444</td>
</tr>
<tr>
<td>Minimum rate of wages</td>
<td>445</td>
</tr>
<tr>
<td>Procedure for fixing and revising minimum wages</td>
<td>445</td>
</tr>
<tr>
<td>Advisory Board</td>
<td>446</td>
</tr>
<tr>
<td>Central Advisory Board</td>
<td>447</td>
</tr>
<tr>
<td>Minimum Wages – Whether to be paid in cash or kind</td>
<td>447</td>
</tr>
<tr>
<td>Payment of minimum wages is obligatory on employer</td>
<td>447</td>
</tr>
</tbody>
</table>
STUDY XVI
EMPLOYEES’ PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

Learning Objectives ... 484
Introduction ... 484
Application of the Act ... 485
Important Definitions ... 487

Schemes under the Act ... 490
   Employees’ Provident Fund Scheme ... 490
   Class of Employees entitled and required to join provident fund ... 491
   Employees’ Pension Scheme ... 493
   Employees’ Deposit-Linked Insurance Scheme ... 495

Determination and Recovery of Moneys due from and by Employers ... 496
Employer not to reduce Wages ... 498
Transfer of Accounts ... 498
Protection against Attachment ... 499
Power to Exempt ... 499

Compliances under the Act ... 500
LESSON ROUND-UP ... 501
SELF-TEST QUESTIONS ... 502

STUDY XVII
EMPLOYEES’ STATE INSURANCE ACT, 1948

Learning Objectives ... 503
Introduction ... 503
<table>
<thead>
<tr>
<th>Important Definitions</th>
<th>...</th>
<th>504</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration of Factories and Establishments under this Act</td>
<td>...</td>
<td>511</td>
</tr>
<tr>
<td>Employees' State Insurance</td>
<td>...</td>
<td>511</td>
</tr>
<tr>
<td>Administration of Employees' State Insurance Scheme</td>
<td>...</td>
<td>511</td>
</tr>
<tr>
<td>Employees' State Insurance Corporation</td>
<td>...</td>
<td>512</td>
</tr>
<tr>
<td>Wings of the Corporation</td>
<td>...</td>
<td>512</td>
</tr>
<tr>
<td>Employees State Insurance Fund</td>
<td>...</td>
<td>513</td>
</tr>
<tr>
<td>Contributions</td>
<td>...</td>
<td>515</td>
</tr>
<tr>
<td>Benefits</td>
<td>...</td>
<td>516</td>
</tr>
<tr>
<td>Employees' Insurance Court (E.I. Court)</td>
<td>...</td>
<td>516</td>
</tr>
<tr>
<td>Exemptions</td>
<td>...</td>
<td>517</td>
</tr>
<tr>
<td>Compliances under the Act</td>
<td>...</td>
<td>518</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
<td>...</td>
<td>518</td>
</tr>
<tr>
<td>SELF-TEST QUESTIONS</td>
<td>...</td>
<td>519</td>
</tr>
</tbody>
</table>

**STUDY XVIII**

**WORKMEN'S COMPENSATION ACT, 1923**

<table>
<thead>
<tr>
<th>Learning Objectives</th>
<th>...</th>
<th>520</th>
</tr>
</thead>
<tbody>
<tr>
<td>Object and Scope</td>
<td>...</td>
<td>520</td>
</tr>
<tr>
<td>Definitions</td>
<td>...</td>
<td>521</td>
</tr>
<tr>
<td>Disablement</td>
<td>...</td>
<td>523</td>
</tr>
<tr>
<td>Employer's Liability for Compensation</td>
<td>...</td>
<td>526</td>
</tr>
<tr>
<td>In cases of occupational disease</td>
<td>...</td>
<td>526</td>
</tr>
<tr>
<td>In cases of personal injuries</td>
<td>...</td>
<td>527</td>
</tr>
<tr>
<td>Employer's liability when contractor is engaged</td>
<td>...</td>
<td>531</td>
</tr>
<tr>
<td>Compensation</td>
<td>...</td>
<td>533</td>
</tr>
<tr>
<td>Obligations and Responsibility of Employer</td>
<td>...</td>
<td>536</td>
</tr>
<tr>
<td>Notice and Claim</td>
<td>...</td>
<td>537</td>
</tr>
<tr>
<td>Medical Examination</td>
<td>...</td>
<td>539</td>
</tr>
<tr>
<td>Procedure in the proceedings before the Commissioner</td>
<td>...</td>
<td>540</td>
</tr>
<tr>
<td>Appeals</td>
<td>...</td>
<td>546</td>
</tr>
<tr>
<td>Penalties</td>
<td>...</td>
<td>547</td>
</tr>
<tr>
<td>Special provisions relating to Masters and Seamen</td>
<td>...</td>
<td>547</td>
</tr>
<tr>
<td>Special provisions relating to captains and crew of aircrafts</td>
<td>...</td>
<td>549</td>
</tr>
<tr>
<td>Special provisions relating to workmen abroad of companies and motor vehicles</td>
<td>...</td>
<td>550</td>
</tr>
<tr>
<td>Compliances under the Act</td>
<td>...</td>
<td>551</td>
</tr>
<tr>
<td>Schedules</td>
<td>...</td>
<td>551</td>
</tr>
</tbody>
</table>
**STUDY XIX**

**CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning Objectives</td>
<td>556</td>
</tr>
<tr>
<td>Scope and Application</td>
<td>556</td>
</tr>
<tr>
<td>Act not to apply to certain establishments</td>
<td>557</td>
</tr>
<tr>
<td>Important Definitions</td>
<td>557</td>
</tr>
<tr>
<td>The Advisory Boards</td>
<td>559</td>
</tr>
<tr>
<td>Registration of establishments employing Contract Labour</td>
<td>560</td>
</tr>
<tr>
<td>Effect of non-registration</td>
<td>560</td>
</tr>
<tr>
<td>Prohibition of Employment of Contract Labour</td>
<td>561</td>
</tr>
<tr>
<td>Appointment of Licensing Officer and Licensing of Contractors</td>
<td>568</td>
</tr>
<tr>
<td>Welfare and Health of Contract Labour</td>
<td>569</td>
</tr>
<tr>
<td>Rules framed under the Act by the Central Government on</td>
<td>571</td>
</tr>
<tr>
<td>the question of wages</td>
<td></td>
</tr>
<tr>
<td>Penalties and Procedure</td>
<td>572</td>
</tr>
<tr>
<td>Inspectors</td>
<td>574</td>
</tr>
<tr>
<td>Maintenance of Records and Registers</td>
<td>575</td>
</tr>
<tr>
<td>Compliances under the Act</td>
<td>575</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
<td>576</td>
</tr>
<tr>
<td>SELF-TEST QUESTIONS</td>
<td>577</td>
</tr>
</tbody>
</table>

**STUDY XX**

**INDUSTRIAL DISPUTES ACT, 1947**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning Objectives</td>
<td>578</td>
</tr>
<tr>
<td>Introduction</td>
<td>578</td>
</tr>
<tr>
<td>Object and significance of the Act</td>
<td>579</td>
</tr>
<tr>
<td>Important Definitions</td>
<td>580</td>
</tr>
<tr>
<td>Types of Strike and their Legality</td>
<td>592</td>
</tr>
<tr>
<td>Legality of Strike</td>
<td>594</td>
</tr>
<tr>
<td>Dismissal etc. of an Individual workman to be deemed to be an Industrial Dispute</td>
<td>605</td>
</tr>
<tr>
<td>Authorities under the Act and their Duties</td>
<td>606</td>
</tr>
<tr>
<td>Reference of Disputes</td>
<td>609</td>
</tr>
<tr>
<td>Voluntary Reference of Disputes to Arbitration</td>
<td>614</td>
</tr>
<tr>
<td>Procedure and Powers of Authorities</td>
<td>615</td>
</tr>
<tr>
<td>Strikes and Lock-outs</td>
<td>617</td>
</tr>
</tbody>
</table>
(xxxii)

Justified and unjustified strikes ................................................................. 619
Wages for strike period .............................................................................. 620
Dismissal of workmen and illegal strike ..................................................... 621
Justification of Lock-out and wages for Lock-out Period .......................... 622
Change in Conditions of Service ............................................................... 622
Unfair Labour Practices ............................................................................ 627
Penalties ..................................................................................................... 628
Schedules ................................................................................................... 629
LESSON ROUND-UP ................................................................................ 634
SELF-TEST QUESTIONS .......................................................................... 635

STUDY XXI

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

Learning Objectives .................................................................................. 636
Object and Scope of the Act ..................................................................... 636
Important Definitions ............................................................................... 638
Certification of Draft Standing Orders ..................................................... 639
Appeals ..................................................................................................... 641
Date of Operation of Standing Orders ..................................................... 641
Posting of Standing Orders ..................................................................... 641
Duration and Modification of Standing Orders ....................................... 641
Payment of Subsistence Allowance ........................................................ 642
Interpretation of Standing Orders ........................................................... 643
Temporary Application of Model Standing Orders ................................. 643
Compliances under the Act ..................................................................... 644

Page

The Schedule to the Act .......................................................................... 644
LESSON ROUND-UP ................................................................................ 645
SELF-TEST QUESTIONS .......................................................................... 646

STUDY XXII

FACTORIES ACT, 1948

Learning Objectives .................................................................................. 647
Object and Scope of the Act ..................................................................... 647
Important Definitions ............................................................................... 648
Statutory Agencies and their Powers for Enforcement of the Act ............... 660
Approval, Licensing and Registration of Factories ..................................... 663
Notice by Occupier .................................................................................. 664
General Duties of occupier ...................................................................... 664
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>General duties of manufacturers, etc.</td>
<td>665</td>
</tr>
<tr>
<td>Measures to be taken by Factories for Heath, Safety and Welfare of Workers</td>
<td>666</td>
</tr>
<tr>
<td>Health</td>
<td>666</td>
</tr>
<tr>
<td>Safety</td>
<td>671</td>
</tr>
<tr>
<td>Welfare</td>
<td>677</td>
</tr>
<tr>
<td>Special provisions relating to Hazardous Processes</td>
<td>681</td>
</tr>
<tr>
<td>Working Hours of Adults</td>
<td>685</td>
</tr>
<tr>
<td>Additional Provisions Regulating Employment of Women in Factory</td>
<td>690</td>
</tr>
<tr>
<td>Employment of Young Persons and Children</td>
<td>691</td>
</tr>
<tr>
<td>Annual Leave with Wages</td>
<td>695</td>
</tr>
<tr>
<td>Penalties and Procedures</td>
<td>698</td>
</tr>
<tr>
<td>Compliances under the Act</td>
<td>701</td>
</tr>
<tr>
<td>Schedules</td>
<td>702</td>
</tr>
<tr>
<td>LESSON ROUND-UP</td>
<td>705</td>
</tr>
<tr>
<td>SELF-TEST QUESTIONS</td>
<td>706</td>
</tr>
<tr>
<td><strong>TEST PAPERS/2011</strong></td>
<td></td>
</tr>
<tr>
<td>Test Paper 1/2011</td>
<td>709</td>
</tr>
<tr>
<td>Test Paper 2/2011</td>
<td>711</td>
</tr>
<tr>
<td>Test Paper 3/2011</td>
<td>713</td>
</tr>
<tr>
<td>Test Paper 4/2011</td>
<td>715</td>
</tr>
<tr>
<td>Test Paper 5/2011</td>
<td>717</td>
</tr>
<tr>
<td>QUESTION PAPER OF PREVIOUS SESSIONS</td>
<td>720</td>
</tr>
</tbody>
</table>
INTRODUCTION

Industrialization is a major objective of developing countries as a means to the attainment of higher levels of economic well-being of the people. Advancement of science and technology provides the wherewithal to achieve faster industrial growth.

After four and half decades of strongly inward oriented policies, India began opening up of its economy to foreign trade and investment with the announcement of New Industrial Policy in July 1991. The New Industrial Policy seeks to prepare Indian industry for meeting the challenges of globalisation. The reforms aim at generating a market orientation for the hitherto highly regulated domestic economy by deregulating the domestic economy to provide Indian industry with greater flexibility to respond to competitive pressures by reducing costs and improving quality.

The New Industrial Policy has injected a substantial measure of competitive environment and market thrust to industry. Many areas earlier reserved for the public sector are now open to private sector participation. The restrictions on the expansion of large industrial houses have been removed. Licensing requirements for industries have been abolished except for a few strategic and defence industries.
The policy reforms towards Foreign Direct Investment (FDI) began with a radically new approach to FDI in the very first year of the implementation of New Industrial Policy. The new regime permits FDI in virtually every sector of the economy. Foreign equity proposals need not be accompanied by technology transfer as required earlier. Royalty payments have been considerably liberalised, and restrictions on the use of foreign brand name/trademarks for internal sale have been removed.

Before going into the details of regulation of Indian industries, let us have a look at the successive industrial policies adopted by the Government.

**Industrial Policy Resolution, 1948**

Immediately after independence, the Government gave a careful thought to the economic problems faced by India and recognised that any improvement in the economic conditions of the people is possible only through a substantial increase in the generation of national wealth as a mere distribution of existing wealth would not make any significant difference to the people. Thus, a need for a dynamic national policy directed towards a continuous increase in production and productivity by all possible means, together with measures to secure its equal distribution was felt. The Government in this context adopted in 1948 an Industrial Policy Resolution, a historic document and a trend setter, which emphasised on importance to the economy of securing a continuous increase in the production and its equitable distribution and pointed out that state must play a progressively active role in the development of industries.

The resolution envisioned that besides arms, ammunition, atomic energy and railway transportation, to be the monopoly of the Central Government, the States would be exclusively responsible for the establishment of new undertakings in basic industries except where, in the national interest, the State itself found it necessary to secure the cooperation of private enterprise. The rest of the industrial areas were thrown open to private enterprise, though it was made clear that the State would also progressively participate in these fields.

Recognising the valuable role of private enterprise in the economy, the resolution emphasised that the States could contribute more quickly to the increase of national wealth by expanding its present activities where it is already operating and by concentrating on new units of production in other fields, rather than acquiring and running existing units. The resolution also recognised the importance of participation of foreign capital and enterprise, particularly in relation to industrial technology and knowledge, for the rapid industrialisation of India. The Industrial Policy Resolution 1948 was provided legal support by enacting Industries (Development and Regulation) Act, 1951 and vesting in the Government necessary powers to regulate and control the existing and future undertakings.

**Industrial Policy Resolution, 1956**

The Industrial Policy Resolution of 1956 laid down the basic approach towards industrial development. The policy thrust rightly recognised the Directive Principles of State Policy enshrined in the Constitution and the adoption by the Parliament in December 1954 of the socialist pattern of society as the objective of social and economic policy.
In order to realise the socialistic pattern of society, the Government recognised the need to accelerate the rate of economic growth and to speed up industrialisation and, in particular, to develop heavy industries and machine making industries, to expand the public sector. The Government also felt the need to prevent private monopolies and the concentration of economic power in different fields in the hands of small number of individuals.

The Government classified industries into three categories. The first category included those industries the future development of which was the exclusive responsibility of States. The second category included progressively State owned industries and areas in which the States had to take initiatives to establish new undertakings, though the private participation was also expected to supplement the Government efforts. The third category included all the remaining industries with the responsibility of private sector for their development.

The Industrial Policy Resolution of 1956 was followed by the Industrial Policy Statement of 1973 which, inter alia, identified high priority industries for investment by large Industrial houses and foreign companies. Emphasis on de-centralisation and on the role of small scale, tiny and cottage industries was the hallmark of the Industrial Policy Statement of 1977. The Industrial Policy Statement of 1980 focussed attention on the need for promoting competition in the domestic market, technological upgradation and modernisation. The policy laid down the foundation for an increasingly competitive export base and for encouraging foreign investment in high technology areas. These policies created a climate for rapid industrial growth in our country. A number of policy and procedural changes were also introduced in the years 1985 and 1986 aimed at increasing productivity, reducing costs and improving quality.

New Industrial Policy, 1991

The New Industrial Policy was tabled in the Parliament on 24th July, 1991, at the time when the Government of India faced severest foreign exchange resource crunch. This document admitted candidly the policy distortions of the past and expressed the Governments earnestness to achieve a break through in its policy formulations.

The statement on New Industrial Policy states that the major objectives of the new Industrial Policy package will be to build on the gains already made, correct the distortions or weaknesses that may have crept in, maintain a sustained growth in productivity and gainful employment and attain international competition...... Pursuant to this, the Government initiated a series of measures in the areas of Industrial licensing, foreign investment, foreign technology agreements, public sector policy and the MRTP Act.

The Industrial Policy Resolution of 1956 and the statement on new Industrial Policy of 1991 provide the basic framework for overall industrial policy of the Government. Over the years, adjustments have been made in the policy to accelerate the pace of industrial growth by providing greater freedom in investment decisions keeping in view the objectives of efficiency and competitiveness, technological upgradation, maximisation of capacity utilisation and increased growth.

The thrust of the New Industrial Policy of 1991 has, therefore, been to inject new dosage of competition in order to induce greater industrial efficiency and international
competitiveness. The domestic competition has been induced by delicensing of industries and liberalising the policy related to foreign direct investment.

Since July 1991, the Indian industry has undergone a sea change in terms of the basic parameters governing its structure and functioning. The major reforms include large scale reduction in the scope of industrial licensing, simplification of procedural rules and regulations, reduction of areas reserved exclusively for the public sector, disinvestment of equity in selected public sector undertakings, enhancing the limits of foreign equity participation in domestic industrial undertakings, liberalisation of trade and exchange rate policies, rationalisation and reduction of customs and excise duties and personal and corporate tax.

With a view to ensure efficient allocation of resources, banking and capital markets also came in for major economic reforms. The banking sector reforms included substantial interest rate deregulation, liberal licensing of private sector banks, and expansion of the branch network of foreign banks. The capital market reforms aimed at de-linking capital market from direct government controls, by a system of better disclosure, greater transparency and wider investor protection. Separate policy measures were announced in the form of specific packages aimed at upliftment of the small scale, tiny and cottage industries as well as 100% Export Oriented Units, and units located in the Export Processing Zones and Technology Parks and Special Economic Zones.

What are the objectives of Industrial Policy of the Government?

- To maintain a sustained growth in productivity;
- To enhance gainful employment;
- To achieve optimal utilisation of human resources;
- To attain international competitiveness; and
- To transform India into a major partner and player in the global arena.

The Policy focus is on –

- Deregulating Indian industry;
- Allowing the industry freedom and flexibility in responding to market forces; and
- Providing a policy regime that facilitates and fosters growth of Indian industry

The Industries (Development & Regulation) Act, 1951

The Industries (Development and Regulation) Act, 1951 is an important piece of legislation affecting the industrial sector of the country.

The object of Industries (Development and Regulation) Act [I (D&R) Act] is to provide to the Central Government means of implementing the Industrial Policy. It
seeks to regulate the deployment of material resources of the community according to the norms laid down in the Policy and is thus an instrument for its implementation. The Act has helped the Government in directing the manner in which industrial development should take place in the country and also in optimising the development of scarce resources of the community amongst competing claims.

The preamble to the Act states that the I (D&R) Act is an Act 'to provide for the development and regulation of certain industries'. These industries are specified in the First Schedule to the Act. The scope of the Act is therefore, limited to the industries mentioned in the First Schedule known as 'scheduled industries'.

The term 'industry' is not defined under the Act though the term 'industrial undertaking' is. The scope of the regulatory provisions in the Act is more specific and limited in respect of 'industrial undertakings' which fall within the industries mentioned in the First Schedule.

The system of licensing provided under the Act regulates the planning of future development and undertakings on sound lines as may be deemed expedient in the opinion of the Central Government. The Act confers on the Central Government power to make rules for registration of existing undertakings, regulation of the production and development of industries specified in the Schedule attached to the Act.

Implementation of the Act

The Act is implemented through Department of Industrial Policy and Promotion, Ministry of Commerce & Industry on whom the Central Government has vested the power to develop and regulate Scheduled Industries.

I(D&R) Act is simple in its text and deals only with principles, leaving the details to be worked out by the authorities entrusted with the task of translating them into concrete action plans. This has resulted in the issue of various notifications, circulars, press notes, clarifications from time to time by the hitherto Department of Industrial Development now named as Department of Industrial Policy and Promotion with a view to administering the Act.

The Central Government has framed the Registration and licensing of Industrial Undertakings Rules, 1952, prescribing general procedure to be followed for the purposes of registration and licensing of an industrial undertaking.

Scheme of the Act

The Act can be divided into two parts: (i) those dealing with developmental aspects and (ii) those dealing with regulatory aspects of scheduled industries. The development of the Scheduled Industries is sought to be secured primarily through the agencies of Central Advisory Council and Development Councils as well as by offering certain special facilities that the Government may consider necessary.

Regulation of these industries is sought to be done by means of a system of registration of existing undertakings, licensing of new undertakings for producing new articles and for substantial expansion or change of location of existing undertakings.
Control over the industries is sought to be exercised by causing investigation into the working of these industries and in appropriate cases taking over of direct management and control.

The Act, however, empowers the Central Government to grant exemptions to any undertaking or a scheduled industry or class of undertakings or scheduled industries from all or any of the provisions of the Act, Rules or Orders made thereunder. Exemptions under Section 29B are granted having regard to the number of workers employed in, or the amount invested in, any industrial undertaking or the desirability of encouraging small undertakings generally or the stage of development of any scheduled industry.

DEFINITIONS

Section 3 of the Act defines some of the terms used in the Act and clarifies that the words and expressions used in the Act and not defined thereunder but defined in the Companies Act, 1956 shall have the meanings respectively assigned in that Act. Before going into the study of the provisions of the Act it would be necessary to look into the meaning and scope of some of the important terms used in the Act.

Existing Industrial Undertaking

Section 3(bb) of the Act defines the term existing industrial undertaking as to mean (a) in the case of an industrial undertaking pertaining to any of the industries specified in the First Schedule as originally enacted, an industrial undertaking which was in existence on the commencement of this Act or for the establishment of which, effective steps had been taken before such commencement, and (b) in the case of an industrial undertaking pertaining to any of the industries added to the First Schedule by an amendment thereof, an industrial undertaking which is in existence on the coming into force of such amendment or for the establishment of which, effective steps had been taken before the coming into force of such amendment.

In this context, Rule 2 of the Registration and Licensing of Industrial Undertakings Rules, 1952 defines ‘effective steps’ to mean one or more of the following:

(a) 60% or more of the capital issued for an industrial undertaking which is a public company within the meaning of the Companies Act, 1956, has been paid up;

(b) a substantial part of the factory building has been constructed;

(c) a firm order has been placed for a substantial part of the plant and machinery required for the undertaking.

To be an ‘existing industrial undertaking’ the undertaking must pertain to an industry specified in the First Schedule i.e. it must have been set up to manufacture articles which can be said to fall in an item in the First Schedule.

Factory

The term factory has been defined under Section 3(c) of the Act and includes any premises including the precincts thereof in any part of which a manufacturing process is being carried on or is ordinarily so carried on (i) with the aid of power provided that 50 or more workers are working or were working thereon on any day of the preceding twelve months, or (ii) without the aid of power provided that 100 or more workers are
working or were working thereon on any day of the preceding twelve months and provided further that in no part of such premises any manufacturing process is being carried on with the aid of power.

The term ‘manufacturing process’ has not been defined under the Act. Although what constitutes ‘manufacturing process’ will depend on the facts and circumstances of each case, it can be said as a first principle that, in order to constitute ‘manufacture’, there must be a transformation. Merely labour bestowed on an article even if the labour is applied through machinery will not make it a manufacture unless it has progressed so far that transformation ensues, and the article becomes commercially known as another and different article from that with which it begins its existence. [A.M. Chinniah, Manager, Sangu Soap Works, AIR (1957) Mad. 755].

In Delhi Cloth and General Mills Co. Ltd. v. Joint Secretary, Govt. of India (1978) Tax L.R. 2094, it had been held that it was not necessary that the manufacturing process should be carried on in the whole of the premises and that even if part of the premises was used for manufacturing process the other could as well be included in factory premises.

**Industrial Undertaking**

Section 3(d) of the Act defines industrial undertaking to include any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government.

Therefore, according to the definition, the undertaking must not only pertain to a scheduled industry but also should be carried on in one or more ‘factories’ within the meaning of Section 3(c) of the Act. That means, where the number of workers employed is less than 50 where power is used or, less than 100 where no power is used, it would not be considered to be factory under the Act and consequently, it would not be an ‘industrial undertaking’ for the purposes of this Act. Though the word ‘undertaking’ is not separately defined in the Act, the basic feature expected to be present to constitute an undertaking is the existence of a factory as defined in the Act where some manufacturing process is carried on.

**New Article**

Section 3(dd) says that new article in relation to an industrial undertaking which is registered or in respect of which a licence or permission has been issued under this Act means: (a) any article which falls under an item in the First Schedule other than the item under which articles ordinarily manufactured or produced in the industrial undertaking at the date of registration or issue of the licence or permission as the case may be, fall; (b) any article which bears a mark as defined in the Trade Marks Act or which is subject of a patent, if at the date of registration or issue of the licence or permission, as the case may be, the industrial undertaking was not manufacturing or producing such article bearing that mark or which is the subject of that patent.

Broadly speaking therefore, an article, the manufacture of which would not be covered by the existing industrial licence would be a ‘new’ article. Where the article to be manufactured is covered under existing licence of the manufacturer by virtue of any broadbanding facility announced by the Government, it would not be termed as a ‘new’ article. But in case the new article to be manufactured bears a new trade mark
or a patent, a fresh licence would be required even if the article falls under the same item in the First Schedule for which the undertaking already possesses a licence.

In order to show that the proposed manufacture of an article is a proposal for manufacturing a new article, it should be proved that the proposed article cannot be brought within the item under which the article being manufactured presently falls. Where, it can be shown that the proposed article falls under a different item of the First Schedule, it would constitute a new article. It may be noted that soon after the introduction of the definition of the term ‘New article’ in the Act, the Licensing Committee had pointed out that a broad and reasonable view of the term should be taken and that where no new trade mark or no new patent was involved and the product was covered within the ambit of the same item in the First Schedule under which the concerned undertaking held a registration certificate or industrial licence, the article of proposed manufacture would not be considered as a new article and there should be no objection to the owner of the industrial undertaking manufacturing it. The term ‘New article’ assumes significance and importance in the context of Section 11A which casts an obligation upon the owner of an industrial undertaking to obtain a licence for producing or manufacturing new articles.

**Owner**

The term owner under Section 3(f) has been defined to mean the person who, or the authority which, has the ultimate control over the affairs of the undertaking and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent shall be deemed to be the owner of the undertaking.

It may be noted that the term ‘person’ employed in the definition would include both natural and artificial persons. Bodies corporate owning industrial undertakings would also be covered within the above definition. While this definition makes it clear that any person or authority having ultimate control over the affairs of the undertaking is the owner, it also introduces a deeming provision whereby certain categories of persons in whom the affairs of the industrial undertaking may be entrusted are declared to be owners.

Thus, a company owning an industrial undertaking would be the person having ‘ultimate’ control over the affairs of the undertaking, but where it has appointed a manager who has the management control of the whole, or substantially the whole of the affairs of the company, he will also be deemed to be the ‘owner’.

The term ‘owner’ has particular relevance and significance in the context of the provisions of Sections 5, 6, 10, 10A, 11A, 13 as well as Section 18F. It should also be noted that reference to managing agent in the definition is not of any significance now on account of the fact that the system of managing agency has since been abolished.

**Scheduled Industry**

Section 3(i) defines the term Scheduled industry to include any of the industries specified in the First Schedule of the Act.

**Current Assets**

The term current assets has been defined under Section 3(ab) of the Act to
include bank balance and cash and such other assets or reserves as are expected to be realised in cash, or sold or consumed within a period of not more than 12 months in the ordinary course of business, such as, stock-in-trade, amounts due from sundry debtors for sale of goods and services rendered, advance tax payments and bills receivable, but does not include sums credited to a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by a company owning an industrial undertaking.

**Current Liabilities**

Section 3(ac) defines the term current liabilities as to mean liabilities which must be met on demand or within a period of twelve months from the date they are incurred; and includes any current liability which is suspended under Section 18FB.

**Central Advisory Council**

Section 5 of the Act empowers the Central Government to establish by notified order, a council to be called the Central Advisory Council, for advising the Government on matters concerning the development and regulation of scheduled industries. Section 5(2), deals with composition of Advisory Council and provides that it shall consist of a chairman and such other members not exceeding thirty in number, to be appointed by the Central Government from among persons who are, in its opinion, capable of representing the interest of owners of industrial undertakings in Scheduled Industries; persons employed in industrial undertakings in Scheduled Industries; consumers of goods manufactured or produced by Scheduled Industries; and such other class of persons including primary producers, as in the opinion of the Central Government ought to be represented on the Advisory Council.

**Development Council**

Section 6 of the Act also empowers the Central Government to establish by notified order, a body of persons to be called a Development Council consisting of such members who, in the opinion of the Central Government, are persons capable of representing the interests of owners of industrial undertakings in the scheduled industry or group of scheduled industries; persons having special knowledge of matters relating to the technical or other aspects of the scheduled industry or group of scheduled industries; persons capable of representing the interests of persons employed in industrial undertakings in the scheduled industry or group of scheduled industries; and persons not belonging to any of the aforesaid categories, who are capable of representing the interests of consumers of goods manufactured or produced by the scheduled industry or group of scheduled industries.

The Central Government may assign to a Development Council, any of the functions specified in the Second Schedule to the Act in order to increase the efficiency or productivity in the scheduled Industry or group of scheduled Industries for which the Development Council is established, improve or develop the service that such industry or group of industries renders, or enable such industry or group of industries to render such service more economically. The functions which may be assigned to Development Council include:

(i) Recommending targets for production, coordinating production programmes and reviewing progress from time to time.

(ii) Suggesting norms of efficiency with a view to eliminating waste, obtaining
maximum production, improving quality and reducing costs.

(iii) Recommending measures for securing the fuller utilisation of installed capacity and for improving the working of the industry, particularly of the less efficient units.

(iv) Promoting arrangements for better marketing and helping in the devising of a system of distribution and sale of the produce of the industry which would be satisfactory to the consumer.

(v) Promoting standardisation of products.

(vi) Assisting in the distribution of controlled materials and promoting arrangements for obtaining materials for the industry.

(vii) Promoting or undertaking inquiry as to materials and equipment and as to methods of production, management and labour utilisation, including the discovery and development of new materials, equipment and methods and of improvement in those already in use, the assessment of the advantages of different alternatives and the conduct of experimental establishments and of tests on a commercial scale.

(viii) Promoting the training of persons engaged or proposing engagement in the industry and their education in technical or artistic subjects relevant thereto.

(ix) Promoting the retraining in alternative occupations of personnel engaged in or retrenched from the industry.

(x) Promoting or undertaking scientific industrial research, research into matters affecting industrial psychology and research into matters relating to production and to the consumption or use of goods and services supplied by the industry.

(xi) Promoting improvements and standardisation of accounting and costing methods and practices.

(xii) Promoting or undertaking the collection and formulation of statistics.

(xiii) Investigating possibilities of decentralising stages and processes of production with a view to encouraging the growth of allied small scale and cottage industries.

(xiv) Promoting the adoption of measures for increasing the productivity of labour, including measures for securing safer and better working conditions and provisions and improvement of amenities and incentives for workers.

(xv) Advising on any matter relating to the industry (other than remuneration and conditions of employment) as to which the Central Government may request the Development Council to advise and undertaking inquiries for the purpose of enabling the Development Council so to advise.

(xvi) Undertaking arrangements for making available to the industry information obtained and for advising on matters with which the Development Councils are concerned in the exercise of any of their functions.

Section 7 requires the Development Council to prepare and transmit to the Central Government and the Advisory Council annually a report (including a statement on the audited accounts together with a copy of audit report) on its functions during the financial year last completed. A copy of each such report shall be laid before Parliament by the Central Government.
Section 9 empowers the Central Government to levy and collect cess on all goods manufactured and produced in any specified scheduled industry and hand over the proceeds to the Development Council established for that industry. The Development Council, in turn, is required to utilise the proceeds, to promote scientific and industrial research with reference to the scheduled industry or group of scheduled industries in respect of which the Development Council is established; to promote improvements in design and quality with reference to the products of such industry or group of industries; to provide for the training of technicians and labour in such industry or group of industries; and to meet such expenses as specified for exercise of its functions including its administrative expenses.

Regulation of Scheduled Industries

Regulation of industries specified in the First Schedule to the Act is sought to be achieved by means of registration of existing industrial undertakings; licensing of new industrial undertakings; and licensing for producing or manufacturing new articles. Registration and licensing procedure has been provided in the Act for the obvious purpose of channelising the limited resources of the country in a manner conducive to the overall industrial development of the country. The Act requires industrial licence to be obtained from the Central Government for certain specific purposes.

Registration of Existing Industrial Undertakings

Section 10 requires the owner of every existing industrial undertaking (not being the Central Government) to register the undertaking in the prescribed manner within the prescribed period. The Central Government has also been put under obligation to register its own existing industrial undertakings. On such a registration the owner of the undertaking is issued a certificate of registration containing the productive capacity of the industrial undertaking and other prescribed particulars.

The concept of existing industrial undertaking may be understood with the help of an illustration. Graphite Crucible was added as Item No. 8 under the head 34 Ceramics in the First Schedule to the Act with effect from 30.12.1978. All industries engaged in manufacture of graphite crucibles on 30.12.1978 and all such industries in respect of which effective steps had been taken on 30.12.1978 for establishment thereof would become existing industrial undertakings within the meaning of the Act.

Issue of Certificate of Registration

Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, after such investigation as it may consider necessary, grants the applicant a certificate of registration containing, besides other prescribed particulars, the productive capacity of the industrial undertaking. In specifying the productive capacity in the certificate of registration, the Central Government takes into consideration the following matters:

(i) the productive or installed capacity of the undertaking as specified in the application for registration;
(ii) level of production immediately before the date on which the application for registration was made;
(iii) the level of the highest annual production during the preceding three years;
(iv) the extent to which production during the said period was utilised for export;
(v) such other factors as the Central Government may consider relevant including the extent of under-utilisation of capacity, if any during the relevant period due to any cause.

Circumstances When Registration is Not Necessary

It may be noted that registration of an undertaking will not be necessary if the undertaking (i) is a small scale industrial undertaking or (ii) is otherwise exempt from the licensing/registration provisions of the Act or (iii) where the undertaking concerned is not satisfying the definition of the term 'factory' under the Act.

Penalty For Failure to Register

The owner of an industrial undertaking which is registrable but has not been registered as required under Section 19(1) of the Act, is liable to be punished under Section 24 of the Act with imprisonment up to six months or fine, which may extend to 5,000 Rupees or with both.

Power to Revoke Registration

The Central Government has been empowered to revoke the registration if it is satisfied that (i) it was obtained by misrepresentation as to essential facts; or (ii) the undertaking has ceased to be registrable by reason of any exemption granted under this Act; or (iii) for any other reason the registration has become useless or ineffective and therefore requires to be revoked. The Central Government is however, required to give an opportunity to the owner of the undertaking to be heard, before revoking the registration.

Licensing of Industrial Undertakings

The major instrument of implementation of industrial policy is the system of grant of various industrial approvals such as, industrial licence, foreign collaborations, import of capital goods, etc. The system of industrial licensing helps the Government to provide and develop the industries in the country in conformity with the national objectives and priorities. As per the new Industrial Policy, 1991, licensing is required only for certain industries related to security and strategic concerns, social reasons, hazardous chemicals and overriding environmental reasons and items of elitist consumption.

What is an Industrial Licence?

An Industrial licence is a written permission from the Government to an industrial undertaking to manufacture specified articles, listed in the First Schedule and includes particulars of industrial undertaking, its location, articles to be manufactured, the capacity on the basis of maximum utilisation of plant and machinery etc. The licence is subject to a validity period within which the licensed capacity of the undertaking should be established.

Licensing of New Undertaking

Under Section 11, no person or authority other than Central Government after the
commencement of the Act, shall establish any new industrial undertaking without a licence from the Central Government. The licence may contain such conditions including in particular, the location and size of the undertaking as the Central Government may deem fit. In case any State Government wants to establish any new industrial undertaking, previous permission of the Central Government would be required.

A licence or permission under Section 11(1) may contain certain conditions as to the location of the undertaking and the minimum standards in respect of size to be provided therein as the Central Government may impose.

**Licence for Producing or Manufacturing New Articles**

The owner of an industrial undertaking (other than Central Government) registered under Section 10, or licensed under Section 11, shall not produce or manufacture any new article unless: (a) in the case of an industrial undertaking registered under Section 10, he has obtained a licence for producing or manufacturing such new articles, and (b) in the case of an undertaking licensed under Section 11, he has had the existing licence amended in the prescribed manner.

**Licence for Carrying on Business After the Revocation of Certificate of Registration**

Under Section 10A, the certificate of registration granted by the Central Government can be revoked under certain circumstances. Section 13(1)(b) provides that after such revocation, the owner shall not carry on the business unless a licence or permission for this purpose has been obtained from the Government.

**Licence for Carrying on Business by an Industrial Undertaking to which the Act became applicable**

There may be cases, where the Act did not originally apply to an industrial undertaking but becomes applicable after the commencement of the Act for any reason. In such cases the owner of the undertaking concerned shall not carry on the business after the expiry of three months from the date on which the provisions become so applicable unless a licence or permission as the case may be, has been obtained from the Central Government in pursuance of clause (c) of Sub-section (1) of Section 13 of the Act.

**Licence for Change in Location**

Under Section 13(1)(e) the owner of an industrial undertaking (other than Central Government) cannot change the location of the whole or any part of a registered industrial undertaking without the Central Government's permission/licence.

**Licence for Effecting Substantial Expansion**

Under Section 13(1)(d), the owner of an industrial undertaking (other than Central Government) cannot effect any substantial expansion of an industrial undertaking registered or in respect of which a licence or permission has been issued, without a licence from the Central Government.
Accordingly, a licence is required for effecting any substantial expansion in any undertaking registered/licensed under the Act.

**What do you mean by the term “Substantial Expansion”?**

“Substantial Expansion” means the expansion of an existing industrial undertaking which substantially increases the productive capacity of the undertaking or which is of such nature as to amount virtually to a new industrial undertaking. However, it does not include any such expansion as is normal to the undertaking having regard to its nature and the circumstances relating to such expansion.

Substantial increase in productive capacity would amount to substantial expansion. What is ‘productive capacity’ has, however, not been defined anywhere in the Act. Recourse should necessarily be had to the productive capacity specified in the registration certificate in terms of Section 10(5) of the Act. Again what is normal expansion in respect of that particular industrial undertaking is not to be construed as amounting to substantial expansion. This has to be determined in the context of the nature of expansion as well as the circumstances relating to such expansion. In the context of substantial expansion, it should also be noted that according to the clarification of the Department of Industrial Development any increase in production by twenty-five per cent over the licensed capacity being in the nature of expansion would not amount to substantial expansion if:

- no additional plant and machinery has been installed except minor balancing equipment indigenously procured;
- no additional expenditure had been incurred or foreign exchange was involved; and
- the extra production does not give rise to any additional demand for scarce raw materials.

In the context of substantial expansion, it is also relevant to note that wherever a question arises as to whether or not there has been a substantial expansion of an industrial undertaking, the decision of the Central Government thereon shall be final.

**Power of the Central Government to Revoke/Amend Licences in Certain Cases**

Section 12 of the Act empowers the Central Government to revoke the licence issued under Section 11 if it is satisfied, either on a reference made to it in this behalf or otherwise that the licencee has, without reasonable cause, failed to establish or to take effective steps to establish the new industrial undertaking within the prescribed time or the extended time, as the case may be.

The Central Government is also empowered under Section 12(2) to vary or amend any licence issued under Section 11. However, this power shall not be exercised when the licencee has already taken effective steps to establish the new industrial undertaking. What constitutes ‘effective steps’ has been explained earlier. As per Section 12(3), the provisions of Sections 12(1) and 12(2) shall also apply in
relation to a licence issued under Section 11A of the Act (for manufacturing new article).

**Investigation**

**Investigation into Scheduled Industries/Industrial Undertakings**

Section 15 of the Act empowers the Central Government to cause an investigation to be made into scheduled industries or industrial undertakings.

The **Central Government may make or cause to be made a full and complete investigation into any scheduled industry or industrial undertaking, in respect of which, it is of the opinion that:**

- there has been or is likely to be, a substantial fall in the volume of production in respect of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which, having regard to the economic conditions prevailing, there is no justification; or

- there has been or is likely to be a marked deterioration in the quality of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings as the case may be, which could have been or can be avoided; or

- there has been or is likely to be a rise in the price of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which there is no justification; or

- it is necessary to take any such action for the purpose of conserving any resources of national importance which are utilised in the industry or the industrial undertaking or undertakings as the case may be.

The investigation may also be ordered by the Central Government, if it is satisfied that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry or to public interest.

In **Juggilal Kamlapat Cotton Spinning Mills v. Union of India** (1984) 3 Comp. L.J. 223 it was held that, the opinion, the Central Government is required to form before passing an order of investigation under this section is to be on a subjective satisfaction, which has to be based on relevant material. Before passing an order the party must be heard. The Central Government may either itself make an investigation or it may cause such investigation to be made by any person or body of persons appointed by it for this purpose. The scope of the investigation is wide because this section contemplates full and complete investigation. The procedure to be followed in making an investigation has been specified in the Investigation of Industrial
Undertakings (Procedure) Rules, 1967. Before commencing investigation the investigator has to call upon the management of the undertaking to furnish written statements relating to the affairs thereof. He is required to probe into the causes which have brought about the above circumstances and make a report in respect of matters referred to in (i) to (iii) above after taking into account the relevant data for a period of three years. It is also required to be stated in the report that whether the opinion of the Central Government (in respect of ordering investigation) is justified and correct. The investigator is also required to give his recommendations for the purpose of taking remedial action.

Investigation into the Affairs of a Company in Liquidation

Section 15A contains provisions for conducting an investigation into the affairs of a company owning an industrial undertaking.

The prerequisites for conducting such an investigation are:

- the company is either being wound up by or under the supervision of a High Court;
- the business of such company is not being continued; and
- the Central Government is of the opinion that it is necessary in the interests of the general public and in particular in the interests of production, supply or distribution of articles or class of articles relatable to the scheduled industry, to investigate into the possibility of running or restarting the industrial undertaking.

If the above circumstances are present in a particular case, the Central Government may make an application to the High Court praying for permission to make or cause to be made an investigation into possibility of re-starting or running the industrial undertaking. On application by the Central Government under this section the High Court shall, notwithstanding anything contained in the Companies Act, 1956, or in any other law for the time being in force, grant the permission prayed for.

In Union of India v. Anglo-French Textiles Limited [(1985) 57 Comp. Cas. 489], the Madras High Court considered the question as to whether an application filed by the Central Government seeking permission of the Court to investigate or cause any investigation to be made in regard to restarting of manufacturing unit of a company under Section 15A of the Act is maintainable even where a petition for winding up of a company under Section 433 of the Companies Act, 1956 is pending. The words used under Section 15A of the Act are the company is either being wound up by or under the supervision of a High Court. Referring to Sections 18FA(10), 18FC, 18FD, 18FE, 18FF, 18FG and 18FH, the court held that even though the application for winding up a company is pending before the Court, it can take the expression being
wound up by or under the supervision of the High Court to include a case where a petition under Section 433 of the Companies Act is pending. On the other hand, the Calcutta High Court in Union of India v. Shalimar Works Limited 1977 47 Comp. Cas. 664 held that the expression being wound up by or under the supervision of the High Court would mean that the company is directed to be wound up, and hence the Court held that the proper stage for application under Section 15A is when the order for winding up has been made by the Court and not before that.

**Directions after Investigation**

Section 16 of the Act provides that after investigation under Section 15, if the Central Government is satisfied that action under Section 16, is desirable, it may issue such directions to the industrial undertaking or undertakings as may be appropriate in the circumstances.

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<th>The Central Government may issue directions under Section 16 for all or any of the following purposes, namely:</th>
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<td>➢ regulatıng the production of any article or class of articles by the industrial undertaking or undertakings and fixing standards of production;</td>
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<tr>
<td>➢ requiring the industrial undertaking or undertakings to take such steps as the Central Government may consider necessary to stimulate the development of the industry to which the undertaking or undertakings relates or relate;</td>
</tr>
<tr>
<td>➢ prohibiting the industrial undertaking or undertakings from resorting to any act or practice which might reduce its or their production capacity or economic value;</td>
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<tr>
<td>➢ controlling the prices, or regulating the distribution of any article or class of articles which have been the subject matter of investigation.</td>
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Section 18 allows the person or body of persons appointed to make any investigation under Section 15 or Section 15A to choose one or more persons possessing special knowledge of any matter relating to the investigation to assist him or it in holding the investigation. Such person or body of persons so appointed have been vested with all the powers of a Civil Court under the Code of Civil Procedure, 1908 for the purpose of taking evidence on oath and enforcing the attendance of witnesses and compelling the production of documents and material objects, and the person or body of persons shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

**Take-Over of Industrial Undertakings**

Chapter III-A of the Act consisting of Sections 18A, 18AA, 18B, 18C, 18D, 18E and 18F vest in the Central Government substantial powers to assume management or control of an industrial undertaking in certain cases. While Section 18A empowers the Central Government to take over an industrial undertaking whose affairs had
been investigated under Section 15, Section 18AA sets out the circumstances under which the Central Government can take over an industrial undertaking without any investigation.

**Take Over After Investigation**

Section 18A as stated above empowers the Central Government to take over the management of an industrial undertaking under certain circumstances.

Where the Central Government is of opinion that:

(a) an industrial undertaking to which directions have been issued in pursuance of Section 16 has failed to comply with such directions; or

(b) an industrial undertaking in respect of which an investigation has been made under Section 15 (whether or not any directions have been issued to the undertaking in pursuance of Section 16),

is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest, it may, by notified order, authorise any person or body of persons to take over the management of the whole or any part of the undertaking or to exercise in respect of the whole or any part of the undertaking, such functions of control as may be specified in the order.

Such notified order shall have effect for a period not exceeding five years as may be specified in the order, but may be extended by the Central Government for a period of 2 years at a time subject to a maximum of 12 years.

**Effect of Notified Order**

Section 18B provides that on the issue of a notified order under Section 18A authorising the taking over of the management of an industrial undertaking,

(1) All persons in charge of the management, including persons holding office as managers or directors of the industrial undertaking immediately before the issue of notified order, shall be deemed to have vacated their office as such.

(2) Any contract of management between the industrial undertaking and any director thereof holding office as such immediately before the issue of the notified order, shall be deemed to have terminated.

(3) The persons or body of persons authorised under Section 18A to take over management (i) shall take all such steps as may be necessary to take into his or their custody or control all the property, effects and actionable claims to which the industrial undertaking is or appears to be entitled, and all the property and effects of the industrial undertaking shall be deemed to be in the custody of such persons from the date of the notified order; (ii) shall be for all purposes, the directors of the industrial undertaking duly constituted under the Companies Act and shall alone, be entitled to exercise all the powers of the directors of the industrial undertaking, whether such powers are derived from the said Act or from the memorandum or articles of association of the industrial undertaking or from any other source; (iii) shall take such steps as may be necessary for the purpose of efficiently managing the business of the industrial undertaking and shall exercise such other powers and have such
other duties as may be prescribed; and (iv) shall, notwithstanding anything contained in the memorandum or articles of association of the industrial undertaking, exercise his or their functions in accordance with such directions as may be given by the Central Government so that they shall not have any power to give any other person any directions inconsistent with the provisions of any Act or instrument determining the functions of the authority carrying on the undertaking except in so far as may be specifically provided by the notified order.

Where any person/body of persons has been authorised to exercise any functions of control with respect to any industrial undertaking, the undertaking shall be carried on pursuant to any directions given by such authorised person(s) and any person having any function of management in relation to that undertaking shall comply with all such directions.

Contracts in Bad Faith to be Cancelled or Varied

Section 18C provides that the persons or body of persons authorised to take over the management, may, with the previous approval of the Central Government, make an application to any court having jurisdiction in this behalf for the purpose of cancelling or varying any contract or agreement entered into any time before the issue of the notified order under Section 18A, between the industrial undertaking and any other person. The court may, after satisfying itself in this behalf that such contract or agreement had been entered into in bad faith and is detrimental to the interests of the industrial undertaking, make an order cancelling or varying that contract or agreement (either unconditionally or subject to such conditions as it may think fit) and the contract or agreement shall have effect accordingly.

The question whether the temporary take-over of respondent company by the Central Government under Section 18A of the Act, constituted the company an instrumentality of the State and thus an authority within the meaning of Article 12 of the Constitution. The matter came for determination before the Calcutta High Court in the case of P.K. Bhattacharjee v. Indian Machinery Company Ltd. and others (1986) 3 Comp. LJ 75. The Court held that the provisions of takeover of an undertaking under Chapter IIIA of the Act did not indicate ‘deep and pervasive State control so as to constitute the undertaking an instrumentality of the State. The State does not acquire ownership of the undertaking; but only for a limited period assumes management and control of the undertaking which has either failed to comply with the directions issued under Section 16 or when an industrial undertaking is being managed in a manner detrimental to the scheduled industry or to public interest. Merely because control and management had been temporarily taken over under Section 18A of the Act, it cannot be said that the undertaking was an authority within the meaning of Article 12 of the Constitution.

Section 18D of the Act debars a person, who ceases to hold any office by reason of the above provisions, from any compensation for the loss of the office or for the premature termination of his contract of management. But the right of any such person to recover from the industrial undertaking moneys recoverable otherwise than by way of such compensation is not affected.
Section 18E of the Act provides that, notwithstanding anything contained in the Companies Act, or in the memorandum or articles of association of an undertaking taken over by the Central Government:

(a) it shall not be lawful for the shareholders of such undertaking or any other person to nominate or appoint any person to be a director of the undertaking;
(b) no resolution passed at any meeting of the shareholders of such undertaking shall be given effect unless approved by the Central Government;
(c) no proceeding for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any court except with the consent of the Central Government;
(d) subject to (a), (b) and (c) above and to other provisions contained in the Act and subject to such other exceptions, restrictions, and limitations, if any, as the Central Government may, by notification in the Official Gazette, specify in this behalf, the Companies Act shall continue to apply to such undertaking in the same manner as it applied thereto before the issue of the notified order under Section 18A.

The Central Government is empowered under Section 18F to cancel any order made under Section 18A either on an application made by the owner of the industrial undertaking or otherwise, if it is satisfied that the purpose of the order under Section 18A has been fulfilled or for any other reason it is not necessary that such order should remain in force. On cancellation of such order, the management or control of the undertaking shall vest in the owner of the undertaking.

Take-Over without Investigation

Section 18AA of the Industries (Development and Regulation) Act, 1951 empowers the Central Government to take over industrial undertakings without investigation under certain circumstances. Section 18AA of the Act empowers the Central Government to authorise, by a notified order, any person or body of persons to take-over the management of whole or part of any industrial undertaking and to exercise prescribed functions of control, provided the Government is satisfied on the basis of documentary or other evidences in its possession that

- the persons in charge of such industrial undertaking have, by reckless investments or creation of encumbrances on the assets of the industrial undertaking, or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured or produced in the industrial undertaking and that immediate action is necessary to prevent such a situation; or
- it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the company owning the industrial undertaking or for any other reason) and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the company owning the industrial undertaking and the condition of the plant and machinery of such undertaking are such that it is possible to restart the undertaking and such restarting is necessary in the interests of the general public.

Where a notified order is made taking over an industrial undertaking, the person or body of persons, having, for the time being in charge of the management or control
of the industrial undertaking, should forthwith make over the charge of management or control to the authorised person.

Such take over shall have effect for a period not exceeding five years. Where the Central Government is of the opinion that it is expedient in public interest that such notified order should continue to have effect after the expiry of the period of five years, it may from time to time issue directions for the continuance of such period, not exceeding two years at a time. However, the total period of such continuance after the initial period of five years, should not exceed twelve years.

The powers of Central Government to take over an industrial undertaking without investigation under Section 18AA does not however extend to an industrial undertaking owned by a company which is being wound up by or under the supervision of the court.

The power to take over without investigation is an extraordinary power in the hands of the Central Government and therefore, only the most extraordinary circumstances should justify the invoking of this power. Section 18AA is intended to confer power on the Central Government to enable it to take immediate steps, either as a preventive measure or in public interest without resorting to the procedure of investigation under Section 15. Action under this section can be taken only if the Central Government is satisfied with regard to the twin conditions specifically set out in the section.

Sub-section (1) of Section 18AA requires that the satisfaction of the Government in regard to the existence of the circumstances or conditions precedent, including the necessity of taking immediate action must be based on evidence in the possession of the Government. If the satisfaction of the Government in regard to the existence of any of the conditions specified in Section 18AA(1), is based on no evidence or on irrelevant evidence or on an extraneous consideration, it would vitiate the order of take over. Even where the statute conferring the discretionary power does not, in terms regulate or hedge around the formation of the opinion by the statutory authority in regard to the existence of preliminary jurisdictional facts with express checks, the authority has to form that opinion reasonably like a reasonable person. In Swadeshi Cotton Mills v. Union of India AIR (1981) SC 818, the Supreme Court held that in respect of such take overs without investigation, hearing at pre decisional stage must be given and the rule of audi alteram partem could not be dispensed with.

Section 18A and Section 18AA - Comparison

A comparison of the provisions of Sections 18A and 18AA reveals two main points of distinction namely, (i) action under Section 18A(1)(b) can be taken only after an investigation had been made under Section 15, whereas under Section 18AA(1)(a) or (b) action can be taken without such investigation; (ii) before taking action under Section 18A(1)(b), the Central Government has to form an opinion on the basis of the investigation conducted under Section 15 in regard to the existence of the objective fact namely, that the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest, whereas under Section 18AA(1)(a), the government has to satisfy itself that the persons incharge of the undertaking have brought about a situation likely to cause fall in production by committing any of the three kinds of acts specified in that provision.
The phrase highly detrimental to the scheduled industry or public interest under Section 18A is capable of being construed to cover a variety of facts or things which may be considered along with the manner of running the industry by the management. In contrast, the action under Section 18AA can be taken if the Central Government is satisfied with regard to the existence of the twin conditions specifically mentioned therein on the basis of evidence in its possession.

**Notice Before Passing an Order under Section 18AA Whether Necessary**

An important question of law arose in *Swadeshi Cotton Mills v. Union of India* (AIR 1981 S.C. 818; 1981 51 Comp. Cas. 210) as to whether the principle of natural justice of giving notice should be observed before passing an order under Section 18AA of the Act. In this case the appellant, a private company had only one undertaking in the year 1946, mainly a textile unit at Kanpur known as the *Swadeshi Cotton Mills*, Kanpur. Between 1956 and 1973 the company set up and/or acquired 5 further textile units at Pondicherry, Naini, Udaipur, Maunath Bhanjan and Rae Bareilly. Each of these six units or undertakings of the company was separately registered in accordance with the provisions of Section 10 of the I(D&R) Act. The company made considerable progress during the years 1957 to 1973. Between 1975 and 1978 the company created encumbrances on the fixed assets. In the accounting year 1976-77 one new encumbrance was created by the company on its fixed assets.

On April 13, 1978 the Government of India in exercise of its power under Section 18AA(1)(a) of the Act, passed an order by which it authorised the National Textile Corporation Ltd. to take over the management of the whole of the said industrial undertaking subject to certain conditions. The order of take over was challenged by the company by means of writ petition filed before the Delhi High Court. The Delhi High Court rejected the petition, thereupon the company appealed against the judgement of the Delhi High Court, to the Supreme Court. The questions for consideration of Supreme Court were (1) whether it was necessary to observe the rules of natural justice before issuing a notified order under Section 18AA, or enforcing a decision under Section 18AA and (2) whether the provisions of Section 18AA and/or Section 18F impliedly excluded rules of natural justice relating to prior hearing. The appeal was allowed but without quashing the order, the case was sent back to the Central Government with the direction that it shall, within a reasonable time, preferably within three months give a full, fair and effective hearing to the aggrieved owner of the undertaking, i.e., the company on all aspects of the matter including those touching the validity and/or correctness of the impugned order and/or action of take over and then after a review of all the relevant materials and circumstances including those obtained on the date of the impugned order, shall take such fresh decision, and/or such remedial action as may be necessary, just, proper and in accordance with law.

The salient features of the judgment are given below:

The principles of natural justice consist of two basic elements, namely (i) *audi alteram partem* (Opportunity of being heard) and (ii) *nemo debet esse judex in propria causa* (Nobody should be a judge in his own cause). Irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial, a duty to act fairly, that is, in consonance with the fundamental principles of substantive justice is generally implied, because the presumption is that in a democratic polity wedded to the rule of law, the State or the Legislature does not
intend that in the exercise of their statutory powers, its functionaries should act unfairly and unjustly.

It cannot be laid down as a general proposition that whenever a statute confers a power on an administrative authority and makes the exercise of that power conditional on the formation of an opinion by that authority in regard to the existence of an immediacy, its opinion in regard to that preliminary fact is not open to judicial scrutiny at all. While it may be conceded that an element of subjectivity is always involved in the formation of such an opinion, but, as was pointed out by the Supreme Court in Barium Chemicals case, the existence of the circumstances from which the inferences constituting the opinion, as the sine qua non for action, are to be drawn, must be demonstrable, and the existence of such circumstances, if questioned must be proved at least prima facie.

The expression 'immediate action' under Section 18AA(1) construed in the light of the marginal heading of the section, its context and the objects and reasons for enacting this provision only means without prior investigation under Section 15. Dispensing with the requirement of such prior investigation does not necessarily indicate an intention to exclude the application of the fundamental principles of natural justice or the duty to act fairly by affording to the owner of the undertaking likely to be affected, at the pre-decisional stage, wherever practicable, a fair hearing, adjusted, attuned and tailored to the exigency of the situation. The second reason for holding that the use of the word immediate does not necessarily and absolutely exclude the prior application of the audi alteram partem rule is that immediacy or urgency requiring swift action is a situational fact having a direct nexus with the likelihood of adverse effect on fall in production. Cases of extreme urgency where action under Section 18AA(1)(a) to prevent fall in production and consequent injury to public interest, brooks absolutely no delay, would be rare. In most cases where the urgency is not so extreme, it is practicable to adjust and strike a balance between the competing claims of hurry and hearing.

The audi alteram partem rule is a very flexible, malleable and adaptable concept of natural justice. To adjust and harmonise the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation. Thus in the ultimate analysis, the question (as to what extent and in what measure) this rule of fair hearing will apply at the pre-decisional stage will depend upon the degree of urgency, if any, evident from the facts and circumstances of the particular case.

The Court then found, as regards the Kanpur unit that it was closed for more than three months and there was no immediacy in relation to that unit which could absolve the government from the obligation of complying with the audi alteram partem rule at the pre-decisional or pre-takeover stage. As regards the other five units the court observed that the production remained fairly constant for two to three years preceding the takeover. Rather in some of the units an upward trend in production was discernible. Be that as it may, that likelihood of fall in production or adverse effect on production in these 5 units could not by any stretch of prognostication or fear of imagination, be said to be imminent, or so urgent that it could not permit the giving of even a minimal but real hearing to the company before taking over these units.

It was also observed that the power of cancellation under Section 18F can be
exercised only on two grounds specified therein and these grounds and the language in which they are couched are clear enough to show that the cancellation contemplated thereunder cannot have the effect of annulling, rescinding or obliterating the order of take-over with retrospective force. It is observed that the Act did not provide any adequate remedial hearing or right of redress to the aggrieved party even where his undertaking has been arbitrarily taken over on insufficient grounds. Rather the plight of the aggrieved owner is accentuated by the provision in Section 18D which disentitles him and other person whose offices are lost or whose contract of management was terminated as a result of the takeover, from claiming any compensation whatever for such loss or termination.

The Court thus concluded that a hearing should be given to the undertaking concerned before passing an order under Section 18AA. Observance of this fundamental principle is necessary if the courts and tribunals and the administrative bodies are to command public confidence in the settlement of disputes or in taking quasi-judicial or administrative decisions affecting civil rights or legitimate interests of the citizens.

Take-Over of Industrial Undertaking Owned by Company in Liquidation

Section 18FA provides that after the necessary investigations have been made under Section 15A if the Central Government is of the opinion that there are possibilities of running or restarting an industrial undertaking, and the Central Government is further satisfied that the industrial undertaking should be run for maintaining or increasing the production, supply or distribution of articles or class of articles relatable to the scheduled industry needed by the general public, it may make an application to the High Court praying for permission for appointment of any person or body of persons to take over the management or control of the whole or any part of the industrial undertaking. As soon as such an application is made by the Central Government, the High Court shall make an order empowering the Central Government to authorise any person or body of persons to take over the management of the industrial undertaking or to exercise such functions of control in relation to the whole or any part of the industrial undertaking for a period not exceeding five years. Any extension beyond this period is granted by the High Court upon an application made in this behalf by the Central Government for a period not exceeding two years at a time. It is to be noted that the total period of extension after the expiry of the initial period of five years should not exceed twelve years.

On the High Court making an order authorising the Central Government to take over the management, the Official Liquidator (or any other person having charge of the management or control of the undertaking) shall, on the direction of the High Court make over the management of such undertaking and thereupon the authorised person shall be deemed to be the Official Liquidator in respect of the industrial undertaking. Before making over the possession of the industrial undertaking to the authorised person, the Official Liquidator shall make a complete inventory of all the assets and liabilities of the industrial undertaking in the manner specified in Section 18FG of the Act and deliver a copy of such inventory to the authorised person.

On taking over the management of the industrial undertaking, the authorised person shall take immediate steps to so run the industrial undertaking as to ensure the maintenance of production. The authorised person may raise any loan for the purpose of running the industrial undertaking or the concerned part and may, for that
purpose create a floating charge on the current assets of the undertaking on such terms and conditions and subject to such limitations or restrictions as may be prescribed. Where the authorised person is of opinion that the replacement or repair of any machinery of the industrial undertaking is necessary for the purpose of efficient running of the industrial undertaking he shall on such terms and conditions and subject to such limitations or restrictions as may be prescribed, make the necessary replacement or repairs. The loans obtained by the authorised person shall be recovered from the assets of the industrial undertaking in the manner prescribed. The authorised person is empowered to employ such of the former employees of the industrial undertaking whose services came to be discharged by reason of the winding up of the company and every such person employed by the authorised person shall be deemed to have entered into a fresh contract of service with the company. The proceedings in the winding up of the company in so far as they relate to the undertaking whose management has been taken over by the authorised person shall, during the period of such management or control, remain stayed and in computing the period of limitation for the enforcement of any right, privilege, obligation or liability in relation to such undertaking or the concerned part, the period during which such proceedings remain stayed shall be excluded.

Cancellation of the Notified Order

Section 18F contains provisions for cancellation of the Notified Order issued under Section 18A. Section 18FD(3) further provides that the provisions of Section 18F are equally applicable to the Notified Order issued under Section 18AA and Section 18FA.

Preparation of Inventory of Assets and Liabilities, List of Members, etc.

Section 18FG requires the authorised person to prepare, soon after taking over the management of an industrial undertaking of a company under Section 18A or Section 18AA or Section 18FA, a complete inventory of (a) all the properties, movable and immovable, including lands, buildings, works, workshops, stores, instruments, plant, machinery, automobiles and other vehicles, stock of materials in the course of production, storage or transit, raw materials, cash balances, cash in hand, deposits in bank or with any other person or body or on loan, reserve funds, investments and book debts and all other rights and interests arising out of such property as were immediately before the date of taking over of the industrial undertaking, in the ownership, possession, power or control of the company, whether within or without India and all books of accounts, registers, maps, property and all other documents of whatever nature relating thereto; (b) all borrowings, liabilities and obligations of whatever kind of the company including liability on account of terminal benefits to its employees subsisting immediately before the said date; and (c) a separate list of members, list of creditors of such company showing separately the secured and the unsecured creditors, as on the date of taking over of the management of the industrial undertaking.

Power to Provide Relief to Certain Industrial Undertakings

Section 18FB of the Act contains provisions empowering the Central Government to make certain declarations in relation to an industrial undertaking, the management or control of which has been taken over under Sections 18A, 18AA or 18FA. In this context and with a view to prevent fall in the volume of production of any scheduled
industry, the Government may declare, by notified order, that

(1) all or any of the enactments mentioned in the Third Schedule to the Act shall not apply or shall apply with such adaptations whether by way of modification, addition or omission to such industrial undertakings as may be specified in the notified order. or

The enactments specified in the Third Schedule are

- The Industrial Employment (Standing Orders) Act, 1946
- The Industrial Disputes Act, 1947, and
- The Minimum Wages Act, 1948

(2) the operation of all or any of the contracts, assurances, properties, agreements, settlements, awards, standing orders or other instruments in force (to which such industrial undertaking or the company owning such industrial undertaking is a party which may be applicable to such industrial undertaking or company) immediately before the date of issue of such notified order shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable by such adaptation and in such manner as may be specified in the notified order.

It should be noted that while making any modification, addition etc. in the notified order, the policy of the said enactments shall not however be affected in any way. The notified order so issued shall remain in force in the first instance for a period of one year. The duration of the notified order may be further extended by a period not exceeding one year at a time. However, no such notified order shall remain in force after the expiry of the period for which the management of the industrial undertaking was taken over under Sections 18A/18AA/18FA; or for more than 8 years in the aggregate from the date of issue of the first notified order, whichever is earlier.

A notified order issued under the provisions of Section 18FB shall be effective notwithstanding anything to the contrary contained in any other law, agreement or instrument or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order. It is important to note that where the operation of certain contracts, assurances of properties, agreements, settlements, awards, etc. have been kept suspended or have been modified by the notified order, they shall remain so suspended or modified, and all the proceedings relating thereto pending before any court, tribunal, officer or other authority shall accordingly remain stayed or be continued subject to such adaptation, so that on the notified order ceasing to have effect the right, privilege, obligation, liability etc., remaining so suspended or modified shall become revived and enforceable; and any proceedings so remaining stayed shall be proceeded with from the stage at which the proceeding became stayed.

It is also provided that in computing the period of limitation for the purpose of enforcement of any right, privilege, obligation, etc. the period during which it remained suspended by virtue of the issue of the notified order under Section 18FB shall be excluded.
**Liquidation or Reconstruction of Companies**

Chapter IIIAC of the Act dealing with liquidation or reconstruction of companies requires the Central Government after the take over of management of an industrial undertaking or part thereof, to ensure that the purpose of the take over is being achieved. It is for this reason that Section 18FC of the Act confers powers on the Central Government to call upon the authorised person to submit a report on the affairs and working of the industrial undertaking whose management or control has been taken over under Sections 18A, 18AA or 18FA.

Section 18FD provides two alternatives to the Central Government in respect of receipt of the report from the authorised person. The Central Government can either decide to sell the undertaking as a running concern or it may decide to prepare a scheme for the reconstruction of the company.

The decision to sell the undertaking as a running concern may be taken by the Central Government on being satisfied that (a) in the case of the company owning the industrial undertaking, which is not being wound up by the High Court, its financial conditions and other circumstances are such that it is not in a position to meet the current liabilities out of its current assets and the interest of the general public makes it expedient to sell the undertaking as a running concern and also proceedings for winding up of the company by the High Court should be started simultaneously; (b) in the case of the undertaking concerned owned by a company and is being wound up by the High Court, its assets and liabilities are such that in the interests of its creditors and contributories, the industrial undertaking should be sold as running concern.

In terms of Section 18FD(2) the decision to prepare a scheme of reconstruction of the company owning the industrial undertaking may be ordered by the Central Government, if it is satisfied that (i) it is in the interest of the general public, or (ii) it is in the interest of the shareholders, or (iii) such a course of action is necessary to secure the proper management of the company owning the industrial undertaking. In case the scheme of reconstruction is to be prepared in relation to an undertaking owned by a company being wound up by or under the supervision of the High Court, prior permission of the High Court is to be obtained.

**Sale of Industrial Undertaking as Running Concern**

As noted earlier, when an industrial undertaking owned by a company is taken over under section 18A, or 18AA, or 18FA, the Central Government, under section 18FD, order the sale of the said undertaking as a running company or order for the preparation of a scheme of reconstruction. Where the Government decides the course of action as specified in Section 18FD(1), namely, sale of the undertaking, then the following provisions of section 18FE would apply:

(i) The decision of the Government to sell the undertaking as a running concern shall be deemed to be a ground specified in Section 433 of the Companies Act under which the company may be wound up by the High Court.

(ii) The authorised person shall present an application to the High Court for winding up as soon as the decision specified in Section 18FD(1)(a) has been taken.
(iii) Where an application has been presented as above, the High Court shall order the winding up of the company and shall appoint the authorised person as the official liquidator in relation to that undertaking.

(iv) Where the decision to sell the undertaking as a running concern is taken under Section 18FD(1)(b), the Central Government shall cause a copy of its decision to be laid before the High Court.

Until the industrial undertaking is sold or purchased, the authorised person shall continue to function as the official liquidator and thereafter the official liquidator appointed by the Central Government under Section 448 of the Companies Act, 1956 shall take over and function as the official liquidator.

Further, it is necessary for the authorised person to report to the Central Government as to what should be the reserve price for the sale of the industrial undertaking as a running concern. In making the report, the authorised person shall have regard to (i) the financial condition of the undertaking concerned, on the date of passing of the order under Section 18FD(1), disclosed in its books of account and as disclosed in its balance sheet and profit and loss account during a period of five years immediately preceding that date; (ii) the condition and nature of the plant, machinery, instruments and other equipment from the point of view of their suitability for profitable use in running of the industrial undertaking; (iii) the total amount of liability on account of secured and unsecured debts including overdrafts, if any, drawn on banks, liabilities on account of terminal benefits to the employees and other borrowings and liabilities of the company; and (iv) other relevant factors including the fact that the industrial undertaking will be sold free from all encumbrances.

Notice of the reserve price should be given to the members and creditors of the company to enable them to make representations to the Central Government through the authorised person. The Central Government shall after considering the representations received and the report of the authorised person, determine the reserve price. Thereafter the authorised person, with the permission of the High Court, invite tenders from the public in the manner determined by the High Court for the sale of the undertaking. The sale should be effected in favour of the highest bidder provided the price offered is not less than the reserve price. The High Court shall not refuse the permission to allow invitation to tenders if it is satisfied that the company is not in a position to meet its current liabilities out of its current assets. Where an offer equal to the reserve price is not received, the undertaking would be purchased by the Central Government at the reserve price. The amount realised from the sale of the industrial undertaking as a running concern together with any amount realised from any contributory should be utilised in accordance with the provisions of the Companies Act, 1956 in discharging its liabilities and distributing the balance, if any, to its members. In all other respects the provisions of the Companies Act, 1956 would apply relating to the winding up of the company. On sale of the undertaking, there shall be transferred to and vested in the purchaser, free from all encumbrances, all such assets existing at the time of the sale or purchase.

In case of any company in respect of which an order under Section 18FD has been made, no suit or other legal proceeding shall be instituted or continue against the company except with the previous permission of the Central Government or any officer or authority authorised by the Government in this behalf.
Reconstruction of the Company Owning the Industrial Undertaking

As already stated, on receipt of the report under Section 18FC from the authorised person the Central Government has got the powers either to liquidate the company whose management has been taken over and sell the undertaking as a running concern or reconstruct the company. The power to reconstruct the company is specified in Sub-section (2) of Section 18FD. The scheme of the reconstruction may be ordered to be prepared only where the Government is satisfied that it is in the interest of the general public or it is in the interest of the shareholders or it is necessary to secure the proper management of the company owning the industrial undertaking. Section 18FF deals with certain provisions in connection with preparation of the scheme of reconstruction of the company owning the industrial undertaking the management of which has been taken over under the provisions of the Act. The Central Government as a first step shall cause to be prepared by the authorised person a scheme of reconstruction of the company containing the following:

(a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, the liabilities, duties and obligations of the company on its reconstruction;

(b) any change in the board of directors, or the appointment of a new board of directors of the company on its reconstruction and the authority by whom, the manner in which and the other terms and conditions on which such change or appointment shall be made and in the case of appointment of a new board of directors or of any director, the period for which such an appointment shall be made;

(c) the vesting of controlling interest, in the reconstructed company in the Central Government, either by the appointment of additional directors or by the allotment of additional shares;

(d) the alteration of the memorandum and articles of association of the company, on its reconstruction, to give effect to such reconstruction;

(e) subject to the provisions of the scheme, the continuation by or against the company, on its reconstruction, of any action or proceedings pending against the company immediately before the date of its reconstruction;

(f) the reduction of the interest or rights which the members and creditors have in or against the company before its reconstruction to such extent as the Central Government may consider necessary in the interests of the general public or in the interest of the members and creditors or for the maintenance of the business of the company;

(g) the payment in cash or otherwise to the creditors in full satisfaction of their claim in respect of their interest or rights in or against the company before its reconstruction, or where their interest or rights in or against the company has or have been reduced in respect of such interest, or right as so reduced;

(h) the allotment to the members of the company for shares held by them therein before its reconstruction [whether their interest in such shares has been reduced or not], of shares in the company on its reconstruction and where it is not possible to allot shares to any members, the payment in cash to those
members in full satisfaction of their claim in respect of their interest in shares in the company before its reconstruction, or where such interest has been reduced, in respect of their interest in shares as so reduced;

(i) the offer by the Central Government to acquire by negotiation with the members of the company their respective shares on payment in cash to those members who may volunteer to sell their shares to the Central Government in full satisfaction of their claim(i) in respect of their interest in shares in the company before its reconstruction, or (ii) where such interest has been reduced, in respect of their interest in shares as so reduced;

(j) the conversion of any debentures issued by the company after taking over of the management of the company under Section 18A or Section 18AA or Section 18FA or of any loans obtained by the company after that date or of any part of such debentures or loans, into shares in the company and the allotment of those shares to such debentureholders or creditors, as the case may be;

(k) the increase of the capital of the company by the issue of new shares and the allotment of such new shares to the Central Government;

(l) the continuance of the services of such of the employees of the company as the Central Government may specify in the scheme in the company itself, on its reconstruction, on such terms and conditions as the Central Government thinks fit;

(m) where any employees of the company whose services have been continued have, by notice in writing given to the company at any time before the expiry of one month next following the date on which the scheme is sanctioned by the High Court, intimated their intention of not becoming employees of the company, on its reconstruction, the payment to such employees and to other employees whose services have not been continued on the reconstruction of the company, of compensation, if any to which they are entitled under the Industrial Disputes Act, 1947, and such pension, gratuity, provident fund and other retirement benefits ordinarily admissible to them under the rules or authorisations of the company immediately before the date of its reconstruction;

(n) any other terms and conditions for the reconstruction of the company;

(o) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction of the company shall be fully and effectively carried out.

A copy of the scheme, as approved by the Central Government shall be sent in draft to the company, to the registered trade union if any, of which the employees of the company are members and to the creditors thereof for suggestions and objections, if any, within such period as the Central Government may specify for this purpose. The Central Government may make such modifications, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the company, the registered trade union of which the employees of the company are members and any member or creditor of the company. The scheme shall thereafter be placed before the High Court for its sanction and the Court, if satisfied that the scheme is in the interests of the general public or in interests of the
shareholders or for securing the proper management of the company and that the scheme is designed to be fair and reasonable to the members and creditors of the company, may, after giving a reasonable opportunity to the company and to its members and creditors of showing cause, sanction the scheme without any modification or with such modifications as it may consider necessary. The scheme sanctioned by the High Court, shall come into force on such date as the Court may specify in this behalf.

The sanction accorded by the High Court shall be conclusive evidence that all the requirements of law relating to the reconstruction of the company have been complied with. A copy of the sanctioned scheme certified by the High Court to be a true copy thereof, shall, in all legal proceedings (whether original or in appeal or otherwise), be admitted as evidence to the same extent as the original scheme. On and from the date of the coming into operation of the scheme or any provision thereof, the scheme or such provision shall be binding on the company and also on all the members and other creditors and employees of the company and on any other person having any right or liability in relation to the company. On the coming into operation of the scheme or any provision thereof, the authorised person shall cease to function, and the management of the reconstructed company shall be assumed by the Board of directors as provided in the scheme. Copies of the scheme shall be laid before each House of Parliament as soon as may be, after the scheme has been sanctioned by the Court.

**Power to Control Supply, Distribution, Price, etc. of Certain Articles**

Chapter IIIB containing Section 18G deals with powers of the Central Government to control the supply, distribution and price, etc. of certain articles. For securing the equitable distribution and availability at fair prices of any article or class of articles relatable to any scheduled industry, the Central Government may, by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein. Without prejudice to the generality of these powers, notified order made thereunder may provide for:

- controlling the prices at which any such article or class thereof may be bought or sold;
- regulating by licences, permits or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any such article or class thereof;
- prohibiting or withholding from sale of any such article or class thereof ordinarily kept for sale;
- requiring any person manufacturing, producing or holding in stock any such article or class thereof to sell the whole or part of the articles so manufactured or produced during a specified period or to sell the whole or a part of the articles so held in stock, to such person or class of persons and in such circumstances as may be specified in the order;
- regulating or prohibiting any class of commercial or financial transactions relating to such article or class thereof which in the opinion of the authority making the order, if unregulated are likely to be detrimental to public interest;
- requiring persons engaged in the distribution and trade and commerce in any such article or class thereof to mark the articles exposed or intended
for sale with the sale price or to exhibit at some easily accessible place on the premises the price-list of articles held for sale and also to similarly exhibit on the first day of every month, or at such other times as may be prescribed, a statement of the total quantities of any such articles in stock,

- collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters; and

- any incidental or supplementary matters, including in particular, the grant or issue of licences, permits or other documents and charging of fees therefor. No such order shall be called in question in any Court.

**General Prohibition of Taking Over Management or Control of Industrial Undertakings by State Government**

Section 20 of the Act imposes general prohibition on any State Government or a local authority to take over the management or control of any industrial undertaking under any law for the time being in force which authorises any such Government or local authority so to do.

**Power to Exempt in Special Cases**

Under Sub-section (1) of Section 29B, the Central Government may, by notification in the Official Gazette, exempt any industrial undertaking or class of industrial undertakings or any scheduled industry or class of Scheduled Industries as may be specified, from all or any of the provisions of the Act or Rule or Order made thereunder having due regard to the smallness of the number of workers employed or the amount invested in any industrial undertaking or the desirability of encouraging small industrial undertakings generally or the stage of development of any scheduled industry and is further convinced that it would not be in public interest to apply all or any of the provisions of the Act to such undertakings.

**Constitution of Advisory Committee**

In pursuance of Sub-section (2B) of Section 29B and in supersession of the notification of the government of India in the Ministry of Industry (Department of Industrial Policy and Promotion) Number SO 633(E), dated 12th July, 1995 the Central Government has Constituted an Advisory Committee consisting of the following persons, for giving its expert advise in the matter of determining the nature of any article or class of articles that may be reserved for production by the ancillary on small scale industrial undertakings, namely

1. Secretary to the Government of India, Ministry of Small Scale Industries and Agro and Rural Industries—Chairman.
2. Secretary to the Government of India, Deptment of Industrial Policy and Promotion, Ministry of Commerce and Industry—Member.
3. Advisor, Village and Small Industries Division, Planning Commission—Member.
4. Secretary to the Government of India, Department of Commerce, Ministry of Commerce and Industry—Member.
5. Additional Secretary to the Government of India and Development Commission, Small Scale Industries—Member Secretary.

The advisory Committee shall normally consider, before communicating its
recommendations to the Central Government: (a) the nature of any article or class of articles which may be produced economically by ancillary or small scale undertakings; (b) the level of employment likely to be generated by the production of such article or class of articles by the ancillary or small scale undertakings; (c) the possibility of encouraging and diffusing entrepreneurship in industry; (d) the prevention of concentration of economic power to the common detriment; and (e) such other matters as it may think fit.

Under Sub-section (2A) the Central Government may, after considering the recommendations of the Advisory Committee, if satisfied that it is necessary to do so, for the development and expansion of ancillary or small scale industrial undertakings, direct by a notified order that any article or class of articles specified in the First Schedule to the Act shall, on and from such date as may be specified in the notified order be reserved for exclusive production by the small scale or ancillary industrial undertaking as the case may be.

**Penalties**

The contravention or attempts to contravene or abetment of the contravention, by any person, of the following would be punishable under Section 24 of the Act:

1. Provisions of Section 10(1)—failure to get an existing industrial undertaking registered.
2. Provisions of Section 10(4)—failure to produce the certificate of registration issued prior to 7.2.1974 [date of coming into force of the Industries (Development and Regulation) Amendment Act, 1973] for entering therein the productive capacity.
3. Provisions of Section 11(1)—failure to obtain industrial licence for setting up a new industrial undertaking.
4. Provisions of Section 11(A)—failure to get a licence for manufacture of a new article.
5. Provisions of Section 13(1)—failure to obtain a C.O.B. licence, permission for changing location, effecting substantial expansion etc.
6. Provisions of Sub-sections (2A), (2D), (2F) and (2G) of Section 29B. [These relate to manufacture of reserved items by other than small scale units].
7. Failure to comply with the directions issued under Section 16 after an investigation.
8. Failure to comply with the directions issued under Section 18B(3) by the person/body authorised to take over the management of an industrial undertaking.
9. Any order made under Section 18G in order to control supply, distribution price etc. of certain articles.

These contraventions attract imprisonment upto six months or fine extending upto Rs. 5,000 or both. In case of continuing contravention, an additional fine which may extend upto Rs. 100 for every day of continuance of such contravention after conviction for the first such contravention, is also leviable.

If the person contravening any of the said provisions is a company, every person who at the time the offence was committed was incharge of, and was responsible to
the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. But such person shall not be liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Notwithstanding anything contained herein, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. The expression Company herein means any body corporate and includes a firm or other association of individuals; and director in relation to a firm, means a partner in the firm.

Penalty for False Statement

Section 24A provides that, if any person(a) when required by this Act or by any order under this Act to make any statement or furnish any information, makes any statement or furnishes any information which is false in any material particular and which he knows or has reasonable cause to believe to be false or does not believe to be true; or (b) makes any such statement as aforesaid in any book, account, record, declaration, return or other document which he is required by any order made under this Act to maintain or furnish, he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to two thousand rupees, or with both.

Cognizance of Offences

Section 27 provides that no Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code.

Certain Other Important Provisions

Section 25 empowers the Central Government to delegate any of its powers under the Act (except its power under Sections 18A, 18AA and 18FA) to any officer or authority (such as the Development Council or the State Government). Where any power has been delegated to the State Government, the State Government may further delegate it to any officer or authority subordinate to it.

The Central Government has been empowered under Section 26 to issue directions to any State Government as to the execution in the State of any of the provisions of the Act or of any order or direction made thereunder.

Section 28 provides that where any person is prosecuted for contravening any order made under Section 18G which prohibits him from doing an act or being in possession of a thing without lawful authority or without a permit, licence or other document, the burden of proving that he has such authority, permit, licence or other document shall be on him.

Section 29 provides that no court inferior to that of a presidency magistrate or a magistrate of first class shall try any offence punishable under the Act.
Section 29A contains a special provision regarding fines. This section provides that notwithstanding anything contained in Section 32 of the Code of Criminal Procedure 1898 (now Cr. P.C. 1973), it shall be lawful for any magistrate of the First class and for any presidency magistrate to pass a sentence of fine exceeding one thousand rupees on any person convicted of any offence under the Act.

Registration and Licensing of Industrial Undertaking Rules, 1952

The study about Industrial Licensing as contained in the Industries (Development and Regulation) Act, 1951 would be incomplete without a brief study of the provisions of Registration and Licencing of Industrial Undertakings Rules, 1952 (RLIU Rules) which specify the procedure for making application for Registration, Industrial Licensing etc.

Under the Rules, an application for registration of an existing industrial undertaking has to be made to the Ministry of Industry, Department of Industrial Development (now Ministry of Commerce and Industry, Department of Industrial Policy & Promotion), Government of India, New Delhi, atleast 3 months before the expiry of the period fixed under Section 10(1) of the IDRA in relation to that undertaking. An application which is not made in time may be entertained by the Ministry if it is satisfied that there was sufficient cause for not making the application in time. Each application has to be accompanied by a crossed demand draft for Rs. 2,500 drawn on the State Bank of India, Nirman Bhawan in favour of Pay and Accounts Officer, Ministry of Commerce and Industry (Department of Industrial Policy & Promotion). On receipt of the application, the receiving officer shall note thereon the date of its receipt and send it to the applicant an acknowledgement stating the date of receipt. The Ministry or any authority appointed by it may require the applicant to furnish additional information considered necessary for the purpose of registration.

An application for the licence or permission for the establishment of a new industrial undertaking or any substantial expansion of, or the production or manufacture of any new article in, an industrial undertaking should be made before taking any of the following steps:

(i) raising from the public any part of the capital required for the undertaking or expansion or the production or manufacture of new article;

(ii) commencing the construction of any part of the factory building for the undertaking or expansion or the production or manufacture of new article;

(iii) placing order for any part of the plant and machinery required for the undertaking or expansion or the production or manufacture of the new article.

An application for a licence or permission for changing the location of the whole or any part of an industrial undertaking which has been registered or in respect of which a licence or permission has been issued, should be made before: (1) Acquisition of land or the construction of premises for the purpose of housing the industrial undertaking at the proposed new site. (2) Dismantling of any part of the plant and machinery at the existing site. Each application has to be accompanied by a crossed demand draft of Rs. 2,500/- drawn on the State Bank of India, Nirman Bhawan, New Delhi in favour of Pay and Accounts Officer Ministry of Commerce and Industry. As in the case of an application for registration, on receipt of the application
an acknowledgement would be sent to the party, and if the Ministry calls for any additional information the applicant has to furnish the same within the specified time.

Applications relating to extension of the period of validity of an industrial licence or to the issue of a carry on business licence or to diversification within the existing licensed capacity in respect of such scheduled industries as may be decided by the Government having regard to the maximisation of production, better utilisation of existing plant and machinery and other factors, could be disposed of by the Ministries concerned without reference to any Committee. Other applications would be referred to Committee constituted by the Government consisting of members drawn from the Ministries of the Central Government dealing with industries specified in the First Schedule to the IDRA, Finance, Corporate Affairs and Science and Technology and also the Planning Commission. The Committee has the power to co-opt one or more representative from the Central Government or the concerned State Government.

Where an application has been referred to the above Committee it would make an investigation and submit its report to the Ministry of Commerce and Industry for its consideration and where it decides that the licence or permission as the case may be, should be granted it shall inform the applicant accordingly not later than three months from the date of receipt of the application or the date on which the additional information was furnished whichever is later. If the Ministry considers it essential to attach certain conditions to the licence or permission, it has to give an opportunity to the applicant to state his case. Where a licence or permission is refused, reasons therefor have to be stated.

Any owner of an industrial undertaking in respect of which a licence has been granted who desires any variance or amendment in the licence, has to apply to the Ministry of Commerce and Industry, giving reasons for such amendment.

Every owner of an industrial undertaking in respect of which a license or permission has been granted should send every half year ending on 30th June and 31st December commencing from date of grant of licence or permission as the case may be, till such time as the industrial undertaking commences production, a return in Form-G with five spare copies to the Ministry of Commerce and Industry, or any authority appointed by it. This return has to be submitted within one month after the expiry of that half year. Where any condition has been attached to a licence or permission to the effect that certain steps should be taken within a period specified therein, every owner of such industrial undertaking has to send a return in Form-G with five spare copies showing the progress made as regards the steps to be taken. This return has to be submitted within a period of 7 days from the expiry of the period specified.

If there is any change in the name of a registered industrial undertaking or an undertaking in respect of which a licence or permission has been granted, the owner thereof should, within 14 days from the date of such change, give a written notice about the change to the Ministry of Commerce and Industry forwarding also the Registration Certificates for necessary endorsement. If there is any change in the owner of a registered undertaking or an undertaking in respect of which a licence or permission has been granted, the new owner should give a written notice about the change within 14 days to the Ministry of Commerce and Industry and also forward the registration certificate for endorsing the change.
If by reason of (i) reduction in the number of workers employed; (ii) discontinuation of the production of articles falling within the scope of the Act; or (iii) any other reason, all or any of the provisions of the Act become inapplicable to a registered industrial undertaking or an undertaking in respect of which a licence or permission has been granted, and continued to be so inapplicable for a period of six months, the owner thereof should, within a period of 14 days of the expiry of a period of six months, give notice in writing of the fact to the Ministry of Commerce and Industry. If a registered industrial undertaking or an undertaking in respect of which a licence or permission has been granted, has been closed for a period exceeding 30 days, the owner thereof shall give a notice in writing to the Ministry of Commerce and Industry within 7 days of the expiry of the period of 30 days. If any decision has been taken by a competent authority that the registered industrial undertaking or an industrial undertaking in respect of which a licence or permission has been granted shall be liquidated, the owner thereof should give a notice in writing to the Ministry of Commerce and Industry within 14 days from the date of such decision and also return the Registration Certificate or the licence.

Where a Registration Certificate or a permission granted is lost, destroyed or mutilated, a duplicate copy may be granted on receipt of a Crossed Demand Draft of Rs. 25 in favour of the ‘Pay and Accounts Officer’, Ministry of Commerce and Industry.

It may also be noted that the owner of an industrial undertaking in respect of which a licence or permission has been granted is eligible for the allotment of controlled commodities and issue of licence for import of goods required for the construction or operation or for both on preferential terms.

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**LESSON ROUND UP**

- Industrialization is a major objective of developing countries as a means to the attainment of higher levels of economic well-being of the people. Advancement of science and technology provides the wherewithal to achieve faster industrial growth.

- The object of Industries (Development and Regulation) Act is to provide to the Central Government means of implementing the Industrial Policy. It seeks to regulate the deployment of material resources of the community according to the norms laid down in the Policy and is thus an instrument for its implementation.

- An Industrial licence is a written permission from the Government to an industrial undertaking to manufacture specified articles, listed in the First Schedule and includes particulars of industrial undertaking, its location, articles to be manufactured, the capacity on the basis of maximum utilisation of plant and machinery etc.
- Industries (Development and Regulation) Act empowers the Central Government to cause an investigation to be made into scheduled industries or industrial undertakings.
- Industries (Development and Regulation) Act, 1951 empowers the Central Government to take over industrial undertakings without investigation under certain circumstances.
- The principles of natural justice consist of two basic elements, namely (i) audi alteram partem (Opportunity of being heard) and (ii) nemo debet esse judex in propria causa (Nobody should be a judge in his own cause).
- Court does not take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code.

**SELF TEST QUESTIONS**

1. Discuss in detail the objective and scope of the Industries (Development and Regulation) Act, 1951.

2. Briefly discuss the Circumstances in which the Central Government can assume management or control of an industrial undertaking.

3. What do you mean by 'New Article' under the Act?

4. What is an industrial licence? Under what circumstances an industrial licence can be revoked?

5. List out any five industries specified in First Schedule of the Act.
SECTION II
THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006

LEARNING OBJECTIVES
The objective of this study lesson is to enable the students to understand
- Micro, Small and Medium Enterprise
- National board for Micro, Small and Medium Enterprises
- Advisory Committee
- Memorandum of Micro, Small and Medium Enterprise
- Delayed Payment to Micro and Small Enterprise
- Facilitation Council
- Closure of business of Micro, Small and Medium Enterprise
- Penalty for contravention

Introduction
The role of micro, small and medium enterprises (MSMEs) in the economic and social development of the country is well established. The MSME sector is a nursery of entrepreneurship, often driven by individual creativity and innovation. This sector contributes 8 per cent of the country’s GDP, 45 per cent of the manufactured output and 40 per cent of its exports. The MSMEs provide employment to about 60 million persons through 26 million enterprises. The labour to capital ratio in MSMEs and the overall growth in the MSME sector is much higher than in the large industries. The geographic distribution of the MSMEs is also more even. Thus, MSMEs are important for the national objectives of growth with equity and inclusion.

The MSME sector in India is highly heterogeneous in terms of the size of the enterprises, variety of products and services produced and the levels of technology employed. While one end of the MSME spectrum contains highly innovative and high growth enterprises, more than 94 per cent of MSMEs are unregistered, with a large number established in the informal or unorganized sector. Besides the growth potential of the sector and its critical role in the manufacturing and value chains, the heterogeneity and the unorganised nature of the Indian MSMEs are important aspects that need to be factored into policy making and programme implementation.
The Government has enacted the Micro, Small and Medium Enterprises Development Act, 2006 w.e.f. October 2, 2006. The Act provides for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.

DEFINITIONS

**Appointed Day**

Section 2(b) of the Act defines the term appointed day as to mean the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.

**Enterprise**

Section 2(c) of the Act defines the term Enterprise as an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (IDRA) or engaged in providing or rendering of any service or services.

**Medium Enterprise**

The term Medium Enterprise has been defined under Section 2(g) of the Act as to mean an enterprise classified as such under sub-clause (iii) of clause (a) or sub-clause (iii) of clause (b) of Sub-section (1) of Section 7. Section 7 deals with the classification of enterprises.

**Micro Enterprise**

Micro Enterprise under Section 2(h) has been defined to mean an enterprise classified as such under sub-clause (i) of clause (a) or sub-clause (i) of clause (b) of Sub-section (1) of Section 7.

**Small Enterprise**

Small Enterprise under Section 2(m) of the Act means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of Sub-section (1) of Section 7.

**Supplier**

The term supplier defined under Section 2(n) of the Act means a micro or small enterprise, which has filed a memorandum with the authority referred to in Sub-section (1) of Section 8, and includes,—

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956;

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956;
(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises.

NATIONAL BOARD FOR MICRO, SMALL AND MEDIUM ENTERPRISES

Section 3 empowers the Central Government to establish National Board for Micro, Small and Medium Enterprises with its head office at Delhi and consisting of –

(a) the Minister in charge of the Ministry or Department of the Central Government having administrative control of the micro, small and medium enterprises to be the ex officio Chairperson of the Board;

(b) the Minister of State or a Deputy Minister, if any, in the Ministry or Department of the Central Government having administrative control of the micro, small and medium enterprises to be ex officio Vice-Chairperson of the Board. Where there is no such Minister of State or Deputy Minister, such person as may be appointed by the Central Government to be the Vice-Chairperson of the Board;

(c) six Ministers of the State Governments having administrative control of the departments of small scale industries or, as the case may be, micro, small and medium enterprises, to be appointed by the Central Government to represent such regions of the country as may be notified by the Central Government in this behalf, ex officio;

(d) three Members of Parliament of whom two shall be elected by the House of the People and one by the Council of States;

(e) the Administrator of a Union territory to be appointed by the Central Government, ex officio;

(f) the Secretary to the Government of India in charge of the Ministry or Department of the Central Government having administrative control of the micro, small and medium enterprises, ex officio;

(g) four Secretaries to the Government of India, to represent the Ministries of the Central Government dealing with commerce and industry, finance, food processing industries, labour and planning to be appointed by the Central Government, ex officio;

(h) the Chairman of the Board of Directors of the National Bank, ex officio;

(i) the chairman and managing director of the Board of Directors of the Small Industries Bank, ex officio;

(j) the chairman, Indian Banks Association, ex officio;

(k) one officer of the Reserve Bank, not below the rank of an Executive Director to be appointed by the Central Government to represent the Reserve Bank;

(l) twenty persons to represent the associations of micro, small and medium enterprises, including not less than three persons representing associations of women's enterprises and not less than three persons representing associations of micro enterprises, to be appointed by the Central Government;

(m) three persons of eminence, one each from the fields of economics, industry and science and technology, not less than one of whom shall be a woman, to
be appointed by the Central Government; and

(n) two representatives of Central Trade Union Organisations, to be appointed by the Central Government; and

(o) one officer not below the rank of Joint Secretary to the Government of India in the Ministry or Department of the Central Government having administrative control of the micro, small and medium enterprises to be appointed by the Central Government, who shall be the Member-Secretary of the Board, ex officio.

Functions of Board

Section 5 empowers the Board subject to the general directions of the Central Government to, perform all or any of the following functions, namely:

(a) examine the factors affecting the promotion and development of micro, small and medium enterprises and review the policies and programmes of the Central Government in regard to facilitating the promotion and development and enhancing the competitiveness of such enterprises and the impact thereof on such enterprises;

(b) make recommendations on matters referred to above or on any other matter referred to it by the Central Government which, in the opinion of that Government, is necessary or expedient for facilitating the promotion and development and enhancing the competitiveness of the micro, small and medium enterprises; and

(c) advise the Central Government on the use of the Fund or Funds constituted under Section 12.

Classification of enterprises

Section 7 empowers the Central Government to classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the IDRA as—

(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;

(ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(b) in the case of the enterprises engaged in providing or rendering of services, as—

(i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;

(ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or
(iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

It has been clarified that the cost of pollution control, research and development, industrial safety devices and such other items as may be specified shall not be included in calculating the investment in plant and machinery.

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Advisory Committee

Section 7(2) empowers the Central Government to constitute an Advisory Committee consisting of the following members, namely:

(a) the Secretary of the Ministry or Department of the Central Government
having administrative control of the small and medium enterprises as the Chairperson, ex officio;

(b) not more than five officers of the Central Government possessing necessary expertise in matters relating to micro, small and medium enterprises as members, ex officio;

(c) not more than three representatives of the State Governments, as members, ex officio; and

(d) one representative each of the associations of micro, small and medium enterprises, as member, ex officio.

The Member-Secretary of the Board shall also be the ex officio Member-Secretary of the Advisory Committee. The Central Government has been put under obligation to obtain the recommendation of the Advisory Board before classifying any class or classes of enterprises.

Functions of Advisory Committee

(1) To examine the matters referred to it by the Board in connection with any subject referred to in Section 5 and furnish its recommendations to the Board.

(2) To advise Central Government on any of the matters specified in Sections 9, 10, 11, 12 or 14 of Chapter IV, dealing with measures for promotion, development and enhancement of competitiveness of micro, small and medium enterprises. Section 9 deals with measures for promotion and development, Section 10 credit facilities, Section 11 procurement preference poling, Section 12 funds and Section 14 deals with administration and utilization of funds.

(3) To advise the State Government on any of the matters specified in the rules made under Section 30. Section 30 empowers the State Government to make rules in respect of the composition of the Micro and Small Enterprises Facilitation Council, the manner of filing vacancies of the members and the procedure to be followed in the discharge of their functions by the members of the Micro and Small Enterprises facilitation Council under Sub-section (3) of Section 23.

(4) To communicate its recommendations or advice to the Central Government or, State Government or the Board after considering the following:

(a) the level of employment in a class or classes of enterprises;

(b) the level of investments in plant and machinery or equipment in a class or classes of enterprises;

(c) the need of higher investment in plant and machinery or equipment for technological upgradation, employment generation and enhanced competitiveness of the class or classes of enterprises;

(d) the possibility of promoting and diffusing entrepreneurship in a micro, small or medium enterprise; and

(e) the international standards for classification of small and medium enterprises.
Memorandum of micro, small and medium enterprises

Any person who intends to establish a micro or small enterprise, may, at his discretion, or a medium enterprise engaged in providing or rendering of services may, at his discretion; or a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the IDRA, is required to file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government or the Central Government (Section 8).

However, a person who has established before the commencement of the Act a small scale industry and obtained a registration certificate, may, at his discretion; and an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to IDRA having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and has filed an Industrial Entrepreneur's Memorandum is required to file the memorandum with the specified authority within one hundred and eighty days from the commencement of the Act.

MEASURES FOR PROMOTION, DEVELOPMENT AND ENHANCEMENT OF COMPETITIVENESS

Promotion and Development

Section 9 empowers the Central Government to specify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises, particularly of the micro and small enterprises. These measures may include development of skill in the employees, management and entrepreneurs, provisioning for technological upgradation marketing assistance or infrastructure facilities and cluster development of such enterprises with a view to strengthening backward and forward linkages.

Credit facilities

Section 10 stipulates that the policies and practices in respect of credit to the micro, small and medium enterprises should be progressive and such as may be specified in the guidelines or instructions issued by the Reserve Bank to ensure timely and smooth flow of credit, minimise the incidence of sickness and enhance the competitiveness of such enterprises.

Procurement preference policy

With a view to facilitating promotion and development of micro and small enterprises, section 11 requires the Central Government or the State Government to notify preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises.

Funds

Section 12 provides for the constitution of one or more Funds and to credit thereto any grants made by the Central Government. Section 13 obliges the Central
Government to credit to the Fund or Funds by way of grants such sums of money as may be considered necessary. Section 14 empowers the Central Government to administer the Fund or Funds in the prescribed manner.

Section 14(2) stipulates that the Fund or Funds should be utilised exclusively for the specified measures. Section 14(3) casts on the Central Government the responsibility for the coordination and ensuring timely utilisation and release of sums in accordance with prescribed criteria.

**DELAYED PAYMENTS TO MICRO AND SMALL ENTERPRISES**

**Liability of buyer to make payment**

Section 15 provides that where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day. However, in no case the period agreed upon between the supplier and the buyer in writing should exceed forty-five days from the day of acceptance or the day of deemed acceptance.

**What do you mean by the day of acceptance?**

*Explanation to Section 2(b) (i) of the MSMED Act, 2006 defines "the day of acceptance" as to mean the day of the actual delivery of goods or the rendering of services; or where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier.*

**What do you mean by the day of deemed acceptance?**

*Explanation to Section 2(b) (i) of the MSMED Act, 2006 defines "the day of deemed acceptance" to mean, where no objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services.*

**Payment of Interest**

Section 16 provides that in case the buyer fails to make payment of the amount to the supplier, the buyer, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force should pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.
Reference to Micro and Small Enterprises Facilitation Council

In the case of dispute regarding payment of any amount section 18 entitles any of the parties to the dispute to make a reference to the Micro and Small Enterprises Facilitation Council. The Council on receipt of a reference either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation in terms of sections 65 to 81 of the Arbitration and Conciliation Act, 1996.

In case the conciliation fails and stands terminated without any settlement between the parties, Section 18(3) requires the Facilitation Council either to itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration in terms of the provisions of Arbitration and Conciliation Act, 1996.

Section 18(4) vests the Facilitation Council or the centre providing alternate dispute resolution services with jurisdiction to act as an Arbitrator or Conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India. Sub-section (5) stipulates that every reference should be decided within a period of ninety days from the date of making of such a reference.

Application for setting aside decree, award or order

Section 19 stipulates that no application for setting aside any decree, award or other order made either by the Facilitation Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court. However, this section empowers the court pending disposal of the application to set aside the decree, award or order that such percentage of the amount deposited be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.

Micro and Small Enterprises Facilitation Council

Section 20 empowers the State Government to establish by notification, one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

Composition of Facilitation Council

Section 21 stipulates that the Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from among the following categories, namely:

(i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises, as chairperson; and

(ii) one or more office-bearers or representatives of associations of micro or small industry or enterprises in the State; and

(iii) one or more representatives of banks and financial institutions lending to
micro or small enterprises; or

(iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

Annual statement of accounts

Section 22 places a buyer, who is required to get his annual accounts audited under any law for the time being in force, to furnish the following additional information in his annual statement of accounts, namely:

(i) the principal amount and the interest due thereon (to be shown separately) remaining unpaid to any supplier as at the end of each accounting year;

(ii) the amount of interest paid by the buyer in terms of section 16, along with the amounts of the payment made to the supplier beyond the appointed day during each accounting year;

(iii) the amount of interest due and payable for the period of delay in making payment (which have been paid but beyond the appointed day during the year) but without adding the interest as specified under the Act;

(iv) the amount of interest accrued and remaining unpaid at the end of each accounting year; and

(v) the amount of further interest remaining due and payable even in the succeeding years, until such date when the interest dues as above are actually paid to the small enterprise, for the purpose of disallowance as a deductible expenditure under section 23.

Interest not to be allowed as deduction from income

Section 23 provides that notwithstanding anything contained in the Income-tax Act, 1961, the amount of interest payable or paid by any buyer, under or in accordance with the provisions of the Act, shall not, for the purposes of computation of income under the Income-tax Act, 1961, be allowed as deduction.

Closure of business of micro, small and medium enterprises

Section 25 places the Central Government under obligation to notify a scheme for facilitating closure of business by a micro, small or medium enterprise, not being a company registered under the Companies Act, 1956, within one year from the date of commencement of the Act.

Penalty for contravention

In terms of Section 27 intentional contravention or attempting contravention or abetting the contravention of provisions of Section 8(1) relating to filing of memorandum or Section 26(2) relating to furnishing of information, has been made punishable in the case of the first conviction, with fine which may extend to rupees one thousand; and in the case of any second or subsequent conviction, with fine which shall not be less than rupees one thousand but may extend to rupees ten thousand. Contravention of the provisions of section 22, by a buyer has been made punishable with a fine which shall not be less than rupees ten thousand.
The MSME Act provides for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.

Enterprises have been classified broadly into:

(i) Enterprises engaged in the Manufacture/production of Goods pertaining to any industry; &
(ii) Enterprises engaged in providing/rendering of services.

Manufacturing enterprises have been defined in terms of investment in plant and machinery (excluding land & buildings) and further classified into:

- Micro Enterprises - investment up to Rs.25 lakh.
- Small Enterprises - investment above Rs.25 lakh & up to Rs.5 crore
- Medium Enterprises - investment above Rs.5 crore & up to Rs.10 crore

Service enterprises have been defined in terms of their investment in equipment (excluding land & buildings) and further classified into:

- Micro Enterprises – investment up to Rs.10 lakh
- Small Enterprises – investment above Rs.10 lakh & up to Rs.2 crore.
- Medium Enterprises – investment above Rs.2 crore & upto Rs.5 crore

Any person who intends to establish a micro or small enterprise, may, at his discretion, or a medium enterprise engaged in providing or rendering of services may, at his discretion; or a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the IDRA, is required to file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government or the Central Government.

Central Government under obligation to notify a scheme for facilitating closure of business by a micro, small or medium enterprise, not being a company registered under the Companies Act, 1956, within one year from the date of commencement of the Act.
1. Define the term Enterprise under the Act?
2. Briefly explain Micro, Small and Medium Enterprise.
3. Explain Memorandum of micro, small and medium enterprise.
4. Distinction between the day of acceptance and the day of deemed acceptance.
5. Briefly explain the composition of Facilitation Council.
STUDY II
SECTION I
FOREIGN TRADE POLICY 2009 -14

LEARNING OBJECTIVES

The objective of this study lesson is to enable the students to understand

- Broad Framework of Foreign Trade Policy
- General Provisions regarding exports and imports
- IEC Number
- Special Focus Initiative
- Board of Trade
- Market Access Initiative (MAI)
- Market Development Assistance (MDA)

INTRODUCTION

The short term objective of Foreign Trade policy is to arrest and reverse the declining trend of exports and to provide additional support especially to those sectors which have been hit badly by recession in the developed world. By 2014, it expects to double India’s exports of goods and services. The long term policy objective for the Government is to double India’s share in global trade by 2020.

In order to meet these objectives, the Government would follow a mix of policy measures including fiscal incentives, institutional changes, procedural rationalization, enhanced market access across the world and diversification of export markets. Improvement in infrastructure related to exports; bringing down transaction costs, and providing full refund of all indirect taxes and levies, would be the three pillars, which will support to achieve the target.

To provide adequate confidence to exporters to maintain their market presence even in a period of stress, a special thrust would be provided to employment intensive sectors, especially in the fields of textile, leather, handicrafts, etc.

In the era of global competitiveness, there is an imperative need for Indian exporters to upgrade their technology and reduce their costs. Accordingly, an important element of the Foreign Trade Policy is to help exporters for technological upgradation, which is sought to be achieved by promoting imports of capital goods for certain sectors under EPCG at zero percent duty.

The Government recognizes exporters based on their export performance and they are called ‘status holders’. For technological upgradation of the export sector, these status holders will be permitted to import capital goods duty free (through Duty Credit Scrips equivalent to 1% of their FOB value of exports in the previous year), of specified product groups. This will help them to upgrade their technology and reduce cost of production.
For upgradation of export sector infrastructure, ‘Towns of Export Excellence’ and units located therein would be granted additional focused support and incentives.

**Duration and Applicability of Foreign Trade Policy**


**Transitional Arrangements**

Authorisation issued before commencement of Foreign Trade Policy shall continue to be valid for the purpose and duration for which such Authorisation was issued, unless otherwise stipulated.

In case an export or import that is permitted freely under erstwhile Foreign Trade Policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that shipment of export or import is made within original validity with respect to available balance and time period of an irrevocable commercial letter of credit, established before date of imposition of such restriction. However for operationalizing such irrevocable commercial letter of credit the applicant shall have to register the Letter of Credit and contract with the concerned Regional Authority within 15 days of the issue of any such restriction or regulation.

**SPECIAL FOCUS INITIATIVES**

*With a view to continuously increasing India’s percentage share of global trade and expanding employment opportunities, certain special focus initiatives have been identified/continued for:*

- Market Diversification
- Technological Upgradation
- Support to status holders
- Agriculture, Handlooms
- Handicraft
- Gems & Jewellery
- Leather
- Marine
- Electronics and IT Hardware manufacturing Industries
- Green products
- Exports of products from North-East
- Sports Goods and Toys sectors.*
The Government shall make concerted efforts to promote exports in these sectors by specific sectoral strategies to be notified from time to time.

Market Diversification

To insulate Indian exports from the decline in demand from developed countries, the Policy focuses on diversification of Indian exports to other markets, specially those located in Latin America, Africa, parts of Asia and Oceania. To achieve diversification of Indian exports, following initiatives have been taken under this Policy.

(a) 26 new countries have been included within the ambit of Focus Market Scheme.

(b) The incentives provided under Focus Market Scheme have been increased from 2.5% to 3%.

(c) There has been a significant increase in the outlay under ‘Market Linked Focus Product Scheme’ by inclusion of more markets and products. This ensures support for exports to all countries in Africa and Latin America.

Technological Upgradation

To usher in the next phase of export growth, India needs to move up in the value chain of export goods. This objective is sought to be achieved by encouraging technological upgradation of India’s export sector. A number of initiatives have been taken to focus on technological upgradation; such initiatives include:

(a) Export Promotion Capital Goods Scheme at zero duty has been introduced for certain engineering products, electronic products, basic chemicals and pharmaceuticals, apparel and textiles, plastics, handicrafts, chemicals and allied products and leather and leather products.

(b) The existing 3% EPCG Scheme has been considerably simplified, to ease its usage by the exporters.

(c) To encourage value added manufacture export, a minimum 15% value addition on imported inputs under Advance Authorisation Scheme has been stipulated.

(d) A number of products including automobiles and other engineering products have been included for incentives under Focus Product, and Market Linked Focus Product Schemes.

(e) Steps to encourage Project Exports shall be taken.

Support to status holders

Status Holders contribute approx. 60% of India’s goods exports. To incentivise and encourage the status holders, as well as to encourage Technological upgradation of export production, additional duty credit scrip @ 1% of the FOB of past export has been granted for specified product groups including leather, specific sub sectors in engineering, textiles, plastics, handicrafts and jute. This duty credit scrip can be used for import of capital goods by these status holders. The imported capital goods shall be subject to actual user condition.
Agriculture and Village Industry

(a) Vishesh Krishi and Gram Udyog Yojana
(b) Capital goods imported under Export Promotion Capital Goods have been permitted to be installed anywhere in Agri Export Zone.
(c) Import of restricted items, such as panels, have been allowed under various export promotion schemes.
(d) Import of inputs such as pesticides have been permitted under Advance Authorisation for agro exports.
(e) New towns of export excellence with a threshold limit of Rs 150 crore have been notified.
(f) Certain specified flowers, fruits and vegetables are entitled to special duty credit scrip, in addition to the normal benefit under VKGUY.

Handlooms

(a) Specific funds have been earmarked under Market Access Initiative (MAI) / Market Development Assistance (MDA) Scheme for promoting handloom exports.
(b) Duty free import entitlement of specified trimmings and embellishments has been fixed as 5% of FOB value of exports during previous financial year.
(c) Duty free import entitlement of hand knotted carpet samples has been fixed as 1% of FOB value of exports during previous financial year.
(d) Duty free import of old pieces of hand knotted carpets on consignment basis for re-export after repair has been permitted.
(e) New towns of export excellence with a threshold limit of Rs 150 crore have been notified.
(f) Machinery and equipment for effluent treatment plants has been exempt from customs duty.

Handicrafts

(a) Duty free import entitlement of tools, trimmings and embellishments has been fixed as 5% of FOB value of exports during previous financial year. Entitlement is broad banded, and shall extend also to merchant exporters tied up with supporting manufacturers.
(b) Handicraft Export Promotion Council has been authorized to import trimmings, embellishments and consumables on behalf of those exporters for whom directly importing may not be viable.
(c) Specific funds have been earmarked under MAI & MDA Schemes for promoting Handicraft exports.
(d) Countervailing Duty has been exempted on duty free import of trimmings, embellishments and consumables.
(e) New towns of export excellence with a reduced threshold limit of Rs 150 crore have been notified.
(f) Machinery and equipment for effluent treatment plants are exempt from customs duty.

(g) All handicraft exports would be treated as special Focus products and entitled to higher incentives.

Gems & Jewellery

(a) Import of gold of 8 carats and above has been allowed under replenishment scheme subject to import being accompanied by an Assay Certificate specifying purity, weight and alloy content.

(b) Duty Free Import Entitlement (based on FOB value of exports during previous financial year) of Consumables and Tools, for:

1. Jewellery made out of:
   (a) Precious metals (other than Gold & Platinum)
   (b) Gold and Platinum
   (c) Rhodium finished Silver

2. Cut and Polished Diamonds

(c) Duty free import entitlement of commercial samples has been fixed as Rs. 300,000.

(d) Duty free re-import entitlement for rejected jewellery has been fixed as 2% of FOB value of exports.

(e) Import of Diamonds on consignment basis for Certification/ Grading & re-export by the authorized offices/agencies of Gemological Institute of America (GIA) in India or other approved agencies will be permitted.

(f) Personal carriage of Gems & Jewellery products in case of holding/participating in overseas exhibitions increased to US$ 5 million and to US$ 1 million in case of export promotion tours.

(g) Extension in number of days for re-import of unsold items in case of participation in an exhibition in USA increased to 90 days.

(h) In an endeavour to make India a diamond international trading hub, the Government proposes to establish “Diamond Bourse (s)”.

Leather and Footwear

(a) Duty free import entitlement of specified items has been fixed as 3% of FOB value of exports of leather garments during preceding financial year.

(b) Duty free entitlement for import of trimmings, embellishments and footwear components for footwear (leather as well as synthetic), gloves, travel bags and handbags has been fixed as 3% of FOB value of exports of previous financial year. Such entitlement also cover packing material, such as printed and non printed shoeboxes, small cartons made of wood, tin or plastic materials for packing footwear.

(c) Machinery and equipment for Effluent Treatment Plants have been exempt from basic customs duty.

(d) Re-export of unsuitable imported materials such as raw hides & skins and wet blue leathers is permitted.

(e) Countervailing Duty is exempted on lining and interlining material.
(f) Countervailing Duty is exempted on raw, tanned and dressed fur skins falling under Chapter 43 of ITC (HS).
(g) Re-export of unsold hides, skins and semi finished leather have been allowed from Public Bonded warehouse at 50% of the applicable export duty.

**Marine Sector**

(a) Imports for technological upgradation under EPCG in fisheries sector (except fishing trawlers, ships, boats and other similar items) exempted from maintaining average export obligation.
(b) Duty free import of specified specialised inputs / chemicals and flavouring oils has been allowed to the extent of 1% of FOB value of preceding financial year's export.
(c) To allow import of monofilament longline system for tuna fishing at a concessional rate of duty and Bait Fish for tuna fishing at Nil duty.
(d) A self removal procedure for clearance of seafood waste is applicable subject to prescribed wastage norms.
(e) Marine products are considered for VKGUY scheme.

**Electronics and IT Hardware Manufacturing Industries**

(a) Expeditious clearance of approvals required from Director General Foreign Trade shall be ensured.
(b) Exporters /Associations would be entitled to utilize Market Access Initiative (MAI) & Market Development Assistance (MDA) Schemes for promoting Electronics and IT Hardware Manufacturing industry exports.

**Sports Goods and Toys**

(a) Duty free import of specified specialised inputs allowed to the extent of 3 % of FOB value of preceding financial year's export.
(b) Sports goods and toys shall be treated as a Priority sector under Market Access Initiative (MAI) & Market Development Assistance (MDA) Scheme. Specific funds would be earmarked under MAI /MDA Scheme for promoting exports from this sector.
(c) Applications relating to Sports Goods and Toys have been considered for fast track clearance by DGFT.
(d) Sports Goods and Toys are treated as special focus products and entitled to higher incentives.

**Green products and technologies**

India aims to become a hub for production and export of green products and technologies. To achieve this objective, special initiative will be taken to promote development and manufacture of such products and technologies for exports. To begin with, focus would be on items relating to transportation, solar and wind power generation and other products as may be notified which will be incentivized under Reward Schemes of Foreign Trade Policy.

**Incentives for Exports from the North Eastern Region**

In order to give a fillip to exports of products from the north-easter States,
notified products of this region would be incentivized under Reward Schemes of Foreign Trade Policy.

**BOARD OF TRADE**

Board of Trade has a clear and dynamic role in advising government on relevant issues connected with Foreign Trade. Board of Trade has following terms of reference:

(i) Advising Government on Policy measures for preparation and implementation of both short and long term plans for increasing exports in the light of emerging national and international economic scenarios;

(ii) Reviewing export performance of various sectors, identify constraints and suggest industry specific measures to optimize export earnings;

(iii) Examining existing institutional framework for imports and exports and suggest practical measures for further streamlining to achieve desired objectives;

(iv) Reviewing policy instruments and procedures for imports and exports and suggest steps to rationalize and channelize such schemes for optimum use;

(v) Examining issues which are considered relevant for promotion of India’s foreign trade, and to strengthen international competitiveness of Indian goods and services; and

(vi) Commissioning studies for furtherance of above objectives.

**Board of Trade - Composition and Meeting**

Commerce & Industry Minister to be the Chairman of the Board of Trade (BOT). Government shall also nominate upto 25 persons, of whom at least 10 to be experts in trade policy. In addition, Chairmen of recognized Export Promotion Councils and President or Secretary-Generals of National Chambers of Commerce to be ex-officio members. BOT is required to meet at least once every quarter.

**GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS**

Exports and Imports have been made free, except where regulated by Foreign Trade Policy or any other law for the time being in force. The item wise export and import policy would however be, as specified in ITC (HS) notified by Director General of Foreign Trade, as amended from time to time. Every exporter or importer is required to comply with the provisions of Foreign Trade (Development & Regulation) Act, the Rules and Orders made there-under, Foreign Trade Policy and terms and conditions of any Authorisation granted to him. All imported goods have also been made subject to domestic Laws, Rules, Orders, Regulations, technical specifications, environmental and safety norms as applicable to domestically produced goods. The import or export of rough diamonds is not permitted unless accompanied by Kimberley Process (KP) Certificate as specified by Gem & Jewellery Export Promotion Council (GJEPC).

**Interpretation of Policy**

The Director General of Foreign Trade has been empowered to decide on any question or doubt arises in respect of interpretation of any provision contained in Foreign Trade Policy, or classification of any item in ITC (HS) or procedures, or Schedule of Duty Entitlement Passbook Rates. The FTP further stipulate that any
question or doubt touching upon the content, scope or issue of an authorization there under should be referred to Director General of Foreign Trade whose decision thereon shall be final and binding.

Who is empowered to decide questions arising in respect of interpretation of FTP?

DGFT, The Foreign Trade Policy 2009-14 empowers the Director General of Foreign Trade to decide on any question or doubt arising in respect of the interpretation of any provision contained in the Policy, or regarding the classification of any item in the ITC(HS) or procedures, any scheme, or Schedule of DEPB Rate.

Procedure

The Director General of Foreign Trade may, specify procedure to be followed for an exporter or importer or by any licensing or any other competent authority for purpose of implementing provisions of Foreign Trade (Development & Regulation) Act, the Rules and the Orders made there under and Foreign Trade Policy. Such procedures shall be published by means of a Public Notice, and may, in like manner, be amended from time to time.

Exemption from Policy/Procedure

The Director General of Foreign Trade has been empowered to pass such orders or grant such relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade. DGFT may also, in public interest, exempt any person or class or category of persons from any provision of Foreign Trade Policy or any procedure and may, while granting such exemption, impose such conditions as he may deem fit.

Principles of Restriction

DGFT has been empowered to adopt and enforce, through a notification, any measure necessary for:

(i) Protection of public morals.
(ii) Protection of human, animal or plant life or health.
(iii) Protection of patents, trademarks and copyrights and the prevention of deceptive practices.
(iv) Prevention of use of prison labour.
(v) Protection of national treasures of artistic, historic or archaeological value.
(vi) Conservation of exhaustible natural resources.
(vii) Protection of trade of fissionable material or material from which they are derived; and
(viii) Prevention of traffic in arms, ammunition and implements of war.
Export and Import of Restricted Goods

The Foreign Trade Policy allows the export or import of any good which is restricted under ITC(HS) only in accordance with an Authorisation or in terms of a public notice issued in this behalf.

Terms and Conditions of a licence/Certificate/Permission/ Authorisation

Every Authorisation shall be valid for prescribed period of validity and shall contain such terms and conditions as may be specified by Regional Authority which may include:

(a) Quantity, description and value of goods;
(b) Actual User condition;
(c) Export obligation;
(d) Value addition to be achieved; and
(e) Minimum export / import price.

Authorisation/Licence/Certificate/Permission not a Right

No person may claim an Authorization as a right and Director General of Foreign Trade or Regional Authority have been empowered to refuse to grant or renew the same in accordance with provisions of Foreign Trade (Development & Regulation) Act, Rules made there under and Foreign Trade Policy.

### Whether every licence valid for a specified period under FTP?

Yes, Foreign Trade Policy 2009-14 provides that every licence/certificate/ permission/ authorisation shall be valid for the period of validity specified in the licence/certificate/ permission/authorisation shall contain such terms and conditions as may be specified by the licensing authority.

Penalty

If an Authorisation holder violates any condition of such Authorisation or fails to fulfill export obligation, he shall be liable for action in accordance with Foreign Trade (Development & Regulation) Act, the Rules and Orders made there under, Foreign Trade Policy and any other law for time being in force.

State Trading

Any goods, import or export of which is governed through exclusive or special privileges granted to State Trading Enterprise(s), may be imported or exported by STE(s) as per conditions specified in ITC (HS). DGFT may, however, grant an Authorisation to any other person to import or export any of these goods. Such STE(s) shall make any such purchases or sales involving imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale in a non discriminatory manner and shall afford enterprises of other countries adequate
opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales.

**Importer-Exporter Code (IEC) Number**

The Foreign Trade Policy prohibits export or import by any person without an IEC number unless specifically exempted. An IEC number is granted on application by competent authority in accordance with specified procedure.

**IEC No: Exempted Categories**

The following categories of importers or exporters have been exempted from obtaining IEC number:

(i) Importers covered by clause 3(1) [except sub-clauses (e) and (l)] and exporters covered by clause 3(2) [except sub-clauses (i) and (k)] of the Foreign Trade (Exemption from application of Rules in certain cases) Order, 1993.

(ii) Ministries/Departments of the Central or State Government.

(iii) Persons importing or exporting goods for personal use not connected with trade or manufacture or agriculture.

(iv) Persons importing/exporting goods from/to Nepal provided the CIF value of a single consignment does not exceed Indian Rs.25,000.

(v) Persons importing/exporting goods from/to Myanmar through Indo-Myanmar border areas provided the CIF value of a single consignment does not exceed Indian Rs.25,000.

However, the exemption from obtaining Importer-Exporter Code (IEC) is not applicable for the export of Special Chemicals, Organisms, Materials, Equipments and Technologies (SCOMET) except in the case of exports by Ministries/Departments of the Central/State Government.

(vi) The FTP allows the following permanent IEC numbers to be used by the categories of importers/exporters mentioned against them for import/ export purposes.

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Code Number</th>
<th>Categories of Importers/Exporters</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>0100000011</td>
<td>All Ministries/Departments of the Central Government and agencies wholly or partially owned by them.</td>
</tr>
<tr>
<td>2.</td>
<td>0100000029</td>
<td>All Ministries/Departments of the State Government and agencies wholly or partially owned by them.</td>
</tr>
<tr>
<td>3.</td>
<td>0100000037</td>
<td>Diplomatic personnel, Counselor officers in India and the officials of the UNO and its specialised agencies.</td>
</tr>
<tr>
<td>4.</td>
<td>0100000045</td>
<td>Indians returning from/going abroad and claiming benefit under the Baggage Rules.</td>
</tr>
<tr>
<td>5.</td>
<td>0100000053</td>
<td>Persons/Institutions/Hospitals importing or exporting goods for personnel use, not connected with trade or manufacture or agriculture.</td>
</tr>
<tr>
<td>6.</td>
<td>0100000061</td>
<td>Persons importing/ exporting goods from/to Nepal provided the CIF value of a single consignment does</td>
</tr>
</tbody>
</table>
persons importing/exporting goods from/to Myanmar through Indo-Myanmar border areas provided the CIF value of a single consignment does not exceed Indian Rupees 25000/-. 

8. 0100000088 Ford Foundation 

9. 0100000096 Importers importing goods for display or use in fairs/exhibitions or similar events under the provisions of ATA carnet. 

10. 0100000100 Director, National Blood Group Reference Laboratory, Bombay or their authorized offices. 

11. 0100000126 Individuals/Charitable Institutions/Registered NGOs importing goods, which have been exempted from Customs duty under the Notification issued by Ministry of Finance for bonafide use by the victims affected by natural calamity.

Note: Commercial Public Sector Undertaking (PSU) who have obtained PAN are however required to obtain Importer Exporter Code number. The permanent IEC number as mentioned above, should be used by non-commercial PSUs.

Application for Grant of IEC Number 

An application for grant of IEC number is required to be made in the prescribed form alongwith specified documents, by the Registered/Head Office of the applicant to the Regional authority under whose jurisdiction, the Registered office in case of company and Head office in case of others, falls. In case of STP/ EHTP/ BTP units, the Regional Offices of the DGFT having jurisdiction over the district in which the Registered/ Head Office of the STP unit is located has been empowered to issue or amend the IECs. An IEC number allotted to an applicant remains valid for all its branches/divisions/units/factories as indicated in the format of IEC.

Duplicate Copy of IEC No.

In case the IEC Number is lost or misplaced, the issuing authority may consider requests for grant of a duplicate copy of IEC number, if accompanied by an affidavit.

Surrender of IEC No.

If an IEC holder does not wish to operate the allotted IEC number, the same may be surrendered by informing the issuing authority. On receipt of such intimation, the issuing authority immediately cancel the same and electronically transmit it to DGFT for onward transmission to the Customs and Regional Authorities.

PROMOTIONAL MEASURES

Assistance to States for Developing Export Infrastructure and Allied Activities (ASIDE)

The Department of Commerce has formulated a scheme called Assistance to States for Developing Export Infrastructure and Allied Activities (ASIDE) to involve
the States in the export effort by providing assistance to the States Governments for creating appropriate infrastructure for the development and growth of exports.

The objective of scheme is to establish a mechanism for involving the State Governments to participate in funding of infrastructure critical for growth of exports by providing export performance linked financial assistance to them.

- The activities aimed at development of infrastructure for exports can be funded from the scheme provided such activities have overwhelming export content and their linkage with exports is full established. The specific purposes for which funds allocated under the Scheme can be sanctioned and utilized are as follows:
  - Creation of new Export Promotion Industrial Parks/ Zones (SEZs/Agri Business Zones) and augmenting facilities in the existing ones.
  - Setting up of electronics and other related infrastructure in export conclave.
  - Equity participation in infrastructure projects including the setting up of SEZs.
  - Meeting requirements of capital outlay of EPIPs/ EPZs/SEZs.
  - Development of complementary infrastructure such as, roads connecting the production centres with the ports, setting up of Inland Container Depots and Container Freight Stations.
  - Stabilizing power supply through additional transformers and islanding of export production centre etc.
  - Development of minor ports and jetties to serve export purpose.
  - Assistance for setting up Common Effluent Treatment facilities and
  - Any other activity as may be notified by DoC.

**Market Access Initiative (MAI)**

Under MAI scheme, financial assistance is provided for export promotion activities on focus country, focus product basis. Financial assistance is available for Export Promotion Councils (EPCs), Industry and Trade Associations (ITAs), Agencies of State Government, Indian Commercial Missions (ICMs) abroad and other national level institutions/eligible entities as may be notified.

A whole range of activities can be funded under MAI scheme. These include, amongst others,

- Market studies/surveys,
- Setting up of showroom / warehouse,
- Participation in international trade fairs,
- Displays in International departmental stores,
- Publicity campaigns,
- Brand promotion,
- Reimbursement of registration charges for pharmaceuticals and expenses for carrying out clinical trials etc., in fulfillment of statutory requirements in
the buyer country,

- Testing charges for engineering products abroad,
- Assistance for contesting Anti Dumping litigations etc.

Each of these export promotion activities can receive financial assistance from Government ranging from 25% to 100% of total cost depending upon activity and implementing agency.

**Market Development Assistance (MDA)**

Under MDA Scheme, financial assistance is provided for a range of export promotion activities implemented by Export Promotion Councils and Trade Promotion Organizations on the basis of approved annual action plans. The scheme is administered by Department of Commerce. Assistance includes, amongst others, participation in:

- Trade Fairs and Buyer Seller meets abroad or in India, and
- Export promotions seminars.

- Financial assistance with travel grant is available to exporters traveling to focus areas, viz., Latin America, Africa, CIS region, ASEAN countries, Australia and New Zealand. In other areas, financial assistance without travel grant is available.

MDA assistance is available for exports having an annual export turnover as prescribed in MDA guidelines.

**Meeting expenses for statutory compliances in buyer country for Trade Related Matters**

Department Of Commerce provides for reimbursement of charges/expenses for fulfilling statutory requirements in the buyer country, including registration charges for product registration for pharmaceuticals, bio-technology and agro-chemicals products on recommendation of Export Promotion Councils. Financial assistance is also provided for contesting litigation(s) in the foreign country concerning restrictions/anti dumping duties etc. on particular product(s) of Indian origin, as provided under the Market Access Initiative (MAI) Scheme of Department of Commerce.

**Towns of Export Excellence (TEE)**

A number of towns have emerged as dynamic industrial clusters contributing handsomely to India’s exports. It is necessary to grant recognition to these industrial clusters with a view to maximizing their potential and enabling them to move higher in the value chain and tap new markets.

Selected towns producing goods of Rs. 750 Crore or more has been notified as TEE based on potential for growth in exports. However for TEE in Handloom, Handicraft, Agriculture and Fisheries sector, threshold limit would be Rs 150 Crores.

(i) Recognized associations of units will be provided financial assistance under MAI scheme, on priority basis, for export promotion projects for marketing, capacity building and technological services.

(ii) Common Service Providers in these areas shall be entitled for Export
Promotion Capital Goods scheme.

(iii) The projects received from TEEs shall be accorded priority by SLEPC for financial assistance under ASIDE.

Brand Promotion and Quality

IBEF (originally called India Brand Equity Fund and later renamed as India Brand Equity Foundation) was set up by the Ministry of Commerce on 11th July, 1996, with the primary objective to promote and create international awareness of the “Made in India” label in markets overseas. IBEF aims to promote India as a business opportunity by creating positive economic perceptions of India globally as well as effectively present the India business perspective and leverage business partnerships in a globalised market-place.

Department of Commerce provides funds for capacity building for up-gradation of quality to national level Institutions and Export Promotion Councils to organize training programmes for the skill improvement of the exporters for quality upgradation, reduction in rejection, product improvement etc. as provided under the Market Access Initiative (MAI) Scheme of Department of Commerce.

Test Houses

Central Government will assist in modernization and upgradation of test houses and laboratories to bring them at par with international standards.

Quality Complaints/Disputes

Regional Sub-Committee on Quality Complaints (RSCQC) set up at Regional Offices of the Directorate shall investigate quality complaints received from foreign buyers.

Trade Disputes affecting Trade Relations

If it comes to Director General of Foreign Trade’s notice or he has reason to believe that an export or import has been made in a manner that

(i) is gravely prejudicial to trade relations of India with any other country; and / or

(ii) is gravely prejudicial to interest of other persons engaged in exports or imports; and/or

(iii) has brought disrepute to the country;

DGFT may take action against such exporter or importer in accordance with Foreign Trade (Development & Regulation) Act, Rules and Orders made there-under and Foreign Trade Policy.
LESSON ROUND UP

- The short term objective of Foreign Trade policy is to arrest and reverse the declining trend of exports and to provide additional support especially to those sectors which have been hit badly by recession in the developed world. By 2014, it expects to double India’s exports of goods and services. The long term policy objective for the Government is to double India’s share in global trade by 2020.
- Commerce & Industry Minister to be the Chairman of the Board of Trade (BOT). Government shall also nominate up to 25 persons, of whom at least 10 to be experts in trade policy.
- The Foreign Trade Policy prohibits export or import by any person without an IEC number unless specifically exempted. An IEC number is granted on application by competent authority in accordance with specified procedure.
- Under MAI scheme, financial assistance is provided for export promotion activities on focus country, focus product basis. Financial assistance is available for Export Promotion Councils (EPCs), Industry and Trade Associations (ITAs), Agencies of State Government, Indian Commercial Missions (ICMs) abroad and other national level institutions/eligible entities.
- Under MDA Scheme, financial assistance is provided for a range of export promotion activities implemented by Export Promotion Councils and Trade Promotion Organizations on the basis of approved annual action plans.

SELF TEST QUESTIONS

1. What are the objective of foreign trade policy?
2. Specify the authority responsible for the administration and execution of the FTP?
3. What do you mean by IEC Number?
4. Distinguish between Market Access Scheme and Market development Assistance.
5. Write short notes on:
   - Board of Trade
   - Star Export House
SECTION II
SPECIAL ECONOMIC ZONES ACT, 2005

LEARNING OBJECTIVES
The objective of this study lesson is to enable the students to understand

- Objective of SEZ Act, 2005
- Salient Features of the SEZ Act, 2005
- Establishment of SEZ
- Guidelines for notifying SEZ
- Board of Approval
- Development Commissioner
- Setting of Unit
- Offshore Banking Unit
- SEZ Authority
- Powers of Central Government to supersede Authority
- Power of the State Government
- Identity Card

Introduction
While the policy relating to the Special Economic Zones is contained in the Foreign Trade Policy, incentives and other facilities offered to the Special Economic Zone developer and units are implemented through various notifications and circulars issued by the concerned Ministries/Departments. The system, therefore, did not lend enough confidence for investors to commit substantial funds for development of infrastructure and for setting up of the units in the Zones for export of goods and services. In order to give a long term and stable policy framework with minimum regulatory regime and to provide expeditious and single window clearance mechanism, the Government enacted Special Economic Zones Act, 2005.

SEZ Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto
Salient Features

The salient features of the Act are as under:

(i) matters relating to establishment of Special Economic Zone and for setting up of units therein, including requirements, obligations and entitlements;

(ii) matters relating to requirements for setting up of off-shore banking units and units in International Financial Service Center in Special Economic Zone, including fiscal regime governing the operation of such units;

(iii) the fiscal regime for developers of Special Economic Zones and units set up therein;

(iv) single window clearance mechanism at the Zone level;

(v) establishment of an Authority for each Special Economic Zone set up by the Central Government to impart greater administrative autonomy; and

(vi) designation of special courts and single enforcement agency to ensure speedy trial and investigation of notified offences committed in Special Economic Zones.

Definitions

Section 2 of the Act contains definitions of the terms used in the Act.

- **Accident:** “Co-Developer” means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (12) of Section 3. [Section 2(f)]

- **Developer** means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of Section 3 and includes an Authority and a Co-Developer. [Section 2(g)]

- **Export** means—
  (i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or
  (ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or
  (iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone. [Section 2(m)]

- **Import** means—
  (i) bringing goods or receiving services, in a Special Economic Zone, by a
Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or

(ii) receiving goods, or services by a Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone. [Section 2(o)]

- **Infrastructure facilities** means industrial, commercial or social infrastructure or other facilities necessary for the development of a Special Economic Zone or such other facilities which may be prescribed. [Section 2(p)]

- **International Financial Services Centre** means an International Financial Services Centre which has been approved by the Central Government under sub-section (1) of Section 18. [Section 2(q)]

- **Manufacture** means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining. [Section 2(r)]

- **Offshore Banking Unit** means a branch of a bank located in a Special Economic Zone and which has obtained the permission under clause (a) of sub-section (1) of Section 23 of the Banking Regulation Act, 1949. [Section 2(u)]

- **person** includes an individual, whether resident in India or outside India, a Hindu undivided family, co-operative society, a company, whether incorporated in India or outside India, a firm, proprietary concern, or an association of persons or body of individuals, whether incorporated or not, local authority and any agency, office or branch owned or controlled by such individual, Hindu undivided family, co-operative, association, body, authority or company. [Section 2(v)]

- **Services** means such tradable services which.—

  (i) are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organisation concluded at Marrakesh on the 15th day of April, 1994;

  (ii) may be prescribed by the Central Government for the purposes of this Act; and

  (iii) earn foreign exchange.[Section 2(z)]

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**What is Special Economic Zone?**

Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs.
Establishment of Special Economic Zone

Section 3 of the Act provides that the Central Government, State Government, or any other person, jointly or severally, may establish a Special Economic Zone. Any person who, intends to set up a Special Economic Zone, may, after identifying the area, make a proposal to the State Government concerned for the purposes of setting up a Special Economic Zone. It also allows a person, at his option to make a proposal directly to the Board for the purpose of setting up Special Economic Zone. In cases where such proposal has been received directly from a person, the Board may grant approval and after receipt of such approval, the person concerned, is required to obtain the concurrence of the State Government within prescribed time.

In a case a State Government intends to set up the Special Economic Zone, it may after identifying the area, forward the proposal directly to the Board of Approval for setting up of Special Economic Zone. However, the Central Government has been empowered to set up and notify the Special Economic Zone without consulting the State Government concerned; without referring the proposal to the Board.

The State Government may, on receipt of the proposal for setting up a Special Economic Zone forward the proposal together with its recommendations to the Board of Approval within the specified time. The Board of Approval may, after receipt of the proposal for setting up a Special Economic Zone either approve the proposal or, approve the proposal subject to such terms and conditions as it may deem fit to impose. It can also modify or reject the proposal for setting up a Special Economic Zone.

The Central Government has been empowered to specify the minimum area of land for setting up a Special Economic Zone and other terms and conditions subject to which the Board may approve, modify or reject any such proposal received by it. Section 3(9) further provides that if the Board approves the proposal without any modification, it shall communicate the same to the Central Government. If it approves the proposal with modification, it shall, communicate the same to the person or the State Government concerned if the modifications are accepted by the person or State Government, the Board of Approval shall communicate the approval to the Central Government. If it rejects the proposal, it shall record the reasons therefor and communicate the rejection to the person or the State Government concerned.

Section 3(10) requires the Central Government to grant on receipt of communication from the Board of Approval, a letter of approval on such terms and conditions and obligations and entitlements, as approved by Board of Approval, to the person or the State Government concerned. However the Central Government may, on the basis of approval of the Board, approve more than one developer in one Special Economic Zone in cases where one Developer does not have in his possession the minimum area of contiguous land, as may be prescribed, for setting up a Special Economic Zone. In all such cases, each Developer is considered as a Developer in respect of the land in his possession.

This section also provides that any person or a State Government, who intends to provide any infrastructure facilities in the identified area or undertaken any authorised operations may, after entering into an agreement with the Developer, make a proposal for the same to the Board of Approval, for its approval. Every such person or State Government, whose proposal has been approved by the Board and
who, or which, has been granted letter of approval by the Central Government, shall be considered a Co-Developer of the Special Economic Zone.

**Who can set up SEZs?**

*Any private/public/joint sector or State Government or its agencies can set up Special Economic Zone (SEZ)*

**Establishment, Approval and Authorization to Operate Special Economic Zone**

Section 4 of the SEZ Act requires the Developer to submit, after the grant of letter of approval, the exact particulars of the identified area to the Central Government which after satisfying that the specified requirements are fulfilled, notify the specifically identified area in the State as a Special Economic Zone. However, the Central Government has been empowered to notify any additional area as a part of a Special Economic Zone. This section empowers the Central Government to authorise the Developer to undertake such operations in a Special Economic Zone, as it may prescribe.

**Guidelines for notifying Special Economic Zone**

**Section 5 stipulates broader guidelines to be considered by the Central Government, while notifying any area as a Special Economic Zone or an area to be included in the SEZ and in discharging its functions under the Act. These include:**

- (a) generation of additional economic activity;
- (b) promotion of exports of goods and services;
- (c) promotion of investment from domestic and foreign sources;
- (d) creation of employment opportunities;
- (e) development of infrastructure facilities; and
- (f) maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States

**The Processing and Non-Processing areas**

Section 6 empowers the Central Government or any specified authority to demarcate the areas falling within the Special Economic Zones as -

- (a) the processing area for setting up Units for activities, being the manufacture of goods, or rendering of services;
- (b) the area exclusively for trading or warehousing purposes; or
- (c) the non-processing areas for activities other than those specified under (a) or (b) above.
Exemption from taxes, duties or cess

Section 7 exempts all goods or services exported out of, or imported into, or procured from the Domestic Tariff Area, by a Unit or Developer in a Special Economic Zone from the payment of taxes, duties or cess under all enactments specified in the First Schedule. The enactments specified in the First Schedule generally relate to levy and payment of cess.

Constitution of Board of Approval

Section 8 empowers the Central Government to constitute, by notification, the Board of Approval within fifteen days of the commencement of the Act. This section also provides for composition of Board, term of office of Members, co-option of certain persons as Members of the Board, its meetings and quorum, etc.

Duties, powers and functions of Board of Approval

Section 9 casts upon the Board the duty to promote and ensure orderly development of the Special Economic Zones. The powers and functions of the Board, inter alia, include

(a) granting of approval or rejecting proposal or modifying such proposals for establishment of the Special Economic Zones;
(b) granting approval of authorised operations to be carried out in the Special Economic Zones by the Developer;
(c) granting of approval to the Developers or Units (other than the Developers or the Units which are exempt from obtaining approval under any law or by the Central Government) for foreign collaborations and foreign direct investments (including investments by a person resident outside India) in the Special Economic Zone for its development, operation and maintenance;
(d) granting of approval or rejecting proposal for providing infrastructure facilities in a Special Economic Zone or modifying such proposals;
(e) granting, a licence to an industrial undertaking referred to in section 3(d) of IDR Act, if such undertaking is established, as a whole or part thereof, or proposed to be established, in a Special Economic Zone;
(f) suspension of the letter of approval granted to a Developer and appointment of an Administrator under Section 10(1) of the Act;
(g) disposing of appeals preferred under Section 15(4) and Section 16(4) of the Act;
(h) performing such other functions as may be assigned to it by the Central Government.

Section 9(3) empowers the Board of Approval to delegate such powers and functions as it may deem fit to one or more Development Commissioners for effective and proper discharge of the functions of the Board. Section 9(5) stipulates that the Board in exercise of its powers and performance of its functions be bound by such directions on questions of policy, as the Central Government may give in writing to it from time to time.

Suspension of letter of approval and transfer of Special Economic Zone in certain cases

Section 10 empowers the Board to suspend the letter of approval granted to the
Developer for a whole or part of his area established as Special Economic Zone for a period not exceeding one year and appoint an Administrator to discharge the functions of the developer in accordance with the terms and conditions of the letter of approval and manage the Special Economic Zone accordingly. The suspension may be ordered by the Board, if in its opinion following circumstances exist:

(i) the developer is unable to discharge the functions or perform the duties imposed on him; or
(ii) the developer has persistently defaulted in complying with the directions of the Board; or
(iii) the developer has violated the terms and conditions of the letter; or
(iv) the financial position of the developer is such that he is unable to fully and efficiently discharge the duties and obligations imposed on him by the letter of approval.

However, no letter of approval can be suspended unless the Board has given to the Developer not less than three months’ notice, in writing, stating the grounds on which it proposes to suspend the letter of approval, and has considered any cause shown by the Developer within the period of that notice, against the proposed suspension.

It has been further provided that the Board may, instead of suspending the letter of approval permit it to remain in force subject to such further terms and conditions as it thinks fit to impose. Section 10(4) makes any further terms or conditions so imposed binding upon the Developer. These terms and conditions have the force and effect as if they were contained in the letter of approval.

In case the Board suspends a letter of approval, it has been put under obligation to serve a notice of suspension upon the Developer and fix a date for suspension to take effect. Upon suspension of the letter of approval, the Special Economic Zone of the Developer vests in the Administrator for a period not exceeding one year or up to the date on which the letter of approval for such Special Economic Zone is transferred, whichever is earlier. This section also contains provisions for transfer of the Special Economic Zone of a Developer whose licence has been suspended and take other actions consequent upon the suspension of the letter of approval. The Board of Approval has been empowered to issue such directions or formulate such scheme as it may consider necessary for operation of such Special Economic Zone.

Development Commissioner

Section 11 empowers the Central Government to appoint the Development Commissioner for one or more Special Economic Zones and such Officers and other employees as it considers necessary to assist every Development Commissioner. It also contains provisions for salary and allowances and other terms and conditions of service in respect of leave, pension, provident fund and other matters of the Development Commissioner, officers and other employees.

Functions of the Development Commissioner

Section 12 dealing with the functions of the Development Commissioner requires every Development Commissioner to take steps in order to discharge his functions to ensure speedy development of the Special Economic Zone and promotion of exports therefrom.
The functions of the Development Commissioner include:

(a) guide the entrepreneurs for setting up of Units in the Special Economic Zone;
(b) ensure and take suitable steps for effective promotion of exports from the Special Economic Zone;
(c) ensure proper coordination with the Central Government or State Government Departments concerned or agencies with respect to, or for above purposes;
(d) monitor the performance of the Developer and the Units in SEZ;
(e) discharge such other functions as may be assigned to him by the Central Government under this Act or any other law for the time being in force; and
(f) any other functions as may be delegated to him by the Board of approval.

This section entitles the Development Commissioner to be overall in charge of the Special Economic Zone and to exercise administrative control and supervision over the officers and employees. Every Development Commissioner is also required to discharge such functions and exercise such powers as may be delegated to him by a general or special order by the Central Government or the State Government concerned, as the case may be. The section further empowers the Development Commissioner to call for such information from a Developer or Unit from time to time as may be necessary to monitor the performance of the Developer and the Unit. The Development Commissioner has been authorised to delegate any or all of his powers or functions to any of the officers employed under him.

Constitution of Approval Committee

Section 13 empowers the Central Government to constitute by notification, a Committee for every Special Economic Zone, to be called the Approval Committee to exercise the powers and perform the functions as specified. In the case of existing Special Economic Zones, the Approval Committee is required to be constituted within six months from the date of commencement of the Act and in case of other Special Economic Zones established after the commencement of the Act within six months from the date of establishment of such Special Economic Zone. This section also contains provisions relating to composition of meetings and its quorum and requires all orders and decisions and instructions of the Approval Committee to be authenticated by the signature of the Chairperson or any other Member as may be authorised by the Approval Committee.

Powers and Functions of Approval Committee

Section 14 empowers every Approval Committee to discharge the functions and exercise the powers in respect of the following matters:

(a) approve, the import or procurement of goods from the Domestic Tariff Area, for carrying on the authorised operations by a Developer in the Special Economic Zone;
(b) approve providing of services by a service provider from outside India or from the Domestic Tariff Area for carrying on the authorised operations by the Developer, in the Special Economic Zone;

(c) monitor the utilisation of goods or services or warehousing or trading in the Special Economic Zone;

(d) approve, modify or reject proposals for setting up Units for manufacturing or rendering of services or warehousing or trading in SEZ in accordance with the provisions of Section 15(8) of the Act;

(e) allow on receipt of approval foreign collaborations and foreign direct investments, including investments by a person outside India for setting up a Unit;

(f) monitor and supervise compliance of conditions subject to which the letter of approval or permission, if any, is granted to the Developer or entrepreneur; and

(g) perform any other functions as may be entrusted to it by the Central Government or the State Government concerned, as the case may be.

In case the developer is Central Government, the approval committee has been empowered to exercise all powers of the approval committee, until the constitution of Approval Committee.

Setting up of Unit

Section 15 entitles any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, to submit a proposal to the Development Commissioner concerned. The Development Commissioner in turn place the proposal before the Approval Committee for its approval. The Approval Committee may, approve the proposal with or without modification, and subject to such terms and conditions as it may deem fit, or reject the same. In case of modification or rejection of a proposal, the Approval Committee has been put under obligation to afford a reasonable opportunity of being heard to the person concerned and after recording the reasons therefor, either modify or reject the proposal. Sub-section (4) entitles a person aggrieved by an order of the Approval Committee, to make an appeal to the Board of Approvals, within the prescribed time and specified manner. Sub-section (8) empowers the Central Government to prescribe the requirements (including the period for which a unit may be set up) subject to which the Approval Committee may approve, modify or reject the proposal. The Development Commissioner may, after the approval of the proposal, grant a letter of approval to the person concerned to set up a Unit and undertake in the Unit such operations which the Development Commissioner may authorise and every such operation so authorised is mentioned in the letter of approval.

Cancellation of letter of approval granted to entrepreneur

Section 16 empowers the Approval Committee to cancel the letter of approval of an entrepreneur after reasonable opportunity of being heard has been afforded to the entrepreneur. The Approval Committee may, at any time, cancel the letter of approval if it has any reason or cause to believe that the entrepreneur has persistently contravened any of the terms and conditions or its obligation subject to which the letter of approval was granted to the entrepreneur. It further provides that where the letter of approval has been cancelled, the Unit shall not, from the date of such
cancellation, be entitled to any exemption, concession, benefit or deduction available
to it as such and such Unit shall remit the exemption, concession, drawback and any
other benefit availed by the entrepreneur in respect of the capital goods, finished
goods lying in the stock and unutilised raw materials in the prescribed manner. Sub-
section (4) entitles any person aggrieved from an order of the Approval Committee to
make an appeal to the Board of Approval within the prescribed time.

Setting up and operation of Offshore Banking Unit

Section 17 dealing with setting up and operation of offshore Banking Unit
provides that an application for setting up and operation of an Offshore Banking Unit
in a Special Economic Zone may be made to the Reserve Bank, in the prescribed
form and manner. The Reserve Bank, of India may, on being satisfied that the
applicant fulfills all the specified conditions, grant permission to such applicant for
setting up and operation of an Offshore Banking Unit in a Special Economic Zone.
Sub-section (3) empowers the Reserve Bank to specify, by notification, the terms and
conditions subject to which an Offshore Banking Unit may be set up and operated in
the Special Economic Zone.

What do you mean by Offshore Banking Unit?

“Offshore Banking Unit” means a branch of a bank located in a
Special Economic Zone and which has obtained the permission
under clause (a) of sub-section (1) of Section 23 of the Banking
Regulation Act, 1949.

Setting up of International Financial Services Centre

Section 18 empowers the Central Government to approve setting up of an
International Financial Services Centre in a Special Economic Zone and to specify
requirements for setting up the operation of such Centre. However, the Central
Government may approve only one international Financial Services Centre in a
Special Economic Zone. The Central Government may subject to the guidelines as
may be framed by the Reserve Bank, the Security and Exchange Board of India, the
Insurance Regulatory and Development Authority and such other authority as it may
decide fit, prescribe the requirement for setting up and terms and conditions of the
operation of International Financial Services Center.

Single application form, return, etc.

Section 19 empowers the Central Government to prescribe single application
form for obtaining any licence, permission or registration or approval by a Developer
or an entrepreneur under one or more Central Acts. Section 19(b) empowers the
Central Government to authorise the Board, the Development Commissioner and the
approval Committee to exercise its powers on matters relating to the development of
SEZ or setting up or operation of units. Section 19(c) empowers the Central
Government to prescribe single form for furnishing returns or information by a
developer or an entrepreneur under one or more Central Acts.

Agency to inspect

Section 20 empowers the Central Government to specify, by notification, any
officer or agency for carrying out surveys or inspections for securing the compliance
with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency is required to submit verification or compliance report, in such manner and within such time as may be specified in the said notification.

**Single enforcement officer or agency for notified offences**

Section 21 empowers the Central Government to specify by notification, any act or omission made punishable under any Central Act, as notified offence for purposes of the proposed legislation. It further empowers the Central Government to authorise any officer or agency to be the enforcement officer or agency in respect of any notified offence committed in a Special Economic Zone. Every officer or agency so authorised has been granted all the corresponding powers of investigation, inspection, search or seizure as provided under the relevant Central Act in respect of the notified offences.

**Investigation, Inspection, Search or Seizure**

Section 22 empowers the agency or officer, with prior intimation to the Development Commissioner concerned to carry out the investigation, inspection, search or seizure in the Special Economic Zone or in a Unit if such agency or officer has reason to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone. However, no investigation, inspection, search or seizure is allowed to be carried out in a SEZ by any agency or officer other than those referred to in Section 21(2) or (3), without prior intimation or approval of the concerned Development Commissioner. It is further provided that an officer or agency, if so authorised by the Central Government, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner.

**Designated Courts to try suits and notified offences**

Section 23 empowers the concerned State Government, in which SEZ is situated, to designate, with the concurrence of the Chief Justice of the High Court of that State, one or more Courts to try all suits of a civil nature arising out of offences committed in the Special Economic Zone. Section 23(2) provides that no court, other than the designated court shall try any suit or conduct the trial of any notified offence.

**Appeal to High Court**

Section 24 entitles any person aggrieved by any decision or order of the designated Court to file an appeal to the High Court within sixty days from the date of communication of the decision or order of the said court to him on any question of fact or law arising out of such orders. However the High Court can, if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the prescribed period of sixty days allow it to be filed within a further period not exceeding sixty days.

**Offences by Companies**

Section 25 dealing with offences by companies provides that where an offence has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to, the company for the conduct of
the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However such person shall not be liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Section 25(2) provides that where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall, also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Exemptions, drawbacks and concessions to every Developer and entrepreneur

Section 26 contains provisions relating to exemptions, drawbacks and concessions to Developer and entrepreneur from any duty of customs under the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, exemption from the service tax under Chapter V of the Finance Act, 1994 and exemption from levy of taxes on sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carrying on authorised operations by the developer or entrepreneur. The developer or entrepreneur has also been entitled to drawback or such other benefits as may be admissible from time to time on goods brought or services provided from DTA into SEZ or unit or services provided in SEZ or unit by service providers located outside India to carry on the authorised operations by the Developer or entrepreneur. The Central Government has also been empowered to specify the manner in which and the terms and conditions subject to which, the exemptions, concessions, drawbacks or other benefits are to be granted to developer or entrepreneur.

Application of the provisions of the Income Tax Act, 1961 with certain modifications in relation to Developers and entrepreneurs

Section 27 provides for application of the provisions of the Income Tax Act, 1961 to the Developer and entrepreneur for carrying on the authorised operations in the Special Economic Zones or Unit subject to modifications specified in the second schedule.

Duration of goods & services in Special Economic Zones

Section 28 empowers the Central Government to specify, the period during which any goods brought into, or services provided in, any Unit or Special Economic Zone without payment of taxes, duties, levies or cess, shall remain or continue to be provided in such Unit or Special Economic Zone.

Transfer of ownership and removal of goods

Section 29 allows the transfer of ownership in any goods brought into, or produced or manufactured in, any Unit or Special Economic Zone or removal thereof from such Unit or Zone, subject to such terms and conditions as specified by the Central Government.
Domestic clearance by Units

Section 30 provides that any goods removed from a Special Economic Zone to the Domestic Tariff Area be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported. This section further provides that the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty. This section empowers the Central Government to make rules specifying conditions in this regard.

Special Economic Zone Authority

Section 31 dealing with the Constitution of Authority empowers the Central Government to constitute by notification in the Official Gazette, an Authority for every SEZ to exercise powers conferred on and discharge the functions assigned to it.

In the case of an existing SEZ established by the Central Government the Central Government has been empowered to establish such authority within six months from the date of commencement of the Act. It is further provided that the person or authority (including Development Commissioner) which is exercising control over an existing SEZ, shall continue to do so till the authority is constituted. Section 31(2) provides that every authority shall be a body corporate by name as assigned, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable and to contract and shall sue and be sued. Section 31(9) stipulated that no act or proceedings of an authority shall be invalidated merely by reason of:

(i) any vacancy in or any defect;
(ii) any defect in the appointment of a person as its member; or
(iii) any irregularity in the procedure of the authority not affecting the merits of the case.

Functions of Authority

Section 34 casts upon the Authority a duty to undertake such measures as it thinks fit for the development, operation and management of the respective Special Economic Zone. Section 34(2) provides for following measures:

(a) the development of infrastructure in the Special Economic Zone;
(b) promoting exports from the Special Economic Zone;
(c) reviewing the functioning and performance of the Special Economic Zone;
(d) levy user or service charges or fees or rent for the use of properties belonging to the Authority;
(e) performing such other functions as may be prescribed.

Directions by the Central Government

Section 38 empowers the Central Government to give directions to the authority and makes it binding for every Authority of the Special Economic Zone to carry out the directions issued from time to time in this regard.
Returns and reports by the Authority

Section 39 casts upon every Authority of the Special Economic Zone a duty to furnish to the Central Government such returns and statements and such particulars in regard to the promotion and development of exports and the operation and maintenance of the Special Economic Zone and Units as it may require from time to time. This section further requires every authority to submit to the Central Government after the end of each financial year a report in form and before specified date, giving a true and full account of its activities, policy and programmes during the previous financial year. Section 39(3) requires a copy of every such report to be laid before each House of Parliament, soon after its receipt.

Power of the Central Government to Supersede Authority

Section 40 empowers the Central Government to supersede an Authority for a maximum period of six months if at any time it is of the opinion that an Authority is unable to perform, or has persistently made default in the performance of the duty imposed on it or has exceeded or abused its powers, or has wilfully or without sufficient cause, failed to comply with any direction issued by it. However, before issuing a notification superseding an authority, the Central Government is required to give reasonable time to that Authority to make representation against the proposed suppression and consider the representations, if any, of the Authority. Section 40(2) dealing with the consequences of publication of the notification superseding the Authority, provides that,

(a) the Chairperson and other Members of the Authority shall, notwithstanding that their term of office has not expired as from the date of supersession, vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisions of the Act, be exercised or discharged by or on behalf of the Authority shall, during the period of supersession, be exercised and performed by such person or persons as the Central Government may direct;

(c) all property vested in the Authority shall, during the period of supersession, vest in the Central Government.

Section 40(3) also provides that on the expiration of the period of supersession specified in the notification, the Central Government may extend the period of supersession for such further period not exceeding six months or reconstitute the Authority in the prescribed manner.

Reference of Dispute and Limitation

Section 42 requires any dispute of civil nature arising among two or more entrepreneurs or two or more Developers or between the entrepreneur and Developer in the Special Economic Zone to be referred to arbitration provided, the court or the courts to try suits in respect of such dispute had not been designated. However no dispute should be referred to the arbitration on or after the date of the designation of court or courts under section 23(1). It further provides that where a dispute has been referred to arbitration, the same shall be settled or decided by the arbitrator to be appointed by the Central Government and the provisions of the Arbitration and Conciliation Act, 1996 shall apply to all arbitrations.

Section 43 stipulates that the period of limitation in the case of any dispute which is required to be referred to arbitration shall be regulated by the provisions of the
Limitation Act, 1963, as if the dispute was a suit and the arbitrator is civil court. Section 43(2), however, empowers the arbitrator to admit a dispute after the expiry of the period of limitation, if the arbitrator is satisfied that the applicant had sufficient cause for not referring the dispute within specified period.

**Person to whom a communication to be sent**

Section 45 provides that a communication by any competent authority or person may be sent to the person who has the ultimate control over the affairs of the Special Economic Zone or Unit or where the said affairs are entrusted to a manager, director, chairperson, or managing director, or to any other officer, by whatever name called, such communication may be sent to such manager, director, chairperson, or managing director or any other officer.

**Identity card**

Section 46 requires that every person whether employed or residing or required to be present in a Special Economic Zone be provided an identity card by every Development Commissioner in prescribed form and containing specified particulars.

**Power of the Central Government to modify provisions of the Act or other enactments in relation to Special Economic Zones**

Section 49 empowers the Central Government to direct, by notification in the Official Gazette, that any of the provision of the Act or any other Central Act, any rules or regulations made thereunder or any notification or order issued or direction given thereunder specified in the notification shall not apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones; or shall apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones only with such exceptions, modification and adaptation, as may be specified in the notification. Sub section (2) requires a copy of every notification proposed to be issued to be laid in draft before each House of Parliament. The notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses of Parliament.

**Power of State Government to grant exemption**

Section 50 empowers the State Government to notify policies for Developers and Units and to take suitable steps for enactment of any law -

(a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur;

(b) delegating the powers conferred upon any person or authority under any State Act to the Development Commissioner in relation to the Developer or the entrepreneur.

**SEZ Act to have overriding effect**

Section 51 giving overriding effect to this Act provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
Special Economic Zones to be ports, airports inland container depots, land stations etc. in certain cases

Section 53 provides that a Special Economic Zone, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorised operations. This section further provides that a Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations under section 7 of the Customs Act, 1962. The Central Government has been empowered to notify different dates for different Special Economic Zones.

Special Economic Zones Rules, 2006

Section 55 empowers the Central Government to make rules in respect of specified matters and requires that the same be published in the Official Gazette and be laid before each House of Parliament. In this context, the Central Government has notified the Special Economic Zones Rules, 2006 on February 10, 2006.

LESSON ROUND UP

- Special Economic Zones (SEZ) are growth engines that can boost manufacturing, augment exports and generate employment.
- Special Economic Zone (SEZ) is a specifically delineated duty free enclave and is deemed to be foreign territory for the purposes of trade operations and duties and tariffs.
- SEZ units may export goods and services including agro-products, partly processed goods, sub-assemblies and components except prohibited items of exports in ITC (HS).
- SEZ units are governed by Special Economic Zones Act, 2005.
- The functions of the Development Commissioner requires every Development Commissioner to take steps in order to discharge his functions to ensure speedy development of the Special Economic Zone and promotion of exports therefrom.
- The Central Government to constitute by notification, a Committee for every Special Economic Zone, to be called the Approval Committee to exercise the powers and perform the functions as specified.
- Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, to submit a proposal to the Development Commissioner concerned.
- Any person aggrieved by any decision or order of the designated Court to file an appeal to the High Court within sixty days from the date of communication of the decision or order of the said court to him on any question of fact or law arising out of such orders.
1. Special Economic Zones are growth engines. Discuss.
2. Discuss in detail the salient features of SEZ Act, 2005.
3. Explain the procedure for establishment of SEZ.
4. Briefly discuss the duties, powers and functions of Board of Approval in respect of Special Economic Zones.
5. What are the functions of Approval Committee under SEZ Act, 2005.
STUDY III
TRADE AND COMPETITION
(GENESIS, DEVELOPMENT AND LEGAL FRAMEWORK)

LEARNING OBJECTIVES

The objective of this study lesson is to enable the students to understand
- Competition Regime in India
- Anti-Competitive Agreement
- Abuse of Dominant Position
- Combination
- Regulation of Combination
- Competition Commission of India
- Competition Appellate Tribunal
- Offences and penalties
- Power of the Central Government to make Rules

INTRODUCTION

There is a growing recognition that a flexible, dynamic and competitive private sector is essential to fostering sustained economic development. Promoting effective competition spurs firms to focus on efficiency and improves consumer welfare by offering greater choice of higher-quality products and services at lower prices. It also promotes greater accountability and transparency in government-business relations and decision making, helps reduce corruption, lobbying, and rent seeking. In addition, it provides opportunities for broadly based participation in the economy and for sharing in the benefits of economic growth.

The idea of competition has had, for two centuries or more, a powerful influence on the way we think about our society, the way we organise things and the way we conduct our own economic and personal lives. The competition being an essential element in the efficient working of markets encourages enterprise and efficiency and widens choice. By encouraging efficiency in industry, competition in the domestic market whether between domestic companies alone or between those and overseas companies also contribute to international competitiveness. The full benefits of competition are, however, felt in markets that are open to trade and investment.
Economic theory suggests that prices and quantities in a competitive market equilibrate to levels that generate efficient outcomes at a given point of time. Competition is therefore, beneficial as it provides to consumers wider choice and provides sellers with stronger incentives to minimize costs, so eliminating waste. Competition increases the likelihood that cost savings resulting from efficiency gains will be passed on to a firm's customers, who may be either final consumers or intermediary customers (in which case costs of those firms are also lowered). Ample empirical evidence supports these arguments. The importance of competition for achieving a higher rate of innovation and adoption of new technologies over time is critical for sustaining rapid growth. Yet it is not automatic, and is not the same as laissez faire.

In fact, there are reasons to believe that less mature markets tend to be more, rather than less, vulnerable to anti-competitive practices than the markets of developed countries. Reasons include: (a) high "natural" entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (b) asymmetries of information in both product and credit markets; and (c) a greater proportion of local (non-tradable) markets. Competition also serves to diffuse socio-economic power, broadening participation in economic, social, and political advances while ensuring opportunities for new entrepreneurs. Moreover, it can facilitate realization of the benefits for the domestic economy of integrating into international trade and investment patterns.

Several studies have demonstrated the stimulating effects of competitive markets in terms of growth and prosperity. William Lewis in his book, *The Power of Productivity* underlines this point forcefully with his observations on the growth of productivity in the late 1990s in the United States. The author has argued that more than technology and other factors, what matters above all is competition. Similarly, economist Paul London in his book, *The Competition Solution* concludes that heightened competition in the US over-shadowed tax cuts or new technologies in explaining the prosperity of the 1990s. Competitive pressures helped suppress inflation and raise living standards though improved productivity. The author noted that competition from imports forced the steel and auto industry, among other manufacturers, to streamline, thereby pushing manufacturing productivity up by 4% a year. Competition has brought down real air fares, telephone rates and several other costs. Where jobs have been lost in one industry, these have been more than compensated by jobs created elsewhere; thus employment has not suffered but has shifted from losers to winners. This argument underlines across the board, the benefits of competition to a wide sections of society, including consumers, workers and many others.

**Definition of Competition**

Competition is a complex and technical subject which does not lend itself to easy summary or concise clarification. Of late, with globalisation and opening of the markets worldwide, it has become a subject of great practical importance. It involves the establishment and development of concepts, legal principles and policies for the benefit of consumer interest. The principles and policies are applied to a wide range of private agreements and arrangements, which commercial undertakings enter into for themselves or with each other. In addition, they also apply to the policies and directions of the Government.
In the absence of a generally accepted definition of the phenomenon of competition, it has to be regarded as the object fostered and protected by competition policy and law. The World Bank and OECD in its Report A Framework for the Design and Implementation of Competition Law and Policy, broadly defines the competition is "a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective, for example, profits, sales or market share."

Competition can also be defined as a process of economic rivalry between market players to attract customers. These market players can be multinational or domestic companies, wholesalers, retailers, or even the neighborhood shopkeeper. In their pursuit to outdo rival enterprises, market players either adopt fair means (producing quality goods, being cost efficient, adopting appropriate technologies, etc.) or indulge in unfair measures (carrying out restrictive business practices – such as predatory pricing, exclusive dealing, tied selling, collusion, cartelisation, abuse of dominant position, etc.). However, in the interest of consumers, and the economy as a whole, it is necessary to promote an environment that facilitates fair competitive outcomes in the market, curb anti-competitive behaviour and discourage market players from adopting unfair measures.

**Competition and Economic Efficiency**

A number of empirical studies found a positive relationship between competition and innovation, productivity and economic growth. P. Aghion and P. Howitt in Endogenous Growth Theory offered several theoretical situations where competition is conducive to innovation – Intensified product market competition could force managers to speed up the adoption of new technologies; Intensive product market competition with incumbent firms engaged in step by step innovative activities could enhance each firm's incentive to acquire or increase its technological lead over its rivals and, if labour markets are flexible, competition will induce skilled workers to move to opportunities employing best practices and technologies. Competition also reduces slack by providing more incentives for managers and workers to increase efforts and improve efficiency. Therefore, the product market competition disciplines firms into efficient operation.

Nickel et.al. in his article Competition and Corporate Performance suggested three different channels of incentives – competition creates greater opportunities for comparing performance; a more competitive environment where price elasticity of demand tends to be higher, induces greater efforts among workers and managers for cost reducing improvements in productivity since improvements could generate larger increase in revenue and profits; and a more competitive environment forces managers to improve efficiency, because more intense the competition, greater the chances for inefficient to be extinguished.

UK White Paper on World Class Competition Regime clearly brings out the importance of competition in an increasingly innovative and globalised economy. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production.

Empirical evidences show that strong competition is closely linked to dynamic
and efficient markets. The benefits of competitive forces for economic growth and consumer welfare are widely recognized and evidenced by several studies. Recently, an empirical study in the U.K. by the Centre for Competition Policy, University of East Anglia showed that prices were more than halved through competition in international telephony and airfares, and were significantly reduced in other areas. The survey also brought home the point that competition is not just about prices but is typically multi-faceted, bringing new ways of doing business and leading to technological and other advances.

Michel Porter in his recent work *Can Japan Compete?* shows that in Japan only those sectors characterized by strong domestic competition remain internationally competitive following the country's recent economic downturn, examples include cameras, automobiles and audio equipment. Many leading competition experts believe in the premise that, in the presence of competition, the market will achieve the objective of maximising welfare.

**Competition Law and Policy**

The World Bank and OECD in its Report *A Framework for the Design and Implementation of Competition Law and Policy* pointed out that a dynamic and competitive environment, underpinned by sound competition law and policy, is an essential characteristic of a successful market economy. Effective enforcement of competition law and active competition advocacy can also be powerful catalysts for successful economic restructuring. This in turn fosters flexibility and mobility of resources, which in the current global business environment are critical elements for the competitiveness of firms and industries across nations. Although the field of competition law and policy is evolving rapidly and includes many different viewpoints on specific issues, recognition is growing that effective competition law is important in shaping business culture and that its proper implementation needs to allow for the education of business people, government officials, the judiciary, and the interested public.

*The basic purpose of Competition Policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy. Competition policy typically has two elements: one is a set of policies that enhance competition in local and national markets. The second element is legislation designed to prevent anti-competitive business practices with minimal Government intervention, i.e., a competition law. Competition law by itself cannot produce or ensure competition in the market unless this is facilitated by appropriate Government policies. On the other hand, Government policies without a law to enforce such policies and prevent competition malpractices would also be incomplete.*

Competition policies cover a much broader set of instruments than competition law, and typically include all policies aimed at increasing the intensity of competition or rivalry in local and national markets by lowering entry barriers and opportunities for harmful coordination, to ensure that markets work effectively and serve the interests of all citizens. Competition law is only a subset of a nation's competition policies. Competition policies typically include pro-competition approaches to trade, investment, sectoral regulation, and consumer protection. The barriers to
international or interregional trade, restrictions on Foreign Direct Investment (FDI) and technology transfers, restrictions on entry in regulated network utility industries, regulations affecting the registration of new enterprises and the taxation and corporate governance of existing enterprises, and rules on marketing practices all influence the extent of competitive pressures in markets and so are appropriate concerns of competition policies. In many countries, competition authorities have become the focal point for consultations and putting forward pro-competition viewpoints across a broad range of policy areas.

Asian Development Bank in “During economic transition or reforms”, observed that “the benefits of an open market economy cannot be fully realized unless restrictions on competition are removed. Opening markets is not enough by itself for countries to begin reaping the benefits of competition; firms will still find incentives to engage in anti-competitive practices. Thus, the intended benefits of trade reforms may not be realized without active enforcement of competition law. This highlights the importance of having faith in the benefits of competition from an early stage of economic growth and of incorporating competition policy into the broader economic policy framework.”

Prof. Paul Geroski, former Chairman, Competition Commission of the United Kingdom observed that “Competition policy is about ensuring that markets are, and remain, competitive. This brings benefits to consumers eventually in all the ways. However, eliminating anti-competitive practices and dismantling monopoly positions that lead to abuses also benefit firms whose business suffers from these practices and abuses. It is worth emphasizing that many of the benefits that emanate from proper application of competition policy are felt in the first instance by firms. This is important for those who seem to think of competition policy as an added and unnecessary burden on business. Competition policy is sometimes a burden on business, but only on those businesses that try to unfairly disadvantage their rivals in ways that reduce their competitive abilities or incentives to compete vigorously”.

Hence, competition policy and competition law need to be distinguished. The former can be regarded as a genus, of which, the latter is specie.

COMPETITION REGIME IN INDIA

Historical Perspective

The Indian economy remained subject to controls and regulations for several decades, such as industrial licensing, foreign exchange restrictions, small scale industry protection, control on foreign investment and technologies, quantitative restrictions on imports, administered prices, and control on capital issues. The domestic industry was thus insulated from competition.

The economic consequences of this policy regime, though initially beneficial, were reflected in a poor rate of economic growth, low levels of productivity and efficiency, absence of international competitiveness, sub-optimal size of businesses, and outdated and inefficient technologies in various sectors.

India has therefore witnessed two phases of development process with different policy regimes and institutional frameworks. In the first phase, since independence, the transformation and development of the Indian economy took place within a planned, rigidly regulated and relatively closed economic framework. In the second
phase, since 1991, when the country embarked upon reform process and embraced market oriented policies.

In the late 1980s and early 1990s, need for liberalization policies was recognized and a range of policy and regulatory reforms were initiated, such as delicensing of industry, shrinking the monopoly of the public sector industries (other than those where strategic and security concerns dominated), removal of quantitative restrictions on imports, market determined exchange rate, liberalization of foreign direct investment, capital market reforms, liberalizing the financial markets, reduction in small scale industry reservations, and a much greater role for the private sector in infrastructure industries such as power, port, transport and communications.

**Economic Reforms and Competition**

The world economy has been experiencing a progressive international economic integration for the last half a century. There has been a marked acceleration in this process of globalisation and also liberalisation during the last three decades.

Since 1991, the Government of India has introduced a series of economic reforms, including policies of liberalisation, deregulation, disinvestment and privatisation. The seriousness of macroeconomic imbalances and unanimity towards reform rendered this possible. The broad thrust of the new policies was a move away from the centralised allocation of resources in some key sectors by the government to allocation by market forces. Private participation in economic development has emerged as an alternative to the state-oriented development strategy in the reform period.

After a decade of reforms, restraints to competition such as state monopolies and protective measures and controls have been replaced by relatively more competitive and de-regulated open market policies. In the post reform period, the private sector participation in production and supply of utility services has increased substantially. Independent regulators have been established for many sectors such as road, power, telecommunications and insurance. These sectoral regulators have been empowered to determine sector specific entry conditions and eventually the level of competition. In nutshell, post reforms period witnessed an open market orientation in industrial policy, foreign trade policy, foreign investment policy and financial sector policy, infrastructure policy, etc.

**Competition Law-Evolution and Development**

The first Indian competition law was enacted in 1969 and was christened as the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The genesis of the MRTP Act, 1969 is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principle of State Policy in those Articles lays down, *inter alia* that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice - social, economic and political - shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing:

1. that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and

2. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
Legal framework dealing with competition in India spread over other legislations, besides the Monopolies and Restrictive Trade Practices Act, 1969, other legislations dealing with competition include Consumer Protection Act, 1986, the Patents Act 1970 etc.

**What is competition in the market?**

In common parlance, competition in the market means sellers striving independently for buyers’ patronage to maximize profit (or other business objectives). A buyer prefers to buy a product at a price that maximizes his benefits whereas the seller prefers to sell the product at a price that maximizes his profit.

**Background to the MRTP Act, 1969**

India, when it became free from the colonial power was industrially very backward. In fact, it inherited an economy in a ravaged condition. Under development of the economy in many respects led the successor Government to adopt a system of planning. In the interest of transformation of the backward industrial economy into an advanced industrial economy, the planners thought it fit to allow the then established industries to develop and grow further. Alongside, mixed economy was also developed as a concept of economic planning. No doubt, there was perceptible growth in industrialisation. However, this also brought on its trails, concentration of wealth and economic power. This led to widening of the difference between the haves and have nots in the society. The Government of India therefore set up the Monopolies Inquiry Commission in 1964 with a view to finding out the causes, the nature and the extent of concentration of economic power in the country and to suggest remedial measures therefor.

The Monopolies Inquiry Commission submitted a detailed report in October 1965 which was well documented and revelatory of many facets of concentration of economic power. Many of the trade practices which were designed to stifle competition in the market and to promote monopolistic tendency were also noticed by the Commission in the course of its inquiry. The Commission observed that there was no need to strike at the concentration of economic power as such but to do so only when it became a menace to the best production in quality and quantity or to fair distribution. Monopolistic conditions in any industrial sphere should be discouraged without injury to the interests of the general public and monopolistic and restrictive trade practices should be curbed except when they were conducive to the common good. The Commission pointed out that on the one hand over the years certain business houses had built vast industrial empires and on the other hand they were trying to accentuate and enlarge the empires by adopting certain trade practices which were intended to distort competition in the market and promote a set of near monopoly conditions. The Commission felt that such tendencies seemed to destroy the basic concept of socio-economic justice enshrined in the Constitution. The Commission also framed a draft Bill as a part of its recommendations.

The Monopolies and Restrictive Trade Practices Bill was introduced in Parliament in 1967 which after being referred to the Joint Select Committee became an Act and finally came into force w.e.f. 1st June, 1970.
The enactment was based on the socio-economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution which provides that the State shall direct its policy towards securing that the ownership and control of material resources of the community are distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The principal objectives of the Act, as spelt out in the preamble were:
(i) prevention of concentration of economic power to the common detriment;
(ii) control of monopolies;
(iii) prohibition of monopolistic trade practice;
(iv) prohibition of restrictive trade practices.

The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991. Major changes introduced in the 1982 and 1984 Amendment Acts were based on the recommendations of the Sachar Committee. The 1984 amendment introduced the concept of unfair trade practice under the Act. Far-reaching changes have been brought about by the 1991 amendment and these were made in the wake of new industrial policy of July, 1991 which is wedded to liberalisation, globalisation and de-regulation.

Scheme of the Act

Prevention of undesirable concentration of economic power was sought to be achieved essentially through the regulation of growth of undertakings of particular size, viz. undertakings having assets of the value of Rs. 100 crores. These business houses were officially designated as large business houses. Undertakings having a sizable share of the market, or licensed production capacity of more than 1/4th of the total production or installed capacity in India were described as dominant undertakings. These companies were declared large business houses if their assets were of the value of Rs. 1 crore or more.

These undertakings were referred to as MRTP undertakings. Such undertakings had to obtain approval of the Central Government to undertake substantial expansion of production, establishment of new undertakings, amalgamate with or takeover any other undertaking. Appointment of persons who were directors in such undertakings as director in any other undertaking needed the approval of the Central Government. The Central Government also had the power to order for division of such undertakings or for severance of interconnection under certain circumstances. Restrictions were placed on the acquisition and transfer of shares of, or by, bodies corporate owning such undertakings.

However, the MRTP (Amendment) Act, 1991 sought to liberalise these restrictions by removing the concept of MRTP undertakings and provisions relating to their substantial expansion, amalgamation etc., and acquisition of shares of, or by, such undertakings etc. The provisions relating to Central Governments power to direct division of undertakings or severance of interconnection have been modified such that they apply to all undertakings (hitherto, they applied only to MRTP undertakings).

Chapter IV deals with monopolistic trade practices indulged in by any undertaking. The Act defines the concept of monopolistic trade practices in terms of
unreasonableness of the prices charged, unreasonableness in preventing or lessening competition in the market, unreasonably increasing prices, profits and limiting technical development to the common detriment etc. The remedy for dealing with monopolistic trade practice is an inquiry at the instance of the Central Government by the M.R.T.P. Commission or suo motu by the Commission and suitable orders being passed by the Central Government thereafter to prevent the mischief resulting from such practices.

The Act also deals with matters relating to restrictive trade practices. Briefly stated, a restrictive trade practice is one which prevents, distorts or restricts competition for goods and services in any manner. While unreasonableness is the test for monopolistic trade practices, even a small distortion in competition is sufficient to bring a case under restrictive trade practices. The provisions relating to restrictive trade practices are therefore intended to promote fair and free competition in the market. The Act provides for a scheme of registration of certain agreements relating to restrictive trade practices. The MRTP (Amendment) Act, 1984 introduced new provisions relating to unfair trade practices with a view to promoting the interest of consumers. It is essential to note that the M.R.T.P. Commission has been given full powers to regulate restrictive and unfair trade practices by means of an inquiry and pass final orders thereon. The MRTP Commission may inquire into restrictive and unfair trade practices at the instance of the Central Government, State Government, Director General of Investigation and Registration, registered consumer associations, individual consumer and on its own. The Commission has also powers to grant temporary injunctions and award compensation and punish for contempt under Sections 12A, 12B and 13B of the Act respectively.

The Commission is an independent quasi-judicial body and has powers similar to a Civil Court under the Code of Civil Procedure, 1908 on some matters. The Director General of Investigation and Registration and the Secretary of the Commission assist in the inquiry in respect of monopolistic, restrictive and unfair trade practices. The Commission conducts enquiries and other businesses in accordance with MRTPC Regulations, 1991.

The Central Government has framed the Monopolies and Restrictive Trade Practices Rules, 1970, the Monopolies and Restrictive Trade Practices (Classification of Goods) Rules, 1971, and the M.R.T.P. (Information) Rules, 1971 in exercise of the powers conferred under the Act. However these Rules have lost much of their significance in view of deletion of Sections 21 to 26 of the Act w.e.f. 27.9.91.

**MRTP (Amendment) Act, 1991**

The new industrial policy announced by the Government in Parliament on July 24, 1991 sought to amend the MRTP Act, 1969 by removing all pre-entry restrictions and placing more emphasis on controlling and regulating monopolistic, restrictive and unfair trade practices.

The ‘Statement of Objects and Reasons to the MRTP (Amendment) Act, 1991 reiterates that the basic philosophy behind the MRTP Act, 1969 was not to inhibit industrial growth but to ensure that industrial growth was channelised for public good and growth did not perpetuate concentration of economic power to the common detriment. To quote,

1. With the growing complexity of industrial structure and the need for achieving
economies of scale for ensuring higher productivity and competitive advantage in the international market, the thrust of the industrial policy has shifted to controlling and regulating the monopolistic, restrictive and unfair trade practices rather than making it necessary for certain undertakings to obtain prior approval of the Central Government for expansion, establishment of new undertakings, merger, amalgamation, take over and appointment of directors. It has been the experience of the Government that pre-entry restrictions under the MRTP Act on the investment decision of the corporate sector has outlived its utility and has become a hindrance to the speedy implementation of industrial projects. By eliminating the requirement of time-consuming procedures and prior approval of the Government, it would be possible for all productive sections of the society to participate in efforts for maximisation of production. It is, therefore, proposed to re-structure the MRTP Act by omitting the provisions of Sections 20 to 26 and transfer the provisions contained in Chapter III-A regarding restrictions on acquisition and transfer of shares to the Companies Act, 1956. The Schedule to the MRTP Act is also consequently to be transferred with modification to the Companies Act, 1956.

2. It is also proposed to enlarge the scope of inquiry by the MRTP Commission with a view to taking effective steps to curb and regulate monopolistic, restrictive and unfair trade practices which are prejudicial to public interest. It is also proposed to provide for deterrent punishment for contravention of the orders passed by the MRTP Commission and the Central Government and empower the Commission to punish for its contempt. Certain other consequential changes are also found necessary in the MRTP Act.

Scope and Applicability of the Act

Section 3 of the MRTP Act, 1969 provides that unless the Central Government, by notification in the Official Gazette otherwise directs, the Act shall not apply to:

(a) undertakings owned or controlled by the Government, a government company, a corporation, a registered cooperative society and undertakings the management of which has been taken over by the Central Government;

(b) trade unions and other associations of workmen;

(c) financial institutions.

However, vide notification dated 27.9.1991, the Government has directed that the provisions of the MRTP Act shall apply to all undertakings and financial institutions specified in Section 3 which were hitherto outside the purview of the Act, except undertakings owned or controlled by a Government company, or the Government and engaged in the production of arms and ammunition and allied items of defence equipment, defence aircraft and warships, atomic energy, minerals specified in the schedule to the Atomic Energy (Control of Production and Use) Order, 1953 and industrial units under the Currency and Coinage Division, Ministry of Finance, Department of Economic Affairs. Thus, the hitherto anomaly which used to exist prior to 27.9.91 about applicability of provisions of Act between private sector enterprises and public sector undertakings and those stated in sub-clause (a) to (g) of Section 3, has been removed.

But trade unions and other associations of workmen or employees formed for
their own reasonable protection as such workmen or employees continue to be exempt from the applicability of the MRTP Act. However, Truck owners or operators Unions/Associations being not of workmen have been held to be subject to the jurisdiction of MRTP Commission by Supreme Court in the case of Bharatpur Truck Operators Union.

In effect, all public sector companies, except those engaged in the production of arms and ammunition etc. and industries under the Currency and Coinage Division, have been brought within the scope of the MRTP Act in respect of monopolistic, restrictive and unfair trade practices.

**MONOPOLISTIC TRADE PRACTICES**

Prohibition of monopolistic trade practices is one of the objects of the MRTP Act, 1969. The word ‘monopoly’ has not been defined in the MRTP Act. But it is common knowledge that a pure monopoly as well as ‘monopolistic’ position leads to distortion of competition in the market, besides endangering in the normal circumstances concerted action to fix prices, supplies of commodities, etc. The result of such action is no doubt detrimental to the consuming public.

The Monopolies Inquiry Commission made copious analysis of this aspect in its report. It is worth quoting the following passages from Chapter V of the report:

Our study of product-wise concentration brings out prominently the fact that in a large number of industries, a single undertaking is the only supplier or at least has to its credit a very large portion of the market as compared with its competitors. Such an undertaking has the power to dictate the price of the commodity or services it supplies and to regulate its volume of production in such a manner as to maximize its profits. This power is what is generally understood by the words “monopoly power” though in the strict etymological sense of the word, and in strict economic theory, monopoly exists when there is only one single supplier, there is no reason why an enterprise enjoying the power to dictate the price and thus to control the market even though it is not the single supplier should not be considered a monopoly. What happens in such cases is that the price decided upon by the dominant producer (or distributor) is followed by others who are in a position to compete. This price leadership phenomenon is in essence a manifestation of the price leaders power to dictate the price in the market. We think it proper therefore to include within the word monopoly not only the single supplier in a market but also the one dominant supplier who has the power to dictate the price in the market."

“The question that next arises is : When such a power is shared by a few enterprises being the dominant sellers, should they be considered to be holding a monopolistic position? We see no reason to exclude such dominant sellers from our understanding of monopoly. For, the essence of monopoly is the ability to dictate the price and control the market without being materially influenced by other competing concerns.”

One important difference between the situation when a single seller dominates the market and a few independent sellers together enjoy a dominating position cannot be overlooked. In the former case, monopoly power is inevitably present, in the latter it may or not be present. The effect on the market of a few dominant sellers has been widely discussed by economists, specially in recent years; but their opinions are by no means the same. We do not propose to try to resolve this
controversy. It is sufficient for our purpose to notice that it is generally agreed that when a few big sellers dominate the market there will ordinarily be a high probability of their coming to some kind of agreement or understanding whether formal or not, about the price and output, by which a monopolistic power is shared between themselves. Even in the absence of such agreement or understanding it frequently happens that each has a healthy fear of the other big producers or distributors and ultimately a policy of live and let live comes into operation. Some economists point out that when a few large sellers dominate the market, each of them is able to calculate fairly and accurately the probable effect on the market of his action in increasing or decreasing his output. So, it is said that each will try to regulate the output in such a way that the marginal costs remain well below the price. Each such seller will also be well aware that any attempt of his to reduce the price is likely to be met immediately by similar action by his competitors. The matter is succinctly put by Stocking in Monopoly and Free Enterprise at p. 90 thus:

“...In markets where sellers are few, each in trying to determine his most profitable volume of output must, as would a monopolist, consider the probable effects of various possible rates of production not only on costs but also on prices. Indeed each seller will ordinarily decide on the price which he will sell and adjust his output accordingly, just as a monopolist does. Each oligopolist however in determining his price must consider not merely his own cost-price relationships but also how his rivals will react to his prices. Anyone of a few sellers, if fully informed and perfectly rational, when selling a completely standardised product will realise that if he reduces his prices his rivals will meet the lower price promptly.

For all these reasons we are convinced that when the market is dominated by a few sellers, monopolistic conditions will sometimes prevail. At the same time, we are conscious that even in a market of a few sellers there will sometimes be keen competition. This is likely to happen apart from the effect of the mutual jealousies which sometimes characterise the relations between big business houses when one or more of the few sellers feel confident that due to superior managerial ability and technical skill and financial resources they will be able to capture a larger share of the market at the expense of their rivals. Even so there is no gainsaying the fact that in a market of a few dominating sellers there is real risk of the emergence of monopolistic power and consequently of monopolistic practices. To ascertain the extent to which monopolistic practices prevail, we must examine not only the cases where a single enterprise is the sole or dominant producer of the goods or services but also the cases where a few enterprises between themselves share such dominating position.

RESTRICTIVE TRADE PRACTICES

The Monopolies and Restrictive Trade Practices Act, 1969, has as one of its objects the prohibition of restrictive trade practices. In order to ensure that the benefits of free and fair competition in a market reach the ultimate consumer, it is essential that the process of competition should not be distorted by any trade practice, either by a single manufacturer or a group of manufacturers or dealers. For instance, if a manufacturer stipulates a condition that the wholesale purchaser shall sell only his products and not of others or shall resell the goods only at the prices stipulated by him or forces the wholesale purchaser to procure the entire line of manufacture from him, the result may be a distortion of competition in the market. The MRTP Act is concerned with promoting fair and free competition in the market, the securing of consumer interest being the ultimate goal.
The Monopolies Inquiry Commission in its report observed that a restrictive trade practice means a practice which obstructs the free play of competitive forces or impedes the free flow of capital or resources into the stream of production or of the finished goods in the stream of distribution at any point before they reach the hands of the ultimate consumer. The Commission list out the following types of restrictive trade practices pursued not only in India but also in many other countries. These include (i) horizontal fixation of price (ii) vertical fixation of price and re-sale price maintenance; (iii) allocation of markets between purchasers; (iv) discrimination between purchasers; (v) boycott; (vi) exclusive dealing contracts; and (vii) tie-up arrangements.

The Monopolies Inquiry Commission made a wee-bit of distinction between a monopolistic trade practice and a restrictive trade practice. It observed every monopolistic trade practice is on the face of it a restrictive trade practice. Indeed, sometimes the two words are used indiscriminately. Thus the report of Macquarie Committee which was set up to study Canadian Combines Legislation treats all combines or common policy among several firms designed to strengthen the market position of a group of firms as monopolistic practices. In our opinion, every practice whether it is by action or understanding or agreement, formal or informal, to which persons enjoying monopoly power resort in exercise of the same to reap the benefits of that power and every action, understanding or agreement tended to or calculated to preserve, increase of consolidate such power should properly be designated monopolistic trade practice.

UNFAIR TRADE PRACTICES

Unfair trade practices in trade and commerce were prevalent even in older days. Priests in Sumaria and Babylon are on record to have lent money to the needy at high rates of interest. During the period of Tudors, practices of forestalling (meaning pushing up prices by buying up supplies before they reached market), regrating (buying up supplies in the market), and engrossing (buying up supplies wherever available) were prevalent. Thus exploitation at market place is not a new phenomena of modern civilisation. At present various types of unfair trade practices are prevalent at National as well as at International markets. The legislative history of countries the world over bears redeeming testimony to the endeavours of the National Governments to enact suitable legislations to curb such unfair trade practices.

The underlying objective of such legislative endeavours has been to make the behaviour at market place conducive to righteous dealings so that the ultimate consumer gets a fair deal. Senator Murphy, the then Australian Attorney General, introducing the Restrictive Trade Practices Bill of the Commonwealth of Australia in the Senate said: In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as ‘Caveat Emptor meaning ‘let the buyer beware. That principle may have been appropriate for transactions conducted in village markets, it has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on organised basis and by the trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions
suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.

It is often said that consumers need no special protection; all can be safely left to the market. But the concept of perfect market is an economist's dream and consumers sovereignty a myth. In real life products are complex and of great variety and consumers and retailers have imperfect knowledge. Suppliers may often have a dominant buying position. As a consequence bargaining power in the market is generally weighed against the consumer. Thus consumers have felt the need to create organisations to identify their interests and to supply information and advice.

The Federal Trade Commission of US is stated to have labelled under the Federal Trade Commission Act, 1914 numerous practices not known before. It was because a need was felt to ensure that the public was prevented from being made victims of false claims of products blatantly advertised even though it may not have an adverse effect on the competition. The effort was to shift the emphasis on detention and eradication of fraud against the consumers, particularly those belonging to the weaker sections of the society.

**Consumer Protection Law in India**

The Government enacted various laws to safeguard the interest of the consumers. The Essential Commodities Act, The Trade Marks Act, The Specific Relief Act, The Drugs Control Act, The Drugs and Cosmetics Act, The Drugs and Magic Remedies (Objectionable Advertisements) Act, The Emblems and Names (Prevention of Improper Use) Act, The Indian Standard Institution (Certification Marks) Act, The Agricultural Produce (Grading and Marketing) Act, The Standards of Weights and Measures Act, etc. are a few of the many laws intended to protect the interest of the consumer. Some of these laws alongwith the delegated legislation framed thereunder protect both the pecuniary interest as well as other interests of the consumer. Even the Indian Contract Act 1872 and the Sale of Goods Act, 1930 contain provisions for breach of contracts and remedies therefor. The Indian Penal Code provides for stringent punishment for certain offences.

In the year 1986, the Government enacted the Consumer Protection Act, 1986 and framed necessary rules thereunder, for facilitating the formation of Consumer Protection Councils in all states and setting up of Consumer Forums at district level, State Commission at state level and National Commission at national level for redressing the grievances of consumers. The Government also framed the MRTP (Recognition of Consumer Association) Rules and amended a number of economic legislations like the Essential Commodities Act, 1955; Standards of Weights and Measures Act, 1976; Prevention of Food Adulteration Act, 1954; Drugs and Cosmetics Act, 1940 etc. to provide better protection to consumers.

However, the passing of the MRTP Act, 1969, could be said to be the beginning of the Government's concern for consumer interest. Till the amendment of the Act in the year 1984, even the MRTP Act did not contain provisions directly aimed at protecting the interests of consumer, but they were intended to regulate competition in the hope that it would generate fair conduct, the effect of which would percolate to the ultimate consumer, the terminal point in the distributive line.
**Recommendations of Sachar Committee**

The Government of India appointed a Committee in August, 1977 under the Chairmanship of Justice Rajinder Sachar to look into the simplification of the working of the companies and the MRTP Act. The Committee submitted its report in the year 1978 and as far as recommendations pertaining to the MRTP Act are concerned, far reaching changes were suggested by the Committee. For the first time, the Committee highlighted the need for introduction of suitable provisions to curb unfair trade practices.

In its view, the assumption that curbing monopolistic and restrictive trade practices and thereby preventing distortion of competition automatically results in the consumers getting a fair deal was only partly true. It was felt necessary to protect the consumers from practices adopted by trade and industry to mislead or dupe them.

The Committee pointed out that advertisements and sales promotion having become well established modes of modern business techniques, representations through such advertisements to the consumer should not become deceptive. If a consumer was falsely induced to enter into buying goods which do not possess the quality and did not have the cure for the ailment advertised, it was apparent that the consumer was being made to pay for quality of things on false representation. Such a situation could not be accepted.

Therefore, an obligation is to be cast on the seller to speak the truth when he advertises and also to avoid half truths, the purpose being preventing false or misleading advertisements.

The Committee also noted that fictitious bargain was another common form of deception and many devices were used to lure buyers into believing that they were getting something for nothing or at a nominal value for their money. The Committee observed: Prices may be advertised as greatly reduced and cut when in reality the goods may be sold at sellers regular prices. Advertised statements that could have two meanings, one of which is false, are also considered misleading. In America, it was held that statement that a tooth paste ‘fights decay could be interpreted as a promise of complete protection and was thus deceptive. Mock-ups on television put up by companies including Colgate Palmolive had also received the attention of the Enforcement Agencies in America and have been held to be deceptive.

We cannot say that the type of misleading and deceptive practices which are to be found in other countries are not being practised in our country. Unfortunately our Act is totally silent on this aspect. The result is that the consumer has no protection against false or deceptive advertisements. Any misrepresentation about the quality of a commodity or the potency of a drug or medicine can be projected without much risk. This has created a situation of a very safe heaven for the suppliers and a position of frustration and uncertainty for the consumers. It should be the function of any consumers legislation to meet this challenge specifically. Consumer protection must have a positive and active role.

Accordingly, the Committee specified certain unfair trade practices which were notorious and suggested prohibition of such practices. The main category of unfair trade practices recommended for prohibition by the Sachar Committee were: (a) misleading advertisements and false representations (b) bargain sale, bait and switch selling; (c) offering gifts or prizes with the intention of not providing them and
conducting promotional contests; (d) supplying goods not conforming to safety standards; and (e) hoarding and destruction of goods.

In India, by an amendment to the MRTP Act in the year 1984 Part B Unfair Trade Practices was added to Chapter V. It may be recalled that Part 'A of Chapter V deals with registration of agreements relating to restrictive trade practices. Section 36A, 36B, 36C, 36D and 36E are relevant for the purposes of understanding the main provisions relating to unfair trade practices.

Scheme of the Act with respect to Unfair Trade Practices

The term ‘Unfair Trade Practices’ is defined in Section 36A which enlists a number of practices as unfair trade practices. This definition has been amended vide the MRTP (Amendment) Act, 1991 making its scope wider in application. Section 36B provides for an enquiry into unfair trade practices by the MRTP Commission. Section 36C contains provision for preliminary investigation by the Director General in certain cases. Section 36D deals with the powers of the Commission to inquire into unfair trade practice and pass remedial orders. Section 36E empowers the Commission to exercise same powers in respect of unfair trade practices as it exercises in respect of restrictive trade practices.

Why do we need competition in the market?

Competition is now universally acknowledged as the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices. Producers will have maximum incentive to innovate, reduce their costs and meet consumer demand. Competition thus promotes allocative and productive efficiency. But all this requires healthy market conditions and governments across the globe are increasingly trying to remove market imperfections through appropriate regulations to promote competition.

COMPETITION ACT, 2002

Short title, extent and commencement

Section 1 of the Act provides that it shall come into force on such date as the Central Government may notify in the Official Gazette. However, an enabling provision empowering the Government to appoint different dates for different provisions of the Act have been incorporated. The scope of the Act extends to whole of India except the State of Jammu and Kashmir.

Scheme of the Act

The Scheme of the Act has been split into nine chapters indicated hereunder: Chapter I contains preliminary provisions viz. Short title, extent and Definition clauses; Chapter II provides for substantive laws i.e. Anti Competitive Agreements, Abuse of Dominance and Regulation of Combinations; Chapter III contains provisions relating to Establishment of Commission, Composition of Commission, Selection of Committee for Chairperson and other Members, Term of Office of Chairperson etc. Chapter IV elaborately provides the Duties, Powers and Functions of the Commission; Chapter V provides for the Duties of Director General; Chapter VI
stipulates Penalties for Contravention of Orders of Commission, Failure to Comply with Directions of Commission and Director-General, Making False Statement or Omission to Furnish Material Information etc; Chapter VII deals with Competition Advocacy; Chapter VIII contains provisions relating to Finance, Accounts and Audit, Chapter VIII A contains provisions relating to “Competition Appellate Tribunal” [inserted by the Competition (Amendment) Act, 2007] and Chapter IX contains Miscellaneous provisions.

The Competition Act, 2002 to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto.

DEFINITIONS

The important concepts incorporated in the Competition Act, 2002 have been defined under Section 2 of the Act. These have been discussed herein below:

Acquisition

This term has been specifically defined. It means – directly or indirectly, acquiring or agreeing to acquire: (i) shares, voting rights or assets of any enterprise; (ii) control over management or control over assets of any enterprise. [Section 2(a)]

The terms ‘acquiring’ or ‘acquisition’ are relevant for “Regulation of Combinations”.

Agreement

The term includes any arrangement or understanding or action in concert—

(i) whether or not, such arrangement, understanding or concert is in formal or in writing; or

(ii) whether or not such arrangement, understanding or concert is intended to be enforceable by legal proceedings.

It implies that an arrangement need not necessarily be in writing. The term is relevant in the context of Section 3, which envisages that anti-competitive agreements shall be void and thereby prohibited by the law. [Section 2(b)]

The term “Competition” is not defined in the Act. However, in the corporate world, the term is generally understood as a process whereby the economic enterprises compete with each other to secure customers for their product. In the process, the enterprises compete to outsmart their competitors, sometimes to eliminate their rivals. Competition in the sense of economic rivalry is unstable and has a natural tendency to give way to a monopoly. Thus, competition kills competition.

Cartel

“Cartel” includes an association of producers, sellers or distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to
control the production, distribution, sale or price of or, trade in goods or provision of services. [Section 2(c)]

The nature of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.

An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.

An import cartel comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country.

An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Competition Act, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements. This is because such cartels do not adversely affect markets in India and are hence outside the purview of the Competition Act.

If there is effective competition in the market, cartels would find it difficult to be formed and sustained.

Some of the conditions that are conducive to cartelization are:

- high concentration - few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs
- excess capacity
- high dependence of the consumers on the product
- history of collusion

Chairperson

Chairperson means the Chairperson of Competition Commission of India appointed under Sub-section (1) of Section 8. [Section 2(d)]

Commission

Commission means Competition Commission of India established under Section 7(1). [Section 2(e)]

Consumer

Under that Act, the Consumer includes only such purchasers or buyers who make purchases for their own consumption or to earn their livelihood. This deficiency has now been made good – by defining “Consumer” under the Act. Consumer means
any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use.

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment when such services are availed of with the approval of the first mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use. [Section 2(f)]

It may be noted that under the Competition Act even if a person purchases goods or avails of services for commercial purpose, he will be a Consumer, whereas for purposes of Consumer Protection Act, a person purchasing goods/ availing services for commercial purposes is not a “Consumer” and can not seek relief under that Act.

**Director General**

Director General means the Director General appointed under Section 16(1) and includes Additional, Joint or Deputy or Assistant Director Generals. [Section 2(g)]

**Enterprise**

Enterprise means a person or a department of the Government, who or which is, engaged in any activity, relating to production, control of goods or articles or provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities whether such unit or division or subsidiary is located at the same place where the enterprise is located or at different place(s).

However, it does not include any activity of the Central Government relating to sovereign functions of Government including all activities carried on by the Government Departments dealing with atomic energy, currency, defence and space.

‘Activity’ includes profession or occupation. ‘A unit or division’ includes a plant or factory established for production, supply, distribution, acquisition or control of any goods or any branch or office established for provision of any service. [Section 2(h)]

It may thus be noted that sovereign function of Government are excluded from definition of enterprise but Government Departments performing non-sovereign functions for consideration are subject to jurisdiction of Commission.

**Goods**

Goods means goods as defined in Sale of Goods Act, 1930 and includes—

(a) products manufactured, processed or mined;

(b) debentures, shares and stocks after allotment;
(c) in relation to ‘goods supplied’, goods imported into India. [Section 2(i)]

**Member**

Member means a Member of the Commission appointed under Section 8(1) of the Act and includes a Chairperson. [Section 2(j)]

**Notification**

Notification means notification published in the Official Gazette. [Section 2(k)]

**Person**

Person includes (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons; (vi) a corporation established under Central, State Act or a Government Company (vii) a body corporate incorporated by or under a law of a foreign country; (viii) a co-operative society registered under any Law (ix) local authority (x) every artificial juridical person.

‘Government Company’ for this Section will be same as defined under Section 617 of Companies Act, 1956. [Section 2(p)]

**Practice**

Practice includes any practice relating to carrying on of any trade by a person or enterprise. [Section 2(p)]

**Prescribed**

Prescribed means prescribed by rules made under the Act by Central Government. [Section 2(n)]

**Price**

Price, in relation to sale of goods or supply of services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration, which relates to sale of any goods or to performance of any services although ostensibly relating to any other matter or thing. [Section 2(o)]

**Public Financial Institution**

Public Financial Institution means a Public Financial Institution as defined in Section 4A of Companies Act, 1956 and includes a State Financial, Industrial or Investment corporation. [Section 2(p)]

**Regulations**

Regulations means the regulations made by the Competition Commission of India. [Section 2(q)]

**Relevant Market**

Relevant market means the market, which may be determined by the Commission with reference to ‘relevant product market’ or ‘relevant geographic
market’ or with reference to both the markets. [Section 2(r)]

**Relevant Geographic Market**

Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas. [Section 2(s)]

**Relevant Product Market**

Relevant Product Market means a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of products or services, their prices and intended use. [Section 2(t)]

The terms ‘relevant market’, ‘relevant geographical market’ and ‘relevant product market’ have relevance in determination of the agreements being anti competitive, in evaluating combinations and dominance of an enterprise or group. An agreement in the nature of cartel which limits or controls production, supply, market, technical development, investments etc. need to be looked as being anti competitive with reference to relevant market. Similarly agreement to share the market or sources of production by way of allocation of geographical area of market, types of goods or services or number of customers in the market or by any similar way and these need to be interpreted in the context of the definition of relevant geographical market under Section 2(s).

**Service**

Service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising. [Section 2(u)]

It may be noted that under the Competition Act, the services of industrial or commercial nature also fall within the scope of the Act whereas under the Consumer Protection Act, the services of commercial nature or for business or industrial purposes are excluded for interpreting deficiency in the supply thereof and for determining compensation, if any, payable to them. To this extent, the relief claimable under the Consumer Protection Act, 1986 is limited in scope. It may also be noted that “education” has been specifically included in ambit of “Service” to set at rest the dispute, if any, about the jurisdiction of Commission in such matters.

**Shares**

Shares means shares in the share capital of a company carrying voting rights and includes, –

(i) any security which entitles the holder to receive shares with voting rights;
(ii) stock except where a distinction between stock and share is expressed or implied. [Section 2(v)]

This definition of shares is much wider than what is provided under the Companies Act. It implies that not only shares in the share capital of a company e.g. equity or preference shares are included in the definition of shares but ‘debentures convertible into shares with voting rights’ are also included.

**Statutory Authority**

Statutory authority means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto. [Section 2(w)]

It implies that this definition widens the scope of type of bodies, which are empowered to make a reference for enquiring into anti-competitive agreement or abuse of dominant position or make a reference for opinion on a competition issue.

**Trade**

Trade means any ‘trade’, business, industry, profession or occupation relating to production, supplies, distribution, storage or control of goods and includes the provision of any services.

The definition of the term ‘trade’ is relevant, inter-alia, to the interpretation of any of the type of agreement listed in Section 4 (a), (b), (c), (d) and (e) in relation to the trading goods and provisions of services. [Section 2(x)]

**Turnover**

Turnover includes value of sale of goods or services. [Section 2(y)]

The definition of the term ‘turnover’, inter-alia, is relevant and significant in determining whether the combination of merging entities exceeds the threshold limit of the turnover specified in Section 5 of the Act. It is also relevant for the purpose of imposition of fines by the Commission.

Section 2 further provides that the words and expression used but not defined in the Competition Act, 2002 and defined in the Companies Act, 1956 [(1) of 1956] shall have the same meaning respectively assigned to them in the Companies Act, 1956 (1 of 1956).

Chapter II of the Competition Act, 2002 stipulates provisions relating to Prohibition of Certain Agreements, Abuse of Dominant Position and Regulations of Combinations.

**Anti Competitive Agreements**

It is provided under Section 3(1) of the Competition Act that no enterprise or association of enterprises or person or association of persons shall enter into any
agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. Section 3(2) further declares that any anti-competitive agreement within the meaning of sub-section 3(1) shall be void. Under the law, the whole agreement is construed as 'void' if it contains anti-competitive clauses having appreciable adverse effect on competition. Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or associations of persons or person or enterprise or practice carried on, or decision taken by any association of enterprises or association of persons, including “cartels”, engaged in identical or similar goods or services which –

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and

(d) directly or indirectly results in bid rigging or collusive bidding;

shall be presumed to have an appreciable adverse effect on the competition and onus to prove otherwise lies on the defendant.

The explanation appended to the Section 3 defines the term ‘bid rigging’ as any agreement between enterprises or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Efficiency enhancing joint ventures entered into by parties engaged in identical or similar goods or services, shall not be presumed to have appreciable adverse effect on competition but judged by rule of reason. The term “cartel” used in the Section is the most severe form of entering into ‘anti competitive agreements’ and has been defined in Section 2(c).

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

**Bid rigging is anti-competitive**

Bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private bodies (companies, corporations, etc.). But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.
Some of the most commonly adopted ways in which collusive bidding or bid rigging may occur are:

- agreements to submit identical bids
- agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntarily inflated bids)
- agreements not to bid against each other,
- agreements on common norms to calculate prices or terms of bids
- agreements to squeeze out outside bidders
- agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis

If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending. Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.

Section 3(4) provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

(a) tie-in agreement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;
(e) resale price maintenance;

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

The term “tie-in agreement” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. A good example of tie-in agreement is where a gas distributor requires a consumer to buy a gas stove as a pre condition to obtain connection of domestic cooking gas. [Chanakaya and Siddharth Gas company, In-re RTP 11/1985 decided by (MRTP Commission on 27.1.1985)]

“Exclusive supply agreement” includes any agreement restricting in any manner from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Thus, where a manufacturer asks a dealer not to deal in similar products of its competitor directly or indirectly and discontinues the supply on the ground that dealer also deals in product of suppliers’ competitor’s goods is an illustration of exclusive dealing agreement. [Bhartia Curtec Hammer Ltd. In-re (1997) 24 CLA 104 (MRTPC)]
“Exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

Requiring a distributor not to sell the goods of the manufacturer beyond the prescribed territory is a good example of exclusive distribution agreement. Vadilal Enterprise Ltd. In-re (1998 (91) COMP CAS 824 is a good example of exclusive distribution agreement.

“Refusal to deal” includes any agreement, which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. For eg. an agreement which provides that the franchisees will not deal in products or goods of similar nature for a period of three years from the date of determination of agreement within a radius of five kms from showroom amounts to exclusive dealing agreement. DGIR v. Titan industries (2001) 43 CLA 293 MRTPC.

“Resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Any stipulation that the cement dealer should not sell below the stipulated price is a ‘resale price maintenance‘ practice and is an anti competitive practice. (In re-India Cement Ltd. RTP Inquiry 48 /1985).

The agreements falling in Section 3(3) shall be presumed to have appreciable adverse affect on competition and thereby they are construed as deemed restrictive agreements. The agreements falling in Section 3(4) shall be judged by rule of reason and the onus lies on the prosecutor to prove its appreciable adverse effect on competition. The definition of all restrictive concepts covered under Section 3(4) is inclusive one.

Moreover, Section 3 does not restrict the right of any person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957;
(b) the Patents Act, 1970;
(c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999;
(e) the Designs Act, 2000;

That apart, the Act does not restrict any person's right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provision of services for fulfilling export contracts. The exclusion of 'export business' is in view of 'effect theory', and doctrine of 'relevant market'.
Application of Rule of Reason

The Supreme Court in TELCO vs. RRTA [1977 AIR SC 973] observed that the decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on that doctrine that any restriction as to area or price will per se be a restrictive trade practice. Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered.

First, what facts are peculiar to the business to which the restraint is applied.

Second, what was the condition before and after the restrain is imposed.

Third, what is the nature of the restraint and what is its actual and probable effect.

Prohibition of abuse of dominant position

Section 4 of the Competition Act, 2002 expressly prohibits any enterprise or group from abusing its dominant position, meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour”.

In line with the latest global trend, the dominance shall not be determined with reference to “assets”, “turnover” or “market share”.

As per Section 2(r) ‘relevant market’ means the market, which may be determined by the Commission with reference to the relevant ‘product market’ or ‘relevant geographic market’ or with reference to both the markets. Thus, for determining dominance, these are relevant concepts.

The term “enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

For the purposes of this clause, “activity” includes profession or occupation; “article” includes a new article and “service” includes a new service; “unit” or “division”, in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution,
acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service.

Section 4(2) states that there shall be abuse of dominant position, if an enterprise or group —

(a) directly or indirectly imposes unfair or discriminatory;

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation appended to Section 4 (2) clarifies that the unfair or discriminatory condition in purchase or sale of goods or services shall not include any discriminatory condition or price which may be adopted to meet the competition.

Section 4(2)(b) includes in abuse of dominant position an enterprise or group limiting or restricting

(i) production of goods or provision of services or market therefore; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers.

Similarly Section 4 (2) (c), (d) and (e) specify three other forms of abuses namely, if any person indulges in practice or practices resulting in denial of market access in any manner; or makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts and also, if any person uses dominant position in one relevant market to enter into, or protect, other relevant market.

The term “predatory price” has been defined as the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors. Thus, the two conditions precedent to bring a case with the ambit of predatory pricing are:

(i) selling goods or provision of service at a price which is below its cost of production and

(ii) that practice is resorted to eliminate the competitors or to reduce competition.

The Competition Commission of India has been empowered under Section 19(4) of the Act to determine whether any enterprise or group enjoys a dominant position or not, in the ‘relevant market’ and also to decide whether or not there has been an abuse of dominant position. It may be noted that mere existence of dominance is not to be frowned upon unless the dominance is abused.

Combinations

Combination has broad coverage and includes acquisition of control, shares, voting rights, assets, merger or amalgamation. The acquisition of one or more enterprises by one or more person or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if —

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and the enterprise,
whose control, shares, voting rights or assets have been acquired or are being acquired jointly have, -

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have, -

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if -

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or

(ii) the group, to which enterprise whose control has been acquired, or is being acquired would belong after the acquisition, jointly have would jointly have,

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India or turnover more than six billion US dollars including at least rupees fifteen hundred crores in India; or

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a
result of the amalgamation, as the case may be, have, -

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees, three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have, -

(A) either in India, the assets of the value or more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) in India or outside India, the assets of the value of more than two billion US dollars including at least rupees five hundred crores in India or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

It may be pointed out that “control” for the purposes of this section includes controlling the affairs or management by — (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise.

The term “group” means two or more enterprises, which, directly or indirectly, are in a position to—

(i) exercise less than fifty percent of voting rights in other enterprise; or

(ii) appoint more than fifty per cent of the members of the board of directors in other enterprise; or

(iii) control the management or affairs of the other enterprise.

It is further provided that the “value of the assets” shall be determined on the basis of the value of assets as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, after deducting any depreciation therefrom. The value of the assets shall also include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, geographical indications, design or layout design or similar other commercial rights, referred to in Section 3(5).

It is clear from the above that two kinds of norms have been prescribed which would attract Section 5. Firstly, the “value of asset” and secondly the “turnover” in India or outside India. In the case of a “group” the “assets” or “turnover” of the “group” has to be aggregated and in the case of “merger” or “amalgamation” the value of the “assets” or “turnover” of the resultant entity has to be computed in case the parties do not belong to a ‘group’. In case a party belongs to a group, the assets or turnover of the group and the merged or amalgamated entity could belong. It is also noteworthy that the control may be either by one or more enterprises over
another enterprise or a group or one or more groups singly or jointly over another group or enterprise. It is also significant to note that while computing the value of the assets both ‘physical assets’ and the intangible ones such as ‘goodwill’ or ‘trade mark’ etc. will be taken into account in determining whether reporting requirements get triggered or not.

In exercise of the powers conferred by the sub section (3) of Section 20 of the Competition Act, 2002, the Central Government in consultation with the Competition Commission of India, vide its Notification S.O. 480(E) dated 4th March, 2011 enhance, on the basis of Wholesale Price Index, the value of assets and the value of turnover, by fifty per cent for the purposes of Section 5 of the Act.

The Central Government, in Public interest, exempts an enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than Rs. 250 crores or turnover of not more than Rs. 750 crores from the provisions of Section 5.

**Regulation of Combinations**

Section 6 of the Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be void. Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form, prescribed and submit the form together with the fee prescribed by regulations. Such intimation should be submitted within 30 days of—

(a) approval of the proposal relating to merger or amalgamation, referred to in Section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

A newly inserted sub-section (2A) envisages that no combination shall come into effect until 210 days have passed from the day of notice or the Commission has passed orders, whichever is earlier.

The Competition Commission of India (CCI) has been empowered to deal with such notice in accordance with provisions of Sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under Section 6(2) is correct and whether the combination has, or is likely to have, an appreciable adverse effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in
its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

The provisions of Section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. This exemption appears to have been provided in the Act to facilitate raising of funds by an enterprise in the course of its normal business. Under Section 6(5), the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement, within seven days from the date of such acquisition or entering into such agreement, as the case may be.

As per the explanation appended to Section 6(5)

(a) “foreign institutional investor” has the same meaning as assigned to it in clause (a) of the Explanation to Section 115AD of the Income-tax Act, 1961;

(b) “venture capital fund” has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of Section 10 of the Income-tax Act, 1961.

It may be noted that under the law, the combinations are only regulated whereas anti-competitive agreements and abuse of dominance are prohibited. Further, under the MRTP Act prior to 27.9.91, undertakings of certain size were required to be registered and such undertakings were required to seek prior approval of the Central Government before embarking upon expansion plans. In the present Act, there is no requirement of registration of an undertaking and further, there is no need to have prior approval of the Central Government but CCI will only examine as to whether or not combination is or is likely to have an appreciable adverse effect on competition.

The Competition Act with many innovative concepts coupled with power to impose fine is likely to let in harsh glare of sunlight to disinfect pernicious anti-competitive practices.

**Competition Commission of India**

*Establishment of Commission*

The Central Government under Section 7 has been empowered to establish a Commission to be called “Competition Commission of India” by issue of a Notification. The Commission is a body corporate having perpetual succession and a common seal. The Commission has power to acquire, hold movable or immovable property and to enter into contract in its name and by the said name, sue or be sued. In the premises, the set up of Commission corresponds to that of Securities & Exchange Board of India constituted under the SEBI Act, 1992.

The Head Office of the Commission shall be at such place as the Central Government may decide from time to time. Vide Notification: SO 1198(E) dtd. 14th
Oct., 2003, the Central Government established the Competition Commission of India having its Head Office at New Delhi.

The Commission has also been authorized to establish its office at other places in India. Thus, the law provides for setting up of CCI’s offices at places other than that of its Headquarter.

Composition of Commission

The composition of the Commission as spelled out under Section 8 of the Act consists of a Chairperson and not less than two and not more than six other Members. The Chairperson and the Members are to be appointed by the Central Government. Regarding the qualifications of the Chairman and other Members, Section 8(2) provides that they shall be person of ability, integrity and standing and who has special knowledge of and such professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy which in the opinion of the Central Government, may be useful to the commission. The Chairperson and other Members are to be appointed on whole time basis.

Selection of Chairperson and Members of Commission

Section 9(1) envisages that the Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of the Chief Justice of India or his nominee, as Chairperson; and the Secretary in the Ministry of Corporate Affairs, Member; the Secretary in the Ministry of Law and Justice, Member; and two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy, as member.

Term of office of Chairperson and other Members

The Act stipulates that the Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years.

A vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 8 and 9. The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed.

In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as
the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office. When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.

Resignation of Chairperson etc.

It has been provided under section 11 that the Chairperson or any other Member may resign his office by notice in writing under his hand addressed to the Central Government. However, until the Chairperson or a Member is permitted by the Central Government to relinquish his office, he will continue to hold his office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as a successor enters into his office or until the expiry of his term, whichever is the earliest. Under Section 11(2), it is provided that in the following circumstances the Central Government may, by order, remove the Chairperson or any Member from his office if such Chairman or Member as the case may be, -

(a) is, or at any time has been, adjudged as an insolvent; or
(b) has engaged at any time, during his term of office, in any paid employment; or
(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
(d) has acquired such financial or other interest as it likely to affect prejudicially his functions as a Member; or
(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or
(f) has become physically or mentally incapable of acting as a Member.

However, no Member shall be removed from his office on the ground that he has acquired such financial or other interest as is likely to affect prejudicially his function as a Member or has so abused his position as to render his continuance in public office prejudicial to the public interest unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has on an inquiry as prescribed reported that the Member ought on such ground or grounds to be removed.

Section 12 provides that for a period of two years from the date on which the Chairperson and other Member cease to hold office shall not accept any appointment in or connected with the management or administration of, any enterprise which has been a party to the proceeding before the Commission. This restriction, however, shall not apply to any employment under the Central Government or a State Government or local authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956 (10 of 1956).

Financial and Administrative Powers of Member Administration

A Member of the Commission as per Section 13 may be designated by the Central Government as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules made by the Central
Government. However, the Member Administration shall have authority to delegate such of his financial and administrative powers to any other officer of the Commission as he may deem fit subject to the condition that, while exercising delegated powers such official shall continue to act under the direction, superintendence and control of the Member Administration.

Salary and Terms and Conditions of Service

The salary allowances and other terms and conditions of service of the Chairman and other member including travel expenses, house rent allowance, conveyance facility, sumptuary allowance and medical facilities shall be such as may be prescribed. Further, to ensure freedom in the functioning of the Chairperson and the Member, Section 14(2) provides that the salary allowance and other terms and conditions of service of the Chairperson or Member shall not be varied to his disadvantage after his appointment.

No act or proceedings of the Commission shall be invalid merely because there is any vacancy in the Commission or defect in the constitution of the Commission; or any defect in the appointment of Chairperson or a Member; or any irregularity in the procedure of the Commission not affecting the merits of the case.

Appointment of Director General

Director General is an important functionary under the Act. He is to assist the Commission in conducting inquiry into contravention of any of the provisions of the Act and for performing such other functions as are, or may be, provided by or under the Act.

Section 16 (1) empowers the Central Government to appoint a Director General and such number of additional, joint, deputy or assistant Director Generals or other advisers, consultants or officers for the purposes of assisting the Commission in conducting inquiry into the contravention of any provision of the Act.

Additional, joint, deputy and assistant Director Generals, other advisors, consultants and officers shall however, exercise powers and discharge functions subject to the general control, supervision and directions of the Director General.

The salary, allowances and other terms and conditions and service of Director General, consultants, advisers or other officers assisting him shall be such as may be prescribed by the Central Government. The Director General, advisers, consultants and officers assisting him are to be appointed from amongst the persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

The Commission may appoint a Secretary and such officers and other employees, as it considers necessary for the efficient performance of his functions under the Act. The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under the Act.

Duties, Powers and Functions of Commission

As per Section 18 of the Act, duties of the CCI are:—
(a) to eliminate practices having adverse effect on competition;
(b) to promote and sustain competition;
(c) to protect interests of consumers and
(d) to ensure freedom of trade carried on by other participants, in markets in India.

Section 18 empowers the Commission to enter into any memorandum or arrangement, with the prior approval of the Central Government, for the purpose of discharging the duties and functions under this Act with any agency of any foreign country. This will enable the CCI to have extra territorial reach and shall facilitate exchange of information and enforcement of its order.

Inquiry into certain agreements and dominant position of enterprise

The Commission may inquire into any alleged contravention of Section 3(1) or 4(1) on its own motion or on

(a) receipt of any information in such manner and accompanied by such fee, from any person, consumer or consumer association or trade association; or
(b) a reference made to it by the Central Government or State Government or a statutory authority.

The Director General is not vested with a right to move an application for institution of an enquiry relating to anti-competitive agreements or abuse of dominance.

The terms ‘person’ and ‘statutory authority’ have been defined under Sections 2(l) and 2(w) respectively. The term ‘person’ has been given wide connotation and it includes an individual, a HUF, a company, a firm, an association of persons, any corporation established under any Central, State or Provincial Act or a Government company, a co-operative society, a local authority and every artificial juridical person.

Section 19(3) provides that while determining whether an agreement has appreciable adverse effect on competition, the Commission shall give due regard to all or any of the following factors, namely –

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services;
(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
The first three factors are anti-competitive, while the latter three factors deal with benign effects.

“Adverse appreciable affect on competition” is a key factor while enquiring into anti-competitive agreement. The touch stone of appreciable adverse effect on competition need not be proved while enquiring into abuse of dominance.

For the purpose of determining whether an enterprise enjoys dominant position or not under Section 4, the Commission shall have due regard to all or any of the following factors, namely –

(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprises;
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;
(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
(m) any other factor which the Commission may consider relevant for the inquiry.

The present law makes explicit the issues and the parameters which will be considered while deciding “abuse of dominance”. The Commission shall have due regard to the, “relevant geographic market” and “relevant product market” for determining as to what constitutes a “relevant market”.

The terms ‘relevant market’ and “relevant geographic market” have been defined in Sections 2 (r) and 2(s) of the Act. For determining the “relevant geographic market”, the Commission shall have due regard to all or any of the following factors, namely;—
(a) regulatory trade barriers;
(b) local specification requirements;
(c) national procurement policies;
(d) adequate distribution facilities;
(e) transport costs;
(f) language;
(g) consumer preferences;
(h) need for secure, regular supplies or rapid after-sales service.

Similarly, while determining ‘relevant product market’ the Commission shall have due regard to all or any of the following factors namely:

(a) physical characteristics or end-use of goods;
(b) price of goods or service;
(c) consumer preferences;
(d) exclusion of in-house production;
(e) existence of specialized producers;
(f) classification of industrial products.

The prescription of parameters for determining “appreciable adverse effect” on competition of agreement, “dominant position”, within “relevant market”, are intended to bring consistency and certainty in the working of the Commission which has to consider all or any of the applicable factors, as the case may be. It is quite apparent that any inquiry by the CCI will be a detailed exercise, which will not only involve gathering of information in regard to technological or marketing factors but also the government policy which relate to the trade or business in which the enterprise is involved beside global scenario especially with regard to regulatory trade barriers including import-export policy, tariff and subsidy issues will also be taken into account by the Commission.

Inquiry into Combination by Commission

The Commission under Section 20 of the Competition Act may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination either upon its own knowledge or information (suo motu) or upon receipt of notice under Section 6(2) relating to acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b) or merger or amalgamation referred to in Section 5(c) of the Act. It has also been provided that an enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the law has provided a time limit within which suo moto inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

On receipt of the notice under Section 6(2) from the person or an enterprise which proposes to enter into a combination, it is mandatory for the Commission to inquire whether the combination referred to in that notice, has caused or is likely to cause an appreciable adverse effect on competition in India.
The Commission shall have due regard to all or any of the factors for the purposes of determining whether the combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, namely—

(a) actual and potential level of competition through imports in the market;
(b) extent of barriers to entry into the market;
(c) level of combination in the market;
(d) degree of countervailing power in the market;
(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
(f) extent of effective competition likely to sustain in a market;
(g) extent to which substitutes are available or are likely to be available in the market;
(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
(j) nature and extent of vertical integration in the market;
(k) possibility of a failing business;
(l) nature and extent of innovation;
(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The above yardsticks are to be taken into account irrespective of fact whether an inquiry is instituted, on receipt of notice under Section 6(2) upon its own knowledge. The scope of assessment of adverse effect on competition will be confined to the “relevant market”. Most of the facts enumerated in Section 20 (4) are external to an enterprise. It is noteworthy that sub clause (n) of Section 20 (4) requires to invoke principles of a “balancing”. It requires the Commission to evaluate whether the benefits of the combination outweigh the adverse impact of the combination, if any. In other words if the benefits of the combination outweigh the adverse affect of the combination, the Commission will approve the combination. Conversely, the Commission may declare such a combination as void.

Reference by statutory authority

The term “statutory authority” has been defined in Section 2(w). If in the course of a proceeding before any statutory authority, an issue is raised by any party that any
decision which such authority has taken or proposes to take, is or would be, contrary to the provisions of the Competition Act 2002, it may make a reference in respect of such issue to the Commission and seek its opinion. The Commission shall, on receipt of the reference, after hearing the parties to the proceedings, give its opinion within 60 days of receipt of such reference to such authority on the issues referred to it. The statutory authority shall thereafter pass such order on the issues referred to the Commission as it deems fit. The statutory authority may, \textit{suo motu} make such reference in respect of such issue to the Commission. Likewise, the Commission either in the course of proceedings before it or \textit{suo motu} may make a reference for opinion to a statutory authority and the latter has to render its opinion within 60 days of making a reference.

**Meetings of Commission**

Section 22 provides that the Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations. The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting. All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote. However, the quorum for such meeting shall be three Members.

**Procedure for inquiry on complaints under Section 19**

If the Commission is of the opinion that there exists a prima facie case, on receipt of an information from any person, consumer, their association or trade association or on a reference from Central Government or State Government or of a statutory authority or on its knowledge or information under Section 19, it shall direct the Director General to cause an investigation to be made into the matter. The Director General shall investigate into the matter and submit a report of its findings within the period as may be specified by the Commission. It is, however, not binding on the Commission to accept the report of the Director General.

Where upon receipt of a reference or information, the Commission is of the opinion that there is no prima-facie case, it shall pass an order dismissing the reference/information, as it deems fit and necessary.

Upon receipt of a report from the Director General, the Commission shall forward a copy thereof to (a) the parties concerned or (b) Central Government or (c) State Government or (d) statutory authority as the case may be. If the Director General, in relation to a matter referred to it, recommends that there is no contravention of any of the provisions of the Act, the Commission shall give an opportunity of hearing to the informant and after hearing, if the Commission agrees with the recommendation of the Director General, it shall dismiss the information. According to Section 26(7) if, after hearing information provider, the Commission is of the opinion that further inquiry is called for, it shall direct the enquiry to proceed further.

Where the report of the Director General relates to matter referred to Commission by the Central Government or a State Government or a statutory authority and the report contains recommendation that there is no contravention of the provisions of the Act, the Commission shall invite the comments of the Central Government or the
State Government or statutory authority, as the case may be, on such report. On receipt of the comments, if there is no prima-facie case, in the opinion of the Commission the Commission shall return the reference. However, if the Commission feels that there is a prima-facie case it shall proceed with a reference.

Section 26(9) provides that the Commission on receipt of recommendation of Director General that there is contravention of any of the provisions of the Act, and a further inquiry is called for, shall inquire into such contravention in accordance with the provisions of the Act.

The provisions of the Section indicate that it is mandatory that information or reference received or a matter which comes to the knowledge of the Commission regarding alleged violation of the provisions of the Act, must be referred to the Director General for an investigation in the matter. A copy of the report of the Director General is required to be sent to the information provider or to the Central Government or State Government or a statutory authority, as the case may be, for their comments and an opportunity of hearing is required to be given to the parties as this is warranted by the principles of natural justice. Where the Director General recommends that there is contravention of any of the provisions of the Act, and that the Commission is of opinion that further inquiry is called for, it shall institute an inquiry into the matter and pass a reasoned order. The Commission may or may not subscribe to the recommendations of the Director General.

Orders by Commission after inquiry into agreements or abuse of dominant position

Section 27 envisages that the Commission after any inquiry into agreement entered into by any enterprise or association of enterprises or person or association of persons, or an inquiry into abuse of dominant position may pass all or any of the following orders, namely,—

(i) direct that such agreement, or abuse of dominant position shall be discontinued and such agreement, which is in contravention of Section 3 shall not be re-entered or the abuse of dominant position in contravention of Section 4 shall be discontinued, as the case may be. The direction to discontinue and not to recur is commonly known as “Cease & desist” order.

(ii) the Commission may impose penalty not exceeding ten percent of the average turnover of last three preceding financial years, upon each of person or enterprises which are parties to such agreement in contravention of Section 3 or are abusing dominant position within meaning of Section 4. In case any agreement which is prohibited by Section 3 has been entered into by any cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider participating in that cartel, a penalty up to three times of its profits for each year of the continuance of such agreement whichever is higher.

(iii) The Commission may direct that the agreements shall stand modified to the extent and in the manner as specified in the order.

(iv) The Commission may direct the enterprises concerned to comply with such other orders and directions, including payment of cost, if any, as it deems fit.

(v) to pass such order or issue such directions as it may deem fit.
**Division of enterprise enjoying dominant position**

The Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise or group does not abuse its dominant position.

The order of the Commission referred to above may provide for all or any of the following matters, namely—

(a) the transfer or vesting of property, rights, liabilities or obligations;
(b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
(c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
(d) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
(e) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
(f) any other matter which may be necessary to give effect to the division of the enterprise or group.

**Procedure for investigation of combination**

The procedure for investigation by the Commission has been stipulated under Section 29 of the Act. It involves following stages -

(i) The Commission first has to form a prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India. Further, when the Commission has come to such a conclusion then it shall proceed to issue a notice to the parties to the combination, calling upon them to show cause why an investigation in respect of such combination should not be conducted;

(ii) After receipt of the response of the parties to the combination may call for the report of the Director General.

(iii) When pursuant to response of parties or on receipt of report of the Director General whichever is later, the Commission prima-facie is of the opinion that the Combination is likely to cause an appreciable adverse effect on competition in relevant market, it shall, within seven days direct the parties to the combination to publish within ten working days, the details of the combination, in such manner as it thinks appropriate so as, to bring to the information of public and persons likely to be affected by such combination.

(iv) The Commission may invite any person affected or likely to be affected by the said combination, to file his written objections within fifteen working days of the publishing of the public notice, with the Commission for its consideration.

(v) The Commission may, within fifteen working days of the filing of written objections, call for such additional or other information as it deem fit from the parties to the said combination and the information shall be furnished by the
parties above referred within fifteen days from the expiry of the period notified by the Commission.

(vi) After receipt of all the information and within forty-five days from expiry of period for filing further information, the Commission shall proceed to deal with the case, in accordance with provisions contained in Section 31 of the Act.

Thus, the provisions of Section 29 provide for a specified timetable within which the parties to the combination or parties likely to be affected by the combination are required to submit the information or further information to the Commission to ensure prompt and timely conduct of the investigation. It further imposes on Commission a time limit of forty-five working days from the receipt of additional or other information called for by it under sub-Section (4) of Section 29 for dealing with the case of investigation into a combination, which may have an adverse effect of the competition.

Inquiry into disclosures under Section 6(2)

Section 6(2) casts an allegation on any person or enterprise, who or which proposes to enter into combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination within thirty days of—

(i) approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned with such merger or amalgamation;

(ii) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

Non-filing of notice attracts penalty in terms of Section 43A of the Act.

The newly inserted section 6(2A) envisages that no combination shall come into effect until two hundred and ten days have passed from the day on which notice has been given to Commission or the Commission has passed orders, whichever is earlier.

Upon receipt of such notice, the Commission shall examine such notice and form its prima facie opinion as to whether the combination has, or is likely to have, an appreciable adverse effect on the competition in the relevant market in India.

Orders of Commission on Certain Combinations

The Commission, after consideration of the relevant facts and circumstances of the case under investigation, by it under Sections 28 or 30 and assessing the effect of any combination on the relevant market in India, may pass any of the written orders indicated herein below. Where the Commission comes to a conclusion that any combination does not, or is not likely to, have an appreciable adverse effect on the Competition in relevant market in India, it may, approve that Combination.

(i) In the case where the Commission is of the opinion that the combination has, or is likely to have an adverse effect on competition, it shall direct that the combination shall not take effect.

(ii) Where the Commission is of the opinion that adverse effect which has been caused or is likely to be caused on competition can be eliminated by modifying such Combination then it shall direct the parties to such combination to carry out necessary modifications to the Combination.
(iii) The parties accepting the proposed modification shall carry out such modification within the period specified by the Commission.

(iv) Where the parties who have accepted the modification, fail to carry out such modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and shall be dealt with by the Commission in accordance with the provisions of the Act.

(v) If the parties to the Combination do not accept the proposed modification such parties may within thirty days of modification proposed by the Commission, submit amendment to the modification proposed by the Commission.

(vi) If the Commission agrees with the agreement submitted by the parties it shall, by an order approve the combination.

(vii) If the Commission does not accept the amendment then, parties shall be allowed a further period of thirty days for accepting the amendment proposed by the Commission.

(viii) Where the parties to the combination fail to accept the modification within thirty days, then it shall be deemed that the combination has an appreciable adverse effect on Competition and will be dealt with in accordance with the provisions of the Act.

(ix) Where the Commission directs under Section 31 (2) that the combination shall not take effect or it has, or is likely to have an appreciable adverse effect, it may order that,

(a) the acquisition referred to in Section 5 (a); or

(b) the acquiring of control referred to in Section 5(b); or

(c) the merger or the amalgamation referred to in Section 5(c) shall not be given effect to by the parties.

As per proviso the Commission may, if it considers appropriate, frame a scheme to implement its order in regard to the above matters under Section 31(10).

(x) A deeming provision has been introduced by Section 31(11). It provides that, if the Commission does not, on expiry of a period of two hundred ten days from the date of filing of notice under Section 6(2) pass an order or issue any direction in accordance with the provisions of Section 29(1) or Section 29(2) or Section 29(7), the combination shall be deemed to have been approved by the Commission. In reckoning the period of two hundred ten days, the period of thirty days specified in Section 29(6) and further period of thirty working days specified in Section 29(8) granted by Commission shall be excluded.

(xi) Further more where extension of time is granted on the request of parties the period of two hundred ten days shall be reckoned after the deducting the extended time granted at the request of the parties.

(xii) Where the Commission has ordered that a combination is void, as it has an appreciable adverse effect on competition, the acquisition or acquiring of control or merger or amalgamation referred to in Section 5, shall be dealt with by other concerned authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had
not taken place and the parties to the combination shall be dealt with accordingly.

(xiii) Section 29(14) makes it clear that nothing contained in Chapter IV of the Act shall affect any proceeding initiated or may be initiated under any other law for the time being in force. It implies that provisions of this Act are in addition to and not in derogation of provisions of other Acts.

Thus, approval under one law does not make out a case for approval under another law.

Section 32 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

(a) an agreement referred to in Section 3 has been entered into outside India; or
(b) any party to such agreement is outside India; or
(c) any enterprise abusing the dominant position is outside India; or
(d) a combination has taken place outside India; or
(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

The above clearly demonstrates that acts taking place outside India but having an effect on competition in India will be subject to the jurisdiction of Commission. The Competition Commission of India will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India.

**Appearance before Commission**

As per Section 35 of the Act, following persons are entitled to appear before the Commission—

(i) a complainant; or
(ii) a defendant; or
(iii) the Director General

They may either appear in person or authorise any of the following:

(a) a chartered accountant as defined in Section 2(1)(b) of Chartered Accountants Act, 1949 (38 of 1949) who has obtained a certificate of practice; or
(b) a company secretary as defined in Section 2(1)(c) of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice;
(c) a cost accountant as defined in Section 2(1)(b) of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice;
(d) a legal practitioner that is an advocate, vakil or an attorney of any High Court including a pleader in practice.
The above provisions unambiguously state that a ‘Company Secretary in Practice’ is entitled to represent an informant or a defendant or Director General. A Company Secretary in practice can also get himself empanelled with the Director General to prosecute his cases before the Commission.

Power of Commission to regulate its own procedure

The Competition Commission of India has been empowered to lay down its own procedure and regulations. It is not bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall have to observe the principles of natural justice and subject to the provisions of the Act. The Competition Commission of India shall also be subject to the rules made by the Central Government. Section 36(2) makes it clear that the Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying the suit, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) issuing commissions for the examination of witnesses or documents;
(e) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;

In terms of Section 36(3), the Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any discipline as it deems necessary to assist the Commission in the conduct of any enquiry by it.

In terms of Section 36(4), the Commission may direct any person –
(a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of the Act;
(b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of the Act.

The Competition Commission in thus empowered to appoint experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist in the conduct of any inquiry or proceeding before it.

As stated earlier, Director General is an important functionary assisting the Commission and the Commission may ask the Director General to investigate into any trade practice and for the purpose of examination of books, or account and other
document of the parties concerned. The Director General is also vested with all the powers as are conferred upon the Commission under Section 36(2) of Act.

Ratification of orders

The Commission may amend any order passed by it under the provisions of this Act with a view to rectifying any mistake apparent from the record. Section 38(2) provides that subject to other provisions of this Act, the Commission may make –

(a) an amendment of an order of its own motion;
(b) an amendment for rectifying any mistake apparent from record, which has been brought to its notice by any party to the order.

An explanation below the Section clarifies that while rectifying any mistake apparent from the record, the Commission shall not amend substantive part of the order passed by it under the provisions of this Act.

Execution of Orders of the Commission Imposing Monetary penalty

Section 39 provides that if a person fails to pay any monetary penalty imposed on him under the Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations. In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under the Act in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine, and interest under the Income-tax Act, 1961 and to the Commission instead of the Assessing Officer.

Explanation 1 – Any reference to sub-section (2) or sub-section (6) of section 220 of the income-tax Act, 1961 (43 of 1961), in the said provisions of that Act or the rules made thereunder shall be construed as references to sections 43 to 45 of this Act.

Explanation 2 – The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act, 1961 shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

Explanation 3 – Any reference to appeal in Chapter XVIIID and the Second Schedule to the Income-tax Act, 1961 shall be construed as a reference to appeal before the Competition Appellate Tribunal under section 53B of this Act.

It would be noted that Commission may by its Regulations has been empowered to evolve procedure of recovering monetary penalty. It may also make reference to Income Tax Authority for recovering of penalty as tax due under the said Act.
As per Section 39 every order passed by the Commission under this Act shall be executed in the same manner as if it were a decree or order made by the High Court or the Principal Civil Court in any suit pending therein.

It shall be lawful for the Commission to send, in event of its inability to execute it such order to the High Court or to the Principal Civil Court, as the case may be, within the limits of whose jurisdiction—

(a) in the case of an order passed against any company or firm; the registered office or the sole or principal office of the business of company in India or where a company also has a subordinate office, that subordinate office, is situated;
(b) in the case of an order passed against any other person, the place, where he voluntarily resides of carries on business or personally works for gain, is situated.

There upon the court to which the order is so sent shall execute the order as if it were a decree or order sent to it for execution.

**Duties of Director General**

The Act provides that the Director General when so directed by the Commission, is to assist the Commission in investigation into any contravention of the provisions of this Act. The Director General is bound to comply with such a direction to render requisite assistance to the Commission.

The Director General, in order to effectively discharge his functions, has been given the same powers as are conferred upon the Commission under section 36(2). Under section 36(2) the Commission is having same powers as are vested in Civil Court under the Code of Civil Procedure (1908) while trying a suit, in respect of the following matters, namely;

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) issuing commissions for the examination of witnesses or documents;
(e) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;

Without prejudice to the above powers, the provisions of Sections 240 and 240A of the Companies Act, 1956, so far as may be, shall apply to an investigation made by the Director General or by a person authorised by him, as they apply to an inspector under the Companies Act 1956. This power includes search and seizure of the record of any person in respect of which an investigation has been directed by the Commission. It has been provided that wherever the approval of the Central Government is required, the same shall be given by the Commission and the word ‘magistrate’ appearing in Section 240A shall be construed as the Chief Metropolitan Magistrate.
Penalties

The Competition Act prescribes penalties for contravention of orders of the Commission. As per Section 42, the Commission may cause an inquiry to be made into compliance of its orders or directions and —

(a) if any person, without any reasonable cause, fails to comply with any order of the Commission, or condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act; or

(b) if any person fails to pay the penalty imposed under the Act,

he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to rupees twenty five crores or with both, as the Chief Metropolitan Magistrate may deem fit. The Chief Metropolitan Magistrate, Delhi, however, shall not take cognizance of any offence save as a complaint filed by Commission or any of its officers authorized by it.

Compensation in case of Contravention of Orders of commission

Section 42A provides that without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

Penalty for failure to comply with directions of Commission and Director General

Section 43 of the Act provides that if any person fails to comply, without reasonable cause, with a direction given by the Commission under Sub-sections (2) and (4) of section 36; or the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.

Power to impose penalty for non-furnishing of information on combination

Section 43A provides that if any person or enterprise who fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination.

Thus, failure to file notice of combination falling under Section 5 attract deterrent penalty.

Penalty for making false statement

Section 44 provides that If any person, being a party to a combination, makes a statement which is false in any material particular, or knowing it to be false; or omits to state any material particular knowing it to be material, such person shall be liable
to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

**Power to impose lesser penalty**

If any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of alleged violations and such a disclosure is vital, the Commission may impose upon him a lesser penalty than as prescribed under the Act or rules or regulations.

However, the lesser penalty shall not be imposed where before making such disclosure, the report of Director General under Section 26 has been received in the Commission. Further, the lesser penalty shall be imposed only in respect of the producer, seller, distributor, trader or service provider included in the cartel, who has made a full, true and vital disclosures under this Section. Any producer, seller, trader or service provider included in the cartel shall also be liable to imposition of penalty, if in the course of proceedings, had,—

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or

(b) given false evidence; or

(c) the disclosure made is not vital.

The lesser penalty is for a member of a ring who breaks the rank. There is no provision to provide any protection or incentive to a whistle blower, which is conferred upon Authorities in contemporary legislations abroad.

The Act does not vest power in the Commission to compound an offence as was the position under the MRTP Act. It is viewed that long drawn investigation and enquiries could be arrested by provision such as compounding which allows an offence to be settled quickly. The Commission is also not vested with power to contempt.

**Contravention by Companies**

A company means a body corporate and includes a firm or other association of individuals; director, in relation to a firm, means a partner in the firm for the purposes of penalties in connection with contravention of the provisions of the Act by companies.

Where any rule, regulation, order made by the Commission or any direction issued thereunder is contravened by a company, every person who, at the time the contravention was committed, was in charge, and was responsible to the company for conducting business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished. However it will be a good defence by a person liable to any punishment if he proves that the contravention was committed without his knowledge or that he has exercised all due diligence to prevent the commission of an offence.

Where a contravention of any of the provisions of this Act or any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that contravention has taken place with the consent or connivance of, or it is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be
deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

The word company in this Section, has been used in a wider sense and also includes a ‘firm’ or an ‘association of persons’. Though the word ‘director’ is normally used in a company, in the light of the wider definition, the term director is interpreted to include a partner of the firm. The company being a legal person, its affairs are conducted by a board of directors, manager, secretary or other officer, therefore, according to Section 48 (2) such director, manager, secretary or other officer, in addition to the company itself shall be deemed to be liable to be proceeded against for contravention of any provisions of this Act or any rule, regulation, order made or direction issued thereunder by the Commission or the Director General of Investigation.

**Competition Advocacy**

Under Section 49 the Central Government/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. In this context, Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within sixty days of making such a reference and the latter may formulate the policy as it deems fit. The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central Government/State Government in formulating such a policy. The Commission is also empowered to take suitable measures for the

(a) promotion of competition advocacy;
(b) creating awareness about the competition; and
(c) imparting training about competition issues.

The creating awareness about benefits of competition and imparting training in competition issues is expected to generate conducive environment to promote and foster competition, which is sine-qua non for accelerating economic growth.

**Finance, Accounts and Audit**

*Grants by Central Government*

The Central Government may make to the Commission grants of such sums of money as it may think fit for being utilised for the purposes of the Act. Such grant is to be made after due appropriation made by the Parliament.

*Constitution of Fund*

The Act provides for the constitution of a fund called the “Competition Fund” for meeting the establishment and other expenses of the Competition Commission in connection with the discharge of its functions and for the purposes of this Act. The following shall be credited to the “Competition Fund”, -

(a) all government grants received by the commission;
(b) Omitted
(c) the fees received under the Act;
(d) the interest on the amounts accrued on the monies referred under clauses (a) to (c).

**Fee realized alongwith notice disclosing combination shall form part of ‘Competition Fund’**.

The Fund shall be administered by a Committee of such Members of the Commission, as may be determined by the Chairperson and the Committee so appointed, shall spend monies out of the Fund only for the objects for which the Fund has been constituted.

**Accounts and Audit**

Proper accounts and other relevant records shall be maintained by the Commission and an annual statement of accounts shall be prepared by it in prescribed form in consultation with the Comptroller and Auditor General of India (CAG). The CAG shall specify the intervals within which the accounts of the Commission shall be audited by him.

Explanation to Section 52(2) clarifies that the orders passed by the Commission, being matters appealable to the Supreme Court, shall not be subject to audit by the CAG. The expenses, if any, incurred in connection with such audit shall be payable by the Commission to the CAG.

The CAG or any person appointed by him in connection with the audit of the accounts of the Commission shall have same rights, privileges and authority in connection with such audit as CAG has in connection with the audit of Government accounts and, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

Only accounts as certified by the CAG and any other person authorised by him in this behalf together with the audit report thereon shall be forwarded to the Central Government and the Government shall cause it to be laid before each House of Parliament.

**Furnishing of Returns, etc., to Central Government**

The Commission shall furnish to the Central Government such returns and statements and such particulars in regard to any proposed or existing measures for promotion of competition advocacy, creating awareness and imparting training about competition issues, in such form and such manner as the Central Government may prescribe. An annual report giving a true and full account of activities of the Commission during the previous year shall be prepared once in every year by the Commission and submitted to the Central Government.

A copy of the annual report of the Commission received by the Government shall cause to be laid by the Central Government before each House of Parliament.

**COMPETITION APPELLATE TRIBUNAL**

Section 53A empowers the Central Government to establish, by notification, an Appellate Tribunal to be known as Competition Appellate Tribunal –

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section
26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

APPEAL TO APPELLATE TRIBUNAL

The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal. Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed. However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against. The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal. The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

Composition of Appellate Tribunal

The Appellate Tribunal shall consist of a Chairperson and not more than two other members to be appointed by the Central Government.

Qualifications for appointment of Chairperson and Members of Appellate Tribunal

Section 53D provides that the Chairperson of the Appellate Tribunal shall be a person, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court.

A member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty five years in, competition matters including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal.

Term of office of Chairperson and Members of Appellate Tribunal

The Chairperson or a member of the Appellate Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office, and shall be
eligible for re-appointment. However, no Chairperson or other member of the Appellate Tribunal shall hold office as such after he has attained, -

(a) in the case of the Chairperson, the age of sixty-eight years;
(b) in the case of any other member of the Appellate Tribunal, the age of sixty-five years.

Resignation of Chairperson and Members of Appellate Tribunal

The Chairperson or a member of the Appellate Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office. However, the Chairperson or a member of the Appellate Tribunal shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

Member of Appellate Tribunal to act as its Chairperson in certain cases

In the event of the occurrence of any vacancy in the office of the Chairperson of the Appellate Tribunal by reason of his death or resignation, the senior-most Member of the Appellate Tribunal shall act as the Chairperson of the Appellate Tribunal until the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

When the Chairperson of the Appellate Tribunal is unable to discharge his functions owing to absence, illness or any other cause, the senior-most member or, as the case may be, such one of the Members of the Appellate Tribunal, as the Central Government may, by notification, authorize in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

Restriction on employment of Chairperson and other Members of Appellate Tribunal in certain cases

The Chairperson and other members of the Appellate Tribunal shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Appellate Tribunal under the Act. However, nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government Company as defined in section 617 of the Companies Act, 1956.

Awarding compensation

Section 53N provides that without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise
for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

Every application made under sub-section (1) shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed. The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise. However, the Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation.

Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Appellate Tribunal, make an application under that sub-section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908, shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.

**Procedures and powers of Appellate Tribunal**

Section 53O provides that the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Appellate Tribunal shall have power to regulate its own procedure including the places at which they shall have their sittings.

The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavit;
(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
(e) issuing commissions for the examination of witnesses or documents;
(f) reviewing its decisions;
(g) dismissing a representation for default or deciding it ex parte;
(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte;
(i) any other matter which may be prescribed.
Every proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code or Criminal Procedure, 1973.

**Execution of orders of Appellate Tribunal**

Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,-

(a) in the case of an order against a company, the registered office of the company is situated; or

(b) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated.

The Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

**Contravention of orders of Appellate Tribunal**

Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit. However, the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence punishable under this sub-section, save on a complaint made by an officer authorized by the Appellate Tribunal.

Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise contravening, without any reasonable ground, any order of the Appellate Tribunal or delaying in carrying out such orders of the Appellate Tribunal.

**Right to legal representation**

A person preferring an appeal to the Appellate Tribunal may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal.

The Central Government or a State Government or a local authority or any enterprise preferring an appeal to the Appellate Tribunal may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

The Commission may authorize one or more chartered accountants or company
secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

Explanation – The expressions “chartered accountant” or “company secretary” or “cost accountant” or “legal practitioner” shall have the meanings respectively assigned to them in the Explanation to section 35.

Appeal to Supreme Court

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them. The Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

Power to Punish for contempt

The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to modifications that,—

(a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;

(b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf.

Miscellaneous

Power to exempt

The Central Government may, by notification exempt from the application of the Act, or any provision thereof—

(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;

(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;

(c) any enterprise, which performs a sovereign function on behalf of the Central Government or a State Government.

Thus, the power to grant exemption can be invoked by the Central Government in specified circumstances and conditions.

Where any enterprise is engaged in activities, which includes any activity relatable to the sovereign functions of the Government, exemption may be granted by the Central Government only in respect of the activity relatable to the sovereign functions.
Power of Central Government to issue directions

The Central Government may give in writing to the Commission such directions on questions of policy, other than those relating to technical and administrative matters and the Commission shall be bound by such directions. The Commission shall be given an opportunity to express its views to the Central Government before any direction is given by the Government to the Commission. The decision of the Central Government as to whether the question is of one of policy or not, shall be final.

Power of Central Government to supersede Commission

It is stipulated under section 56 of the Act that if at any time the Central Government is of the opinion,

(a) that the Commission, on account of circumstances beyond its control is unable to discharge the functions or perform the duties imposed on it by or under the provisions of the Act; or

(b) that the commission has persistently made default in complying with any direction given by the Central Government under this Act or in discharge of functions or performance of duties imposed on it by or under the provisions of the Act and as a result of such default the financial position or the administration of the Commission has suffered; or

(c) that the circumstances exist which render it necessary in the public interest to do so, the Central Government may, by notification and for the reasons stated therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification.

Thus, power to supersede CCI vests in the Central Government. However before issuing any such notification, the Central Government shall give to the Commission a reasonable opportunity to make representations against the proposed supersession for its consideration. Upon publication of a notification superseding the Commission—

(a) the Chairperson and other members shall vacate the office from the date of suppression;

(b) until Commission is reconstituted, all powers functions and duties of the Commission shall be discharged by the Central Government or by an authority specified by the Central Government in this behalf;

(c) until the Commission is reconstituted all of its properties shall vest in the Central Government.

The Central Government shall reconstitute the Commission by a fresh appointment of its Chairman and other Members on or before the expiration of six months from the date of order of the Central Government superseding the Commission. Any Chairperson or Member who vacates the office because the Commission is unable to discharge its functions or perform duties imposed on it by or under the provisions of this Act on account of circumstance beyond its control shall not be deemed to be disqualified for re-appointment upon re-constitution of the Commission by the Government.

The Central Government shall cause a notification superseding the Commission and a full report of any action taken under this Section and circumstances leading to such action, be laid before each House of the Parliament at the earliest.
Restriction on disclosure of information

The Commission from time to time may require any enterprise to submit information for the purposes of the Act. The information may relate to sensitive business secrets and patents of such an enterprise. In order to ensure complete secrecy of such information, Section 57 provides that no information relating to an enterprise obtained by or on behalf of the Commission for the purposes of the Act shall be disclosed except with the previous permission of the enterprise in writing otherwise than in compliance with or for the purposes of the Act or any other law for the time being in force.

Protection of action taken in good faith

While acting or purporting to act in pursuance of any of the provisions of this Act, the Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Registrar and officers and other employees shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code. However the Act provides for protection of action taken in good faith. As per Section 59 no suit or legal proceedings shall lie against the Central Government or Commission or any Chairperson or any Member or Director General or Registrar or other officers or employees of the Commission for anything, which is done or intended to be done in good faith under the Act or rules or regulations, made thereunder.

Exclusion of jurisdiction of Civil Courts

A civil court is precluded to exercise Jurisdiction in respect of any matter, which the Commission is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

Application of other laws not barred

The provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Power to make rules

The Central Government may, by notification, make rules to carry out provisions of this Act. In particular, the Central Government may make rules to provide for all or any of the following matters; namely-

(a) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of Section 9;
(b) the form and manner in which and the authority before whom the oath of office and of secrecy shall be made and subscribed to under Sub-section (3) of Section 10;
(c) Omitted by the Competition (Amendment) Act, 2007;
(d) the salary and the other terms and conditions of service including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities to be provided to the Chairperson and other Members under Sub-section (1) of Section 14;
(da) the number of Additional, Joint, Deputy or Assistant Director General or such officers or other employees in the office of DG and the manner in which such
Additional, Joint, Deputy or Assistant Director Generals or such officers or other employees may be appointed under sub-section (1A) of Section 16.

(e) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under Sub-section (3) of Section 16;

(f) the qualifications for appointment of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under Sub-section (4) of Section 16;

(g) the salaries and allowances and other terms and conditions of service of the Secretary and officers and other employees payable, and the number of such officers and employees under Sub-section (2) of Section 17;

(h) for securing any case or matter which requires to be decided by a Bench composed of more than two Members under Sub-section (4) of Section 23; (Omitted by the Competition (Amendment) Act, 2007)

(i) any other matter in respect of which the Commission shall have power under clause (g) of Sub-section (2) of Section 36; (Omitted by the Competition (Amendment) Act, 2007)

(j) the promotion of competition advocacy, creating awareness and imparting training about competition issues under Sub-section (3) of Section 49; (Omitted by the Competition (Amendment) Act, 2007)

(k) the form in which the annual statement of accounts shall be prepared under Sub-section (1) of Section 52;

(l) the time within which and the form and manner in which the Commission may furnish returns, statements & such particulars as the Central Government may require under Sub-section (1) of Section 53;

(m) the form in which and the time within which the annual report shall be prepared under Sub-section (2) of Section 53;

(ma) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (2) of section 53B and the fees payable in respect of such appeal;

(mb) the term of the Selection Committee and the manner of selection of panel of names under sub-section(2) of section 53E;

(mc) the salaries and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub-section (1) of section 53G;

(md) the salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal under sub-section (3) of section 53M;

(me) the fee which shall be accompanied with every application made under sub-section (2) of section 53N;

(mf) the other matters under clause (i) of sub-section(2) of section 53O in respect of which the Appellate Tribunal shall have powers under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit;

(n) the manner in which the monies transferred to the Central Government shall be dealt with by that Government under the fourth proviso to Sub-section (2)
of Section 66;
(o) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

Every notification for making such rules shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions. If both Houses agree that notification is not to be issued or rule should not be made, then rule shall not be made or if the House decides that notification or rules should have effect in such modified form then the rule or notification shall be enforced in modified form. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under the notification or rule, as the case may be.

Power to make Regulations

The Commission may, by notification, make regulations, which are consistent with the Act. Without prejudice to the generality of the foregoing provision, such regulations may provide for all or any of the following matters, namely, -
(a) the cost of production to be determined under clause (b) of the Explanation to Section 4;
(b) the form of notice as may be specified and the fee which may be determined under Sub-section (2) of Section 6;
(c) the form in which details of acquisition shall be filed under Sub-section (5) of Section 6;
(d) the procedure to be followed for engaging the experts and the professionals under sub-section (3) of Section 17;
(e) the fee which may be determined under clause (a) of Sub-section (1) of Section 19;
(f) the rules of procedure in regard to transaction of business at the meetings of the Commission under sub-section (1) of Section 22;
(g) the manner in which penalty shall be recovered under sub-section (1) of Section 39;
(h) any other matter in respect of which provision is to be, or may be made by regulations.

Every regulation shall be laid before both the Houses of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

Power to remove difficulties

The Central government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act as may appear to be necessary to remove difficulties which may arise in giving effect to the provisions of
the Act. However, no such order shall be made after expiry of a period of two years from the commencement of the Act. Every order made under this Section shall be laid before both the Houses of Parliament as soon as may be, after it is made.

Repeal and Saving

Section 66 provides that the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(1A) The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,-

(a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or
(b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or
(c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or
(d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

(2) On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not exceeding three months’ pay and allowances for the premature termination of term of their office or of any contract of service:

Provided that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission appointed on deputation basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

Provided further that the Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate
Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be.

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947(14 of 1947), or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority:

Provided also that where the Monopolies and Restrictive Trade Practices Commission has established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in ,the Competition Commission of India or the Appellate Tribunal as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be prescribed.

(3) All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

“Explanation.— For the removal of doubts, it is hereby declared that all cases referred to in this sub-section, sub-section (4) and subsection (5) shall be deemed to include all applications made for the losses or damages under section 12B of the Monopolies and Restrictive Trade Practices Act, 1969 as it
stood before its repeal;

(4) Subject to the provisions of sub-section(3), all cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section(1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission immediately before the commencement of the Competition (Amendment) Act, 2009, shall, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission shall dispose of such cases as if they were cases filed under that Act:

Provided that the National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986) and that State Commission shall dispose of such case as if it was filed under that Act.

“Provided further that all the cases relating to the unfair trade practices pending, before the National Commission under this sub-section, on or before the date on which the Competition (Amendment) Act, 2009 receives the assent of the President, shall, on and from that date, stand transferred to the Appellate Tribunal and be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.”

(5) All cases pertaining to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under that Act.

(6) All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

(7) All investigations or proceedings, relating to unfair trade practices, other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969(54 of 1969) and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

“Provided that all investigations or proceedings, relating to unfair trade practices pending before the National Commission, on or before the date on which the Competition (Amendment) Bill, 2009 receives the assent of the President shall, on and from that date, stand transferred to the Appellate Tribunal and the Appellate Tribunal may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.”
(8) All investigations or proceedings relating to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969), and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit.

(9) Save as otherwise provided under sub-sections (3) to (8), all cases or proceedings pending before the Monopolies and Restrictive Trade Practices Commission shall abate.

(10) The mention of the particular matters referred to in sub-sections (3) to (8) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

**LESSON ROUND UP**

- Competition Act, 2002 seeks to provide, keeping in view the economic development of the country, for the establishment of Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto besides repeal of MRTP Act and the dissolution of the MRTP Commission.
- No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition.
- Competition Act expressly prohibits any enterprise or group from abusing its dominant position, meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.
- Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed it shall be void.
- While formulating a policy on the competition the Central/State Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition.
- Competition Appellate Tribunal to hear and dispose of appeals against the direction issued or decision made or orders passed by the Commission under the Act, and to adjudicate on claim of compensation.
1. Define and discuss the Relevant Market, Relevant Geographic Market, and Relevant Product Market.

2. What are anti-competitive agreements. Discuss the procedure for enquiry into anti-competitive agreements.

3. Discuss the composition and functions of Competition Commission of India.

4. The Competition Act does not prohibit dominance, but the abuse of dominant position. Explain.

5. Write short notes on:
   (i) Combinations.
   (ii) Competition Advocacy.
LEARNING OBJECTIVES

The objective of this study lesson is to enable the students to understand:

- Object of the Consumer Protection Act, 1986
- Consumer Rights
- Meaning of consumer
- Commercial purpose
- District Forum
- State Consumer Protection Council
- Central Consumer Protection Council
- Offences and Penalty

INTRODUCTION

A consumer is a user of goods and services, therefore, every producer is also a consumer. However, conflicting interests have categorised them, inevitably, into two different groups. The industrial revolution brought in the concept of standardisation and mass production and over the years, the type of goods and the nature of services available grew manifold. The doctrine of ‘Caveat Emptor’ or ‘let the buyer beware’ which came into existence in the middle ages had been replaced by the principle of ‘Consumer Sovereignty or ‘Consumer is the King’. But, with tremendous increase in the world population, the growing markets were unable to meet the rising demand which created a gap between the general ‘demand’ and ‘supply’ levels in the markets. This to some extent watered down the concept of ‘Consumer Sovereignty’, what with consumers being forced to accept whatever was offered to them. On the other hand, the expanding markets necessitated the introduction of various intermediaries between the producer and the ultimate consumer. ‘Advertising’, though ostensibly directed at informing potential consumers about the availability and uses of a product began to be resorted to as a medium for exaggerating the uses of ones products or disparaging others products so as to have an edge over competitors. Unfair and deceptive practices such as selling of defective or sub-standard goods, charging exhorbitant prices, misrepresenting the efficacy or usefulness of goods, negligence as to safety standards, etc. became rampant. It, therefore, became necessary to
evolve statutory measures, even in developed countries, to make producers/traders more accountable to consumers. It also became inevitable for consumers to unite on a common platform to deal with issues of common concern and having their grievances redressed satisfactorily.

**Genesis of Consumer Protection Laws**

The need to ensure the basic rights to health, safety, etc. of consumers has long been recognised the worldover and various general legislations were enacted in India and abroad in this direction. In India, the general enactments other than the law of torts which ultimately aimed at protection of consumers interests are the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Dangerous Drugs Act, 1930, the Agricultural Produce (Grading and Marketing) Act, 1937, the Drugs and Cosmetics Act, 1940, the Indian Standards Institution (Certification Marks) Act, 1952, the Prevention of Food Adulteration Act, 1954, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, the Essential Commodities Act, 1955, the Standards of Weights and Measures Act, 1976, the Trade and Merchandise Marks Act, 1958, (Now Trade Marks Act, 1999), the Patents Act, 1970, the Hire Purchases Act, 1972 and the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

These legislations contained regulatory provisions and contravention of these provisions attracted civil liability. This meant that an ordinary consumer had no other remedy but to initiate action by way of a civil suit which involved lengthy legal process proving to be too expensive and time consuming for lay consumers. In fact, at times, the time and cost involved in the legal process was disproportionate to the compensation claimed and granted to an individual consumer. Though the MRTP Commission proved to be far more accessible and less time-consuming than the Civil Courts, its single central location at New Delhi did not make the redressal agency accessible to all consumers, especially those located in the remote towns and villages of the country. Therefore, it became necessary to evolve laws directed at protecting the consumers and at the same time, providing for remedies which are simpler, more accessible, quicker and less expensive.

This paved the way for enactment of the Consumer Protection Act in 1986 providing for simple, quick and easy remedy to consumers under a three-tier quasi-judicial redressal agency at the District, State and National levels. To make the Act more effective and meaningful, necessary changes have been brought by Consumer Protection (Amendment) Act, 2002, which came into force w.e.f. March 15, 2003.

**Objects of the Consumer Protection Act, 1986**

According to the preamble, the Act is to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers disputes and for matters connected therewith.
The basic rights of consumers that are sought to be promoted and protected are:

- the right to be protected against marketing of goods and services which are hazardous to life and property;
- the right to be informed about the quality, quantity, potency, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices;
- the right to be assured, wherever possible, access to variety of goods and services at competitive prices;
- the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;
- the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
- right to consumer education.

This is based on the basic rights of consumers as defined by the International Organisation of Consumers (IOCU) viz., the Rights to Safety, to Information, of Choice, to be Heard, to Redressal, to Consumer Education, to Healthy Environment and to Basic Needs.

Scope of the Act

The Act extends to the whole of India except the State of Jammu and Kashmir and applies to all goods and services unless otherwise notified by the Central Government. The Act received the Presidents assent on 24.12.1986. However, all provisions of the Act except those relating to establishment, composition, jurisdiction, etc. of the Consumer Disputes Agencies (which came into force on 1.7.1987) came into force on 15.4.1987.

DEFINITIONS

Section 2(1) of the Act defines various terms used in the Act. Some of the definitions are given hereunder:

Complainant means

(i) a consumer, or
(ii) any voluntary consumer association registered under the Companies Act, 1956, or under any other law for the time being in force; or
(iii) the Central Government or any State Government, who or which makes a complaint; or
(iv) one or more consumers where there are numerous consumers having the same interest;
(v) in case of death of a consumer, his legal heir or representative; who or which makes a complaint [Section 2(1)(b)]

An association of persons, to have *locus standi* as consumer, it is necessary that all the individual persons forming the association must be consumers under Section 2(1)(d) of the Act having purchased the same goods/hired the same service from the same party i.e. they should have a common cause of action. Thus, unlike MRTP Act, 1969, the Redressal Machinery under Consumer Protection Act, 1986 has no power to initiate cases *suo-moto*.

**Complaint** means any allegation in writing made, with a view to obtaining any relief, by a complainant that

(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

(ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;

(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;

(iv) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price—

— fixed by or under any law for the time being in force;

— displayed on the goods or any package containing such goods;

— displayed on the price list exhibited by him by or under any law for the time being in force

— agreed between the parties.

(v) goods which will be hazardous to life and safety when used are being offered for sale to the public,—

— in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;

— if the trader could have known with due diligence that the goods so offered are unsafe to the public.

(vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety. [Section 2(1)(c)].

**Consumer** means any person who

(a) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(b) hires or avails of any services for a consideration which has been paid or
promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose. [Section 2(1)(d)].

It has been clarified that the term commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.

Therefore, to be a ‘consumer’ under the Act:

(i) the goods or services must have been purchased or hired or availed of for consideration which has been paid in full or in part or under any system of deferred payment, i.e. in respect of hire purchase transactions;

(ii) goods purchased should not be meant for re-sale or for a commercial purpose. Goods purchased by a dealer in the ordinary course of his business and those which are in the course of his business to supply would be deemed to be for re-sale; and

(iii) in addition to the purchaser(s) of goods, or hirer(s) or users of services, any beneficiary of such services, using the goods/services with the approval of the purchaser or hirer or user would also be deemed a ‘consumer under the Act.

A purchase of goods can be said to be for a ‘commercial purpose only if the goods have been purchased for being used in some profit making activity on a large-scale, and there is close and direct nexus between the purchase of goods and the profit-making activity. In Laxmi Engineering Works v. P.S.G. Industrial Institute, Supreme Court held that the explanation to Section 2(1)(d) is clarificatory in nature. It observed that whether the purpose for which a person has bought goods is a ‘commercial purpose’ is always a question of facts and to be decided in the facts and circumstances of each case. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self employment such purchaser of goods would yet be a consumer. The Supreme Court further observed that if a person purchased a machine to operate it himself for earning his livelihood, he would be a consumer. If such person took the assistance of one or two persons to assist him in operating the machine, he would still be a consumer. But if a person purchases a machine and appoint or engage another person exclusively to operate the machine, then such person would not be a consumer.

In Bhupendra Jang Bahadur Guna v. Regional Manager and Others (II 1995 CPJ 139), the National Commission held that a tractor purchased primarily to till the land of the purchaser and let out on hire during the idle time to till the lands of others would not amount to commercial use.

In the case of Super Engineering Corporation (HUF) v. Sanjay Vinayak Pant (F.A. No. 17/1991 decided on 10.12.1991) the National Commission observed that to determine whether the goods had been purchased for a commercial purpose or not,
had to be decided, after giving the parties concerned to lead evidence on this point, whether the goods were to be used for profit-making activity on a large scale or for use in small venture in order to make a living as distinguished from large scale activity for profit.

The question as to whether the widow of the deceased policy holder was a „consumer“ under the Act was decided in the affirmative by the State Commission in Andhra Pradesh in the case of *A Narasamma v. LIC of India*. The State Commission held that as the term „consumer“ includes any beneficiary of service other than the person who hires the services for consideration, the widow being the beneficiary of services is a „consumer“ under the Act entitled to be compensated for the loss suffered by her due to negligence of the LIC.

*In Laxmiben Laxmichand Shah v. Sakerben Kanji Chandan and others* 2001 CTJ 401 (Supreme Court) (CP), the Supreme Court held that the tenant entering into lease agreement with the landlord cannot be considered as consumer under Section 2(1)(d) of the Act. Where there was no provision in the lease agreement in respect of cleaning, repairing and maintaining the building, the rent paid by tenant is not the consideration for availing these services and therefore, no question of deficiency in service.

**Goods**, in terms of Section 2(1)(i) has been defined to mean goods as defined in the Sale of Goods Act, 1930. As per Section 2(7) of the Sale of Goods Act, 1930 Goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. Therefore, most consumer products come under the purview of this definition.

*In Morgan Stanley Mutual Fund v. Kartik Das* (1994) 3 CLJ 27, the Supreme Court held that an application for allotment of shares cannot constitute goods. It is after allotment, rights may arise as per the articles of association of the company. At the stage of application there is no purchase of goods for consideration and again the purchaser cannot be called the hirer of services for consideration.

**Service** : The term „service“ is defined under Section 2(1)(o) as to mean service of any description which is made available to potential users and includes, but not limited to the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Passengers travelling by trains on payment of the stipulated fare charged for the ticket are „consumers“ and the facility of transportation by rail provided by the railway administration is a „service“ rendered for consideration as defined in the Act Subscribers of telephones would also be „consumer“ under the Act.

*In Consumer Unity and Trust Society v. State of Rajasthan* (First Appeal No. 2/89, order dated 15.12.1989), the National Commission, while hearing an appeal from the State of Rajasthan, held that complaints against government hospitals cannot be entertained under the Act on the ground that a person receiving treatment
in such hospital is not a ‘consumer as the patient does not ‘hire the services of the hospital’. Moreover, the treatment provided is free of charge, and therefore, it does not amount to service.

As for what is meant by the expression ‘contract of personal service’, the interpretations are varied. Broadly speaking, any service rendered under a contract of personal service includes service rendered in a private capacity e.g. employee-employer relationship.

**Contract of Service and Contract for Service**

The Supreme Court in the case of Indian Merchants Association v. V P Santha, (CA No. 688 of 1993 decided on 13th November 1995) observed that a contract for service implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A contract of service on the other hand implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The Parliamentary draftsman was well aware of this well-accepted distinction between ‘contract of service’ and ‘contract for services’ and had deliberately chosen the expression ‘contract of service’ instead of the expression ‘contract for service’ in the exclusionary part of the definition of ‘service’, this being the reason being that an employer could not be regarded as a consumer in respect of the services rendered by his employee in pursuance of contract of employment. By affixing the adjective ‘personal’ to the word ‘service’ the nature of the contracts which were excluded were not altered. The adjective only emphasised that what was sought to be excluded was personal service only. The expression contract of personal service in the exclusionary part of Section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service free from the ambit of the expression service.

Liability of Medical Officer Employed by a Hospital Rendering Service Free of Charge: The medical officer who is employed in the hospital renders service on behalf of the hospital administration and if the services as rendered by the hospital do not fall within the ambit of Section 2(1)(o), being free of charge, the same service can not be treated as service under Section 2(1)(o) for the reason that it has been rendered by a medical officer in the hospital who receives salary for employment in the hospital. There can be no direct nexus between the payment of the salary to the medical officer by the hospital administration and the person to whom service is rendered. The salary paid by the hospital administration to the employee medical officer could not be regarded as payment made on behalf of the person availing the service as a consumer under Section 2(1)(d) in respect of the service rendered to him. The service rendered by the employee-medical officer to such a person would, therefore, continue to be service rendered free of charge and would be outside the purview of Section 2(1)(o).
Taxes Paid by Consumers is ‘Consideration for Service’ Rendered Free of Charge in Government Hospitals: The tax paid by the person availing the service at a Government hospital can not be treated as a consideration or charge for the service rendered at the hospital and such service, though rendered free of charge would not cease to be so because the person availing the service happened to be a tax payer. The reason for this is plain. There are certain essential characteristics of a tax which are evolved by courts. They are: (i) it is imposed under statutory power without the taxpayers consent and the payment would be enforced by law; (ii) it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax, and (iii) it is part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay.

Service Rendered under Medicare Insurance Scheme: Service rendered by a medical practitioner or hospital/nursing home can not be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of ‘service’ as defined in Section 2(1)(o). Similarly, where as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, service rendered to such an employee and his family members would not be free of charge and would constitute ‘service’ under Section 2(1)(o) of the Act.

In State of Haryana v. Santra [2000(3) SCALE 417], the Supreme Court held that in a country where the population has been increasing rapidly and the Government has taken up the family planning as an important programme, the medical officer as also the State Government must be held responsible in damages if the family planning operation is a failure on account of the medical officer’s negligence because this has created additional burden on the parents of the child.

In the case of Alex J. Rebello v. Vice Chancellor, Banglore University and others, 2003 CTJ 575 (CP) (NCDRC) the National Commission has held that the University in conducting examination, evaluating answer sheets and publishing the result was not performing any service for consideration and a candidate who appeared for the examination cannot be regarded as a consumer.

Consumer Dispute means a dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint [Section 2(1)(e)].

Restrictive Trade Practice means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include—

(a) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;

(b) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent to buying, hiring or availing of other goods or services.[Section 2(1)(nn)].
**Defect** means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods [Section 2(1)(f)].

It is clear from the above definition that non-fulfilment of any of the standards or requirements laid down under any law for the time being in force or as claimed by the trader in relation to any goods fall under the ambit of defect. Therefore, contravention of any of the provisions of enactments such as the Drugs & Cosmetics Act, 1950, Standards of Weights and Measures Act, 1976, the Prevention of Food Adulteration Act, 1955, the Indian Standards Institution (Certification Marks) Act, 1952 etc. or any rules framed under any such enactment or contravention of the conditions or implied warranties under the Sale of Goods Act, 1930 in relation to any goods have also been treated as a defect under the Act. Fault, imperfection or shortcoming in quality, quantity, potency, purity or standard as claimed by the trader in any manner whatsoever in relation to goods is to be determined with reference to the warranties or guarantees expressly given by a trader.

**Deficiency** means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service [Section 2(1)(g)].

Failure to maintain the quality of performance required by the law or failure to provide services as per warranties given, by the provider of the service would amount to ‘deficiency’.

*In Divisional Manager, LIC of India v. Bhavanam Srinivas Reddy*, the National Commission observed that default or negligence in regard to settlement of an insurance claim (on allegation of suppression of material facts, in this particular case) would constitute a deficiency in service on the part of the insurance company and it will be perfectly open for the aggrieved consumer to approach the Redressal Forums to seek appropriate relief.

*In Jaipur Metals and Electrical Ltd. v. Laxmi Industries*, the National Commission held that a reading of Section 2(1)(g) of the Act shows that deficiency must pertain to the ‘performance’ in terms of quality, nature and manner to be maintained or had been undertaken to be performed in pursuance of a contract.

*In Punjab National Bank v. K.B. Shetty (First Appeal No. 7 of 1991 decided on 6th August, 1991)*, ornaments kept in the banks locker were found lost though the certificate recorded by the custodian of the bank on the day the customer operated the locker stated that all lockers operated during the day have been checked and found properly locked. The National Commission unholding the decision of the State Commission, held the bank guilty of negligence and therefore, liable to make good the loss.

However, failure to provide nursing and financing facilities to a small scale industry which consequently became sick cannot be said to constitute ‘deficiency in service’ as in matters of grant or withholding of further advances and insisting on
margin money, banks may exercise their discretion and act in accordance with their best judgement after taking into account various relevant factors. Therefore, the proper forum to agitate such grievances is a civil court (Special Machines v. Punjab National Bank, Original Petition No. 32/1989 decided on 22.12.1989; M.L. Joseph v. SBI: O.P. No. 2/1989 decided on 31.8.1989). It has also been held by National Commission in the case of Mrs. Anumati v. Punjab National Bank (2003 CTJ 921 (CP) (NCDRC) that the financial institutions have every right to protect their interests by taking conscious decisions. There shall be no deficiency in service where the bank takes conscious decision to adjust the fixed deposit of the joint holders against the loan taken by a third party when the FDR has been mortgaged as guarantee for loan.

In Pradeep Kumar Jain v. Citi Bank [1999(g) SCALE 662] the appellant purchased a car by taking a loan from the respondent bank, and gave post dated cheques to the bank not only in respect of repayment of loan instalments but also of premium of insurance policy for succeeding years. On the expiry of the policy the bank failed to get the policy renewed. In the meantime the car met with an accident. The Supreme Court held that there is no deficiency in service because the obligation to renew the policy was on the appellant alone. But merely passing on two cheques to the bank for being paid to the insurance company the appellant would not absolve himself of his liability to renew the policy. The appellant also have certain duties to discharge in the matter of obtaining the policy and can not merely pass the blame to someone else.

Failure of a Housing Board to give possession of the flat after receiving the price and after registering it in favour of the allottee was held to be deficiency in service in the case of Lucknow Development Authority v. Roop Kishore Tandon F.N. No. 54/1990 decided on 10.10.1990.

Cancellation of train services by the railways due to disturbance involving violence so as to safeguard the passengers as well as its own property was held by the National Commission as not constituting deficiency in service’ on the part of the Railway. [Dainik Rail Yatri Sangh (Regd.) v. The General Manager, Northern Railway - I (1992) CPJ 218 (NC)]. Failure of the Railways to provide cushioned seats in the first class compartments as per specifications laid down by the Railway Board and to check unauthorised persons from entering and occupying first class compartments was held to be deficiency [N. Prabhakaran v. General Manager, Southern Railway, Madras - I (1992) CPJ 323 (NC)].

In Bhaskar Chowdhry v. Dr. Pramod Kumar Aggarwal [1999 CCJ 31 (NCDRC)], the complainant passenger was holding confirmed air-conditioned class tickets from Allahabad to Howrah by Kalka Mail. The train was late. Since another train, Chambal Express going to Howrah was on the platform, the complainant approached the conductor and requested him to allow him to travel by that train. Since there was no air-conditioned class coach in that train, he was allowed to travel in first class compartment. An endorsement to that effect had been made on the tickets. While travelling anti fraud squad forced him to pay penalty as passenger without ticket.

The State Commission held that there was a deficiency in service by the railways. The National Commission on revision petition held that, as far as the
complainant was concerned, he was under the *bona-fide* impression that he was permitted to travel by Chambal Express on the basis of endorsement on the ticket he had obtained. The endorsement created an estoppel on the railway authority. The railway can not turn around and challenge its own action at a later stage.

*In Union Bank of India v. Seppo Rally OY (1999) 35 CLA 203,* the Supreme Court held that delay in payment of an unconditionally guaranteed amount by a bank in India to a non-resident in Finland in foreign currency can not be attributed to any deficiency in the service of the bank when the banks stand is that the delay is caused by the failure of a bank in Finland, to which the remittance was to have been made under the non-residents instructions to reply to the Indian Banks valid query in this connection and the RBI took time to grant the necessary permission to make the remittance.

**CONSUMER PROTECTION COUNCILS**

The interests of consumers are sought to be promoted and protected under the Act inter alia by establishment of Consumer Protection Councils at the Central, State and District Levels. Chapter II of the Consumer Protection Act, 1986 comprising Sections 4 to 8 deals with Consumer Protection Councils.

**Central Consumer Protection Council**

Section 4 empowers the Central Government to establish a Council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council), consisting of the Minister in charge of Consumer Affairs in the Central Government, as its Chairman, and such number of other official or non-official members representing such interests as may be prescribed. However, the Consumer Protection Rules, 1987 restrict the number of members of the Central Council to 150 members.

Section 5 of the Act requires the Central Council to meet as and when necessary, but at least once in every year. The procedure in regard to transaction of its business at the meeting is given in Rule 4 of the Rules.

**State Consumer Protection Council**

Section 7 provides for the establishment of State Consumer Protection Councils by any State Government (by notification) to be known as Consumer Protection Council for (name of the State). The State Council shall consist of a Minister in charge of Consumer Affairs in the State Government as its Chairman and such number of other official or non-official members representing such interests as may be prescribed by the State Government and such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government. The State Council shall meet as and when necessary but not less than two meetings shall be held every year. The procedure to be observed in regard to the transaction of its business at such meetings shall be prescribed by the State Government.

**District Consumer Protection Council**

In order to promote and protect the rights of the consumers within the district,
section 8A provides for establishment in every district of a council to be known as the District Consumer Protection Council. It shall consist of the Collector of the district (by whatever name called), who shall be its Chairman and such number of other official and non-official members representing such interests as may be prescribed by the State Government. The District Council shall meet as and when necessary but not less than two meetings shall be held every year. The District Council shall meet at such time and place within the district as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed by the State Government.

REDRESSAL MACHINERY UNDER THE ACT

The Act provides for a three-tier quasi-judicial redressal machinery at the District, State and National level for redressal of consumer disputes and grievances. The District Forum has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, does not exceed Rs. 20 lakhs, the State Commission for claims exceeding Rs. 20 lakhs but not exceeding Rs. 1 crore; and the National Commission for claims exceeding Rs. 1 crore.

**District Forum**

Section 9 of the Act provides for the establishment of a District Forum by the State Government in each district of the State. However, the State Government may establish more than one District Forum in a district if it deems fit to do so. Section 10(1) provides that each District Forum shall consist of:

(a) a person who is, or who has been, or is qualified to be, a District Judge, who shall be its President;

(b) two other members one of whom shall be a woman, who shall have the following qualifications, namely:
   (i) be not less than thirty-five years of age,
   (ii) possess a bachelor’s degree from a recognised university,
   (iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that a person shall be disqualified for appointment as a member if he—

(a) has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the State Government involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or
(e) has, in the opinion of the State Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or

(f) has such other disqualification as may be prescribed by the State Government.

Every member of the District Forum shall hold office for a term of 5 years or upto the age of 65 years, whichever is earlier, and shall be eligible for reappointment for another term of five years or upto the age of sixty-five years, whichever is earlier, subject to the condition that he fulfills the qualifications and other conditions for appointment mentioned in Section 10(1)(b) and such re-appointment is also made on the basis of the recommendation of the Selection Committee. A member may resign his office in writing under his hand addressed to the State Government.

**Jurisdiction of District Forum**

Section 11 provides for the jurisdiction of the District Forum under two criteria pecuniary and territorial.

**Pecuniary limits**

Section 11(1) empowers the District Forum to entertain complaints where the value of goods or services and the compensation, if any, claimed does not exceed rupees twenty lakhs.

**Territorial limits**

Section 11(2) requires a complaint to be instituted in the District Forum within the local limits of whose jurisdiction the opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office or personally works for gain, at the time of institution of the complaint; or any one of the opposite parties (where there are more than one) actually and voluntarily resides or carries on business or has a branch office or personally works for gain, at the time of institution of the complaint, provided that the other opposite party/parties acquiesce in such institution or the permission of the Forum is obtained in respect of such opposite parties; or the cause of action arises, wholly or in part.

*In the case of Dynavox Electronic Pvt. Ltd. v. B.J.S. Rampuria Jain College, Bikaner* (Appeal No. 4/89 before the Rajasthan CDRC), it was held that where in a contract, the machinery was supplied and installed at a particular place, a part of cause of action would be deemed to have arisen at that place, therefore, the complaint could be instituted in the District Forum within whose jurisdiction that place falls.

Section 16 of the Act empowers the State Government to establish the State Consumer Disputes Redressal Commission consisting of:

**State Commission**

Section 16 of the Act empowers the State Government to establish the State Consumer Disputes Redressal Commission consisting of:

(a) a person who is or has been a judge of a High Court appointed by the State Government (in consultation with the Chief Justice of the High Court) who shall be its President.
(b) not less than two and not more than such number of members, as may be prescribed, one of whom shall be a woman, who shall have the following qualifications, namely:

(i) be not less than thirty-five years of age,

(ii) possess a bachelor's degree from a recognised university, and

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

It is required that not more than fifty per cent of the members be from amongst persons having a judicial background. “Persons having judicial background” shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level.

A person shall be disqualified for appointment as a member if he—

(a) has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the State Government involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(e) has in the opinion of the State Government, such financial or other interest, as is likely to affect prejudicially the discharge by him of his functions as a member; or

(f) has such other disqualification as may be prescribed by the State Government.

Every appointment shall be made by the State Government on the recommendation of a Selection Committee consisting of the President of the State Commission, Secretary Law Department of the State and Secretary in charge of Consumer Affairs in the State. The proviso to this clause states that where the President of the State Commission is, by reason of absence or otherwise, unable to act as Chairman of the Selection Committee, the State Government may refer the matter to the Chief Justice of the High Court for nominating a sitting Judge of that High Court to act as Chairman. Section 16(2) empowers the State Government to decide on the salary or honorarium and other allowances payable to the members of the State Commission and the other terms and conditions of service.

Every member of the State Commission shall hold office for a term of five years or upto the age of sixty-seven years, whichever is earlier and shall be eligible for reappointment for another term of five years or upto the age of sixty-seven years, whichever is earlier, subject to the condition that he fulfills the qualifications and other conditions for appointment mentioned in Section 16(1)(b) and such re-appointment is made on the basis of the recommendation of the Selection Committee.
Jurisdiction of State Commission

Section 17 of the Act provides for the jurisdiction of the Commission as follows:

(a) the State Commission can entertain complaints where the value of the goods or services and the compensation, if any claimed exceed rupees twenty lakhs but does not exceed rupees one crore;

(b) the State Commission also has the jurisdiction to entertain appeals against the orders of any District Forum within the State. However, under second proviso to Section 15 no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty percent of the amount or rupees twenty-five thousand, whichever is less;

(c) the State Commission also has the power to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, if it appears to it that such District Forum has exercised any power not vested in it by law or has failed to exercise a power rightfully vested in it by law or has acted illegally or with material irregularity.

A complaint shall be instituted in a State Commission within the limits of whose jurisdiction, -

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally work for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises

The State Commission’s jurisdiction may be original, appellate or revisional. In respect of (c) above, the State Commission may reverse the orders passed by the District Forum on any question of fact or law or correct any error of fact or of law made by the Forum.

The National Commission in Indian Airlines v. Consumer Education and Research Society (1992) CPR 4 (NC) held that in respect of the original jurisdiction of the State Commission, Section 17 only prescribes pecuniary limits. No territorial limits have been fixed for the exercise of original jurisdiction under the Act though the provision contained in Section 11(2) of the Act apply mutatis mutandis in the matter of entertaining original complaints by the State Commission. The territorial jurisdiction of
the State Commission therefore extends to the territorial limit of the State. In the exercise of its appellate jurisdiction, the State Commission may entertain appeals only against the orders of any District Forum within the State. Similar condition also applies in respect of the State Commissions power to revise orders of the District Forums - only orders of the District Forum within the State may be subject to revision by the State Commission.

Transfer of Cases

Section 17A empowers the State Commission on the application of the complainant or of its own motion to transfer, at any stage of the proceeding any complaint pending before the District Forum to another District Forum within the State if the interest of justice so requires.

National Commission

Section 9 empowers the Central Government to establish the National Consumer Disputes Redressal Commission, by notification in the Official Gazette. Section 20(1) provides that the National Commission shall consist of—

(a) a person who is or has been a judge of the Supreme Court, to be appointed by the Central Government (in consultation with the Chief Justice of India), who shall be its President;

(b) not less than four and not more than such number of members as may be prescribed one of whom shall be a woman, who shall have the following qualifications, namely:-

(i) be not less than thirty-five years of age;

(ii) possess a bachelor’s degree from a recognized university; and

(iii) be persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that not more than fifty percent of the members shall be from amongst the persons having judicial background. “Persons having judicial background” shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level:

A person shall be disqualified for appointment if he—

(a) has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the Central Government involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent court; or

(d) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(e) has in the opinion of the Central Government such financial or other interest
as is likely to affect prejudicially the discharge by him of his functions as a
member; or
(f) has such other disqualification as may be prescribed by the Central
Government

Every appointment by the Central Government is required to be made on the
recommendation of a Selection Committee consisting of a Judge of the Supreme
Court to be nominated by the Chief Justice of India, the Secretary in the Department
of Legal Affairs and the Secretary in charge of Consumer Affairs in the Government
of India. Section 20(2) empowers the Central Government to fix the salary/
honorarium and other allowances payable to the members as well as the other terms
and conditions of their service. Every member of the National Commission shall hold
office for a term of five years or up to seventy years of age, whichever is earlier and
shall be eligible for reappointment for another term of five years or up to the age of
seventy years, whichever is earlier, subject to the condition that he fulfills the
qualifications and other conditions for appointment mentioned in Section 20(1)(b) and
such re-appointment is made on the basis of the recommendation of the Selection
Committee.

Jurisdiction of National Commission

Section 21 provides that the National Commission shall have jurisdiction:

(a) to entertain complaints where the value of the goods or services and the
compensation, if any, claimed exceeds rupees one crore;

(b) to entertain appeals against the orders of any State Commission. However,
under second proviso to Section 19 no appeal by a person, who is required
to pay any amount in terms of an order of the State Commission, shall be
entertained by the National Commission unless the appellant has deposited
in the prescribed manner fifty percent of the amount or rupees thirty-five
thousands, whichever is less; and

(c) to call for the records and pass appropriate orders in any consumer dispute
which is pending before, or has been decided by any State Commission
where it appears to the National Commission that such State Commission
has exercised a jurisdiction not vested in it by law, or has failed to exercise a
jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or
with material irregularity.

Complaints before the District Forum and State Commission

Section 12 provides that a complaint, in relation to any goods sold or delivered or
agreed to be sold or delivered or any service provided or agreed to be provided may
be filed with the District Forum by—

(a) the consumer to whom such goods are sold or delivered or agreed to be sold
or delivered or such service provided or agreed to be provided;

(b) any recognised consumer association, whether the consumer to whom the
goods sold or delivered or agreed to be sold or delivered or service provided
or agreed to be provided, is a member of such association or not; or
(c) one or more consumers, where there are numerous consumers having the same interest with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

(d) the Central or the State Government as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.

Every complaint filed under this section is required to be accompanied with such amount of fee and payable in such manner as may be prescribed. On receipt of a complaint, the District Forum may, by order, allow the complaint to be proceeded with or rejected. However, a complaint shall not be rejected unless an opportunity of being heard has been given to the complainant. It is also to be noted that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was received. Where a complaint is allowed to be proceeded, the District Forum may proceed with the complaint in the manner provided under this Act. Where a complaint has been admitted by the District Forum, it shall not be transferred to any other court or tribunal or any authority set up by or under any other law for the time being in force.

The explanation defines the term 'recognised consumer association' as to mean any voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force.

Thus, in case the affected consumer is unable to file the complaint due to ignorance, illiteracy or poverty, any recognised consumer association may file the complaint. The rule of 'privity of contract' or locus standi which permits only the aggrieved party to take action has very rightly been set aside in the spirit of public interest litigation. Section 13 states the procedure to be followed by the District Forum or the State Commission on receipt of a complaint. On receipt of a complaint, a copy of the complaint is to be referred to the opposite party (or each of the opposite parties, where there are more than one) within twenty-one days from the date of its admission, directing him to give his version of the case within a period of 30 days. This period may be extended by another period of 15 days. If the opposite party admits the allegations contained in the complaint, the complaint will be decided on the basis of materials on the record. Where the opposite party denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the stipulated time, the dispute will be settled in the following manner:

(i) In case of dispute relating to any goods

Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, a sample of the goods shall be obtained from the complainant, sealed and authenticated in the prescribed manner, for referring to the appropriate laboratory for the purpose of any analysis or test whichever may be necessary, so as to find out whether such goods suffer from any such defect. The 'appropriate laboratory' would be required to report its finding to the referring authority, i.e. the District Forum or the State Commission within a period of forty-five days from the receipt of the reference or within such extended period as may be granted by these agencies [Section 13(1)(c)].
The term ‘Appropriate laboratory’ has been defined to mean a laboratory or organisation recognised by the Central Government or a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf; or any such laboratory or organisation established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect.

Section 13 empowers the District Forum/State Commission to require the complainant to deposit such amount as may be specified, towards payment of fees to the ‘appropriate laboratory for the purpose of carrying out the necessary analysis or tests. The amount so deposited shall be remitted to the appropriate laboratory to enable it to carry out the analysis and send the report. On receipt of the report, a copy thereof is to be sent by District Forum/State Commission to the opposite party along with its own remarks. In case any of the parties i.e. opposite party or the complainant, disputes the correctness of the methods of analysis/test adopted by the appropriate laboratory, the concerned party will be required to submit his objections in writing in regard to the report.

After giving both the parties a reasonable opportunity of being heard and to present their objections, if any, the District Forum/State Commission shall pass appropriate orders under Section 14 of the Act.

(ii) In case of dispute relating to goods not requiring testing or analysis or relating to services

Section 13(2)(b) provides that where the opposite party denies or disputes the allegations contained in the complaint within the time given by the District/State Commission, the Agency concerned shall dispose of the complaint on the basis of evidence tendered by the parties. In case of failure by the opposite party to represent his case within the prescribed time, the complaint shall be disposed of on the basis of evidence tendered by the complainant.

**Limitation Period for Filing of Complaint**

Section 24A provides that the District Forum, the State Commission, or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. However, where the complainant satisfies the Forum/Commission as the case may be, that he had sufficient cause for not filing the complaint within two years, such complaint may be entertained by it after recording the reasons for condoning the delay.

**Administrative Control**

Section 24B authorises the National Commission to exercise administrative control over the State Commissions in the matter of calling for periodical returns regarding the institution, pendency and disposal of cases, issuance of instructions regarding adopting of uniform procedure in hearing of matters, serving copies of
documents, translation of judgements etc. and generally overseeing the functioning of the State Commission/District forum to ensure that the objects and purposes of the Act are served in the best possible manner.

Similarly, the State Commission has been authorised to excercise administrative control over all the District forum within its jurisdiction in all the above matters.

**Powers of the Redressal Agencies**

The District Forum, State Commission and the National Commission have been vested with the powers of a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters:

(i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;

(ii) the discovery and production of any document or other material object producible as evidence;

(iii) the reception of evidence on affidavits;

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(v) issuing of any commission for the examination of any witness; and

(vi) any other matter which may be prescribed.

Under the Consumer Protection Rules, 1987, the District Forum, the State Commission and the National Commission have the power to require any person:

(i) to produce before and allow to be examined by an officer of any of these agencies, such books of accounts, documents or commodities as may be required and to keep such book, documents etc. under his custody for the purposes of the Act;

(ii) to furnish such information which may be required for the purposes of the Act to any officer so specified.

These redressal agencies have also been empowered to pass written orders authorising any officer to exercise the power of entry and search of any premises where the books, papers, commodities or documents are kept if there is any ground to believe that these may be destroyed, mutilated, altered, falsified or secreted. Such authorised officer may also seize books, papers, documents or commodities if they are required for the purposes of the Act, provided the seizure is communicated to the District Forum/State Commission/National Commission within 72 hours. On examination of such documents or commodities, the agency concerned may order the retention thereof or may return it to the party concerned.

The District forum, the State Commission and the National Commission have the power to issue remedial orders to the opposite party directing him to do any one or more of the things referred to in Section 14(1)(a) to (i) as discussed hereinbelow. The redressal agencies have also been empowered to dismiss frivolous and vexatious complaints under Section 26 of the Act and to order the complainant to make payment of costs, not exceeding Rs. 10,000 to the opposite party.
Nature and Scope of Remedies Under the Act

In terms of Section 14(1) of the Act, where the goods complained against suffer from any of the defects specified in the complaint or any of the allegations contained in the complaint about the services are proved, the District Forum/State Commission/National Commission may pass one or more of the following orders:

(a) to remove the defects pointed out by the appropriate laboratory from the goods in question;
(b) to replace the goods with new goods of similar description which shall be free from any defect;
(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;
(e) to remove the defects in goods or deficiencies in the services in question;
(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
(g) not to offer the hazardous goods for sale;
(h) to withdraw the hazardous goods from being offered for sale;
(ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;
(hb) to pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

It is to be noted that the minimum amount of sum so payable shall not be less than five percent of the value of such defective goods sold or service provided, as the case may be, to such consumers. Further, the amount so obtained shall be credited in favour of such person and utilized in such manner as may be prescribed.

(hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

(i) to provide for adequate costs to parties.

The remedies that can be granted by the redressal agencies are therefore, wide enough to cover removal of defects/deficiency in goods/services, replacing defective goods with new goods, refunding price/charges paid by the complainant, payment of compensation for loss or damage suffered, providing costs to parties and issuing prohibitory orders directing the discontinuance of unfair trade practice, sale of
hazardous goods etc. However, the redressal agencies have not been granted power to order injunctions.

Section 14(1)(d) provides that the redressal agency may order payment of compensation only in the event of negligence of the opposite party which resulted in loss or damage and not otherwise, i.e. even though the complainant has suffered loss or damage, he may not be entitled for compensation if he cannot prove negligence.

Appeal

Section 15 entitles a person aggrieved by an order of the District Forum to prefer an appeal to the State Commission. Similarly any person aggrieved by any original order of the State Commission may prefer an appeal to the National Commission under Section 19. Likewise, any person aggrieved by any original order of the National Commission may prefer an appeal to the Supreme Court, under Section 23.

All such appeals are to be made within thirty days from the date of the order. However, the concerned Appellate authority may entertain an appeal after the said period of thirty days if it is satisfied that there was sufficient cause for not filling it within the prescribed period. The period of 30 days would be computed from the date of receipt of the order by the appellant.

It may be noted that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum/State Commission, shall be entertained by the State Commission/National Commission respectively unless the appellant has deposited in the prescribed manner fifty percent of that amount or twenty five thousand rupees/thirty-five thousand respectively, whichever is less. It may be observed that appeals are allowable only against the original orders passed by the concerned redressal agency. Appellate orders passed by the State Commission or National Commission (i.e. on appeal against the orders of the District Forum or State Commission) cannot be further appealed against though on questions of law revision petitions may be filed. So also, the revisional orders passed by the State Commission or the National Commission are not appealable.

Penalties

Section 27 of the Act deals with penalties and provides that failure or omission by a trader or other person against whom a complaint is made or the complainant to comply with any order of the District Forum, State Commission or the National Commission shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine of not less than Rs. 2,000 but which may extend to Rs. 10,000, or with both.

However, on being satisfied that the circumstances of any case so require, the District Forum or the State Commission or the National Commission may impose a lesser fine or a shorter term of imprisonment. Section 27(3) prescribes that all offences under the Act to be tried summarily.

GIST OF IMPORTANT CONSUMER CASES

Gist of some of the important rulings rendered by Supreme Court, National Commission and State Commissions, are given hereunder:
Proceedings before Consumer Forums and applicability of Section 34 of the Arbitration Act

According to Section 34 of the Arbitration Act if a contract contains an arbitration clause, the legal proceedings before a judicial authority are liable to be stayed. This is to give primacy to the resolution of disputes through arbitration expressly agreed to between the contracting parties. The question whether Section 34 of the Arbitration Act is applicable to proceedings before the consumer forums was considered by the National Commission in N.K. Modi v. Fair Air Engineers Pvt. Ltd. (decided on 13.11.1992). In this case, the contract contained an arbitration clause. One of the parties made a complaint before the consumer forum. In defence, it was pleaded that consumer forums have no jurisdiction to entertain the complaints in view of Section 34 of the Arbitration Act under which legal proceedings before any judicial authority shall stand stayed.

The National Commission observed that the forums under the Consumer Protection Act are not to be construed as judicial authorities and the proceedings before them cannot be taken to be legal proceedings. For a judicial authority, it is necessary that some part of the judicial power should be transferred to and vested in the forums as in the case of civil/criminal/special courts. Though, the consumer forums have powers to adjudicate dispute, they do not have any trappings of a Court. Except, conforming to the principle of natural justice, consumer forums are not governed by the Evidence Act or the Civil Procedure Code, except for certain limited purposes. Even the Limitation Act is not strictly applicable to the proceedings before them. Observing this, the National Commission came to the conclusion that consumer forums can entertain a complaint arising out of the contract which provides for arbitration of disputes, and Section 34 of the Arbitration Act shall not be a bar on the jurisdiction of the forums.

Failure to provide basic safeguards in the swimming pool – deficiency in service

In the case of Sashikant Krishnaji Dole v. Shitshan Prasarak Mandali [F.A. No. 134 of 1993 decided on 27.9.1995 (NCDRC)] the school owned a swimming pool and offered swimming facilities to the public on payment of a fee. The school conducted winter and summer training camps to train boys in swimming and for this purpose engaged a trainer/coach. The complainants had enrolled their son for learning swimming under the guidance of the coach. It was alleged that due to the negligence of the coach the boy was drowned and met with his death. The school denied that it had engaged the services of a coach and also denied any responsibility on its part. The coach claimed that he was a person with considerable experience in coaching young boys in swimming and that as in other cases he taught the deceased boy also the way in which he should swim and take all precautions while swimming. When the deceased was found to have been drowned the coach immediately took him out of the water and removed the water from his stomach and gave him artificial respiration and thereafter took him to a doctor, where he died.

The State Commission held the school and the coach deficient in rendering service to the deceased, that the coach was not fully trained, did not exercise even the basic commonsense needed to counter an accident in swimming. He was so casual in his behaviour that he did not attempt to take prompt action to save the life of
the deceased and so far as the school was concerned it did not even provide basic facilities nor did it provide any safeguards to prevent accidents.

Dismissing the appeal the National Commission observed that the State Commission had given cogent reasons for holding the school and the coach responsible for death of the deceased. A detailed examination of the depositions of eye witnesses showed that the Commission had correctly appreciated the evidence and come to the conclusion that the coach was negligent and the school did not provide the necessary life saving mechanism to save the lives of trainee students in cases of accidents.

So far as the compensation was concerned the State Commission had taken all relevant factors into account and fixed the amount at Rs. 1.50 lakhs which was reasonable.

Removal of ladder of an aircraft while disembarking by the passenger—deficiency in service

In Station Manager, Indian Airlines v. Dr. Jiteswar Ahir [First Appeal No. 270 of 1994 decided on 28.2.1996 (NCDRC)] when the complainant-passenger occupied his seat in the aircraft, an announcement was made that his luggage was lying on the ground unidentified and that he should disembark to identify his luggage. According to the complainant he moved towards the rear door, and finding that the step ladder was attached to the aircraft door, he stepped out on to the staircase but before he could actually put his entire body weight on the staircase the ladder was suddenly removed as a result of which he fell down on the ground and sustained bodily injuries which was reported to be about 10 percent. As against the complainant’s claim of Rs. 10 lakhs the airlines was willing to pay Rs. 40,000 as compensation which according to them was the maximum statutory liability of the Corporation under the Carriage by Air Act, 1972.

The State Commission, after examining witnesses and the medical boards report held that there was dangerous deficiency in service and having regard to the expert opinion and other medical reports, it ordered payment of compensation of Rs. 4 lakhs and Rs. 1 lakh for mental agony and distress plus costs.

In appeal by the Corporation, the National Commission, upholding the State Commissions order, held that in terms of regulations relied upon by the appellant Corporation, if it was proved that the accident caused to the complainant had resulted in a permanent disablement, incapacitating him from engaging in or being occupied with his usual duties or his business or occupation, the liability could not exceed Rs. 5 lakhs. This case related to the incapacity and permanent disability to the extent of 10 per cent and, therefore, the compensation could not exceed Rs. 5 lakhs. The State Commissions assessment of compensation of Rs. 4 lakhs was justified, considering the age of the complainant (37 years) at the time of accident and his having lost earning capacity. The State Commission was also right in awarding compensation of rupees one lakh for the complainants mental suffering and agony as well as feeling of inferiority in social relations.

Deficiency in service cannot be alleged without attributing fault, imperfection, shortcoming or in adequacy in the quality, nature and manner of performance which is required to be performed by a person in pursuance of a contract or otherwise in relation to any service. The burden of proving deficiency in service is upon the person
who alleged it. When the complainant has not established any willful fault, imperfection, shortcoming or inadequacy in the service of the respondent, there can be no deficiency in service.

In Ravneet Singh Bagga v. KLM Royal Dutch Fintimes [1999(7) SCALE 43], the complainant booked a ticket from Delhi to New York by a KLM plane. The airport authorities in New Delhi did not find any fault in his visa and other documents. However at Amsterdam, the airport authorities instituted proceedings of verification because of which the appellant missed his flight to New York. After reaching New York, the airlines tendered apology to the appellant for the inconvenience and paid as a goodwill gesture a sum of Rs. 2,500. The appellant made a complaint to the National Commission under the Consumer Protection Act which was rejected.

The Supreme Court held that the respondent could not be held to be guilty of deficiency in service. The staff of the airline acted fairly and in a bona fide manner, keeping in mind security and safety of passengers and the Aircraft. The photograph on visa documents was a photo copy and not the original which was unusual. In the circumstances, the staff took some time to ascertain the truth and helped the appellant to reach New York the same day.

A doctor qualified to practice homoeopathic system of medicines treating a patient with allopathic medicines and patient dies - guilty of negligence

In Poonam Verma v. Ashwin Patel [1996(4) SCALE 364] the respondent was a qualified medical practitioner in homoeopathic system of medicine. The appellant, was the widow of a person who, it was alleged, had died because of the negligence of the respondent in administering allopathic medicines in which he was not qualified to practise. It was alleged that the deceased was treated to begin with, for viral fever on allopathic medicines and since his condition had not improved antibiotics were used without conducting proper tests. When his condition further deteriorated he was removed to a nursing home and after four days he was removed to a hospital in an unconscious state. Within a few hours thereafter he died.

Her complaint to the National Consumer Disputes Redressal Commission for damages for the negligence and carelessness of respondent in treating her husband was dismissed. Allowing the appeal the Supreme Court held that the respondent who had practised in allopathy without being qualified in that system was guilty of negligence per se. A person is liable at law for the consequences of his negligence.

Jurisdiction of the Commission: The Supreme Court observed that it is beyond doubt now that disputes regarding applicability of the Act to persons engaged in medical profession either as private practitioners or as Government doctors working in hospitals or Government dispensaries come within the purview of the Consumer Protection Act, 1986. It is also settled that a patient who is a consumer has to be awarded compensation for loss or injury suffered by him due to negligence of the doctor by applying the same tests as are applied in an action for damages for negligence.

In Gopi Ram Goyal and others v. National Heart Institute and others, 2001 CTJ 405 (CP) (NCDRC), the National Commission held that where the record and evidence shows that the conduct of the opposite parties i.e. doctors was more than reasonable and the level of care was as could be expected from professional in exercising reasonable degree of skill and knowledge. The complainant however failed
to prove any case of negligence on the part of doctors, therefore the doctor cannot be held liable for death of patient.

**Fall from a running train while passing through vestibule passage – deficiency in service**

*In Union of India v. Nathmal Hansaria [First Appeal No. 692 of 1993 decided on 24.1.1997 (NCDRC)]* the daughter of the respondent, travelling by a train, fell down from the running train while she was passing through the inter-connecting passage between two compartments and died as a result of crush injuries on her head. In the respondents petition for compensation, the Railways contended that the Consumer Redressal agencies had no jurisdiction to consider a complaint of this nature in view of Section 15 of the Railway Claims Tribunal Act read with Section 13 of that Act.

The State Commission held that a railway passenger travelling in a train on payment of consideration was a consumer within the meaning of the Consumer Protection Act, 1986. Section 82A of the Railways Act referred to in Section 13 of the Railway Claims Tribunal Act, 1987 and the rules made thereunder provided compensation for railway accidents and not for accidental death of this nature.

Dismissing the appeal the National Commission held that the death of the passenger could not be described as resulting from railway accident but an accidental death caused by the absence of safety devices in the vestibule passage way.

Although the railway administration had claimed that the coach was a new coach and that all coaches had been thoroughly checked at the starting point of the train and that no defect was reported, the railways had not contended that this particular coach was checked at the time of commencement of the journey. The general statement of practice and procedure was not conclusive proof that this particular coach was checked and no evidence had been produced in support of their contention. Thus, the State Commission was right in holding that the deceased passenger was a consumer. On the basis of similar facts, the MRTP Commission has recently awarded a compensation of Rs. 18 lakhs with 9% interest to the parents of deceased. The above compensation appears to be the highest award in commission’s history.

**Repudiation of Insurance claim because the driver did not have a valid license**

In the case of Jitendra Kumar v. Oriental Insurance Company Ltd. and another the Supreme Court has held that where the fire has occurred due to mechanical failure and not due to any act or omission of the driver, the insurance company cannot repudiate the claim because of lack of valid driving license.

**Premium paid to the agent of the LIC but the agent did not deposit the premium, death of the insured - No deficiency of service on the part of the LIC**

*In Harshad J. Shah v. Life Insurance Corporation of India [1997(3) SCALE 423 (SC)]* the insured (since deceased) took out four life policies with double accident benefits, premium payable half-yearly. When the third premium fell due, the general agent of the Corporation met the person and took a bearer cheque towards the premium payable by him in respect of the policies. Although the cheque was encashed immediately thereafter, it was not deposited with the Corporation for another three months. In the meantime, the insured met with a fatal accident and
died. The Corporation rejected the widows claim for payment of the sum assured on the ground that the policies had lapsed for non-payment of premium within the grace period.

In the widows complaint to the State Commission under the Consumer Protection Act the Corporation pleaded that the amount of premium allegedly collected by the general agent could not be said to have been received by the Corporation, that the agent was not authorised to collect the premium amount. The State Commission held that in order to collect more business, agents of the Corporation collected premiums from policyholders either in cash or by cheque and then deposited the money so collected with the Corporation and that this practice had been going on directly within the knowledge of the Corporations administration, notwithstanding the departmental instructions that the agent was not authorised to collect the premiums. When the practice of the agent collecting the premiums from policyholders was in existence and the money was collected by the agent in his capacity and authority, the reasonable inference was that the Corporation was negligent in its service towards the policyholder.

The National Commission, in appeal, was of the view that the insurance agent in receiving a bearer cheque from the insured towards payment of insurance premium was not acting as agent of the Corporation nor could it be said that the Corporation had received the premium on the date the bearer cheque was received by the agent, even though he deposited the sum with the Corporation a day after the death of the insured.

Dismissing the appeal the Supreme Court held that the agent had no express authority to receive the premium on behalf of the Corporation. In his letter of appointment there was a condition expressly prohibiting him from collecting the premium. Nor could it be said that he had an implied authority to collect the premium, as regulation 8(4) expressly prohibited the agents from collecting premiums. Therefore, no case had been set up by the complainant before the State Commission that the Corporation by its conduct had induced the policyholders, including the insured, to believe that the agents were authorised to receive premiums on behalf of the Corporation. Nor was there any material on record that lent support to this contention. In the facts of this case there was no room to invoke the doctrine of apparent authority underlying Section 237 of the Indian Contract Act.

In National Insurance Co. Ltd. v. Seema Malhotra [2001(2) SCALE 140] (Supreme Court) a cheque was issued under a contract of insurance of motor car by the insured for payment of premium to the policy. However, cheque was dishonoured for want of funds in the account. Meanwhile, the car met an accident and badly damaged, killing the insured owner. The claim for insured amount was repudiated by the company.

The Supreme Court held that applying the principles envisaged under Section 51, 52 and 54 of Indian Contract Act, relating to reciprocal promises, insurer need not to perform his part of promise when the other party fails to perform his part and thus not liable to pay the insured amount.

Educational Institutions

In Sreedharan Nair N. v. Registrar, University of Kerala [2001 CTJ 561 (CP) (NCDRC)], the University refused to provide LL.B. degree certificate on completion of
course on the ground that the qualifying examination on the basis of which student was admitted in LL.B. course in Kerala law college has not been recognised by it. The National Commission held that this is a clear case of deficiency on part of University. A compensation of Rs. 50,000 was awarded to complainant.

In Isabella Thoburn College v. Ms. Fatima Effendi [2001 CTJ 386 (CP) (SCDRC)], the State Commission held that non-refund of admission fee is not a deficiency of service on the part of the university because admission fee is consideration for admission and respondent herself voluntarily withdrawing admission from one university to join another institute cannot claim refund of admission fee.

**Medical professional is guilty of medical negligence**

In Kusum Sharma & Others Versus Batra Hospital & Medical Research Centre & Others 2010 CTJ 242 Supreme Court (CP) Supreme Court held that while deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the
medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

**X.** The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

**XI.** The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

The aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

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**LESSON ROUND UP**

- Consumer Protection Act, 1986 provides for simple, quick and easy remedy to consumers.
- The Act empowers the Central Government to establish a Council to be known as the Central Consumer Protection Council.
- The Act provides for the establishment of State Consumer Protection Councils by any State Government.
- The Act provides for establishment in every district of a council to be known as the District Consumer Protection Council.
- District Forum has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, is less than Rs. 20 lakhs, the State Commission for claims exceeding Rs. 20 lakhs but not exceeding Rs. 1 crore; and the National Commission for claims exceeding Rs. 1 crore.
- The District Forum, the State Commission, or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.
- The District Forum, State Commission and the National Commission have been vested with the powers of a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the certain matters.
SELF TEST QUESTIONS

1. Discuss in detail the objects of Consumer Protection Act, 1986.
2. Briefly discuss the jurisdiction of the various Forums/Commissions under the Consumer Protection Act, 1986?
3. Explain the nature and scope of the remedies under the Act?
4. Write short note on the following:
   (i) Complainant
   (ii) Deficiency in service
   (iii) Power of redressal agencies
   (iv) Limitation period for filing of complaint.
LEARNING OBJECTIVES

The objective of this study lesson is to enable the students to understand

- Overview of Essential Commodities Act, 1955
- Object and Scope of the Act
- Essential Commodities
- Powers of Central Government to control production, supply and distribution etc., of essential commodities
- Fixing of price for essential commodities
- Confiscation of Essential Commodities
- Orders passed under Essential Commodities Act, 1955
- Offences and penalties
- Special Courts
- Grant of Injunction by Civil Court

INTRODUCTION

In 1939 the Government of India made certain rules to control the production, supply and distribution of certain commodities under the Defence of India Act which ceased to have force in September, 1946. It was however considered necessary that control in respect of certain commodities essential for human beings should continue in the interest of the general public. Therefore, the Essential Supplies (Temporary Powers) Ordinance, XVIII of 1946 was promulgated by which certain provisions of the Defence of India Rules continued to have force. This Ordinance was subsequently replaced by the Essential Supplies (Temporary Powers) Act, 1946 (Act No. XXIV of 1946).

The operation of the Act was prolonged upto 1st April, 1948, by virtue of a Notification published in the Gazette of India, dated March 8, 1947. Under certain resolution of the Constituent Assembly passed in 1948 and 1949 and by the Adaptation of Laws Act, 1950, the operation of the Act was further extended to different periods from time to time.

Since in public interest it was considered necessary that the Centre should
continue to control production, supply and distribution of certain essential commodities, the need for a permanent measure on the subject was felt. For this purpose, certain amendments were required to be made in the Constitution. The Constitution (Third Amendment) Act made the required amendments in Entry 33 of List 3 of the Seventh Schedule to the Constitution to enable the Parliament to enact the required legislation. The Essential Commodities Ordinance No. 1 of 1955, was therefore, promulgated which came into force on 26th January, 1955. This Ordinance was subsequently replaced by the present Act namely, the Essential Commodities Act, 1955 (Act No. 1 of 1955) w.e.f 1st April, 1955.

**OBJECT AND SCOPE OF THE ACT**

The Preamble to the Act says that it is an Act to provide in the interest of the general public for the control of the production, supply and distribution of, and trade and commerce in, certain commodities. The dominant object and intendment of the Act is to secure equitable distribution and availability at fair prices of essential commodities in the interest of the general public. The interest of the general public necessarily connotes the interest of the consuming public and not the interest of the dealer (1958 Andh. LT587).

**DEFINITIONS (SECTION 2)**

The Act contains definitions of five important terms, namely:

- **Collector**: “Collector” includes an Additional Collector, and such other officer not below the rank of sub-divisional Officer as may be authorised to perform the functions and exercise the powers of the Collector under the Act [Section 2(ia)].

- **Essential Commodities**

  Section 2A dealing with Essential commodities declaration, etc. defines the "essential commodity" as to mean a commodity specified in the Schedule.

**Schedule to the Act lists out following commodities:**

1. **drugs**: The explanation clarifies that for the purposes of this Schedule, "drugs" has the meaning assigned to it in clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940);
2. **fertilizer**, whether inorganic, organic or mixed;
3. **foodstuffs**, including edible oilseeds and oils;
4. **hank yarn made wholly from cotton**;
5. **petroleum and petroleum products**;
6. **raw jute and jute textiles**;
7. **seeds of food-crops and seeds of fruits and vegetables**;
   - (i) seeds of cattle fodder; and
   - (ii) jute seeds.
Sub-section (2) empowers the Central Government to amend, if it is satisfied that it is necessary so to do in the public interest and for reasons to be specified in the notification published in the Official Gazette, the Schedule so as to (a) add a commodity to the said Schedule; and (b) remove any commodity from the said Schedule, in consultation with the State Governments.

In terms of Sub-section (3) any notification issued under Sub-section (2) may also direct that an entry shall be made against such commodity in the said Schedule declaring that such commodity shall be deemed to be an essential commodity for such period not exceeding six months to be specified in the notification. However, Central Government may, in the public interest and for reasons to be specified, by notification in the Official Gazette, extend such period beyond the said six months.

The Central Government may exercise its powers under Sub-section (2) in respect of the commodity to which Parliament has power to make laws by virtue of Entry 33 in List III in the Seventh Schedule to the Constitution. Every notification issued under sub-section (2) is required to be laid, as soon as may be after it is issued, before both Houses of Parliament.

In addition to the items included in the list given in the said clause, such other items which may be so declared by the Central Government by notified orders would also be included in the list of essential commodities, but in any case, such commodities would not be outside the scope of Entry 33 in List III in the Seventh Schedule to the Constitution. The Central Government has time and again, notified various commodities to be essential commodities. The term “essential commodities” is defined in Rule 35(3) of the Defence of India Rules, 1962, to mean “food, water, fuel, light, power or any other thing notified by the Central Government in this behalf as essential for the existence of the community”. Of course, the definition in the Essential Commodities Act is more comprehensive than that in the Defence of India Rules, but both definitions enumerate certain things or articles and have scope for addition to the list of other articles notified in that behalf by the Central Government. As such, the articles not expressly mentioned in the definition given in the Defence of India Rules, can become essential commodities within the meaning of the expression used in the Rules by a simple government notification and the slight difference in the definition of essential commodity in the Act from that given in the Rules does not make one repugnant to the other [Nathuni Lai Gupta v. The State (1964 Cr. LJ 662)].

It has been held that sugarcane is a “foodstuff” within the meaning of the Essential Commodities Act (Mahabir Sugar Mills Pvt. Ltd. v. Union of India, AIR 1975 ALL 239). Cement has been notified as an essential commodity.

In Kamala Kanta Mishra v. State [AIR 1951 (ALL) 598], the Allahabad High Court observed that the word “edible” should be interpreted in its ordinary dictionary sense, what is “eatable” or “fit to be used as food”. Therefore, it was held that linseed and oil seed should be regarded as edible oil seeds. In Atulya Kumar De v. Director, Procurement and Supply (AIR 1953 Cal. 548) the Court held that paddy is also foodstuff within the meaning of the expression as used in the Act. Ice was held to be food for the purpose of the Delhi Ice Control Order, 1979 [H.S. New India Industries Crop. Ltd. v. Union of India, AIR 1980 Del. 271].

the question whether ‘turmeric’ was a foodstuff arose. It was held that turmeric was an essential commodity and not merely a luxury which at a time of austerity could be dispensed with. Similarly, milk is nutritious and sustenance of life is possible with milk. Especially for infants, the diseased and invalids, it provides nourishment and therefore milk was held to be foodstuff (State of Bombay v. Jal K. Patel, A.I.R. 1951 Bom. 203 p. 205).

In Nathuni Lai Gupta v. The State (Supra), the Calcutta High Court held the wheat and wheat products to be foodstuffs.

In Sujan Singh v. State of Haryana (AIR 1968 Punjab & Haryana 363), the High Court of Punjab and Haryana held the following commodities to be foodstuffs: turmeric, pepper, chillies, coriander, cummin, cinnamon cloves, fenugreek, cardamom, dry mango peel (amchur), dry ginger (soonttr).

IN S. Samuel, AID. Harrisons Malayava v. Union of India, AIR 2004 SC 218, Supreme Court held that Tea is not foodstuff. Even in a wider sense, foodstuffs will not include tea as tea either in the form of the leaves or in the form of beverage, does not go into the preparation of food proper to make it more palatable and digestible. Tea leaves are not eaten. Tea is a beverage produced by steeping tea leaves or buds of the tea plants in the boiled water. Such tea is consumed hot or cold for its flavour, taste and its quality as a stimulant. The stimulating effect is caused by the presence of caffeine therein. Tea neither nourishes the body nor sustains nor promotes its growth. It does not have any nutritional value. It does not help formation of enzymes nor does it enable anabolism. Tea or its beverage does not go into the preparation of any foodstuff. In common parlance, any one who has taken tea would not say that he has taken or eaten food. Thus tea is not a food.

- **Order:** “Order” includes a direction issued thereunder [Section 2(c)].
- **State Government:** “State Government”, in relation to a Union territory means the administrator of such territory [Section 2(d)].
- **Sugar:** “Sugar” means: (i) any form of sugar containing more than 90 per cent of sucrose, including sugar candy; (ii) Khandasri sugar or bura sugar or crushed sugar, or any sugar in crystalline or powdered form; or (iii) sugar in process in vacuum pan sugar factory, or raw sugar [Section 2(e)].

**Authorities responsible to administer the Act**

Necessary powers have been given to the Central Government under the Act to administer the provisions of the Act by issuing orders/directions notified in the official gazette and by delegating the authority to State Governments and administrators of Union Territories. The Central Government at its apex level is responsible for achieving the objectives enshrined by the Parliament under this Act for the welfare and general well-being of all the citizens.
Powers of Central Government to control production, supply and distribution etc., of essential commodities [Section 3]

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<th>Power to Issue Orders</th>
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<td>The Central Government having been vested with power under Section 3(1) can issue order in the following circumstances providing for regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein:</td>
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<td>(i) when it is necessary or expedient for maintaining or increasing supplies of any essential commodity;</td>
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<td>(ii) for securing the equitable distribution and availability of essential commodities at fair price; or</td>
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<td>(iii) for securing any essential commodity for the defence of India or the efficient conduct of military operations.</td>
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In *Narain Dass Daulat Ram v. State of Haryana*, AIR 1978 Punj. 310 the question that came up for consideration was whether notification No. GSR 57/CA 10/55/S:3/78 dated 29th May, 1978 issued by Haryana State Government exempting Delhi Milk Scheme and Mother Dairy, Delhi from the ban on the export of milk from the State of Haryana, infringes the right of the petitioners to equality under Article 14 of the Constitution. The contention was that these two organisations purchase milk from the State of Haryana and take it to Delhi and the same right should have been conceded to the petitioner as well. Due to the fact that petitioner, and the two organisations named above have been treated differently in the Notification, whether Article 14 of the Constitution stands attracted and renders it bad was the question before the court. It was held that the Delhi Milk Scheme and Mother Dairy, Delhi are two State controlled organisations. They are manned by the Government Officers and they supply milk to the people in the capital at subsidised rates. As against this, the petitioners are private persons and their sole object of exporting milk from the State of Haryana is pecuniary gain. Keeping in view the fact that the duration of the ban is for a short period, that is May 24, 1978 to July 14, 1978, it is obvious that the petitioner cannot be treated on equal footing with Delhi Milk Scheme and Mother Dairy, Delhi. As the Delhi organisations constitute a class in themselves, distinct from the petitioner, the question of the Notification violating Article 14 of the Constitution does not arise.

It is a condition precedent for the exercise of the powers under Section 3 that: (a) the Central Government or the authorised officer had formed an opinion that it was necessary or expedient to take the impugned action; and (b) the opinion formed is bonafide.

It is not however necessary to recite in the order the requisite opinion of the Central Government. It is implicit in the recital on the control orders that Central Government had formed the requisite opinion within Section 3 of the Act. [Chinta Lingam v. Government of India AIR (1971) SC 471].

Contents of the Order

Notwithstanding the above and without prejudice to the generality of the powers
contained in Sub-section (1) above, Sub-section (2) of Section 3 provides that the Central Government may issue an order which may provide for all or any of the following matters:

(a) for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;

(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for growing thereon of food crops generally or of specified food crops and for otherwise maintaining or increasing the cultivation of food crops generally, or of specified food crops;

(c) for controlling the price at which any essential commodity may be bought or sold. All kinds of prices—ex-factory, wholesale or retail, can be controlled [Diwan Sugar and General Milk (P) Ltd. v. Union of India, AIR 1959 SC 626]. The Government has framed Price Control Orders in respect of various commodities from time to time;

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale; prohibitions of the withholding for sale “is not the same as prohibition of the refusal to sell”. Thus, the State Government went beyond the power delegated to it by the Central Government and even beyond the powers contemplated by the Act itself in promulgating Section 3 to prohibit refusal to sell “cycle tires and tubes” [Uday Metro Cycle Importing Co. v. State of Kerala (1969) KLT 69];

(f) for requiring any person holding in stock, or engaged in the production, or in the business of buying or selling, of any essential commodity—(a) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or (b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the order.

Explanation I provides that an order made under this clause in relation to foodgrains, edible oilseeds or edible oils may, having regard to the estimated production, in the concerned area, of such foodgrains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation of the producers. Explanation II provides that “production” for the purposes of this clause includes manufacture of edible oils and sugar with its grammatical variation and cognate expressions;

(g) for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs which in the opinion of the authority making the order, are, or if unregulated, are likely to be detrimental to the public interest;

(h) for collecting any information or statistics with a view to regulating or
prohibiting any of the aforesaid matters;

(i) for requiring persons engaged in the production of, or trade and commerce in, any essential commodity to maintain and produce for inspection such books, accounts and record relating to their business and to furnish such information relating thereto as may be specified in the order;

(ii) for the grant or issue of licences, permits or other documents, the charging of fees therefor, the deposit of such sum, if any, as may be specified in the order as security for the due performance of the conditions of any such licence, permit or other document, the forfeiture of the sum so deposited or any part thereof for contravention of any such conditions and the adjudication of such forfeiture by such authority as may be specified in the order;

(i) for any incidental and supplementary matters, including in particular, the entry, search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals and the seizure by a person authorised to make such entry, search or examination:

(j) of any article in respect of which such person has reason to believe that a contravention of the order has been, is being or is about to be, committed and any packages, coverings, or receptacles in which such articles are found; (ii) of any aircraft, vessel, vehicle or other conveyance or animal used in carrying such articles, if such a person has reason to believe that such aircraft, vessel, vehicle or other conveyance or animal is liable to be forfeited under the provisions of this Act; (iii) of any books of account and documents which in the opinion of such person, may be useful to, or relevant to any proceeding under this Act and the person from whose custody such books of account or documents are seized shall be entitled to make copies thereof or to take extracts therefrom in the presence of an officer having the custody of such books of account or documents.

Fixing the Price of Essential Commodities being sold to Government

Section 3(3) vests powers in Central Government to deal with the pricing of the essential commodities particularly when the commodities are being sold to Central/State Government in compliance of order under clause (f) of Sub-section (2) of Section 3. In such a case, the price shall be paid as provided hereunder:

(a) the agreed price, where the price can be agreed upon consistently with the controlled price fixed under this section;

(b) controlled price: where no such agreement can be reached, the price calculated with reference to controlled price;

(c) the price calculated at the market rate prevailing in the locality on the date of sale, where neither clause (a) nor clause (b) applies.

Fixing the Price of Essential Commodities during Emergency

Section 3(3A)(i) is in the nature of an emergency provision and can be resorted to meet a situation arising at a particular locality. It empowers the Central Government to direct the price at which the foodstuffs in any locality will be sold to general public. This direction will be issued only when the Central Government is of the opinion that takings such step is necessary for controlling price rise or preventing
the hoarding of any foodstuff in any locality. The notification issued by the Government to the above effect shall be in force for 3 months only as may be specified therein as per Sub-section (3A)(ii). Further, for selling specified foodstuffs in the specified locality, the seller shall be paid price therefor as follows:

(a) agreed price, when the price can be agreed upon consistently with the controlled price fixed under this sub-section; or
(b) the controlled price, when no such agreement can be reached as stated above; or
(c) the market rate price as per the prevailing market rate in the locality at the date of sale where neither of the above clause (a) or (b) apply.

Payment of Procurement Price for Foodgrains and Edible Oil

The Essential Commodities (Amendment) Act, 1976, inserted Sub-section (3B) in substitution of the then existing section providing for payment of procurement price of such foodgrains, edible oils or oilseeds as may be specified by State Government with the prior approval of Central Government. Therefore, as per Section 3(3B) where any person is required in terms of an order under Sub-section (2)(f) to sell to the Central Government or a State Government or any officer or agent of such Government or to a Corporation owned or controlled by such Government any grade or variety of foodgrains, edible oil and oilseeds in relation to which no notification has been issued under Section 3(3A) or such notification, having been issued, has ceased to be in force, procurement price shall be paid irrespective of the provisions of Sub-section (3) having regard to the following facts:

(a) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oils and oilseeds;
(b) the general crop prospects;
(c) the need for making such grade or variety of foodgrains, edible oils and seeds available at reasonable prices to the consumers, particularly the vulnerable sections of the consumers; and
(d) the recommendations, if any, of the Agricultural Prices Commission with regard to the price of the concerned grade or variety of foodgrains, edible oils and oilseeds.

Fixing Price for Sugar to be Paid to Producer

Sub-section (3C) of Section 3 provides that where any producer of sugar is required by an order made under Sub-section (2)(f) to sell any kind of sugar to the Central or State Government/officer or agent of such government or to any person/class of persons, whether notification in this regard under Sub-section (3A) is issued or not or ceased to be in force and notwithstanding anything contained in Sub-section (3), the producer shall be paid such price for sugar as the Central Government may, by order, determine having regard to (a) the minimum price, if any fixed for sugar cane by the Central Government under this section; (b) the manufacturing cost of sugar; (c) the duty or tax, if any, paid or payable thereon; and (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar.

Further, the Central Government may determine different prices for different
areas from time to time or for different factories or for different kinds of sugar. It is explained in the sub-section that producers for the purposes of this sub-section shall include persons carrying on business of manufacturing sugar.

Price fixation under Section 3(2) and 3(3B) is different from price fixation in the case of sugar under Sub-section (3C). In the former, the dominant purpose in fixing price is to ensure that goods are available to consumers at a reasonable price. In the latter, price fixed must also give a reasonable return on investment to the producer.

Sub-section (3D) of the Act empowers the Central Government to direct that no producer, importer or exporter to sell or otherwise dispose of or deliver any kind of sugar or remove any kind of sugar from the bonded godowns of the factory in which it is produced, whether such godowns are situated within the premises of the factory or outside or from the warehouses of the importers or exporters, as the case may be, except under and in accordance with its direction. However, this provision does not affect the pledging of such sugar by any producer or importer in favour of any scheduled bank as defined in clause (e) of Section 2 of the Reserve Bank of India Act, 1934 or any corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, so, however, that no such bank sells the sugar pledged to it except under and in accordance with a direction issued by the Central Government.

In terms of Sub-section 3(E) the Central Government has been empowered to direct from time to time, by general or special order, any producer or importer or exporter or recognised dealer or any class of producers or recognised dealers, to take action regarding production, maintenance of stocks, storage, sale, grading, packing, marking, weighment, disposal, delivery and distribution of any kind of sugar in the manner specified in the direction.

**Power to Appoint Authorised Controller**

The Central Government has been vested with necessary powers under Sub-section (4) of Section 3 to authorise any person (known as authorised controller) when it is considered necessary for maintaining or increasing the production and supply of essential commodities. The authorised controller shall exercise such functions of control as may be provided in the order with respect to the whole or any part of any such undertaking engaged in the production and supply of the commodity. The authorised controller shall exercise his functions in accordance with any instructions given to him by the Central Government. He shall not have any power to give any direction inconsistent with the provisions of any enactment or any instrument determining the functions of the person in charge of the management of the undertaking except in so far as may be specifically provided by the order. The undertaking shall be carried on in accordance with any directions, given by the authorised controller under the provisions of the order. The person who is responsible to function as a manager of the undertaking or part of it shall comply with such directions.

In *State of Bihar v. Oswal Chemicals and Fertilizers Ltd.*, AIR 2001 Pat 184, the Patna High Court held that the directions issued by Registering Authority for allocation of district-wise supply by manufacturer and also regarding fixation of railway rake points for particular districts for receipt, storage and unloading of urea would be *ultra vires*
Issuance and Service of Order

An order made under Section 3 of the Act shall be issued and served in the manner as provided under Section 3(5) i.e. in the following manner:

(a) in the case of an order of general nature or affecting a class of persons be notified in the official gazette; and

(b) in the case of an order directed to a specified individual be served on such individual (i) by delivering or tendering it to that individual, or (ii) if it cannot be so delivered or tendered, by affixing it on the outer door or some other conspicuous part of the premises in which that individual lives, and a written report thereof shall be prepared and witnessed by two persons living in the neighbourhood.

Laying the Order before Parliament

Sub-section (6) provides that every order made under Section 3 by the Central Government or by any officer or authority of Central Government shall be laid before both Houses of Parliament as soon as may be, after it is made.

Imposition of Duties on State Government

Section 4 of the Act provides that an order made under Section 3 may confer powers and impose duties upon the Central Government or the State Government or officers and authorities of the Central Government or State Government and may contain directions to any, State Government or to officers or authorities thereof as to the exercise of any such powers or discharge of any such duties.

Delegation of powers

In terms of Section 5, the Central Government may, by notified order direct that the power to make orders or issue notifications under Section 3 shall in relation to such matters and subject to such conditions, if any, as may be specified in the direction be exercisable also by (a) such officer or authority subordinate to Central Government, (b) such State Government or such officer or authority subordinate to a State Government as may be specified in the direction.

NATURE OF ORDER PASSED UNDER THE ACT

It may be noted from the foregoing paragraphs that the order notified by the Government under Section 3(2) specifies the various aspects which may be covered under the order while ensuring the production, procurement and distribution of the essential commodities. Further, Sub-sections (3), (3A), (3B), (3C) provide for issuance of order for fixation of prices of the essential commodities. Order may be passed for appointing Controlling Authority under this Act which is of different nature being administrative in kind and effect. Sub-section (5) provides for the issuance and service of the order. The order notified by the Government is such an important document that the Act provides, under Sub-section (6) of Section 3, for it to placed before both Houses of Parliament. Thus, the order in its nature, is a medium of administering the Act and a proper course of communication to and from the Government, exercising and delegating the powers vested in the Government under the Act.
Effect of the Order

Section 6 provides that the order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

It could be seen that this section does not either expressly or by implication, repeal any of the provisions of the pre-existing laws, nor does it abrogate such laws. The object of Section 6 is simply to by-pass them. Thus, for example, an order made under Section 3 would be operative in regard to the essential commodities covered by the Textile Control Order, wherever there is any repugnancy in that order with any existing law, and to that extent the existing law with regard to those commodities will not operate.

The Calcutta High Court had observed that the ultimate effect of Section 6 is that an order under Section 3 will override existing laws, only on the ground that the are orders validly made under Section 3 of the Act (Ramananda Agrawala v. State AIR 1951 Calcutta 120).

As rightly pointed out by the Patna High Court, Section 6 is a saving section which affords protection to the orders made under Section 3 of the Act as against the onslaught of any law, merely by reason of inconsistency (Mohammad Anwar Hussi v. State of Bihar, AIR 1955 Patna 220).

Presumption as to Orders

Section 13 provides that where an order purports to have been made and sign by an authority in exercise of any powers conferred by or under this Act, a court so presume that such order was so made by that authority within the meaning of Indian Evidence Act, 1972.

Burden of Proof in certain cases

Section 14 provides that on being prosecuted for contravention of any order made under Section 3 which prohibits him from doing any act or being in possession of a thing without lawful authority or without a permit, licence or other document such person shall have to prove that he has such authority, permit, licence or other document as the burden of proof lies upon him.

In a case decided by the Supreme Court the appellant was charged with having exported 1405 bags of uncleaned tur-dal without any permit. Although the initial burden was on the appellant to prove that he had the required permit, once he produced the permit authorising him to export chuni bharda and showed that the commodity which he had exported fell within the description of chuni bharda, the burden shifted upon the prosecution to prove that the commodity which was being exploited was not chuni bharda, but uncleaned tur-dal. Therefore, unless the prosecution discharged this burden, the conviction of the appellant could not be sustained. Under the circumstances, it was held that it was not for appellant to prove that the commodity which he was exporting was not uncleaned tur-dal (Srinivas Pannalal Chokhani v. State of M.P. AIR 1954 S.C. 2).

Protection for Acts done in Pursuance of Order

Section 15 provides immunity against action taken in good faith under the Act
and lays down that no suit, prosecution or other legal proceedings can be taken against any person for anything which is in good faith done, or intended to be done, in pursuance of any order made under Section 3 of the Act. Likewise, no suit or other legal proceedings can lie against the Government, for any damage caused or likely to be caused, by anything which is in good faith done, or intended to be done, in pursuance of any order made under Section 3 of the Act.

It may be noted that immunity can be claimed by the Government or by its officers, only if it is shown that an order was issued under Section 3 of the Act, and the liability which the plaintiff is seeking to enforce arises from the fact that action was taken in pursuance of the order of the government under that section.

The Andhra Pradesh High Court has observed that what this section lays down is that if an employee of the Government taken actions in pursuance of an order passed under the Act and if this is done in good faith, the State Government is not responsible. However, in the case before the High Court then, there was no order of the Government under which the Tehsildar could have seized the goods. It was proved before the Court that the previews order of the Government was cancelled, and on the date of the seizure there was admittedly no direction or anything under which the Tehsildar could have acted and seized the goods. Therefore, it could not be said that action of the Tehsildar was in pursuance, of an order, and therefore, entitled to the protection of this section. If the Tehsildar thus seized the goods without any authority of law, it would be his own action and for that he alone would be responsible. For such a tortuous act of a Government employee, the Government could not be held liable (Government of Andhra Pradesh v. Pabbisetty Subharamaiah Setty AIR 1966 A.P. 225).

CONFISCATION OF ESSENTIAL COMMODITIES

Seizure and Confiscation of Essential Commodities

The Essential Commodities Act envisages two independent proceedings against a person charged with contravention of the provisions of the Act. Under Section 6A, the Collector can confiscate the seized commodity and under Section 7, the contravention would be punishable. Confiscation of essential commodities is a sharp weapon which the Act has provided to the Central Government under Section 6A of the Act.

Section 6A provides that where any essential commodity is seized in pursuance of an order made under Section 3, a report of such seizure shall be made, without any unreasonable delay, to the collector of the district or the Presidency town in which such essential commodity is seized. The Collector at his discretion, may direct for the production of the seized commodity before him and if he is satisfied that there has been contravention of the order he may pass order for confiscation of (a) the essential commodity so seized, (b) any package, covering or receptacle in which such essential commodity is found, and (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity. Provided that without prejudice to any action which may be taken under any other provision of this Act, no foodgrains or edible oilseeds seized in pursuance of an order made under Section 3 in relation thereto from a producer shall, if the seized foodgrains or edible oilseeds have been produced by him, be confiscated under this section. Provided further that
in the case of any animal, vehicle, vessel or other conveyance the owner of such animal, vehicle etc., shall be given an option to pay in lieu of its confiscation, a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by such animal, vehicle, vessel, or other conveyance.

The Act uses the expressions 'confiscation' and 'seizure' in Section 6A and under this section a commodity which has been seized in pursuance of an order under Section 3 can be confiscated under the circumstances mentioned in Section 6A. Therefore, it is essential to know in brief the distinction between seizure and confiscation.

### ‘Seizure’

The expression ‘seize’ means to take possession contrary to the wishes of the owner of the property and that such action is unilateral action of the person seizing. The person from whom anything is seized loses, from the moment of seizure, the right or power to control or regulate the use of that thing. The dictionary meaning of the word ‘seize’ means to lay hold of suddenly or forcibly, to take hold of, to reach and grasp, to clutch’. It also means ‘to take possession of or appropriate in order to subject to the force or operation of a warrant, order of Court or other legal processes. A reference to some provisions of the Codes of Criminal Procedure shows that the term seizure had been used therein in connection with the taking of actual physical possession of moveable property.

### ‘Confiscation’

‘Confiscation’ according to Wharton’s Law Lexicon, is condemnation and adjudication of property to the public treasury as of goods seized under the Customs Act. Confiscation, according to Strouds judicial Dictionary, must be an act done in some way on the part of the Government of the country where it takes place and in some way beneficial to that Government, though the proceeds may not strictly speaking be brought into its treasury. In State of Kerala v. Mathai (1961 K.L.T. 169) it was pointed out that confiscation is not to be considered part of the sentence for an offence but is only a mode by which Courts can dispose of property which comes before it in criminal trials.

That being the general distinction between confiscation and seizure, in the context of the Essential Commodities Act, it could be seen that an essential commodity which has been seized, could be confiscated. Therefore, confiscation is an action posterior to the seizure of the essential commodity. A commodity that has not been seized cannot be confiscated. Seizure itself does not imply confiscation.
The seizure should have been made by virtue of an order passed under Section 3 of the Act. Clause (j) of Section 3 empowers the Government to make an order for seizure of any essential commodity if an order made by the Central Government controlling production, supply, distribution etc. of essential commodities has been or is about to be contravened. Therefore, any contravention or intended contravention of an order passed by the Government under the Act may lead to seizure, and under the circumstances mentioned in Section 6A such seized commodity could be confiscated.

Power is conferred on the Collector to confiscate any Animal, vehicle, vessel or other conveyance if used in carrying the essential commodities. Where it was clear from the report of the Sub-Inspector of Police that the jeep in question was not found or used for carrying any essential commodity, it was found moving in front of the lorry which was loaded with paddy, it was held that, that by itself was no ground for its seizure. Unless the vehicle was used for carrying the essential commodities, the Deputy Commissioner had no jurisdiction to initiate proceedings for its confiscation, much less the police to seize it. [Ramchandra v. Sub-Inspector of Police (1976) 1 Kar. LJ. 126]

The Collector has no jurisdiction to go into the validity of the seizure; he could only confiscate goods, out of those seized, in respect of which contravention is established. Only if the seizure is valid could the Collector have jurisdiction to go on into the question whether there has been any contravention of the control order in respect of the whole or part of the goods, seized at this is entirely different from saying that the Collector could go on with the enquiry, postulated in Sections 6A and 6B, when the seizure itself, on which alone his jurisdiction to make an enquiry depends, is found to be illegal. [Hindustan Aluminium v. Controller of Aluminium, AIR (1976) Dewii225]

In S. Seetharamayya Gupta v. Distt. Revenue Officer, Chittoor (AIR 1977 AP 103) it was held that delegation of power of the Collector under Section 6A to Distt. Officer is competent and valid. Even though Section 6A authorizes confiscation of seized goods it does not say that the entire seized quantity should be directed to the confiscated. It is left to the discretion of the Distt. Revenue Officer land the appellate authority to decide whether the entire seized stock should be confiscated or only a portion of it. That, however, is a judicial discretion and must be exercised judicially having regard to the circumstances of the case, the gravity of the matter and other relevant and pertinent factors. The Act provides for enquiry and total absence of adequate opportunity to the party to make representation and consequently passing order of confiscation must be held bad.

In Ahmedshah Bikhushah Diwan v. State of Gujarat, AIR 2002 Guj 303, the kerosene was illegally transported and the transfer was confiscated. Gujarat High Court held that the finding of authority upholding validity of confiscation on basis of evidence on record was proper. See also in Manikeshari Agencies v. Joint Collector, (R.R. Dt), AIR 2001 AP 300.

In Deputy Commissioner, Dakhina Kannada District v. Rudolf Fernandes, AIR 2000 SC 1132, it was held that the fine in lieu of confiscation contemplated under second Proviso to section 6A(1) of the Essential Commodities Act, 1955 provides for levy of fine on the basis of market value of the confiscated vehicle and not on the
basis of the market price of the essential commodity sought to be carried by such vehicle.

Sale of the Confiscated Commodity

The amending Act 92 of 1976 has inserted a few more sub-sections to Section 6A in regard to treatment and disposal of the confiscated commodity and the proceeds thereof. Sub-section (2) provides that where the collector, on receiving a report of seizure or on inspection of any essential commodity under Sub-section (1) above, is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do he may (i) order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; (ii) where no such price is fixed, order the same to be sold by public auction. Provided that in case of foodgrains, the collector may, for its equitable distribution and availability at fair prices, order the same to be sold through fair price shops at the price fixed by the Central Government or by the State Government as the case may be, for the retail sale of such foodgrains to the public.

Disposal of Sale Proceeds of Confiscated Goods

In terms of Section 6A(3), the sale proceeds of the essential commodity sold, after deduction of the expenses of any such sale or auction or other incidental expenses relating thereto shall be paid to the owner or person from whom it is seized in the following circumstances: (a) where no order of confiscation is ultimately passed by the Collector; (b) where an order passed on appeal under Sub-section (1) of Section 6C so requires, or (c) where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made under this section, the person concerned is acquitted.

Issue of Show Cause Notice before Confiscation of Essential Commodity

Before passing an order for confiscation under Section 6A, in terms of Sub-section (1) of Section 6B of the Act, the owner of the essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance or the person from whom it is seized is required to be given a notice in writing informing him of the grounds on which it is proposed to confiscate the above goods to provide him an opportunity of making a representation in writing within a reasonable time and give him a reasonable opportunity of being heard in the matter.

In Amarjit Singh v. State of Bihar, AIR 2007 Jha 23, it was held that the initiation of notice under section 6B cannot be issued to petitioner who is in jail custody at that time.

A show cause notice was served on the petitioner’s representative in the evening of 26th November, 1973 posting the matter to 27th November, 1973 "1ft 11.00 A.M. at Tirupati, 90 miles away. Again, it was adjourned to 28th November," 1973 to be heard at Chittoor. That day the enquiry was over. Held, it is not reasonable to expect any person to make an effective representation within such short time. The fact of the advocate seeking an adjournment of at least 3 days was established by the affidavit which the advocate himself had filed. It was thus manifest that the so-called enquiry under Section 6A conducted by the District Revenue Officer was vitiated by total
absence of an adequate opportunity to the petitioner to make his representation. Consequently, the confiscation order must be held to be bad. *(B, Seetharamayya v. District Revenue Officer, AIR 1977 Andhra Pradesh 103)*.

It is also provided in Sub-section (2) that no order of confiscation can be made if the owner of the confiscated animal, vehicle, vessel or other conveyance proves to the satisfaction of the Collector that the said modes of transport owned by him were used in carrying the essential commodity without his knowledge or connivance of himself or his agent, if any, and each of them had taken the necessary precautions against such use.

It is not sufficient for the owner to prove that the vehicle carried the essential commodity without his knowledge or concurrence. He must also prove that the vehicle was used without the knowledge, or concurrence of the person in charge of the vehicle. In addition, he must prove that not only he but also the person in charge of the vehicle had taken all reasonable and necessary precautions against such use *[Shai Rahhim v. State of Andhra* *(1976)* *LT 357]*.

However, once an order confiscating the goods of above description has been passed it shall not be held invalid in terms of Sub-section (3) merely by reason of any defect or irregularity in the notice given under clause (a) of Sub-section (1) if in giving such notice the provisions of that clause have been substantially complied with.

**Appeal against Confiscation Order**

In terms of Sub-section (1) of Section 6C, any person aggrieved by an order of confiscation under Section 6A may appeal to the State Government concerned within one month from the date of passing the order. The State Government shall give an opportunity to the appellant to be heard and pass such order as it may think fit, confirming, modifying or annulling the order appealed against. In terms of Sub-section (2) of Section 6C, if the appeal has been decided in favour of appellant, he is entitled to the possession of the confiscated goods and if it is not possible for any reason to return the essential commodity seized from him, such person shall be paid the price therefore as if the essential commodity had been sold to the Government with reasonable interest calculated from the day of seizure of essential commodity and such price shall be determined in accordance with: (i) Sub-section (3B) of Section 3 in case of foodgrains, edible oils and oilseeds; (ii) Sub-section (3C) of Section 3 in case of sugar; and (iii) Sub-section (3) of Section 3 in case of any other essential commodity.

**Confiscation and punishment**

Section 6D provides that the award of any confiscation under this Act by the Collector shall not prevent the infliction of any punishment to which the person affected thereby is liable under this Act.

**Bar of Jurisdiction in Matters of Confiscation**

The 1976 Amendment Act has inserted Section 6-E in the Act which provides that no court, tribunal or authority shall have any jurisdiction to make an order with regard to the matters falling within the purview of this Act particularly wherever any essential commodity is seized in pursuance of an order made under Section 3 when the collector or the judicial authority appointed under Section 6C shall have the jurisdiction.
OFFENCES AND PENALTIES

Cognizance of offences

Section 10A of the Act declares that notwithstanding anything contained in the Criminal Procedure Code, 1971, every offence punishable under the Act shall be cognizable and non-bailable.

A cognizable offence is one, where, under the Criminal Procedure Code or any other law in force, a police officer may arrest a person without a warrant.

Section 11 lays down that before a Court can take cognizance of any offence punishable under the Act, the following three conditions must be satisfied, viz. (i) there must be a report in writing, (ii) the report must be made by a public servant, as defined in Section 21 of Indian Penal Code, or any aggrieved person or any recognised consumer association.

If all these three conditions are satisfied, the jurisdiction of the Magistrate to take cognizance of an offence is not ousted merely because there is no reference to the notification contravened, or the specific offence (G. Gurumurthy v. State AIR 1969 Orissa 72).

As observed by the Supreme Court, this section does not require the report to contain either the charge sheet or the evidence in support of the charge. Its function is merely to afford the basis for enabling the Magistrate to take cognizance of the case (Bhagwati Sarav v. State of I/PAIR 1961 S.C. 928).

Prosecution of Public Servants (Section 15A)

If any public servant is accused of any offence alleged to have been committed by him while acting, or purporting to act, in the discharge of his duties, in pursuance of any order made under Section 3, no court can take cognizance of such an offence except with the previous sanction—(a) of the Central Government in the case of a person who is employed in connection with the affairs of the Union; and (b) of the State Government in the case of a person who is employed in connection with the affairs of the State.

It was held that the report of the Police Officer in writing as required by Section 173(2) of Criminal Procedure Code (1973) disclosing an offence, can be taken note of by the Magistrate. Section 11 of the Act stands fully complied within such a case (Satya Narain Musadi v. State of Bihar, 1972 A. Cr. R. 470 (SC)).

Penalties

Section 7 of the Act deals with penalties. Contravention of an order passed by the Central Government under Section 3 with reference to clause (h) or (i) of Sub-section (2) thereof is punishable with imprisonment for a term which may extend to one year and also with fine [Section 7(1)(a)(i)]. For the contravention of an order with reference to other clauses of Sub-section (2) of Section 3 the punishment is imprisonment for a term ranging from three months to seven years and in addition fine is also leviable.

Further if any person contravenes any order made under Section 3, any property in respect of which the order has been contravened shall be forfeited to the Government and any package, covering, receptacle in which the property is found
and any animal, vehicle, vessel or other conveyance used in carrying the property, could also be forfeited if the court so orders.

If any person to whom a direction is given under Section 3(4) (b) fails to comply with it, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine.

If any person convicted of an offence under Section 7(1)(a)(ii) or 7(2) is again convicted of an offence under the same provision he shall be punishable with imprisonment for the second and for every subsequent offence for a term which shall not be less than six months but which may extend to seven years besides fine. For adequate and sufficient reasons the court can award imprisonment for a term less than six months. Where an offence is committed for a second time, besides the above punishment, the Court can also order that the person shall not carry on any business of that essential commodity for such period not being*less than six months as may be specified by the Court.

**Mens rea (Sections 6A and 7)**

In Nathulal v. State of Madhya Pradesh (AIR 1966 S.C. 43) it was held by the Supreme Court that mens rea or guilty mind is an ingredient of the offence punishable under Section 7 of the Essential Commodities Act, 1955 i.e., an intentional contravention of an order made under Section 3, is an essential ingredient of an offence under Section 7. In other words, if the dealer did believe bona fide that he could store the foodgrains for instance, without infringing any order under Section 3, there could be no contravention under Section 7.

It was observed by the Supreme Court in this case that mens rea is an essential ingredient of any criminal offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the Statute would otherwise be defeated. The nature of mens rea that would be implied in a Statute creating an offence depends on the object of the Act and the provisions thereof.

In Hariprasad Rao v. State (AIR 1951 SC 264), it was observed that unless a Statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, an accused cannot be found guilty of an offence against the criminal law unless he has got a guilty mind. Therefore, mens rea is an essential ingredient of an offence under Section 7 of the Act.

It is to be noted that the contravention under Section 6A is also of the same character. Section 6A in brief provides for seizure and confiscation based on ‘contravention’ of an order under Section 3. Therefore, the Collector before exercising his powers under the section would be entitled to take into consideration the question whether there was an intentional contravention of the order or whether the conduct of the dealer was bona fide under the belief that he was acting legally. But it should be remembered that the orders of the Collector are provisional in the sense that the Court is entitled, on appeal by the dealer, to look into whole matter to see whether there were reasons to confiscate the goods under Section 6A. It can be concluded
that the provisions as regard ‘contravention’ under Section 6A or 7 are in pari materia—the contravention which details confiscation is of the same kind as that for which a dealer can be punished.

An interesting question is whether the doctrine of mens rea applies to cases of vicarious liability, as for instance, in the case of a master and servant. It is well accepted that the legislature cannot introduce the principles of vicarious liability and make the master liable for the act of his servants, although the master himself had no mens rea. Thus, in one case the charge against the respondents was that they sold some cloth in excess of the controlled price, and thus contravened the provisions of the Madhya Bharat Cotton Control Order; one of the respondents, Gangaram Saboo was not present in the shop at the time the cloth was alleged to have been sold, and it was, therefore, held that he could not be held vicariously liable for the act of his munim who had actually sold the cloth (State v. Gangaram AIR 1935 H.B. 244).

Culpable Mental State

Section 10-C provides for a presumption of culpable mental state, which includes intention, motive, knowledge of a fact and the belief in a fact. It is now provided that in any prosecution for an offence under the Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of mental state. Of course, it is open to the accused to prove that he had no such mental state with respect of the act committed by him.

Attempt and Abetment

Section 8 provides that any person who attempts to contravene or abets a contravention of any order made under Section 3 shall be deemed to have contravened that order. (For such attempt and abetment the punishment will be of the same dimension as for the actual committal of the offence).

In other words, an attempt and an abetment have been placed on the same footing as a contravention under the Act.

The proviso to Section 8 provides that where such abetment is for the purpose of procuring any essential commodity in the nature of drugs or foodstuffs for his own use or for the use of his family member or any dependent, and not for carrying on any business or trade in that essential commodity, the Court may impose a sentence of fine only notwithstanding anything contained in Section 7.

However, an attempt to commit an offence is to be distinguished from a preparation to commit the offence. The former is punishable, but the latter is not.

In Malkiat Singh and another v. State of Punjab (AIR 1970 SC 710), the question to be considered was whether upon the facts found by the lower Courts any offence had been committed by the appellants. Under the Punjab Paddy (Export) Order, 1939 export of paddy from the State of Punjab was prohibited. The word ‘export’ was defined to mean to take’ or cause to be taken out of any place within the State of Punjab, to any place outside the State. On suspicion, the truck driven by Malkiat Singh, and carrying the paddy in question, was stopped at a place which was 32 miles away from the Punjab border, well within the State of Punjab. It was, therefore,
evident that there was no export of paddy within the meaning of the Order. It was, however, argued on behalf of the respondents that there was an attempt on the part of the appellant to commit the offence. Rejecting this contention, it was held that on the facts of the case there was no attempt on the part of the appellants to commit the offence of export. It was merely a preparation on the part of the appellant, and as a matter of law, a preparation for committing an offence is different from an attempt to commit it.

**False Statement**

A person shall be punishable under Section 9 with imprisonment for a term of which may extend to five years or with fine or with both for the following offences:

(i) when required by any order made under Section 3 to make any statement or furnish any information, makes any statement or furnishes any information which is false in any material particular which he knows or has reasonable cause to believe to be false or does not believe to be true, or

(ii) makes any such statement as aforesaid in any book, account, record, declaration, return or other document which he is required by any such order to maintain or furnish.

**Offences by Companies**

Section 10(1) provides that if the person contravening an order under Section 3 is, a company, every person who, at the time of the contravention, was in charge of, and was responsible to, the company for the conduct of the business of the company, shall be deemed to be guilty of the contravention, and shall be liable to be punished accordingly. In such cases, the company itself is also liable to be proceeded against. Any such person, can, however, escape liability if he proves that the contravention took place without his knowledge, or that he exercised all due diligence to prevent it.

It may be noted that the term ‘company’ as used above, refers to any body corporate, and even includes a firm or other association or individuals. In the case of a firm, the term ‘Director’ would mean a partner in the firm (Expln. to Section 10).

**Publication of names of convicted companies by Court**

Section 10-B of the Act provides that the Court may cause to be published in newspapers or in other manner at the expense of the company the name, place of business and the offence/contravention committed by it when a company has been convicted. However, no publication shall be made until the period for preferring an appeal against the order of the Court has expired, without any appeal having been preferred or where such appeal having been preferred, was disposed of. The expenses of any publication shall be recoverable from the company as if it were a fine imposed by Court.

**SPECIAL COURTS UNDER THE ACT**

Section 12A provides that the State Government may, by notification in the Official Gazette constitute one or more Special Courts for different areas for the purpose of providing speedy trial of offences under the Act. A Special Court shall consist of a single judge who shall be appointed by the High Court.

Section 12AA provides *inter alia*, that notwithstanding anything contained in the
Code of Criminal Procedure, 1973, all offences under this Act shall be triable only by
the Special Court constituted for the area in which the offence was committed.

The Special Court may exercise the same powers as a Magistrate having
jurisdiction under the Code of Criminal Procedure in respect of authorising detention
etc. of a person accused of or suspected of the commission of an offence under the
Act.

Further, no person accused of or suspected of commission of an offence under
the Act shall be released on bail by any Court other than Special Court or the High
Court. The Special Court shall not release any such person on bail without giving the
prosecution an opportunity to oppose the application; for release unless it is of the
opinion that it is not practicable to give such opportunity and where there is such
opposition and the Special Court is satisfied that there are reasonable grounds to
believe that the person concerned is guilty.

All offences under this Act shall be tried in a summary way and-in case of any
conviction, the Special Court may pass a sentence of imprisonment for a term not
exceeding 2 years.

GRANT OF INJUNCTION BY CIVIL COURTS (SECTION 12B)

It is expressly provided by Section 12B that no Civil Court can grant any
injunction or make any order for any other relief against the Central or State
Government or any public officer, in respect of any act done, or purporting to be
done, by such person in his official capacity under the Act, or any Order made
thereunder, until after notice of the application for such injunction or other report is
given to the Government or to such officer.

LESSON ROUND UP

- Essential Commodities Act, 1955 has been enacted to provide in the interest of
  the general public for the control of the production, supply and distribution of, and
  trade and commerce in, certain commodities.
- Section 2A dealing with Essential commodities declaration, etc. defines the
  "essential commodity" as to means a commodity specified in the Schedule to the
  Act.
- Central Government has been empowered to administer the provisions of the Act
  by issuing orders/directions notified in the official gazette and by delegating the
  authority to State Governments and administrators of Union Territories.
- An essential commodity which has been seized could be confiscated. Therefore,
  confiscation is an action posterior to the seizure of the essential commodity. A
  commodity that has not been seized cannot be confiscated. Seizure itself does
  not imply confiscation.
Mens rea or guilty mind is an ingredient of the offence punishable under the Act.

Culpable mental state, which includes intention, motive, knowledge of a fact and the belief in a fact.

Where an offence is committed by a company, if it is proved that the offence had been committed with the consent or connivance of or is attributable to any neglect on the part of any Director, Manager, Secretary or other officer of the company, such a person shall be deemed to be guilty of that offence, and is liable to be proceeded against and punished accordingly.

Section 12A provides that the State Government may, by notification in the Official Gazette constitute one or more Special Courts for different areas for the purpose of providing speedy trial of offences under the Act.

The Act expressly provides that no Civil Court can grant any injunction or make any order for any other relief against the Central or State Government or any public officer, in respect of any act done, or purporting to be done, by such person in his official capacity under the Act, or any Order made thereunder, until after notice of the application for such injunction or other report is given to the Government or to such officer.

SELF TEST QUESTIONS

1. What do you understand by essential commodities? What are the commodities termed as essential commodities, under the Essential Commodities Act?

2. Specify the authority responsible for the administration and execution of the Act?

3. What do you know about an ‘order’ under the Act? What are the powers of Central Government in issuing the order under the Act?

4. There is a difference in seizure and confiscation of commodities under the Act. How can the sale proceeds of confiscated commodities be utilized? What is the procedure for disposal of confiscated goods?

5. A reasonable opportunity is required to be given to the person concerned before confiscation of his commodities or vehicle, etc., under the Act. Elaborate this statement in the light of provisions of the Act.
INTRODUCTION

“Weights and measures may be ranked among the necessaries of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family”, said Mr. John Quincy Adams, the Sixth US President in his report to Congress in 1821.

The essence of these words show the importance of weights and measures. In fact, the influence and impact of the system of weights and measures for trade use is as pervasive as ever. Weights and measures embrace every aspect of modern living. It is therefore critical for any country to have an accurate system of weights and measures. Such a system is indispensable in facilitating trade – as it fosters certainty, trust and confidence in all transactions involving weights and measures. It underpins fair trade and competition, and promotes efficiency, and in so doing, helps economy to grow.

Metrology studies many types of measurements. It studies not only length but also such measurements as weight and time. Each and every one of these elements can be studied in various manners as well. In metrology, there are set standards that are set for measurement qualities to determine what the typical measurement is. In many cases, they also have a well thought out plan as to how much of a degree of error there is as well in each measurement. There are various answers to questions about metrology because, in many cases, each theory can be right. Metrology goes back thousands of years to early civilization and was present well before the aspects of science as well.
The branch of knowledge concerning weights and measures is technically known as legal metrology. Metrology is an important term to understand, but it is a term that is widely used to mean a number of things. In basic form, metrology is the science of measurement. What this tells us, though, is that measurement is far from a perfect solution.

**Legal Metrology**

*Legal Metrology* is the name by which the law relating to weights and measures is known in international parlance. Legal Metrology is very vital for scientific, technological and industrial progress of any country. The establishment of national standards of weights and measures an their proper enforcement aim at ensuring accuracy of measurements and measuring instruments and thus legal metrology strengthens the national economy in a broader sense besides being a potential instrument of consumer protection. The scope of legal metrology according to international practice extends to three broad fields of human activities, namely, commercial transactions, industrial measurements and measurements needed to ensure public health and human safety. The coverage of legal metrology varies from country to country. In some, almost all practical measurements are brought under the purview of legal metrology, whereas in other countries legal metrology finds restricted application in a few quantities like mass, length and volume used in trade and commerce. In most of the countries, however, legal metrology encompasses measurements which have a bearing on the protection of individuals from the financial and environmental points of view.

Legal metrology can be defined as that part of metrology which deals with units of measurement, methods of measurement and measuring instruments in so far as they concern statutory, technical and legal requirements which have the ultimate object of assuring public guarantee from the point of view of security and of appropriate accuracy of measurements.

**International Organization of Legal Metrology (OIML)**

The International Organization of Legal Metrology (OIML) is an intergovernmental treaty organization whose membership includes Member States, countries which participate actively in technical activities, and Corresponding Members, countries which join the OIML as observers. It was established in 1955 in order to promote the global harmonization of legal metrology procedures. Since that time, the OIML has developed a worldwide technical structure that provides its Members with metrological guidelines for the elaboration of national and regional requirements concerning the manufacture and use of measuring instruments for legal metrology applications.

According to OIML legal Metrology is the entirety of the legislative, administrative and technical procedures established by, or by reference to public authorities, and implemented on their behalf in order to specify and to ensure, in a regulatory or contractual manner, the appropriate quality and credibility of measurements related to official controls, trade, health, safety and the environment.

The OIML develops model regulations, International Recommendations, which provide Members with an internationally agreed-upon basis for the establishment of national legislation on various categories of measuring instruments. Given the increasing national implementation of OIML guidelines, more and more manufacturers
are referring to OIML International and Recommendations to ensure that their products meet international specifications for metrological performance and testing.

**OIML Certificate System for Measuring Instruments**

The OIML Certificate System for Measuring Instruments was introduced in 1991 to facilitate administrative procedures and lower the costs associated with the international trade of measuring instruments subject to legal requirements. The System provides the possibility for a manufacturer to obtain an OIML Certificate and a Test Report indicating that a given instrument type (pattern) complies with the requirements of the relevant OIML International Recommendations. Certificates are delivered by OIML Member States that have established one or several Issuing Authorities responsible for processing applications by manufacturers wishing to have their instrument types (patterns) certified.

Certificates issued by OIML are accepted by national metrology services on a voluntary basis, and as the climate for mutual confidence and recognition of test results develops between OIML Members, the System serves to simplify the type (pattern) approval process for manufacturers and metrology authorities by eliminating costly duplication of application and test procedures.

**Legal metrology Act, 2009**

*Intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.*

**Definitions**

Section 2 contains definitions of various terms used in the Act. Some of the important ones are reproduced hereunder.

**Dealer**

According to section 2(b) Dealer in relation to any weight or measure, means a person who, carries on, directly or otherwise, the business of buying, selling, supplying or distributing any such weight or measure, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration; and includes a commission agent, an importer, a manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure manufactured by him to any person other than a dealer;

**Export**

According to section 2(d) "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

**Import**

According section 2(e) "import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India;
Label

Under clause (j) of section 2 "label" means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity;

Legal Metrology

As per section 2(g) "Legal Metrology" means that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements;

Manufacture

As per section 2(i) "manufacturer" in relation to any weight or measure, means a person who -

(i) manufactures weight or measure,
(ii) manufactures one or more parts, and acquires other parts, of such weight or measure and, after assembling those parts, claims the end product to be a weight or measure manufactured by himself or itself, as the case may be,
(iii) does not manufacture any part of such weight or measure but assembles parts thereof manufactured by others and claims the end product to be a weight or measure manufactured by himself or itself, as the case may be,
(iv) puts, or causes to be put, his own mark on any complete weight or measure made or manufactured by any other person and claims such product to be a weight or measure made or manufactured by himself or itself, as the case may be;

Protection

Section 2”(k) define “protection” as to mean the utilisation of reading obtained from any weight or measure, for the purpose of determining any step which is required to be taken to safeguard the well-being of any human being or animal, or to protect any commodity, vegetation or thing, whether individually or collectively;

Pre-packed Commodity

Section 2 (l) define “pre-packaged commodity” as to mean a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity;

Person

As per section 2(m) the term "person" includes,-

(i) a Hindu undivided family,
(ii) every department or office,
(iii) every organisation established or constituted by Government,
(iv) every local authority within the territory of India,
(v) a company, firm and association of individuals,
(vi) trust constituted under an Act,
(vii) every co-operative society, constituted under an Act,
(viii) every other society registered under the Societies Registration Act, 1860;

**Premises**

As per section 2 (n) the term “premises” includes—
(i) a place where any business, industry, production or transaction is carried on by a person, whether by himself or through an agent, by whatever name called, including the person who carries on the business in such premises,
(ii) a warehouse, godown or other place where any weight or measure or other goods are stored or exhibited,
(iii) a place where any books of account or other documents pertaining to any trade or transaction are kept,
(iv) a dwelling house, if any part thereof is used for the purpose of carrying on any business, industry, production or trade,
(v) a vehicle or vessel or any other mobile device, with the help of which any transaction or business is carried on;

**Repairer**

Section 2 (P) defines “repairer” as to mean a person who repairs a weight or measure and includes a person who adjusts, cleans, lubricates or paints any weight or measure or renders any other service to such weight or measure to ensure that such weight or measure conforms to the standards established by or under this Act;

**Sale**

“Sale”, with its grammatical variations and cognate expressions, means transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration and includes a transfer of any weight, measure or other goods on the hire-purchase system or any other system of payment by instalments, but does not include a mortgage or hypothecation of, or a charge or pledge on, such weight, measure or other goods;[section 2 (r)]

**Seal**

As per section 2(s) "seal" means a device or process by which a stamp is made, and includes any wire or other accessory which is used for ensuring the integrity of any stamp;

**Stamp**

Section 2(t) defines "stamp" as to mean a mark, made by impressing, casting, engraving, etching, branding, affixing pre-stressed paper seal or any other process in relation to, any weight or measure with a view to-
(i) certifying that such weight or measure conforms to the standard specified by or under this Act, or
(ii) indicating that any mark which was previously made thereon certifying that such weight or measure conforms to the standards specified by or under this Act, has been obliterated;
Transaction
Under section 2(u) “transaction” means,-
(i) any contract, whether for sale, purchase, exchange or any other purpose, or
(ii) any assessment of royalty, toll, duty or other dues, or
(iii) the assessment of any work done, wages due or services rendered;

Verification
As per section 2(v) “verification”, with its grammatical variations and cognate expressions, includes, in relation to any weight or measure, the process of comparing, checking, testing or adjusting such weight or measure with a view to ensuring that such weight or measure conforms to the standards established by or under this Act and also includes re-verification and calibration;

Weight and measure
Under section 2(w) “weight or measure” means a weight or measure specified by or under this Act and includes a weighing or measuring instrument.

STANDARD WEIGHTS AND MEASURES
Chapter II of the Act containing sections 4 to 12 deals with standard weight and measure. Section 4 provides units of weights and measures to be based on metric system. Section 5 provides the base unit of weights and measures. Section 6 deals with base unit of numeration. Section 7 provides the standard units of weights and measures. Section 8 states standard weight, measure or numeral. Section 9 provides the reference, secondary and working standard. 10 deals with use of weight or measure for particular purposes. Section 11 contains prohibition of quotation, etc., otherwise than in terms of standard units of weight, measure or remuneration.

Section 4 of the Act provides that every unit of weight or measure shall be in accordance with the metric system based on the international system of units.

Section 5 of the Act provides that the base unit of length shall be the metre; mass shall be the kilogram; time shall be the second; electric current shall be the ampere; thermodynamic temperature shall be the kelvin; luminous intensity shall be the candela; and amount of substance shall be the mole.

Section 6 states that the base unit of numeration shall be the unit of the international form of Indian numeral. Every numeration shall be made in accordance with the decimal system. The decimal multiples and sub-multiples of the numerals shall be of such denominations and be written in such manner as may be prescribed.

As per section 7 of the Act the base units of weights and measures specified in section 5 shall be the standard units of weights and measures. The base unit of numeration specified in section 6 shall be the standard unit of numeration. For the purpose of deriving the value of base, derived and other units mentioned in section 5, the Central Government shall prepare or cause to be prepared objects or equipments in such manner as may be prescribed. The physical characteristics, configuration, constructional details, materials, equipments, performance, tolerances, period of re-verification, methods or procedures of tests shall be such as may be prescribed.

Section 8 provides that any weight or measure which conforms to the standard unit of such weight or measure and also conforms to such of the provisions of section
7 as are applicable to it shall be the standard weight or measure. Any numeral which conforms to the provisions of section 6 shall be the standard numeral.

No weight, measure or numeral, other than the standard weight, measure or numeral, shall be used as a standard weight, measure or numeral. No weight or measure, shall be manufactured or imported unless it conforms to the standards of weight or measure specified under section 8:

However, the aforesaid provisions shall not apply for manufacture done exclusively for export or for the purpose of any scientific investigation or research.

Section 11 of the Act provides that no person shall, in relation to any goods, things or service, quote, or make announcement of, whether by word of mouth or otherwise, any price or charge, or issue or exhibit any price list, invoice, cash memo or other document, or prepare or publish any advertisement, poster or other document, or indicate the net quantity of a pre-packaged commodity, or express in relation to any transaction or protection, any quantity or dimension, otherwise than in accordance with the standard unit of weight, measure or numeration.

It may be noted that the provisions mentioned above shall not be applicable for export of any goods, things or service.

Section 12 provides that any custom, usage, practice or method of whatever nature which permits a person to demand, receive or cause to be demanded or received, any quantity of article, thing or service in excess of or less than, the quantity specified by weight, measure or number in the contract or other agreement in relation to the said article, thing or service, shall be void.

Appointment and Power of Director, Controller and legal metrology officers

Chapter III of the Act containing sections 13 to 23 of the Act deals with appointment and powers of director, controller and legal metrology officers

Section 13 of the Act empowers the Central Government to appoint (by Notification) a Director of legal metrology, Additional Director, Joint Director, Deputy Director, Assistant Director and other employees for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to inter-State trade and commerce.

The Director and every legal metrology officer, appointed, shall exercise such powers and discharge such functions in respect of such local limits as the Central Government may, by notification, specify. Every legal metrology officer shall exercise powers and discharge duties under the general superintendence, direction and control of the Director.

The Director, the Controller and every legal metrology officer authorised to perform any duty by or under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code. No suit, prosecution or other legal proceeding shall lie against the Director, the Controller and legal metrology officer authorised to perform any duty by or under this Act in respect of anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder.

The Central Government may, with the consent of the State Government and
subject to such conditions, limitations and restrictions as it may specify in this behalf, delegate such of the powers of the Director under this Act as it may think fit to the Controller of legal metrology in the State, and such Controller may, if he is of opinion that it is necessary or expedient in the public interest so to do, delegate such of the powers delegated to him as he may think fit to any legal metrology officer and where any such delegation of powers is made by such Controller, the person to whom such powers are delegated shall exercise those powers in the same manner and with the same effect as if they had been conferred on him directly by this Act and not by way of delegation.

Section 14 of the Act, provides that the State Government may, by notification, appoint a Controller of legal metrology, Additional Controller, Joint Controller, Deputy Controller, Assistant Controller, Inspector and other employees for the State for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to intra State trade and commerce.

The Controller and every legal metrology officer so appointed shall exercise such powers and discharge such functions in respect of such local limits as the State Government may, by notification, specify. Every legal metrology officer shall exercise and discharge the duties under the general superintendence, direction and control of the Controller.

**Power of inspection, seizure**

Section 15 of the Act confer powers of inspection on the Director, Controller or any legal metrology officer may, if he has any reason to believe, whether from any information given to him by any person and taken down in writing or from personal knowledge or otherwise, that any weight or measure or other goods in relation to which any trade and commerce has taken place or is intended to take place and in respect of which an offence punishable under this Act appears to have been, or is likely to be, committed are either kept or concealed in any premises or are in the course of transportation.

The powers include entry at any reasonable time into any such premises and search for and inspect any weight, measure or other goods in relation to which trade and commerce has taken place, or is intended to take place and any record, register or other document relating thereto. The power also include seizer of any weight, measure or other goods and any record, register or other document or article which he has reason to believe may furnish evidence indicating that an offence punishable under the Act has been, or is likely to be, committed in the course of or in relation to, any trade and commerce.

Where any goods seized are subject to speedy or natural decay, the Director, Controller or legal metrology officer may dispose of such goods in such manner as may be prescribed. Every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973, relating to searches and seizures.

**Forfeiture**

Every non-standard or unverified weight or measure, and every package used in
the course of, or in relation to, any trade and commerce and seized under section 15, shall be liable to be forfeited to the State Government.

However, such unverified weight or measure shall not be forfeited to the State Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed. Every weight, measure or other goods seized under section 15 but not forfeited shall be disposed of by such authority and in such manner as may be prescribed.

Manufacturers, etc., to maintain records and registers

Section 17 of the Act provides that every manufacturer, repairer or dealer of weight or measure shall maintain such records and registers as may be prescribed. The records and registers maintained shall be produced at the time of inspection to the persons authorised for the purpose of Inspection.

Declarations on pre-packaged commodities

Section 18 states that no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed. Any advertisement mentioning the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.

Registration for importer of weight or measure

Section 19 provides that no person shall import any weight or measure unless he is registered with the Director in such manner and on payment of such fees, as may be prescribed. No weight or measure, whether singly or as a part or component of any machine shall be imported unless it conforms to the standards of weight or measure established by or under this Act (Section 20).

Approval of model

Every person, before manufacturing or importing any weight or measure shall seek the approval of model of such weight or measure in such manner, on payment of such fee and from such authority as may be prescribed. However, such approval of model may not be required in respect of any cast iron, brass, bullion, or carat weight or any beam scale, length measures (not being measuring tapes) which are ordinarily used in retail trade for measuring textiles or timber, capacity measures, not exceeding twenty litre in capacity, which are ordinarily used in retail trade for measuring kerosene, milk or potable liquors:

It may be noted that the prescribed authority may, if he is satisfied that the model of any weight or measure which has been approved in a country outside India conforms to the standards established by or under this Act, approve such model without any test or after such test as he may deem fit.

Prohibition manufacture, repair or sale of weight or measure without licence

Section 23 of the Act provides that no person shall manufacture, repair or sell, or
offer, expose or possess for repair or sale, any weight or measure unless he holds a licence issued by the Controller. However, no licence to repair shall be required by a manufacturer for repair of his own weight or measure in a State other than the State of manufacture of the same. The Controller shall issue a licence in such form and manner, on such conditions, for such period and such area of jurisdiction and on payment of such fee as may be prescribed.

Section 24 provides for verification and stamping of weight or, measure. Every person having any weight or measure in his possession, custody or control in circumstances indicating that such weight or measure is being, or is intended or is likely to be, used by him in any transaction or for protection, shall, before putting such weight or measure into such use, have such weight or measure verified at such place and during such hours as the Controller may, by general or special order, specify in this behalf, on payment of such fees as may be prescribed.

The Central Government may prescribe the kinds of weights and measures for which the verification is to be done through the Government approved Test Centre. The Government approved Test Centre shall be notified by the Central Government or the State Government, as the case may be, in such manner, on such terms and conditions and on payment of such fee as may be prescribed.

**Offences and penalties**

Chapter V of the Act deals with offences and penalties

Section 25 of the Act provides for penalty for use of non-standard Weight or measure. The section stipulates that whoever uses or keeps for use any weight or measure or makes use of any numeration otherwise than in accordance with the standards of weight or measure or the standard of numeration, as the case may be, specified by or under this Act, shall be punished with fine which may extend to twenty-five thousand rupees and for the second or subsequent offence, with imprisonment for a term which may extend to six months and also with fine.

Under section 26, Whoever tampers with, or alters in any way, any reference standard, secondary standard or working standard or increases or decreases or alters any weight or measure with a view to deceiving any person or knowing or having reason to believe that any person is likely to be deceived thereby, except where such alteration is made for the correction of any error noticed therein on verification, shall be punished with fine which may extend to fifty thousand rupees and for the second and subsequent offence with imprisonment for a term which shall not be less than six months but which may extend to one year or with fine or with both.

Section 27 provides that every person who manufactures or causes to be manufactured or sells or offers, exposes or possesses for sale, any weight or measure which, does not conform to the standards of weight or measure specified by or under this Act; or which bears thereon any inscription of weight, measure or number which does not conform to the standards of weight, measure or numeration specified by or under this Act, except where he is permitted to do so under this Act, shall be punished with a fine which may extend to twenty thousand rupees and for the second or subsequent offence with imprisonment for a term which may extend to three years or with fine or with both.
Section 30 dealing with penalty for transaction in contravention of standard weight or measure provides that whoever, in selling any article or thing by weight, measure or number, delivers or causes to be delivered to the purchaser any quantity or number of that article or thing less than the quantity or number contracted for or paid for; or in rendering any service by weight, measure or number, renders that service less than the service contracted for or paid for; or in buying any article or thing by weight, measure or number, fraudulently receives, or causes to be received any quantity or number of that article or thing in excess of the quantity or number contracted for or paid for; or in obtaining any service by weight, measure or number, obtains that service in excess of the service contracted for or paid for, shall be punished with fine which may extend to ten thousand rupees, and; for the second or subsequent offence, with imprisonment for a term which may extend to one year, or with fine, or with both.

Under section 31, Whoever, being required by or under this Act or the rules made thereunder to submit returns, maintain any record or register, or being required by the Director or the Controller or any legal metrology officer to produce before him for inspection any weight or measure or any document, register or other record relating thereto, omits or fails without any reasonable excuse, so to do, shall be punished with fine which may extend to five thousand rupees and for the second or subsequent offence, with imprisonment for a term which may extend to one year and also with fine.

Section 35 provides that whoever renders or causes to be rendered, any service through means other than the weight or measure or numeration or in terms of any weight, measure or number other than the standard weight or measure, shall be punished with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees and for the second or subsequent offence, with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine, or with both.

Under section 36 Whoever manufactures, packs, imports, sells, distributes, delivers or otherwise transfers, offers, exposes or possesses for sale, or causes to be sold, distributed, delivered or otherwise transferred, offered, exposed for sale any pre-packaged commodity which does not conform to the declarations on the package as provided in this Act, shall be punished with fine which may extend to twenty-five thousand rupees, for the second offence, with fine which may extend to fifty thousand rupees and for the subsequent offence, with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees or with imprisonment for a term which may extend to one year or with both. Whoever manufactures or packs or imports or causes to be manufactured or packed or imported, any pre-packaged commodity, with error in pet quantity as may be prescribed shall be punished with fine which shall not be less than ten thousand rupees but which may extend to fifty thousand rupees and for the second and subsequent offence, with fine which may extend to one lakh rupees or with imprisonment for a term which may extend to one year or with both.

Section 42 provides for Vexatious search and empowers the Director, the Controller or any legal metrology officer, exercising powers under this Act or any rule made thereunder, who knows that there are no reasonable grounds for so doing, and yet searches, or causes to be searched, any house, conveyance or place; or searches any person; or seizes any weight; measure or other movable property shall,
for every such offence, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees or with both.

**Penalty for counterfeiting or seals**

Section 44 provides that whoever counterfeits any seal specified by or under this Act or the rules made thereunder, or sells or otherwise disposes of any counterfeit seal, or possesses any counterfeit seal, or counterfeits or removes or tampers with any stamp, specified by or under this Act or rules made thereunder, or affixes the stamp so removed on, or inserts the same into, any other weight or measure, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

*Explanation.* In this sub-section, “counterfeit” shall have the meaning assigned to it in section 28 of the Indian Penal Code.

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**A person is said to “counterfeit” who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.**

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**Explanation 1.** It is not essential to counterfeiting that the imitation should be exact.

**Explanation 2.** When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practice deception or knew it to be likely that deception would thereby be practiced.

Whoever obtains, by unlawful means, any seal specified by or under this Act or the rules made thereunder and uses, or causes to be used, any such seal for making any stamp on any weight or measure with a view to representing that the stamp made by such seal is authorised by or under this Act or the rules made thereunder shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

Whoever, being in lawful possession of a seal specified by or under this Act or the rules made thereunder, uses, or causes to be used, such seal without any lawful authority for such use, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

Whoever sells or offers or exposes for sale or otherwise disposes of any weight or measure which, he knows or has reason to believe, bears thereon a counterfeit stamp, shall be punished with imprisonment for a term which shall not be less than
six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

**Compounding of offence**

In terms of offence punishable under section 25, sections 27 to 39, sections 45 to 47 either before or after the institution of the prosecution, be compounded, on payment for credit to the Government of such sum as may be prescribed.

However, the Director or legal metrology officer as may be specially authorised by him in this behalf, may compound offences punishable under section 25, sections 27 to 39, or any rule made under sub-section (3) of section 52. The Controller or legal metrology officer specially authorised by him, may compound offences punishable under section 25, sections 27 to 31, sections 33 to 37, sections 45 to 47, and any rule made under sub-section (3) of section 52:

Provided that such sum shall not, in any case, exceed the maximum amount of the fine, which may be imposed under this Act for the offence so compounded.

**Offences by companies**

Section 49 provides that where an offence under this Act has been committed by a company, the person, if any, who has been nominated to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as a person responsible); or where no person has been nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

However, such person shall not be liable to any punishment, if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

Any company may, by order in writing, authorise any of its directors to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Director or the concerned Controller or any legal metrology officer authorised in this behalf by such Controller in such form and in such manner as may be prescribed, that it has nominated such director as the person responsible, along with the written consent of such director for being so nominated.

Explanation.-Where a company has different establishments or branches or different, units in any establishment or branch, different persons may be nominated under this subsection in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

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

Where any company is convicted under this Act for contravention of any of the provisions thereof, it shall be competent for the court convicting the company to cause the name and place of business of the company, nature of the contravention, the fact that the company has been so convicted and such other particulars as the court may consider to be appropriate in the circumstances of the case, to be published at the expense of the company in such newspaper or in such other manner as the court may direct. No publication shall be made until the period for preferring an appeal against the orders of the court has expired without any appeal having been preferred, or such an appeal, having been preferred, has been disposed of. The expenses of any publication shall be recoverable from the company as if it were a fine imposed by the court. 

'*Explanation.-For the purposes of this section,-*

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm but excludes nominated directors, honorary directors, Government nominated directors.

**Power of the Central Government to make rules**

Section 52 of the Act empowers the Central Government to make rules, by notification, for carrying out the provisions of this Act.

In making any rule the Central Government may provide that a breach thereof shall be punishable with fine which may extend to five thousand rupees.

Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

**Power of State Government to make rules**

Section 53 empowers the State Government to make rules, by notification, and after consultation with the Central Government, to carry out the provisions of this Act.

In making any rule under this section, the State Government may provide that a breach thereof shall be punishable with fine which may extend to five thousand rupees. The power to make rules under this section shall be subject to the condition of the rules being made after previous publication in Official Gazette. Every rule made under this section shall, as soon as may be after it is made, be laid before each House of State Legislature, where there are two Houses and where there is one House of State Legislature, before that House.
LESSON ROUND UP

- Weights and measures may be ranked among the necessaries of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family.
- Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.
- Label means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity.
- "Legal Metrology" means that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements.
- Every unit of weight or measure to be in accordance with the metric system based on the international system of units.
- Legal Metrology Act provides for penalty for use of non-standard Weight or measure.
- A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.
- Legal Metrology Act empowers the Central Government and State Governments to make rules for carrying out the provisions of this Act.

SELF TEST QUESTIONS

1. What are the objectives of Legal Metrology Act, 2009?
2. Enumerate the powers and functions of Controller and Legal Metrology Officer?
3. Write short note on Counterfeit.
4. Every non-standard weight and measure used in the course of trade is liable to be forfeited. Comment.
5. Briefly explain the provision regarding declaration on pre-packed commodities.
LEARNING OBJECTIVE

The objective of this study lesson is to enable the students to understand

- Foreign Exchange and Foreign Security
- Person resident in India
- Current Account Transactions
- Capital Account Transactions
- Foreign Direct Investment in India
- Direct Investment outside India
- Acquisition & Transfer of immovable property in/outside India.
- Establishment of Branch office in India
- Export of Goods and services
- Realisation & Repatriation of foreign exchange
- Adjudication and Appeal
- Contraventions and Penalties.

INTRODUCTION

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

The Foreign Exchange Regulation Act, since then had been reviewed and amendments were made as part of the on going process of economic liberalization relating to foreign investment and foreign trade for closer interaction with the world economy. During the subsequent period, the Central Government decided further review of the Foreign Exchange Regulation Act in the light of developments and experience in relation to foreign trade and investment. It was at that time felt, that a better course would be to repeal the Foreign Exchange Regulation Act and enact a new legislation.
Taking into consideration the developments such as substantial increase in foreign exchanges reserves, growth in foreign trade, rationalization of tariffs, current account convertibility etc., the Foreign Exchange Management Bill, to repeal and replace the Foreign Exchange Regulation Act was introduced in the Lok Sabha. But before the Bill came up for discussion and approval, the Lok Sabha was dissolved. Subsequently, certain modifications were made to the original Bill and a modified Bill was presented and passed by both the Houses of Parliament. The Foreign Exchange Management Act received the assent of the President on 9th December, 1999 and brought into force with effect from 1.6.2000.

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

DEFINITIONS

Section 2 of the Act defines various terms used in the Act, as given below:

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

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

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

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

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

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

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

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

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

‘Currency Notes’ means and includes cash in the form of coins and bank notes. In fact, it means money and such bank notes or other paper money as are authorised by law and circulate from hand to hand as a medium of exchange.
Current Account Transaction [Section 2(j)]

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

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

Foreign Exchange [Section 2(n)]

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

Foreign Security [Section 2(o)]

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

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

Person [Section 2(u)]

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

Person Resident in India [Section 2(v)]

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

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

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

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

Regulation and Management of Foreign Exchange

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

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

CURRENT ACCOUNT TRANSACTIONS

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

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

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

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

Prior approval of Government of India for certain transactions

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

Illustration

Mr. Y, a person resident in India, desires to take a life insurance policy from a foreign insurance company, the yearly premium of which is US$ 25, 000.

“Mr. Y, a person resident in India, can take a life insurance policy from a foreign insurance company with a yearly premium of US$25,000 (VIDE-A.P.(DIR SERIES) CIRCULAR NO. 76, DATED 24/02/2004 ISSUED BY RBI). Earlier, as per Rule 4 read with Schedule II to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, payment for securing insurance for health from a company abroad required prior permission of Central Government”.

Prior approval of RBI for certain transactions

Rule 5 requires prior approval of the Reserve Bank in the following cases:

1. Release of exchange exceeding US$ 10,000 or its equivalent in one calendar year, for one or more private visits to any country (except Nepal and Bhutan).
2. Gift remittances exceeding US$ 5,000 per remitter/donor per annum.
3. Donation exceeding US$ 5,000 per remitter/donor per annum.

4. Exchange facilities exceeding US$ 1,00,000 for persons going abroad for employment.

5. Exchange facilities exceeding US$ 1,00,000 for emigration or exceeding the amount prescribed by country of emigration.

6. Remittance for maintenance of close relatives abroad—
   (i) exceeding net salary (after deduction of taxes, contribution to provident fund and other deductions) of a person who is resident but not permanently resident in India and:
      (a) is a citizen of a foreign state other than Pakistan;
      (b) is a citizen of India, who is on deputation to the office or branch or subsidiary or a joint venture in India of such foreign company.
   (ii) exceeding US$ 100,000 per year per recipient, in all other cases.

   It has been explained that the item, “a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or a specific job or assignment the duration of which does not exceed three years, is a resident but not permanently resident.”

7. Release of foreign exchange, exceeding US$ 25,000 to a person, irrespective of period of stay, for business travel, or attending a conference or specialised training or maintenance expenses of a patient going abroad for medical treatment or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up.

8. Release of foreign exchange for meeting expenses for medical treatment exceeding US$ 100,000 or its equivalent.

9. Release of exchange for studies abroad exceeding the estimates from the institution abroad or US$ 1,00,000 per academic year whichever is higher.

10. Commission per transaction to agents abroad for sale of residential flats/commercial plots in India exceeding the limits of US$ 25,000 or 5 per cent of the inward remittance, per transaction, whichever is higher.

11. Remittances exceeding US$ 1 million per project for any consultancy services procured from abroad.

12. Remittance exceeding US$ 1,00,000 by an entity in India by way of reimbursement of pre-incorporation expenses.

   However, this Rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

   Rule 7 provides that in case of use of International Credit Card for making payment by a person towards meeting expenses while such person is on visit outside India the prior approval of Reserve Bank shall not be required for transactions included in Schedule III.

   Vide a circular dated 14th June, 2005, it has been clarified that International Debit Cards can also be used by a resident for drawing cash or making payment to a merchant establishment overseas during his visit abroad for permissible current
account transactions and itemwise limits as mentioned in the schedules shall be applicable to payment made through use of these cards.

Illustration

**Mr. X, an Indian businessman, is interested in remitting US $ 10,000 for purchase of trade mark/franchise in India.**

"Mr. X is allowed to remit US $ 10,000 for purchase of Trade Mark/Franchise in India (VIDE-A.P.(DIR SERIES) CIRCULAR NO. 14, DATED 28/11/2006 ISSUED BY RBI). Earlier, as per Rule 5 read with Schedule III to the Foreign Exchange Management (Current Account Transaction) Rules 2000 prior approval of RBI was required for release of foreign exchange towards purchase of Trade Mark/Franchise."

**CAPITAL ACCOUNT TRANSACTION**

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

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

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

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

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

**Permissible Capital Account Transactions**

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

1. Classes of capital account transactions of persons resident in India.
2. Classes of capital account transactions of persons resident outside India.

**Classes of Capital Account Transactions of Persons Resident in India**

(i) investment by a person resident in India in foreign securities.

(ii) foreign currency loans raised in India and abroad by a person resident in India;

(iii) transfer of immovable property outside India by a person resident in India;

(iv) guarantees issued by a person resident in India in favour of a person resident outside India;

(v) export, import and holding of currency/currency notes;

(vi) loans and overdrafts by a person resident in India from a person resident outside India;

(vii) maintenance of foreign currency accounts in India and outside India by a person resident in India;

(viii) taking out of insurance policy by a person resident in India from an insurance company outside India;

(ix) loans and overdrafts by a person resident in India to a person resident outside India;

(x) remittance outside India of capital assets of a person resident in India;

(xi) sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

However, vide notification No. FEMA 110/2004-RB dated 5th February, 2004, a resident individual may draw subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, from an authorized person foreign exchange not exceeding USD 25,000 per calendar year for a capital account transaction specified in Schedule I; where the drawal of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds USD 25,000 per calendar year, the limit specified in the regulations relevant to the transaction shall apply with respect to the drawal.

It is to be noted that no part of the foreign exchange of USD 25,000 drawn under
aforementioned points can be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

**Classes of Capital Account Transactions of Persons Resident Outside India**

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

(a) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and

(b) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.

(ii) Acquisition and transfer of immovable property in India by a person resident outside India.

(iii) Guarantee by a person resident outside India in favour of, or on behalf of a person resident in India.

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

(v) Deposits between a person resident in India and a person resident outside India.

(vi) Foreign Currency accounts in India of a person resident outside India.

(vii) Remittance outside India of capital assets in India of a person resident outside India.

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

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

The payment for investment are required to be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India in accordance with the regulation made by the Reserve Bank of India. Every person selling or drawing foreign exchange to or from an authorised person for a capital account transaction is required to furnish to Reserve Bank a declaration within the time specified in the regulations relevant to the transactions.
FOREIGN DIRECT INVESTMENTS IN INDIA

INTRODUCTION

Foreign Direct Investment (FDI) is a category of cross border investment made by a resident in one economy (the direct investor) with the objective of establishing a 'lasting interest' in an enterprise (the direct investment enterprise) i.e. resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long term relationship with the direct investment enterprise to ensure the significant degree of influence by the direct investor in the management of the direct investment enterprise. The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise.

The Government of India, Department of Industrial Policy & Promotion, Ministry of Commerce and Industry issued the Consolidated FDI Policy on October 1, 2010 consolidating into one document all the prior policies/regulations on FDI which are contained in FEMA, 1999, RBI Regulations under FEMA, 1999 and Press Notes/Press Releases/Clarifications issued by DIPP and reflect the current policy framework on FDI. It has been clarified that this is a consolidation/compilation and comprehensive listing of most matters on FDI and is not intended to make changes in the extant regulations. This consolidation deals comprehensively with all aspects of FDI Policy which are covered under the various Press Notes/Press Releases/Clarifications issued by DIPP.

DEFINITIONS OF FDI POLICY

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

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

‘Authorized Dealer’ means a person authorized as an authorized dealer under subsection (1) of section 10 of FEMA.

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

‘Capital’ means equity shares; fully, compulsorily & mandatorily convertible preference shares; fully, compulsorily & mandatorily convertible debentures.

Note: Any other type of instruments like warrants, partly paid shares etc. are not considered as capital and cannot be issued to person resident outside India.

‘Capital account transaction’ means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6 of FEMA.
A company is considered as “Controlled” by resident Indian citizens if the resident Indian citizens and Indian companies, which are owned and controlled by resident, Indian citizens, have the power to appoint a majority of its directors in that company.

An entity is considered as ‘Controlled’ by ‘non resident entities’, if non-residents have the power to appoint a majority of its directors.

‘Depository Receipt’ (DR) means a negotiable security issued outside India by a Depository bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as deposit by a Custodian bank in India. DRs are traded on Stock Exchanges in the US, Singapore, Luxembourg, etc. DRs listed and traded in the US markets are known as American Depository Receipts (ADRs) and those listed and traded anywhere/elsewhere are known as Global Depository Receipts (GDRs).

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

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

‘FDI’ means investment by non-resident entity/person resident outside India in the capital of the Indian company under Schedule 1 of FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000.


‘FIPB’ means the Foreign Investment Promotion Board constituted by the Government of India.

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

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

‘Government route’ means that investment in the capital of resident entities by
nonresident entities can be made only with the prior approval from FIPB, Ministry of Finance or SIA, DIPP as the case may be.

‘Holding Company’ would have the same meaning as defined in Companies Act 1956.

‘Indian Company’ means a company incorporated in India under the Companies Act, 1956.

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

‘Investing Company’ means an Indian Company holding only investments in another Indian company, directly or indirectly, other than for trading of such holdings/securities.

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

‘Joint Venture’ (JV) means an Indian entity incorporated in accordance with the laws and regulations in India in whose capital a foreign entity makes an investment.

‘Non resident entity’ means a ‘person resident outside India’ as defined under FEMA

‘Non Resident Indian’ (NRI) means an individual resident outside India who is a citizen of India or is an individual of Indian origin.

A company is considered as ‘Owned’ by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian companies, which are ultimately owned and controlled by resident Indian citizens;

An entity is considered as ‘Owned’ by ‘non resident entities’, if more than 50% of the capital in it is beneficially owned by non-residents.


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

‘Person of Indian Origin’ (PIO) means a citizen of any country other than Bangladesh or Pakistan, if
(i) he at any time held Indian Passport
(ii) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
(iii) the person is a spouse of an Indian citizen or a person referred to in sub clause (i) or (ii).

‘Person resident in India’ means -
(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include
(A) A person who has gone out of India or who stays outside India, in either case—
   (a) for or on taking up employment outside India, or
   (b) for carrying on outside India a business or vocation outside India, or
   (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
(B) A person who has come to or stays in India, in either case, otherwise than-
   (a) for or on taking up employment in India; or
   (b) for carrying on in India a business or vocation in India, or
   (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
(ii) any person or body corporate registered or incorporated in India,
(iii) an office, branch or agency in India owned or controlled by a person resident outside India,
(iv) an office, branch or agency outside India owned or controlled by a person resident in India.

‘Person resident outside India’ means a person who is not a Person resident in India.

‘RBI’ means the Reserve Bank of India established under the Reserve Bank of India Act, 1934.

‘Resident Entity’ means ‘Person resident in India’ excluding an individual.

‘Resident Indian Citizen’ shall be interpreted in line with the definition of ‘person resident in India’ as per FEMA, 1999, read in conjunction with the Indian Citizenship Act, 1955.
‘SEBI’ means the Securities and Exchange Board of India established under the Securities and Exchange Board of India Act, 1992.

‘SEZ’ means a Special Economic Zone as defined in Special Economic Zone Act, 2005.

‘SIA’ means Secretariat of Industrial Assistance in DIPP, Ministry of Commerce & Industry, Government of India.

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

‘Venture Capital Fund’ (VCF) means a Fund established in the form of a Trust, a company including a body corporate and registered under Securities and Exchange Board of India (Venture Capital Fund) Regulations, 1996, which

(i) has a dedicated pool of capital;
(ii) raised in the manner specified under the Regulations; and
(iii) invests in accordance with the Regulations.

ORIGIN OF INVESTMENT IN INDIA

A non-resident entity (other than a citizen of Pakistan or an entity incorporated in Pakistan) can invest in India, subject to the FDI Policy. A citizen of Bangladesh or an entity incorporated in Bangladesh can invest in India under the FDI Policy, only under the Government route.

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

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

An FI may invest in the capital of an Indian company either under the FDI Scheme/Policy or the Portfolio Investment Scheme. 10% individual limit and 24% aggregate limit for FI investment would be applicable even when FIs invest under the FDI scheme/policy. The Indian company which has issued shares to FIs under the FDI Policy for which the payment has been received directly into company’s account should report these figures separately under item no. 5 of Form FC-GPR (Post-issue pattern of shareholding) so that the details could be suitably reconciled for statistical/monitoring purposes. A daily statement in respect of all transactions (except derivative trade) have to be submitted by the custodian bank in floppy/soft
copy in the prescribed format directly to RBI to monitor the overall ceiling/sectoral cap/statutory ceiling.

No person other than registered FII/NRI as per Schedules II and III of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations of FEMA 1999 can invest/trade in capital of Indian Companies in the Indian Stock Exchanges directly i.e. through brokers like a Person Resident in India.

A Foreign Venture Capital Investor (FVCI) may contribute up to 100% of the capital of a Venture Capital Fund/Indian Venture Capital Undertaking and may also set up a domestic asset management company to manage the fund. All such investments are allowed under the automatic route subject to SEBI and RBI regulations and FDI Policy. However FVCIs are also allowed to invest as non-resident entities in other companies subject to FDI Policy.

TYPES OF INSTRUMENTS

Indian companies can issue equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares subject to pricing guidelines/valuation norms prescribed under FEMA Regulations. The pricing of the capital instruments should be decided/determined upfront at the time of issue of the instruments.

Other types of Preference shares/Debentures i.e. non-convertible, optionally convertible or partially convertible for issue of which funds have been received on or after May 1, 2007 are considered as debt. Accordingly all norms applicable for ECBs relating to eligible borrowers, recognized lenders, amount and maturity, end-use stipulations, etc. shall apply.

The inward remittance received by the Indian company vide issuance of DRs and FCCBs are treated as FDI and counted towards FDI.

Issue of shares by Indian Companies under FCCB/ADR/GDR

(i) Indian companies can raise foreign currency resources abroad through the issue of FCCB/DR (ADRs/GDRs), in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Government of India thereunder from time to time.

(ii) A company can issue ADRs/GDRs if it is eligible to issue shares to persons resident outside India under the FDI Policy. However, an Indian listed company, which is not eligible to raise funds from the Indian Capital Market including a company which has been restrained from accessing the securities market by the Securities and Exchange Board of India (SEBI) will not be eligible to issue ADRs/GDRs.

(iii) Unlisted companies, which have not yet accessed the ADR/GDR route for raising capital in the international market, would require prior or simultaneous listing in the domestic market, while seeking to issue such overseas instruments. Unlisted companies, which have already issued ADRs/GDRs in the international market, have
to list in the domestic market on making profit or within three years of such issue of ADRs/GDRs, whichever is earlier. ADRs/GDRs are issued on the basis of the ratio worked out by the Indian company in consultation with the Lead Manager to the issue. The proceeds so raised have to be kept abroad till actually required in India. Pending repatriation or utilization of the proceeds, the Indian company can invest the funds in:

(a) Deposits, Certificate of Deposits or other instruments offered by banks rated by Standard and Poor, Fitch, IBCA , Moody’s, etc. with rating not below the rating stipulated by Reserve Bank from time to time for the purpose;

(b) Deposits with branch/es of Indian Authorized Dealers outside India; and

(c) Treasury bills and other monetary instruments with a maturity or unexpired maturity of one year or less.

(iv) There are no end-use restrictions except for a ban on deployment/investment of such funds in real estate or the stock market. There is no monetary limit up to which an Indian company can raise ADRs/GDRs.

(v) The ADR/GDR proceeds can be utilized for first stage acquisition of shares in the disinvestment process of Public Sector Undertakings/Enterprises and also in the mandatory second stage offer to the public in view of their strategic importance.

(vi) Voting rights on shares issued under the Scheme shall be as per the provisions of Companies Act, 1956 and in a manner in which restrictions on voting rights imposed on ADR/GDR issues shall be consistent with the Company Law provisions. Voting rights in the case of banking companies will continue to be in terms of the provisions of the Banking Regulation Act, 1949 and the instructions issued by the Reserve Bank from time to time, as applicable to all shareholders exercising voting rights.

(vii) Erstwhile OCBs who are not eligible to invest in India and entities prohibited from buying, selling or dealing in securities by SEBI will not be eligible to subscribe to ADRs/GDRs issued by Indian companies.

(viii) The pricing of ADR/GDR issues should be made at a price determined under the provisions of the Scheme of issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Government of India and directions issued by the Reserve Bank, from time to time.

(ix) The pricing of sponsored ADRs/GDRs would be determined under the provisions of the Scheme of issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Government of India and directions issued by the Reserve Bank, from time to time.

Two-way Fungibility Scheme

A limited two-way Fungibility scheme has been put in place by the Government of India for ADRs/GDRs. Under this Scheme, a stock broker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs/GDRs based on instructions received from overseas investors. Re-issuance of
ADRs/GDRs would be permitted to the extent of ADRs/GDRs which have been redeemed into underlying shares and sold in the Indian market.

**Sponsored ADR/GDR issue**

An Indian company can also sponsor an issue of ADR/GDR. Under this mechanism, the company offers its resident shareholders a choice to submit their shares back to the company so that on the basis of such shares, ADRs/GDRs can be issued abroad. The proceeds of the ADR/GDR issue are remitted back to India and distributed among the resident investors who had offered their Rupee denominated shares for conversion. These proceeds can be kept in Resident Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for conversion into ADRs/GDRs.

**ELIGIBILITY OF FDI IN RESIDENT ENTITIES**

**FDI in an Indian Company**

Indian companies including those which are micro and small enterprises can issue capital against FDI.

**FDI in Partnership Firm/Proprietary Concern**

(i) A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) resident outside India can invest by way of contribution to the capital of a firm or a proprietary concern in India on non-repatriation basis provided;

(a) Amount is invested by inward remittance or out of NRE/FCNR(B)/NRO account maintained with Authorized Dealers/Authorized banks.

(b) The firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector.

(c) Amount invested shall not be eligible for repatriation outside India.

(ii) Investments with repatriation benefits: NRIs/PIO may seek prior permission of Reserve Bank for investment in sole proprietorship concerns/partnership firms with repatriation benefits. The application will be decided in consultation with the Government of India.

(iii) Investment by non-residents other than NRIs/PIO: A person resident outside India other than NRIs/PIO may make an application and seek prior approval of Reserve Bank for making investment by way of contribution to the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India.

(iv) Restrictions: An NRI or PIO is not allowed to invest in a firm or proprietorship concern engaged in any agricultural/plantation activity or real estate business (i.e. dealing in land and immovable property with a view to earning profit or earning income there from) or engaged in Print Media.

**FDI in Limited Liability Partnership**

FDI in LLPs is permitted, subject to the following conditions:

(a) FDI in LLPs has been allowed, through the Government approval route, only
for LLPs operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance related conditions (such as ‘Non Banking Finance Companies’ or ‘Development of Townships, Housing, Built-up infrastructure and Construction-development projects’ etc.)

(b) LLPs with FDI will not be allowed to operate in agriculture/plantation activity, print media or real estate business.

(c) An Indian company, having FDI, has been permitted to make downstream investment in an LLP only if both-the company, as well as the LLP- are operating in sectors where 100% FDI is allowed, through the automatic route and there are no FDEI-linked performance related conditions.

(d) LLPs with FDI are not eligible to make any downstream investment.

(e) Foreign Capital participation in the capital structure of LLPs is allowed only by way of cash consideration, received by inward remittance, through normal banking channels or by debit to NRE/FCNR account of the person concerned, maintained with an authorized dealer/authorized bank.

(f) Investment in LLPs by Foreign Institutional Investors (FIIs) and Foreign Venture Capital Investors (FVCIs) is not permitted. LLPs are also not permitted to avail External Commercial Borrowings (ECBs)

(g) In case the LLP with FDI has a body corporate that is a designated partner or nominates an individual to act as a designated partner in accordance with the provisions of Section 7 of the LLP Act, 2008, such a body corporate should only be a company registered in India under the Companies Act, 1956 and not any other body, such as an LLP or a trust.

(h) For such LLPs, the designated partner “resident in India”, as defined under the ‘Explanation’ to Section 7(1) of the LLP Act, 2008, would also have to satisfy the definition of “person resident in India”, as prescribed under Section 2(v)(i) of the Foreign Exchange Management Act, 1999.

(i) The designated partners are responsible for compliance with all the above conditions and also liable for all penalties imposed on the LLP for their contravention, if any.

(j) Conversion of a company with FDI, into an LLP, is allowed only if the above stipulations are met and with the prior approval of the FIPB/Government.

FDI in Trusts

FDI in Trusts other than Venture Capital Fund (VCF) is not permitted.

CONDITIONS ON ISSUE/TRANSFER OF SHARES

The capital instruments should be issued within 180 days from the date of receipt of the inward remittance or by debit to the NRE/FCNR (B) account of the non-resident investor. In case, the capital instruments are not issued within 180 days from the date of receipt of the inward remittance or date of debit to the NRE/FCNR (B) account, the amount of consideration so received should be refunded immediately to the non-
resident investor by outward remittance through normal banking channels or by credit to the NRE/FCNR (B) account, as the case may be. Non-compliance with the above provision would be reckoned as a contravention under FEMA and would attract penal provisions. In exceptional cases, refund of the amount of consideration outstanding beyond a period of 180 days from the date of receipt may be considered by the RBI, on the merits of the case.

**Issue price of shares**

Issue price of shares to persons resident outside India under the FDI Policy, shall be on the basis of SEBI guidelines in case of listed companies. In case of unlisted companies, valuation of shares has to be done by a Chartered Accountant in accordance with the guidelines issued by the erstwhile Controller of Capital Issues (CCI).

**Foreign Currency Account**

Indian companies which are eligible to issue shares to persons resident outside India under the FDI Policy may be allowed to retain the share subscription amount in a Foreign Currency Account, with the prior approval of RBI.

**Transfer of shares and convertible debentures**

(i) Subject to FDI sectoral policy, foreign investors can also invest in Indian companies by purchasing/acquiring existing shares from Indian shareholders or from other non-resident shareholders. General permission has been granted to non-residents/NRIs for acquisition of shares by way of transfer subject to the following:

(a) A person resident outside India (other than NRI and erstwhile OCB) may transfer by way of sale or gift, the shares or convertible debentures to any person resident outside India (including NRIs).

(b) NRIs may transfer by way of sale or gift the shares or convertible debentures held by them to another NRI.

(c) A person resident outside India can transfer any security to a person resident in India by way of gift.

(d) A person resident outside India can sell the shares and convertible debentures of an Indian company on a recognized Stock Exchange in India through a stock broker registered with stock exchange or a merchant banker registered with SEBI.

(e) A person resident in India can transfer by way of sale, shares/convertible debentures (including transfer of subscriber’s shares), of an Indian company in sectors other than financial services sectors (i.e. Banks, NBFC, Insurance, ARCs, CICs, infrastructure companies in the securities market viz. Stock Exchanges, Clearing Corporations, and Depositories, Commodity Exchanges, etc.) under private arrangement to a person resident outside India, subject to the specified guidelines.

(f) General permission is also available for transfer of shares/convertible debentures, by way of sale under private arrangement by a person resident outside India to a person resident in India, subject to the specified guidelines.
(g) The above General Permission also covers transfer by a resident to a non-resident of shares/convertible debentures of an Indian company, engaged in an activity earlier covered under the Government Route but now falling under Automatic Route, as well as transfer of shares by a non-resident to an Indian company under buyback and/or capital reduction scheme of the company. However, this General Permission is not available in case of transfer of shares/debentures, from a Resident to a Non-Resident/Non-Resident Indian, of an entity engaged in any activity in the financial services sector (i.e. Banks, NBFCs, ARCs, CICs, Insurance, infrastructure companies in the securities market such as Stock Exchanges, Clearing Corporations, and Depositories, Commodity Exchanges, etc.).

(h) The Form FC-TRS should be submitted to the AD Category-I Bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee, resident in India.

(ii) The sale consideration in respect of equity instruments purchased by a person resident outside India, remitted into India through normal banking channels, shall be subjected to a Know Your Customer (KYC) check by the remittance receiving AD Category – I bank at the time of receipt of funds. In case, the remittance receiving AD Category – I bank is different from the AD Category – I bank handling the transfer transaction, the KYC check should be carried out by the remittance receiving bank and the KYC report be submitted by the customer to the AD Category – I bank carrying out the transaction along with the Form FC-TRS.

(iii) Escrow: AD Category – I banks have been given general permission to open Escrow account and Special account of non-resident corporate for open offers/exit offers and delisting of shares. The relevant SEBI (SAST) Regulations or any other applicable SEBI Regulations/provisions of the Companies Act, 1956 will be applicable.

Prior permission of RBI in certain cases for transfer of capital instruments

(i) The following instances of transfer of capital instruments from resident to non-residents by way of sale require prior approval of RBI:

(a) Transfer of capital instruments of an Indian company engaged in financial services sector (i.e. Banks, NBFCs, Asset Reconstruction Companies, CICs, Insurance companies, infrastructure companies in the securities market such as Stock Exchanges, Clearing Corporations, and Depositories, Commodity Exchanges, etc.).

(b) Transactions which attract the provisions of SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997.

(c) The activity of the Indian company whose capital instruments are being transferred falls outside the automatic route and the approval of the FIPB has been obtained for the said transfer.

(d) The transfer is to take place at a price which falls outside the pricing guidelines specified by the Reserve Bank from time to time.
(e) Transfer of capital instruments where the non-resident acquirer proposes deferment of payment of the amount of consideration, prior approval of the Reserve Bank would be required, as hitherto. Further, in case approval is granted for a transaction, the same should be reported in Form FC-TRS, to an AD Category – I bank for necessary due diligence, within 60 days from the date of receipt of the full and final amount of consideration. The link office of the AD Category-I Bank will consolidate such Form FC-TRS details and report the same to the Central Office of RBI.

(ii) The transfer of capital instruments of companies engaged in sectors falling under the Government Route from residents to non-residents by way of sale or otherwise requires Government approval followed by permission from RBI.

(iii) A person resident in India, who intends to transfer any capital instrument, by way of gift to a person resident outside India, has to obtain prior approval from Reserve Bank. While forwarding applications to Reserve Bank for approval for transfer of capital instruments by way of gift, the specified documents should be enclosed. Reserve Bank considers the following factors while processing such applications:

(a) The proposed transferee (donee) is eligible to hold such capital instruments under Schedules 1, 4 and 5 of Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.

(b) The gift does not exceed 5 per cent of the paid-up capital of the Indian company/each series of debentures/each mutual fund scheme.

(c) The applicable sectoral cap limit in the Indian company is not breached.

(d) The transferor (donor) and the proposed transferee (donee) are close relatives as defined in Section 6 of the Companies Act, 1956, as amended from time to time.

(e) The value of capital instruments to be transferred together with any capital instruments already transferred by the transferor, as gift, to any person residing outside India does not exceed the rupee equivalent of USD 25,000 during the calendar year.

(f) Such other conditions as stipulated by Reserve Bank in public interest from time to time.

Conversion of ECB/Lumpsum Fee/Royalty into Equity

(i) Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) (excluding those deemed as ECB) in convertible foreign currency into shares/preference shares, subject to the following conditions and reporting requirements.

(a) The activity of the company is covered under the Automatic Route for FDI or the company has obtained Government approval for foreign equity in the company;

(b) The foreign equity after conversion of ECB into equity is within the sectoral cap, if any;
(c) Pricing of shares is as per SEBI regulations or erstwhile CCI guidelines in the case of listed or unlisted companies respectively;

(d) Compliance with the requirements prescribed under any other statute and regulation in force; and

(e) The conversion facility is available for ECBs availed under the Automatic or Government Route and is applicable to ECBs, due for payment or not, as well as secured/unsecured loans availed from non-resident collaborators.

(ii) General permission is also available for issue of shares/preference shares against lump sum technical know-how fee, royalty, under automatic route or SIA/FIPB route, subject to pricing guidelines of SEBI/CCI and compliance with applicable tax laws.

ISSUE OF INSTRUMENTS

Issue of Rights/Bonus Shares

FEMA provisions allow Indian companies to freely issue Rights/Bonus shares to existing non-resident shareholders, subject to adherence to sectoral cap, if any. However, such issue of bonus/rights shares has to be in accordance with other laws/statutes like the Companies Act, 1956, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (in case of listed companies), etc. The price of shares offered on rights basis by the Indian company to non-resident shareholders shall not be lower than the price at which such shares are offered to resident shareholders.

Prior permission of RBI for Rights issue to erstwhile OCBs

OCBs have been derecognized as a class of investors from September 16, 2003. Therefore companies desiring to issue rights share to such erstwhile OCBs will have to take specific prior permission from RBI. As such, entitlement of rights share is not automatically available to erstwhile OCBs. However bonus shares can be issued to erstwhile OCBs without the approval of RBI.

Additional allocation of rights share by residents to non-residents

Existing non-resident shareholders are allowed to apply for issue of additional shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares and above their rights share entitlements. The investee company can allot the additional rights share out of unsubscribed portion, subject to the condition that the overall issue of shares to non-residents in the total paid-up capital of the company does not exceed the sectoral cap.

Acquisition of shares under Scheme of Merger/Demerger/Amalgamation

Mergers/demergers/amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/demerger/amalgamation. Once the scheme of merger or demerger or amalgamation of two or more Indian companies has been approved by a Court in India, the transferee company or new company is allowed to
issue shares to the shareholders of the transferor company resident outside India, subject to the conditions that:

(i) the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap, and

(ii) the transferor company or the transferee or the new company is not engaged in activities which are prohibited under the FDI policy.

Issue of shares under Employees Stock Option Scheme (ESOPs)

Listed Indian companies are allowed to issue shares under the Employees Stock Option Scheme (ESOPs), to its employees or employees of its joint venture or wholly owned subsidiary abroad who are resident outside India, other than to the citizens of Pakistan.

ESOPs can be issued to citizens of Bangladesh with the prior approval of FIPB. Shares under ESOPs can be issued directly or through a Trust subject to the condition that:

(a) The scheme has been drawn in terms of relevant regulations issued by the SEBI, and

(b) The face value of the shares to be allotted under the scheme to the non-resident employees does not exceed 5 per cent of the paid-up capital of the issuing company.

Unlisted companies have to follow the provisions of the Companies Act, 1956. The Indian company can issue ESOPs to employees who are resident outside India, other than to the citizens of Pakistan. ESOPs can be issued to the citizens of Bangladesh with the prior approval of the FIPB.

The issuing company is required to report the details of such issues to the Regional Office concerned of the Reserve Bank, within 30 days from the date of issue of shares.

REMITTANCE AND REPATRIATION

Remittance of sale proceeds:

Sale proceeds of shares and securities and their remittance is ‘remittance of asset’ governed by The Foreign Exchange Management (Remittance of Assets) Regulations 2000 under FEMA.

AD Category – I bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC/tax clearance certificate from the Income Tax Department has been produced.

Remittance on winding up/liquidation of Companies

AD Category – I banks have been allowed to remit winding up proceeds of companies in India, which are under liquidation, subject to payment of applicable
taxes. Liquidation may be subject to any order issued by the court winding up the company or the official liquidator in case of voluntary winding up under the provisions of the Companies Act, 1956. AD Category – I banks shall allow the remittance provided the applicant submits:

(a) No objection or Tax clearance certificate from Income Tax Department for the remittance.

(b) Auditor’s certificate confirming that all liabilities in India have been either fully paid or adequately provided for.

(c) Auditor’s certificate to the effect that the winding up is in accordance with the provisions of the Companies Act, 1956.

(d) In case of winding up otherwise than by a court, an auditor’s certificate to the effect that there are no legal proceedings pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

Repatriation of Dividend

Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

Repatriation of Interest

Interest on fully, mandatorily and compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

FOREIGN DIRECT INVESTMENT REPORTING

Reporting of Inflow

An Indian company receiving investment from outside India for issuing shares/convertible debentures/preference shares under the FDI Scheme, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank not later than 30 days from the date of receipt in the Advance Reporting Form.

Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares/convertible debentures, through an AD Category – I bank, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which will allot a Unique Identification Number (UIN) for the amount reported.

Reporting of issue of shares

After issue of shares (including bonus and shares issued on rights basis and shares issued under ESOP)/fully, mandatorily and compulsorily convertible
debentures/fully, mandatorily and compulsorily convertible preference shares, the Indian company has to file Form FC-GPR, not later than 30 days from the date of issue of shares.

**Reporting of transfer of shares**

Reporting of transfer of shares between residents and non-residents and vice-versa is to be done in Form FC-TRS. The Form FC-TRS should be submitted to the AD Category – I bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee, resident in India. The AD Category – I bank, would forward the same to its link office. The link office would consolidate the Form FC-TRS and submit a monthly report to the Reserve Bank.

**Reporting of Non-Cash**

Details of issue of shares against conversion of ECB has to be reported to the Regional Office concerned of the RBI, as indicated below:

In case of full conversion of ECB into equity, the company shall report the conversion in Form FC-GPR to the Regional Office concerned of the Reserve Bank as well as in Form ECB-2 to the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai – 400 051, within seven working days from the close of month to which it relates. The words "ECB wholly converted to equity" shall be clearly indicated on top of the Form ECB-2. Once reported, filing of Form ECB-2 in the subsequent months is not necessary.

In case of partial conversion of ECB, the company shall report the converted portion in Form FC-GPR to the Regional Office concerned as well as in Form ECB-2 clearly differentiating the converted portion from the non-converted portion. The words "ECB partially converted to equity" shall be indicated on top of the Form ECB-2. In the subsequent months, the outstanding balance of ECB shall be reported in Form ECB-2 to DSIM.

**Reporting of FCCB/ADR/GDR Issues**

The Indian company issuing ADRs/GDRs has to furnish to the Reserve Bank, full details of such issue in the FORM DR, within 30 days from the date of closing of the issue.

The company should also furnish a quarterly return in the FORM DR-QUARTERLY, to the Reserve Bank within 15 days of the close of the calendar quarter. The quarterly return has to be submitted till the entire amount raised through ADR/GDR mechanism is either repatriated to India or utilized abroad as per the extant Reserve Bank guidelines.

**Consequences of Violation**

FDI is a capital account transaction and thus any violation of FDI regulations are covered by the penal provisions of the FEMA. Reserve Bank of India administers the FEMA and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA. The Directorate takes up investigation in any contravention of FEMA.
Penalties

If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/noncompliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of India/FIPB/Reserve Bank of India, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contraventions where such amount is quantifiable, or up to two lakh Rupees where the amount is not quantifiable, and where such contraventions is a continuing one, further penalty which may extend to five thousand Rupees for every day after the first day during which the contraventions continues.

Where a person committing a contravention of any provisions of this Act or of any rule, direction or order made there under is a company (company means any body corporate and includes a firm or other association of individuals as defined in the Companies Act), every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Any Adjudicating Authority adjudging any contraventions may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government.

FDI is prohibited in the following activities/sectors:

- Retail Trading (except single brand product retailing)
- Atomic Energy
- Lottery Business including Government/private lottery, online lotteries, etc.
- Gambling and Betting including casinos etc.
- Business of chit fund
- Nidhi company
- Trading in Transferable Development Rights (TDRs)
- Real Estate Business or Construction of Farm Houses
- Activities/sectors not opened to private sector investment.

FDI is allowed in the following activities/sectors:

- Animal Husbandry
- Floriculture
- Pisciculture
- Aquaculture
• Development of seeds
• Vegetable and Mushrooms
• Tea plantation
• Mining
• Manufacture of items reserved for production in Micro and Small Enterprises (MSEs)
• Defence
• Electric Generation, Transmission, Distribution and Trading
• Civil Aviation Sector
• Asset Reconstruction Companies
• Banking – Private Sector
• Banking – Public Sector
• Terrestrial Broadcasting
• Cable network
• DTH
• HITS
• Setting up hardware facilities such as up-linking, HUB
• Commodity Exchange
• Development of Townships, Housing, Built-up infrastructure and Construction-development projects
• Credit Information Companies (CIC)
• Industrial Parks both setting up and in established Industrial Parks
• Insurance
• Infrastructure Company in the Securities Market
• Non-Banking Finance Companies (NBFC)
• Petroleum Refining by PSU
• Print Media
• Security Agencies in Private Sector
• Satellites – Establishment and operation
• Telecommunication
• Ash and Carry Trading Wholesale Trading/Wholesale Trading
• Courier services for carrying packages, parcels and other items which do not come within the ambit of the Indian Post Office Act, 1898
• Trading for export
• E-Commerce Activities
• Trading of items sourced from MSE Sector
• Test Marketing
• Single Brand Product Trading

DIRECT INVESTMENT OUTSIDE INDIA

In terms of section 6(3) of FEMA, the Direct investments by residents in Joint Venture (JV) and Wholly Owned Subsidiary (WOS) has been allowed. Section 6(3)
of Foreign Exchange Management Act empowers the Reserve Bank to prohibit restrict or regulate various transactions, by making Regulations. In exercise of the above powers, the Reserve Bank has, issued Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 which has been amended from time to time. The Notification seeks to regulate acquisition and transfer of a foreign security by a person resident in India i.e. investment by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

**Prohibitions**

Indian parties are prohibited from making investment in a foreign entity engaged in real estate or banking business.

**General Permission**

In terms of Regulation 4 general permission has been granted to residents for purchase/acquisition of securities in the following manner:

(a) out of funds held in RFC account; and

(b) as bonus shares on existing holding of foreign currency shares.

(c) when not permanently resident in India, out of their foreign currency resources outside India, General permission is also given to sell the shares so purchased or acquired.

**Automatic Route**

In terms of Regulation 6 of the Notification, an Indian party has been permitted to make investment in overseas Joint Ventures (JV)/Wholly Owned Subsidiaries (WOS), not exceeding 400 per cent of the net worth of the Indian party (corporates) as on the date of the last audited balance sheet.

This ceiling will not be applicable where the investment is made out of balances held in Exchange Earners' Foreign Currency account of the Indian party or out of funds raised through ADRs/GDRs.

The above ceiling includes contribution to the capital of the overseas JV/WOS, loan granted to the JV/WOS, and 100 per cent of guarantees issued to or on behalf of the JV/WOS. Such investments are subject to the following conditions:

(a) The Indian entity may extend loan/guarantee to an overseas concern only in which it has equity participation. Indian entities may offer any form of guarantee - corporate or personal/primary or collateral/guarantee by the promoter company/guarantee by group company, sister concern or associate company in India; provided that

(i) All financial commitments including all forms of guarantees are within the overall ceiling prescribed for overseas investment by the Indian party i.e. currently within 400 per cent of the net worth of the Indian party.

(ii) No guarantee is ‘open ended’ i.e. the amount of the guarantee should be specified upfront, and

(iii) As in the case of corporate guarantees, all guarantees are required to be reported to Reserve Bank, in Form ODI Part II. Guarantees issued by
banks in India in favour of WOSs/JVs outside India, are outside this ceiling and are subject to prudential norms issued by Reserve Bank from time to time.

The Indian party should not be on the Reserve Bank’s Exporters caution list/list of defaulters to the banking system circulated by the Reserve Bank/The Credit Information Bureau (India) Ltd (CIBIL) or under investigation by any investigation/enforcement agency or regulatory body. All transactions relating to a JV/WOS should be routed through one branch of an authorised dealer bank to be designated by the Indian party.

In case of partial/full acquisition of an existing foreign company, where the investment is more than USD 5.00 million, valuation of the shares of the company is required to be made by a Category I Merchant Banker registered with SEBI or an Investment Banker/Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and, in all other cases by a Chartered Accountant or a Certified Public Accountant. However, in cases of investment by way of swap of shares, in all cases irrespective of the amount, valuation of the shares is required to be made by a Category I Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country. Approval of the Foreign Investment Promotion Board (FIPB) is also a precondition.

In case of investment in overseas JV/WOS abroad by a registered Partnership firm, where entire funding for such investment is done by the firm, it will be in order for individual partners to hold shares for and on behalf of the firm in the overseas JV/WOS if the host country regulations or operational requirements warrant such holdings.

An Indian party is also permitted to acquire shares of a foreign company engaged in a bonafide business activity, in exchange of ADRs/GDRs issued to the latter in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the guidelines issued there under from time to time by the Central Government, provided:

(a) ADRs/GDRs are listed on any stock exchange outside India;
(b) The ADR and/or GDR issue for the purpose of acquisition is backed by underlying fresh equity shares issued by the Indian party;
(c) The total holding in the Indian entity by persons resident outside India in the expanded capital base, after the new ADR and/or GDR issue, does not exceed the sectoral cap prescribed under the relevant regulations for such investment under FDI;
(d) Valuation of the shares of the foreign company should be
   (i) as per the recommendations of the Investment Banker if the shares are not listed on any recognized stock exchange; or
   (ii) based on the current market Capitalization of the foreign company arrived at on the basis of monthly average price on any stock exchange abroad for the three months preceding the month in which the acquisition is committed and over and above, the premium, if any, as recommended by the Investment Banker in its due diligence report in other cases.
The Indian Party is required to report such acquisition in form ODI to the AD Bank for report to the Reserve Bank within a period of 30 days from the date of the transaction.

It may be noted that Investments in Nepal are permitted only in Indian rupees. Investments in Bhutan are permitted in Indian Rupees as well as in freely convertible currencies. All dues receivable on investments made in freely convertible currencies, as well as their sale/winding up proceeds are required to be repatriated to India in freely convertible currencies only. The automatic route facility is not available for investment in Pakistan.

Method of Funding

Investment in an overseas JV/WOS may be funded out of one or more of the following sources:

(i) drawal of foreign exchange from an AD Bank in India;
(ii) capitalisation of exports;
(ii) swap of shares;
(iv) utilisation of proceeds of External Commercial Borrowings (ECBs)/Foreign Currency Convertible Bonds (FCCBs);
(v) in exchange of ADRs/GDRs issued in accordance with the scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the guidelines issued there under from time to time by the Central Government
(vi) balances held in EEFC account of the Indian party; and
(vii) utilisation of proceeds of foreign currency funds raised through ADR/GDR issues

In respect of (vi) and (vii) above, the ceiling of 400 per cent of net worth does not apply. However, in respect of investments in the financial sector, they are subject to compliance of Regulation 7 irrespective of the method of funding.

Capitalisation of exports and other dues

(a) Indian parties are also permitted to capitalise the payments due from the foreign entity towards exports, fees, royalties or any other entitlements due from the foreign entity for supplying technical know-how, consultancy, managerial and other services within the ceilings applicable. Capitalization of Export proceeds remaining unrealized beyond the prescribed period of realization will require the prior approval of the Reserve Bank before capitalisation.

(b) Indian software exporters are permitted to receive 25 per cent of the value of their exports to an overseas software startup company in the form of shares without entering into Joint Venture Agreements, with prior approval of the Reserve Bank.

Investments in Financial Services Sector

In terms of Regulation 7 an Indian party seeking to make investment in an entity
engaged in the financial services sector also is required to fulfill the following additional conditions:

(i) be registered with the appropriate regulatory authority in India for conducting the financial sector activities;
(ii) have earned net profit during the preceding three financial years from the financial services activities;
(iii) have obtained approval for investment in financial sector activities abroad from regulatory authorities concerned in India and abroad; and
(iv) have fulfilled the prudential norms relating to capital adequacy as prescribed by the regulatory authority concerned in India.

A step down subsidiary of JV/WOS investing in a financial services sector is also required to comply with the above conditions.

Regulated entities in the financial sector making investments in any activity overseas are required to comply with the above guidelines. It is clarified that unregulated entities in the financial services sector in India may invest in non financial sector activities subject to compliance with the provisions of Regulation 6. It is further clarified that trading in Commodities Exchanges overseas and setting up JV/WOS for trading in overseas exchanges are reckoned as financial services activity and require clearance from the Forward Markets Commission.

**Investment in Equity of Companies Registered Overseas/Rated Debt Instruments**

**Corporates**

Listed Indian companies are permitted to invest abroad in companies listed on a recognized stock exchange. Such investments should not exceed 50 per cent of the Indian company’s net worth as on the date of the latest audited balance sheet.

**Individuals**

Resident individuals are permitted to invest in equity and in rated bonds/fixed income securities of overseas companies as permitted in terms of the limits and conditions specified under the Liberalised Remittance Scheme.

**Investment by Mutual Funds**

Mutual Funds are permitted to invest in ADRs/GDRs of the Indian and foreign companies, rated debt instruments, equity of listed overseas companies, ETFs and overseas mutual funds that make nominal investments (i.e., to the extent of 10 per cent of net asset value) in unlisted overseas securities. Domestic Venture Capital Funds registered with SEBI may invest in equity and equity linked instruments of offshore Venture Capital Undertakings, subject to an overall limit of USD 500 million.

**Approval of the Reserve Bank**

Prior approval of the Reserve Bank is required in all other cases of direct investment abroad. For this purpose, application together with necessary documents should be made in Form ODI submitted through their Authorised Dealer. Reserve
Bank, takes into account the following factors while considering such applications:

(a) Prima facie viability of the JV/WOS outside India;

(b) Contribution to external trade and other benefits which will accrue to India through such investment;

(c) Financial position and business track record of the Indian party and the foreign entity;

(d) Expertise and experience of the Indian party in the same or related line of activity of the JV/WOS outside India

Overseas Investments by Proprietorship Concerns

With a view to enabling recognized star exporters with a proven track record and a consistently high export performance to reap the benefits of globalization and liberalization, proprietorship concerns and unregistered partnership firms have been allowed to set up a JV/WOS outside India with prior approval of the Reserve Bank subject to satisfying certain eligibility criteria.

An application in form ODI may be made to the Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Overseas Investment Division, Central Office, Amar Building 3rd Floor, Fort, Mumbai 400 001, through the AD Banks.

Investments by established proprietorship or unregistered partnership exporter firms is subject to the following criteria:

(i) The Partnership/Proprietorship firm is a DGFT recognized Star Export House (export exceeding Rs.15 crore) per annum.

(ii) The AD bank is satisfied that the exporter is KYC (Know Your Customer) compliant, is engaged in the proposed business and has turnover as indicated.

(iii) Exporter has proven track record i.e. export outstanding does not exceed 10 per cent of the average export realization of preceding three financial years.

(iv) The exporter has not come under adverse notice of any Government agency like Enforcement Directorate, CBI and does not appear in the exporters’ caution list of the Reserve Bank or in the list of defaulters to the banking system in India.

(v) The amount of investment outside India does not exceed 10 per cent of the average of three financial years export realization or 200 per cent of the net owned funds of the firm, whichever is lower.

Overseas Investment by Registered Trust/Society

Registered Trusts and Societies engaged in manufacturing/educational sector are allowed make investment in the same sector(s) in a Joint Venture or Wholly Owned Subsidiary outside India, with the prior approval of the Reserve Bank. Trusts/ Societies satisfying the eligibility criteria as given below may submit the application/s in Form ODI-Part I, through their Authorised Dealer.
Eligibility Criteria for Trust:

- The Trust should be registered under the Indian Trust Act, 1882;
- The Trust deed permits the proposed investment overseas;
- The proposed investment should be approved by the trustee/s;
- Authorised Dealer Bank is satisfied that the Trust is KYC (Know Your Customer) compliant and is engaged in a bonafide activity;
- The Trust has been in existence at least for a period of three years;
- The Trust has not come under the adverse notice of any Regulatory/Enforcement agency like the Directorate of Enforcement, CBI etc.

Eligibility Criteria for Society:

- The Society should be registered under the Societies Registration Act, 1860.
- The Memorandum of Association and rules and regulations permit the Society to make the proposed investment which should also be approved by the governing body/council or a managing/executive committee.
- The AD Category-I bank is satisfied that the Society is KYC (Know Your Customer) compliant and is engaged in a bonafide activity;
- The Society has been in existence at least for a period of three years;
- The Society has not come under the adverse notice of any Regulatory/Enforcement agency like the Directorate of Enforcement, CBI etc.

In addition to the registration, the activities which require special license/permission either from the Ministry of Home Affairs, Government of India or from the relevant local authority, as the case may be, the Authorised Dealer Bank should ensure that such special license/permission has been obtained by the applicant, sale of securities so acquired.

Acquisition of a foreign company through bidding or tender procedure

In terms of Regulation 14 an Indian party may remit earnest money deposit or issue a bid bond guarantee for acquisition of a foreign company through bidding and tender procedure and also make subsequent remittances through an AD Bank.

Obligations of Indian Entity

In terms of provisions of Regulation 15 an Indian party which has made direct
investment abroad has been put under obligation to (a) receive share certificate or any other document as an evidence of investment, (b) repatriate to India the dues receivable from foreign entity and (c) submit the documents/Annual Performance Report to the Reserve Bank, in accordance with the provisions specified in Regulation 15 of the Notification.

**Transfer by way of sale of shares of a JV/WOS**

Indian parties may also disinvest without prior approval of the Reserve Bank, in the following categories:

(i) in case where the JV/WOS is listed in the overseas stock exchange;

(ii) in cases where the Indian promoter company is listed on a stock exchange in India and has a net worth of not less than Rs.100 crore;

(iii) where the Indian promoter is an unlisted company

(iv) and the investment in overseas venture does not exceed USD 10 million.

The Indian entity is required to submit details of the disinvestment through its designated Authorised Dealer bank within 30 days from the date of investment. An Indian party, which does not satisfy the conditions laid down, shall have to apply to the Reserve Bank for prior permission.

**Permission for purchase/acquisition of foreign securities in certain cases**

General permission has been granted to a person resident in India who is an individual—

(a) to acquire foreign securities as a gift from any person resident outside India; or

(b) to acquire shares under Cashless Employees Stock Option Scheme issued by a company outside India, provided it does not involve any remittance from India; or

(c) to acquire shares by way of inheritance from a person whether resident in or outside India;

(d) to purchase equity shares offered by a foreign company under its ESOP Schemes if he is an employee, or, a director of an Indian office or branch of a foreign company, or, of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company/Special Purpose Vehicle (SPV), is not less than 51 per cent.

A person resident in India may transfer by way of sale the shares acquired as stated above provided that the proceeds thereof are repatriated immediately on receipt thereof and in any case not later than 90 days from the date of sale of such securities.

(e) Foreign companies are permitted to repurchase the shares issued to residents in India under any ESOP Scheme provided (i) the shares were issued in accordance with the Rules/Regulations framed under Foreign
Exchange Management Act, 1999, (ii) the shares are being repurchased in terms of the initial offer document and, (iii) An annual return is submitted through the AD Bank giving details of remittances/beneficiaries, etc.

(f) In all other cases, not covered by general or special permission, approval of the Reserve Bank is required to be obtained before acquisition of a foreign security.

Pledge of a foreign security by a person resident in India

The shares acquired by persons resident in India in accordance with the provisions of Foreign Exchange Management Act, 1999 or Rules or Regulations made thereunder are allowed to be pledged for obtaining credit facilities in India from an AD Bank/Public Financial Institution.

General permission in certain cases

Residents are permitted to acquire a foreign security, if it represents –

(a) qualification shares for becoming a director of a company outside India provided it does not exceed 1 per cent of the paid up capital of the overseas company and the consideration for the acquisition does not exceed USD 20,000/- in a calendar year;

(b) rights shares provided that the rights shares are being issued by virtue of holding shares in accordance with the provisions of law for the time being in force;

(c) purchase of shares of a JV/WOS abroad of the Indian promoter company by the employees/directors of Indian promoter company which is engaged in the field of software where the consideration for purchase does not exceed USD 10,000 or its equivalent per employee in a block of five calendar years; the shares so acquired do not exceed 5 per cent of the paid-up capital of the JV/WOS outside India; and after allotment of such shares, the percentage of shares held by the Indian promoter company, together with shares allotted to its employees is not less than the percentage of shares held by the Indian promoter company prior to such allotment;

(d) purchase of foreign securities under ADR/GDR linked stock option schemes by resident employees of Indian companies in the knowledge based sectors, including working directors provided purchase consideration does not exceed USD 50,000 or its equivalent in a block of five calendar years.

What is direct investment outside India?

Direct investment outside India means investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity, signifying a long term interest (setting up a Joint Venture (JV) or a Wholly Owned Subsidiary (WOS)) in the overseas entity and thus does not include portfolio investment.

ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OUTSIDE INDIA

The Reserve Bank of India in exercise of the powers conferred under
Section 6(3)(h) and Section 47(2) of the Foreign Exchange Management Act, 1999 prescribed regulations in respect of acquisition and transfer of immovable property outside India.

A person resident in India is prohibited from acquiring or transferring any immovable property situated outside India without general or special permission of the Reserve Bank. However, this prohibition is not applicable to the property held by a person resident in India who is a national of a foreign state; and acquired by a person resident in India on or before 8th July, 1947 and continued to be held by him with the permission of the Reserve Bank.

A person resident in India may acquire immovable property outside India by way of gift or inheritance from a person who was resident outside India, in terms of Section 6(4) of FEMA acquired by a person resident in India on or before July 8, 1947 and continued to be held by him with the permission of RBI.

A person resident in India may acquire immovable property outside India by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000.

Reserve Bank is empowered to permit a company incorporated in India having overseas offices, to acquire immovable property outside India for its business and for residential purpose of its staff subject to such terms and conditions as it considers necessary.

A person resident in India who has acquired immovable property outside India as above may transfer it by way of gift to his relative who is a person resident in India. For this purpose, relative in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

**ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA**

The Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000, issued by the RBI defines the term ‘A person of Indian origin as to mean an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan), who

(i) at any time, held Indian passport; or

(ii) who or either of whose father or whose grandfather was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955.

The term ‘Repatriation outside India has been defined to mean the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through normal banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency.

**Acquisition and Transfer of Property in India by an Indian Citizen Resident Outside India**

An Indian citizen resident outside India may—

(i) acquire any immovable property in India other than agricultural/plantation/
(ii) transfer any immovable property in India to a person resident in India, and
(iii) transfer any immovable property other than agricultural or plantation property or farm house to an Indian citizen or to a person of Indian origin, resident outside India.

**Acquisition and Transfer of Property in India by a Person of Indian Origin**

A person of Indian origin resident outside India may acquire any immovable property other than agricultural land/farm house/plantation property in India by purchase, from out of funds received in India through normal banking channels by way of inward remittance from any place outside India or funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank under the Act. It has been clarified that such payments can not be made either by traveller’s cheque or by foreign currency notes or by other mode other than those specified in this behalf. He may also acquire any immovable property in India other than agricultural land/farm house/plantation property by way of gift from a person resident in India or from a person resident outside India who is a citizen of India or from a person of Indian origin resident outside India.

A person of Indian origin resident outside may also acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or from a person resident in India. He has been permitted to transfer any immovable property in India other than agricultural land/farm house/plantation property, by way of sale to a person resident in India; transfer agricultural land/farm house/plantation property in India, by way of gift or sale to a person resident in India who is a citizen of India; and transfer residential or commercial property in India by way of gift to a person resident in India or to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India.

**Acquisition of Immovable Property for Carrying on a Permitted Activity**

A person resident outside India who has established in India in accordance with the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000, a branch, office or other place of business for carrying on in India any activity, except a liaison office, may acquire any immovable property in India, which is necessary for or incidental to carrying on such activity, provided that all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and the person files with the Reserve Bank a declaration in the Form IPI not later than ninety days from the date of such acquisition. Such a person is also allowed to transfer by way of mortgage to an authorised dealer as a security for any borrowing, the acquired immovable property.

**Purchase/Sale of Immovable Property by Foreign Embassies/Diplomats/Consulate Generals**

A Foreign Embassies/Diplomats/Consulate Generals may purchase/sell immovable property in India other than agricultural land/farm house/plantation
property provided (i) clearance from government of India, Ministry of External Affairs is obtained for such purchase/sale and (ii) the consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channel.

**Repatriation of Sale Proceeds**

A person resident outside India, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property. In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied—

(a) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000;

(b) the amount to be repatriated does not exceed the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account or the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property.

(c) In the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

**ESTABLISHMENT IN INDIA OF BRANCH/LIAISON/PROJECT OFFICE**

Establishment of Branch/Liaison /Project Offices in India is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Foreign Exchange Management (Establishment in India of branch or office or other place of business) Regulations, 2000 as amended from time to time.

A body corporate incorporated outside India (including a firm or other association of individuals), desirous of opening a Liaison Office (LO) / Branch Office (BO) in India have to obtain permission from the Reserve Bank under provisions of FEMA 1999. The applications from such entities considered by Reserve Bank under two routes:

— **Reserve Bank Route** — Where principal business of the foreign entity falls under sectors where 100 per cent Foreign Direct Investment (FDI) is permissible under the automatic route.

— **Government Route** — Where principal business of the foreign entity falls under the sectors where 100 per cent FDI is not permissible under the automatic route. Applications from entities falling under this category and those from Non-Government Organisations / Non-Profit Organisations / Government Bodies / Departments are considered by the Reserve Bank in consultation with the Ministry of Finance, Government of India.

The following additional criteria are also considered by the Reserve Bank while
sanctioning Liaison/Branch Offices of foreign entities:

- **Track Record**
  - **For Branch Office** — a profit making track record during the immediately preceding five financial years in the home country.
  - **For Liaison Office** — a profit making track record during the immediately preceding three financial years in the home country.

- **Net Worth** [total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name].
  - **For Branch Office** — not less than USD 100,000 or its equivalent.
  - **For Liaison Office** — not less than USD 50,000 or its equivalent.

**Permissible Activities for a Liaison Office**

A Liaison Office (also known as Representative Office) can undertake only liaison activities, i.e. it can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office outside India. The role of such offices is, therefore, limited to collecting information about possible market opportunities and providing information about the company and its products to the prospective Indian customers. Permission to set up such offices is initially granted for a period of 3 years and this may be extended from time to time by an AD Category I bank.

**Liaison Office can undertake the following activities in India:**

- Representing in India the parent company / group companies.
- Promoting export / import from / to India.
- Promoting technical/financial collaborations between parent/group companies and companies in India.
- Acting as a communication channel between the parent company and Indian companies.

**Liaison Office of Foreign Insurance Companies / Banks**

Foreign Insurance companies can establish Liaison Offices in India only after obtaining approval from the Insurance Regulatory and Development Authority (IRDA). Foreign banks can establish Liaison Offices in India only after obtaining approval from the Department of Banking Operations and Development (DBOD), Reserve Bank of India.

**Permissible Activities for branch offices**

Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up Branch Offices in India with specific approval of the Reserve Bank. Such Branch Offices are permitted to represent the parent / group
companies and undertake the following activities in India:

— Export / Import of goods.
— Rendering professional or consultancy services.
— Carrying out research work, in areas in which the parent company is engaged.
— Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
— Representing the parent company in India and acting as buying / selling agent in India.
— Rendering services in information technology and development of software in India.
— Rendering technical support to the products supplied by parent/group companies.
— Foreign airline / shipping company.

Normally, the Branch Office should be engaged in the activity in which the parent company is engaged.

**Branch Office in Special Economic Zones (SEZs)**

Reserve Bank has given general permission to foreign companies for establishing branch/unit in Special Economic Zones (SEZs) to undertake manufacturing and service activities. The general permission is subject to the following conditions:

— such units are functioning in those sectors where 100 per cent FDI is permitted;
— such units comply with part XI of the Companies Act, 1956 (Section 592 to 602);
— such units function on a stand-alone basis.

In the event of winding-up of business and for remittance of winding-up proceeds, the branch shall approach an AD Category – I bank with the documents as mentioned under "Closure of Liaison / Branch Office" except the copy of the letter granting approval by the Reserve Bank.

**Project office**

Reserve Bank has granted general permission to foreign companies to establish Project Offices in India, provided they have secured a contract from an Indian company to execute a project in India, and

— the project is funded directly by inward remittance from abroad; or
— the project is funded by a bilateral or multilateral International Financing Agency; or
— the project has been cleared by an appropriate authority; or
— a company or entity in India awarding the contract has been granted Term Loan by a Public Financial Institution or a bank in India for the project.

However, if the above criteria are not met, the foreign entity has to approach the Reserve Bank of India for approval.

**EXPORT OF GOODS AND SERVICES**

Section 7 of the Act deals with export of goods and services. Under Sub-section (1) every exporter is required to furnish to Reserve Bank or any other authority as prescribed, a declaration containing true and correct particulars, including the amount representing the full export value or if the full export value of the goods is not ascertainable at the time of export, the value which the exporter having regard to prevailing market conditions expects to receive on sale of the goods in a market outside India. Every exporter is also under obligation to furnish such other information as may be required by the Reserve Bank for the purpose of ensuring the realisation of the export proceeds.

**Declaration as Regards Export of Goods and Services**

Every exporter of goods or software, in physical form or through any other form either directly or indirectly to any place outside India, other than Nepal and Bhutan, is required to furnish to the specified authority a declaration in the prescribed form and supported by specified evidence containing true and correct material particulars including the amount representing the full export value of the goods or software or if the full export value is not ascertainable at the time of export, the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or the software in the overseas market, affirming that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be paid in the specified manner.

In respect of export of services to which none of the forms specified apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export and to repatriate the same to India.

**Export of Goods or Services Without Declaration**

Export of goods or services may be made without furnishing the declaration in the following cases, namely:

(i) trade samples of goods and publicity material supplied free of cost;
(ii) personal effects of travellers, whether accompanied or unaccompanied;
(iii) ships stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;
(iv) goods or software accompanied by a declaration by the exporter that they are not more than twenty five thousand rupees in value;
(v) by way of gift of goods accompanied by a declaration by the exporter that they are not more than one lakh rupees in value;

(vi) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling/repairs, within a period of six months from the date of their export;

(vii) goods imported free of cost on re-export basis;

(viii) goods not exceeding US$ 1000 or its equivalent in value per transaction exported to Myanmar under the Barter Trade Agreement between the Central Government and the Government of Myanmar;

(ix) the goods which are permitted by the Development Commissioner of the Export Processing Zones, EHTP, STP or Free Trade Zones to be re-exported. These include, imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators; goods imported from foreign suppliers/collaborators on loan basis; goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations. These goods may also be re-exported by the units in SEZ, under the intimation to Development Commissioner of SEZ/concerned Asstt. Commissioner or Dy. Commissioner of customs.

(x) replacement goods exported free of charge in accordance with the provisions of Exim Policy in force, for the time being.

(xi) goods sent outside India for testing subject to re-import into India.

(xii) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

(xiii) export permitted by RBI.

**Indication of Importer-Exporter Code Number**

The importer-exporter code number allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development and Regulation) Act, 1992 has to be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and also in all correspondence with the authorised dealer or the Reserve Bank, as the case may be.

**Evidence in Support of Declaration**

The Commissioner of Customs or the postal authority or the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance of provisions of the Act and the regulations made thereunder require such evidence in support of the declaration as may establish that the exporter is a person resident in India and has a place of business in India; and the destination stated on the declaration is the final place of the destination of the goods exported.

The term ‘final place of destination has been defined to mean a place in a country
in which the goods are ultimately imported and cleared through Customs of that
country; and the value stated in the declaration represents the full export value of the
goods or software; or where the full export value of the goods or software is not
ascertainable at the time of export the value which the exporter, having regard to the
prevailing market conditions expects to receive on the sale of the goods in the
overseas market.

**Manner of Payment of Export Value of Goods**

Unless otherwise authorised by the Reserve Bank, the amount representing the
full export value of the goods exported shall be paid through an authorised dealer in
the manner specified in the Foreign Exchange Management (Manner of Receipt and
Payment) Regulations, 2000. In this context, the re-import into India, within the period
specified for realisation of the export value of the exported goods in respect of which
a declaration was made, shall be deemed to be realisation of full export value of such
goods.

**Time Limit for Realisation of Export Value of Goods/Software**

The amount representing the full export value of goods or software exported is
required to be realised and repatriated to India within twelve months from the date of
export. However where the goods or software are exported by the units in Special
Economic Zones, the stipulation of period of realization and repatriation to India of full
export value of goods or software shall not apply. In the case of export of goods to a
warehouse established outside India with the permission of the Reserve Bank, the
amount representing the full export value of goods exported is to be paid to the
authorised dealer as soon as it is realised and in any case within fifteen months from
the date of shipment of goods. In this regard the authorised dealer have been
empowered, for a sufficient and reasonable cause shown, to extend the said period
of twelve months or fifteen months as the case may be.

However, in the case of export of goods or software by a statusholder exporter,
the amount representing full export value of goods or software shall be realised within
a period of twelve months from the date of export. In this context, RBI has been
empowered to extend the said period of twelve months.

No person shall enter into any contract, without the approval of RBI, to export
goods on the terms which provide for a period longer than twelve months for payment
of the value of the goods to be exported.

**Submission of export documents**

The documents pertaining to export shall, within 21 days from the date of export
as, as the case may be, from the date of certification of SOFTEX form, be submitted
to the Authorised Dealer mentioned in the relevant declaration form. However,
subject to the directions issued by the Reserve Bank from time to time, the
Authorised Dealer may accept the documents pertaining to export submitted after the
expiry of the specified period of 21 days, for reasons beyond the control of the
exporter.

**Transfer of Documents**

Regulation 12 empowers the authorised dealer to accept, for negotiation or
collection, shipping documents including invoice and bill of exchange covering exports, from his constituent not being a person who has signed the declaration as regards to export of goods and services. However where the value declared in the declaration does not differ from the value shown in the documents being negotiated or sent for collection, or where the value declared in the declaration is less than the value shown in the documents being negotiated or sent for collection, the authorised dealer, before accepting the documents, require the constituent concerned also to sign such declaration and thereupon such constituent shall be bound to comply with such requisition and such constituent signing the declaration shall be considered to be the exporter to the extent of the full value shown in the documents being negotiated or sent for collection.

Payment for the Export

In respect of export of any goods or software requiring a declaration to be furnished, no person shall, without the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing that the payment for the goods or software is made otherwise than in the specified manner; or that the payment is delayed beyond the specified period; or that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer.

However, proceedings in respect of contravention of these provisions shall not be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after allowed deductions, has not been made in the specified manner within the specified period.

Certain Exports Requiring Prior Approval

Regulation 14 of the Foreign Exchange Management (Export of Goods and Services) Regulation, 2000 requires certain exports to obtain prior approval of Reserve Bank.

(a) Export of Goods on Lease, Hire, etc.

No person is allowed, except with the prior permission of the Reserve Bank, to take or send out by land, sea or air any goods from India to any place outside India on lease or hire or under any arrangement or in any other manner other than sale or disposal of such goods.

(b) Exports under Trade Agreement/Rupee Credit etc.

Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Government of a foreign state are governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.

The export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, are
governed by the terms and conditions advised by the Reserve Bank to the authorised dealers from time to time.

(c) Counter Trade

Any arrangement involving adjustment of value of goods imported into India against value of goods exported from India, requires prior approval of the Reserve Bank.

Delay in Receipt of Payment

Where in relation to goods or software export of which is required to be declared on the specified form, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

(a) the payment therefor if the goods or software has been sold and
(b) the sale of goods and payment thereof, if goods or software has not been sold or re-import thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf;

However, omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

Advance payment against exports

Where an exporter receives advance payment (with or without interest), from a buyer outside India, the exporter has been put under an obligation to ensure that -

(i) The shipment of goods is made within one year from the date of receipt of advance payment;

(ii) The rate of interest, if any, payable on the advance payment does not exceed London Inter-Bank Offered Rate (LIBOR) + 100 basis points, and

The documents covering the shipment are routed through the Authorised Dealer through whom the advance payment is received.

However, in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilised portion of advance payment or towards payment of interest, shall be made after the expiry of the said period of one year, without the prior approval of the Reserve Bank. In case the export agreement provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment, the exporter shall require the prior approval of the Reserve Bank.

Project exports

Regulation 18 deals with project exports and provides that where the export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering
into any such export arrangement, submit the proposal for prior approval of the Working Group, or the Exim Bank or Authorised dealer, as the case may be, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank from time to time.

REALISATION, REPATRIATION AND HOLDING OF FOREIGN CURRENCY

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

Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 requires a person resident in India to whom any foreign exchange is due or has accrued, to take all reasonable steps to realise and repatriate to India such foreign exchange unless an exemption has been granted under the Act and rules or regulations made thereunder or under the general or special permission of Reserve Bank. Regulation 3 also requires a person resident in India, to refrain from doing anything/taking any action, resulting in delay in receipt of foreign exchange in whole or part, or ceasing in whole or part the foreign exchange receivable by him.

Manner of Repatriation

Regulation 4 requires that after realisation of foreign exchange due, the person concerned shall repatriate the same to India and sell it to an authorised person or retain it to the specified extent in an account with an authorised dealer or use it for discharging a foreign exchange debt or liability to the specified extent.

The regulation further provides that the realised foreign exchange shall be deemed to be repatriated to India, when the person concerned receives in India payments in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Time Limit for Surrender of Realised Foreign Exchange

Any foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation or an income on assets held outside India or as inheritance, settlement or gift should be sold by the person concerned to an authorised person within a period of seven days of its receipt, and in all other cases within 90 days from the date of its receipt.

Regulation 6 deals with time limit for surrender of foreign exchange in certain other cases and provides that any person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under Section 10(5) of the Act and does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.

However, in case the foreign exchange acquired or purchased by any person
from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall be surrendered to an authorised person within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

**Note:** The provisions of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulation are not applicable to foreign exchange in the form of currency of Nepal or Bhutan.

**Exemption from Realisation or Repatriation**

Section 9 contains exemptions from the application of provisions relating to holding of foreign currency and realisation and repatriation in certain circumstances, as provided under Sections 4 and 8 of the Act respectively. Accordingly, possession of foreign currency or coins by any person or class of persons, as the Reserve Bank may specify is not prohibited. A person or class of persons may hold and operate foreign currency account within the prescribed limits as may be specified by the Reserve Bank. Foreign exchange acquired or received before 8th July, 1947, or any income arising or accruing thereon which is held outside India, in pursuance of a general or special permission of RBI, is also exempted.

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

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

Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 provides for limits for possession and retention of foreign currency or foreign coins. Under Regulation 3 the Reserve Bank has specified following limits for possession or retention of foreign currency or foreign coins, namely:

(i) possession without limit of foreign currency and coins by an authorised person within the scope of his authority;

(ii) possession without limit of foreign coins by any person;

(iii) retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers cheques not exceeding US $ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques acquired during a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or from any person not resident in India and also who is on a visit to India, or as honorarium or gift or for services rendered or in settlement of any lawful obligation; or as a honorarium or gift
while on a visit to any place outside India; or represents unspent amount of foreign exchange acquired from an authorised person for travel abroad.

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

**AUTHORISED PERSON**

Chapter III of the Act containing Sections 10-12 deals with the provisions relating to authorised person. Section 10 deals with the procedure of appointing authorised person by the Reserve Bank, Section 11 specifies the powers of the RBI to issue directions to authorised person and Section 12 prescribes the power of the RBI to inspect authorised person.

Under Section 10, any person who has made an application to the RBI may be authorised by it to act as an authorised person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or offshore banking unit or in any other manner as the RBI deem fit. This authorisation is in writing and subject to the conditions laid down by the RBI.

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

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

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

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

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

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

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

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The Government of India took a policy decision to permit FDI in infrastructure companies in securities market viz stock exchanges, depositories and clearing corporation. SEBI issued a circular in this regard. RBI also issued a circular A.P.(DIR Series) Circular No. 25 dated 22.12.2006 giving certain directions to authorized dealers. The petitioner challenged the RBI Circular as invalid in as much as it restricts the trade activities of general corporate sector.

In Prof. Krishnaraj Goswami vs. Reserve Bank of India [(2008) 83 SCL 133 (BOM)]. Bombay High Court observed that the RBI had issued the impugned circular dated 22.12.2006 by way of directions as contemplated under section 10(4) and 11(1) of the FEMA. A bare reading of the provisions of these sections clearly shows that RBI has power to issue directions to authorized persons and this power is wide enough to cover any kind of directions so far it provides for regulation of foreign exchange management. The contention of petitioner, that RBI had no jurisdiction to issue such circulars, can not accepted. Section 10(4) clearly stipulate that an authorized person, in all dealings, is bound by the directions, general, or special, issued by RBI. Similarly, section 11(1) provides that RBI may, for the purpose of securing compliance of the provisions of the FEMA and of any rules, regulations and directions made thereunder, give to the authorized persons any direction in regard to making of payment or the doing or desist from doing of any act relating to foreign exchange or foreign security.

The petitioner had not challenged the policy decision of the Central Government, but had merely questioned the incidental act i.e. the impugned circular. In any event, these are policy decisions which fall within the domain of the authorities concerned in the Central Government. The effect and repercussions of such policy decision can hardly be subject mater of judicial review. Policy decision unless and until are reversed or inconsistent with the constitutional mandate or a patent abuse of power, judicial intervention will normally be not necessitated. Petition dismissed.
Power of Reserve Bank to Inspect authorised person

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

When an inspection is initiated by the Reserve Bank, it shall be the duty of every authorised person (where the authorised person is a company or firm, every director partner or officer of such a company or firm), to produce before the inspecting officer, such books, accounts and other documents in his custody and to furnish any statement or information relating to the affairs of such authorised person within the time limit and the manner in which such inspecting officer may direct.

CONTRAVENTION AND PENALTIES

Chapter IV of the Act containing Sections 13 to 15 deals with contravention and penalties. Section 13 deals with penalties, Section 14 provides for enforcement of the orders of Adjudicating Authority and Section 15 deals with compounding of contraventions.

Section 13 provides that any person contravening any provision of the Act, or any condition subject to which the authorisation is granted by the RBI, shall be liable for penalty upon adjudication, which may extend up to thrice the sum involved in such contravention where such amount is quantifiable or up to two lakh rupees where the amount is not quantifiable. If the contravention continues, the penalty of Rs. 5,000 per day during the period in which the contravention continues, shall be imposed.

In addition to the powers to impose penalty, the Adjudicating Authority, adjudging any contravention is empowered to confiscate to the Government of India any currency, security or any other money or property in respect of which the contravention has taken place and may further direct that the foreign exchange holdings if any, of the persons committing the contravention shall be brought back either to India or retained outside India, in accordance with the directions.

Enforcement of the Orders of Adjudicating Authority

In terms of Section 14 of the Act, if any person fails to make full payment of the penalty imposed within a period of ninety days from the date on which the notice of payment of such penalty is served on him, he shall be liable for civil imprisonment. However, no order of arrest and detention in civil imprisonment should be made unless the Adjudicating Authority issue showcause notice to defaulter as to why he should not be committed to civil imprisonment and unless the Adjudicating Authority, for reasons in writing, is satisfied that the defaulter has transferred, concealed or removed any part of his property or he has refused to pay the penalty despite the fact he had means to pay the arrears.

The defaulter may be issued by the Adjudicating Authority a warrant of arrest, on
its satisfaction by affidavit or otherwise, that the defaulter is likely to abscond or leave
the local limit of its jurisdiction. A warrant issued by one Adjudicating Authority may
also be executed by any other Adjudicating Authority within whose jurisdiction the
defaulter is found, and the person so arrested shall be brought before the
Adjudicating Authority issuing warrant within 24 hours of arrest, excluding however
the time taken in journey.

On arrest, if the defaulter pays the amount entered in the warrant as due and the
cost of arrest to the arresting officer, such officer is under obligation to release him at
once.

The Act gives an opportunity to make an appeal to Appellate Tribunal within forty
five days from the date on which a copy of the order made by the Adjudicating
Authority or the Special Director (Appeals) is received by the aggrieved person. This
period of forty-five days for filing the appeal may be relaxed by the Appellate Tribunal
if it is satisfied that there was sufficient cause for not filing the appeal in time.

Compounding of Contraventions

Section 15 empowers the Directorate of Enforcement or Officers of the
Directorate of Enforcement and of the Reserve Bank to compound the offences. This
section provides that contravention under Section 13 may be compounded within 180
days from the date of receipt of application. Sub-section (2) provides that where the
contravention has been compounded, the accused person is relieved from further
proceedings for the contravention.

Foreign Exchange (Compounding Proceedings) Rules, 2000 deals with
procedure for compounding of contravention of the provisions of the Act. Rule 3
defines the Compounding Authority as to mean the persons authorised by the Central
Government under Sub-section (1) of Section 15 of the Act namely:

(a) an officer of the Enforcement Directorate not below the rank of Deputy
Director or Deputy Legal Advisor (DLA).

(b) an officer of the Reserve Bank of India not below the rank of the Assistant
General Manager.

Powers of Reserve Bank to Compound Contravention

Rule 4 empowers the RBI to compound only quantifiable contravention
committed by any person of the provisions of Section 7 or Section 8 or Section 9, or
Third Schedule to the Foreign Exchange Management (Current Account
Transactions) Rules, 2000 in the following manner:

(a) where the sum involved in such contravention is five lakhs rupees or below,
by the Assistant General Manager of the Reserve Bank of India;

(b) where the sum involved in such contravention is more than rupees five lakhs
but less than rupees twenty lakhs by the Deputy General Manager of
Reserve Bank of India;

(c) where the sum involved in the contravention is rupees twenty lakhs or more
but less than rupees fifty lakhs by the General Manager of Reserve Bank of
India; and
(d) the sum involved in such contravention is rupees fifty lakhs or more, by the Chief General Manager of the Reserve Bank of India.

Powers of Enforcement Directorate to Compound Contravention

Rule 5 specifies the cases in which only quantifiable contraventions of the provisions of the Act [other than Section 7 or Section 8 or Section 9 or Third Schedule to the Foreign Exchange (Current Account Transactions) Rules, 2000] can be compounded by the Enforcement Directorate. These include:

(a) where the sum involved in such contravention is five lakhs rupees or below, by the Deputy Director of the Directorate of Enforcement;

(b) where the sum involved in such contravention is more than rupees five lakhs but less than rupees ten lakhs by the Additional Director of the Directorate of Enforcement;

(c) where the sum involved in the contravention is rupees ten lakhs or more but less than rupees fifty lakhs by the Special Director of the Directorate of Enforcement;

(d) where the sum involved in the contravention is rupees fifty lakhs or more, but less than rupees one crore by Special Director with Deputy Legal Advisor of the Directorate of Enforcement;

(e) where the sum involved in such contravention is one crore rupees or more, by the Director of Enforcement with Special Director of the Enforcement Directorate.

The benefit of above provisions shall not be available in case a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules. However, any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention.

Where any contravention is compounded before the adjudication of any contravention under Section 16, no inquiry shall be held for adjudication of such contravention in relation to such contravention against the person in relation to whom the contravention is so compounded. In case the compounding of any contravention is made after making of a complaint under Sub-section (3) of Section 16, such compounding shall be brought by the authority specified in Rule 4 or Rule 5 in writing, to the notice of the Adjudicating Authority and on such notice of the compounding of the contravention being given, the person in relation to whom the contravention is so compounded shall be discharged.

Payment of Compounded Amount

Rule 9 deals with payment of amount compounded. Where a contravention has been compounded in terms of Rule 8(2) the sum involved in such contravention shall be deposited within fifteen days from the date of the order of compounding of such contravention by demand draft in favour of the Compounding Authority. In case a person fails to pay the sum compounded within the specified time, he shall be deemed to have never made an application for compounding of any contravention and the provisions of the Act for contravention shall apply to him.
However, no contravention shall be compounded if an appeal has been filed with the Special Director (Appeals) under Section 17 or with Appellate Tribunal under Section 19. Every order of compounding the contravention shall specify the provisions of the Act or the rules, directions, requisitions or orders made thereunder in respect of which contravention has taken place alongwith details of the alleged contravention and a copy thereof shall be supplied to the applicant and the Adjudicating Authority as the case may be.

ADJUDICATION AND APPEAL

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

Appointment of Adjudicating Authority

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

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

Appeal to Special Director (Appeals)

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

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

Establishment of Appellate Tribunal

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

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

A person who is or has been or is qualified to be a judge of a High Court shall be eligible for the appointment as chairperson of Appellate Tribunal. A person who is or has been or is eligible to be a district judge shall be eligible for appointment as a member of Appellate Tribunal. A member of the Indian Legal Service and holding the post in Grade I of that Services or the member of Indian Revenue Service and holding the post equivalent to a Joint Secretary to the Government of India, shall be eligible to be appointed as Special Director (Appeals).

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

Appeal to High Court

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

Directorate of Enforcement

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

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

Investigation

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

In this context, Foreign Exchange Management (Encashment of Draft, Cheque Instrument and Payment of Interest) Rules, 2000 provides that where investigation referred to in Section 37 of the Act is being taken up into any alleged contravention of any provisions of the Act or rule, regulation, direction or order or violation of any condition subject to which Reserve Bank of India gives authorisation, and any draft, cheque or other instrument relevant for such investigation, such officer shall send such draft, cheque or other instrument to the Reserve Bank of India or to an authorised person as the officer may specify for encashment. The Reserve Bank of India or the authorised person is required to take steps without delay for encashment of the draft, cheque or other instrument and to credit the proceeds of such encashment (less any commission and expenses incurred for such encashment) to a separate account in the name of the Directorate of Enforcement.

The Central Government is required to indemnify the Reserve Bank of India or an authorised person against any liability which may incur by reason of or in connection with the encashment of the draft, cheque or other instrument delivered to it.

Contravention by Companies

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

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

LESSON ROUND UP

- The Foreign Exchange Management Act has repealed the FERA.
- Capital Account transactions means any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.
- Current Account Transaction means a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the
ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.

- Foreign Exchange Management (Current Account Transactions) Rules prohibits the withdrawal of foreign exchange for the purposes of transactions specified in the Schedule I.
- Foreign Exchange Management (Current Account Transactions) Rules requires prior approval of the Government of India for the transactions as specified in Schedule II.
- Foreign Exchange Management (Current Account Transactions) Rules, 2000 requires prior approval of the Reserve Bank for the transactions as specified in Schedule III.
- Schedule I & II to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 classifies the capital account transactions of a person under the following two heads viz.
  (a) Classes of capital account transactions of persons resident in India.
  (b) Classes of capital account transactions of persons resident outside India.
- Foreign Direct Investments (FDI) can be made under two routes—Automatic Route and Government Route.
- FEMA provisions allow Indian companies to freely issue Right/Bonus shares to existing non-resident share-holders, subject to adherence to sectoral cap, if any.
- Indian parties are prohibited from making investment in a foreign entity engaged in real estate or banking business.
- The issue of FCCBs are subject to ceiling of US $ 500 million in any one financial year.
- A person who is resident outside India and permitted by the Reserve Bank to establish a branch or a liaison office in India may undertake or carry on any specified activity.
- The Act requires the person resident in India to make all reasonable efforts to realise and repatriate the foreign exchange due or accrued as per the directions of the Reserve Bank.

**SELF TEST QUESTIONS**

1. Define the Capital Account Transactions and enumerate permissible capital account transactions in relation to persons resident in India and resident outside India?
2. Discuss the Acquisition and Transfer of Immovable Property in India under FEMA?
3. Discuss the establishment of branch or office or place of business in India under FEMA.

4. Define Authorised person? Briefly discuss the powers of RBI to give directions to Authorised persons?

5. Write short note on the following:
   (i) Compounding of Contraventions
   (ii) Directorate of Enforcement
   (iii) Appellate Tribunal
   (iv) Investigation
   (v) Export of Goods and Services.
INTRODUCTION

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

Significant development have taken place since 1984 such as change in internal security scenario, an increased influence of voluntary organizations, spread of use of communication and information technology, quantum jump in the amount of foreign contribution being received, and large scale growth in the number of registered organizations. This has necessitated large scale changes in the Act of 1976 and therefore, it was thought appropriate to replace the FCRA, 1976 by a new legislation to regulate the acceptance and utilization of foreign contribution and foreign hospitality by a person or association.
The Foreign Contribution (Regulation) Act, 2010 has come into effect from May 1, 2011. The Ministry of Home Affairs has issued the necessary Gazette Notification vide S.O. 999 (E) dated the 29th April, 2011 in this regard. The Ministry of Home Affairs has also issued a Gazette Notification vide G.S.R. 349 (E) dated the 29th April, 2011 notifying the Foreign Contribution (Regulation) Rules, 2011 made under section 48 of FCRA, 2010. The FCR Rules, 2011 have come into force simultaneously with FCRA, 2010.

### Foreign Contribution (Regulation) Act, 2010

*The object of the act is to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.*

### DEFINITIONS

The definitions of the following terms used in the statute are relevant for understanding the operative provisions of the law.

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

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

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

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

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

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

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

(i) a foreign company within the meaning of section 591 of the Companies Act, 1956 (1 of 1956);

(ii) a company which is a subsidiary of a foreign company;

(iii) the registered office or principal place of business of a foreign company referred to in sub-clause (i) or company referred to in sub-clause (ii);

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

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

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

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

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

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

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

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

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

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

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

“Foreign source” includes,—

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

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

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

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

(vi) a company within the meaning of the Companies Act, 1956 and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:

(A) the Government of a foreign country or territory;

(B) the citizens of a foreign country or territory;

(C) corporations incorporated in a foreign country or territory;

(D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;

(E) foreign company;

(vii) a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;

(viii) a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;

(ix) a society, club or other association of individuals formed or registered outside India;

(x) a citizen of a foreign country[ Section 2 (1) (j)]

“Legislature” means —

(A) either House of Parliament;

(B) the Legislative Assembly of a State, or in the case of a State having a Legislative Council, either House of the Legislature of that State;

(C) Legislative Assembly of a Union territory constituted under the Government of Union Territories Act, 1963;

(D) Legislative Assembly for the National Capital Territory of Delhi referred to in the Government of National Capital Territory of Delhi Act, 1991;

(E) Municipality as defined in clause (e) of article 243P of the Constitution;

(F) District Councils and Regional Councils in the States of Assam, Meghalaya, Tripura and Mizoram as provided in the Sixth Schedule to the Constitution[ Section 2 (1) (k)]

“Person” includes—

(i) an individual;

(ii) a Hindu undivided family;
(iii) an association;

(iv) a company registered under section 25 of the Companies Act, 1956 [Section 2 (1) (m)]

“Political party” means—

(i) an association or body of individual citizens of India—

(A) to be registered with the Election Commission of India as a political party under section 29A of the Representation of the People Act, 1951; or

(B) which has set up candidates for election to any Legislature, but is not so registered or deemed to be registered under the Election Symbols (Reservation and Allotment) Order, 1968;

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

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

REGULATION OF FOREIGN CONTRIBUTION AND FOREIGN HOSPITALITY

Prohibition to accept foreign contribution

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

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

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

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

Person to whom section 3 does not apply

Section 4 provides that nothing contained in section 3 shall apply to the acceptance, by any person specified in that section, of any foreign contribution where such contribution is accepted by him, subject to the provisions of section 10,—

(a) by way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source; or

(b) by way of payment, in the course of international trade or commerce, or in the ordinary course of business transacted by him outside India; or

(c) as an agent of a foreign source in relation to any transaction made by such foreign source with the Central Government or State Government; or

(d) by way of a gift or presentation made to him as a member of any Indian delegation, provided that such gift or present was accepted in accordance with the rules made by the Central Government with regard to the acceptance or retention of such gift or presentation; or

(e) from his relative; or

(f) by way of remittance received, in the ordinary course of business through any official channel, post office, or any authorised person in foreign exchange under the Foreign Exchange Management Act, 1999; or

(g) by way of any scholarship, stipend or any payment of like nature:

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

Procedure to notify an organization of a political nature

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

**Restriction on acceptance of foreign hospitality**

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

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

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

Section 7 prohibits the transfer of foreign contribution to other person. Accordingly, no person who is registered and granted a certificate or has obtained prior permission under the Act; and receives any foreign contribution, shall transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior permission under the Act.

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

**Utilization of foreign contribution**

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

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

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

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

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

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

(b) require any person or class of persons, not specified in section 6, to obtain prior permission of the Central Government before accepting any foreign hospitality;

(c) require any person or class of persons not specified in section 11, to furnish intimation within such time and in such manner as may be prescribed as to the amount of any foreign contribution received by such person or class of persons as the case may be, and the source from which and the manner in which such contribution was received and the purpose for which and the manner in which such foreign contribution was utilised;

(d) without prejudice to the provisions of sub-section (1) of section 11, require any person or class of persons specified in that sub-section to obtain prior permission of the Central Government before accepting any foreign contribution;

(e) require any person or class of persons, not specified in section 6, to furnish intimation, within such time and in such manner as may be prescribed, as to the receipt of any foreign hospitality, the source from which and the manner in which such hospitality was received.

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

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

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

**Registration of certain persons with Central Government**

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

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

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

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

Grant of certificate of registration

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

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

(a) the person making an application for registration or grant of prior permission

under sub-section (1),—

(i) is not fictitious or benami;

(ii) has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;

(iii) has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;

(iv) has not been found guilty or diversion or mis-utilisation of its funds;

(v) is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;

(vi) is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;

(vii) has not contravened any of the provisions of this Act;

(viii) has not been prohibited from accepting foreign contribution;

(b) the person making an application for registration under sub-section (1) has undertaken reasonable activity in its chosen field for the benefit of the society for which the foreign contribution is proposed to be utilised;

(c) the person making an application for giving prior permission under sub-section (1) has prepared a reasonable project for the benefit of the society for which the foreign contribution is proposed to be utilised;

(d) in case the person being an individual, such individual has neither been convicted under any law for the time being in force nor any prosecution for any offence pending against him;

(e) in case the person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him;

(f) the acceptance of foreign contribution by the person referred to in sub-section (1) is not likely to affect prejudicially—

(i) the sovereignty and integrity of India; or

(ii) the security, strategic, scientific or economic interest of the State; or

(iii) the public interest; or

(iv) freedom or fairness of election to any Legislature; or

(v) friendly relation with any foreign State; or

(vi) harmony between religious, racial, social, linguistic, regional groups, castes or communities;

(g) the acceptance of foreign contribution referred to in sub-section (1),—

(i) shall not lead to incitement of an offence;

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

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

Suspension of certificate

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

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

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

Cancellation of certificate

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

(a) the holder of the certificate has made a statement in, or in relation to, the application for the grant of registration or renewal thereof, which is incorrect or false; or

(b) the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or

(c) in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or

(d) the holder of certificate has violated any of the provisions of this Act or rules or order made thereunder; or

(e) if the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.
Before passing an order of cancellation of certificate, the person concerned would be given a reasonable opportunity of being heard. Any person, whose certificate has been cancelled, shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

Management of foreign contribution of person whose certificate has been cancelled

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

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

Renewal of certificate

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

Application for Renewal

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

ACCOUNTS, INTIMATION, AUDIT AND DISPOSAL OF ASSETS

Foreign contribution through scheduled bank

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

However, such person may open one or more accounts in one or more banks for utilising the foreign contribution received by him. Further no funds other than foreign contribution shall be received or deposited in such account or accounts.
Every bank or authorised person in foreign exchange shall report to such authority as may be specified amount of foreign remittance; the source and manner in which the foreign remittance was received; and other particulars, in such form and manner as may be prescribed.

**Intimation**

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

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

**Maintenance of accounts**

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

**Order for Audit of accounts**

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

**Intimation by candidate for election**

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

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

INSPECTION, SEARCH AND SEIZURE

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

Seizure of accounts or records

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

Adjudication of confiscation

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

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

Appeal

Section 31 deals with appeals and provides that any person aggrieved by any order made under section 29 may prefer an appeal, where the order has been made
by the Court of Session, to the High Court to which such Court is subordinate;
or where the order has been made by any officer specified, to the Court of Session
within the local limits of whose jurisdiction such order of adjudication of confiscation
was made, within one month from the date of communication to such person of the
order.

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

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

Penalty and Punishment

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

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

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

Offences by companies

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

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

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

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

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

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

LESSON ROUND UP

- FCRA, 2011 regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.

- Where any person who has been granted a certificate or given prior permission, fails to furnish any intimation within the time specified therefor or the intimation so furnished is not in accordance with law or if, after inspection of such intimation, the central government has any reasonable cause to believe that any provision of act has been, or is being, contravened, the central government may, by general or special order, authorise such gazetted officer, holding a group a post under the central government or any other officer or authority or organisation, as it may think fit, to audit any books of account kept or maintained by such person.
Every candidate for election, who had received any foreign contribution, at any time within one hundred and eighty days immediately preceding the date on which he is duly nominated as such candidate, shall give, within such time and in such manner as may be prescribed, an intimation to the central government or prescribed authority or both as to the amount of foreign contribution received by him, the source from which, and the manner in which, such foreign contribution was received and the purposes for which and the manner in which such foreign contribution was utilised by him.

Any offence punishable under this act (whether committed by an individual or association or any officer or employee thereof), not being an offence punishable with imprisonment only, may, before the institution of any prosecution, be compounded by such officers or authorities and for such sums as the central government may, by notification in the official gazette, specify in this behalf.

SELF TEST QUESTIONS

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

The objective of this study lesson is to enable the students to understand
- Concept of Sustainable Development/Sustainable living
- Government Policy regarding environment
- National Conservation Strategy and Policy Statement on Environment and Development
- Power of the Central Government
- Environmental Clearance and Location of Industries
- Environmental Laboratories
- Liability for Pollution

Introduction

Advances in science and technology have, no doubt conferred many benefits on society in the form of better and improved quality of goods at comparatively reasonable prices and in comparatively large quantities. This advent of technology has also brought in its trail the problem of pollution. 'Pollution' in ordinary parlance can be defined to mean the presence of wrong matter in wrong quantity and at wrong place. For instance, storing of huge quantity of industrial gas in tanks may prove useful for production of certain articles but allowing it to escape into atmosphere may prove hazardous to the life and health of people and animals living around. Even otherwise the emissions of smoke, dust and other polluting matter from factories as a result of production process may itself pollute atmosphere which may, though not in the immediate future, in the long run be a potential source of health hazard. Therefore, it is necessary to ensure that there is sufficient checks against pollution.
The term environment denotes totality of all extrinsic, physical and biotic factors affecting the life and behaviour of all living things. It is therefore important that the environment of which land, water, air, human beings, plants and animals are the components, be preserved and protected from degradation to enable maintenance of the ecological balance.

Considering that these natural resources sustain life on the planet being the basis of all our activities, whether agriculture, industry, science or technology, their conservation, both quantitatively and qualitatively, is of vital importance. Protection of the environment has assumed even more importance in recent times with increased industrialization resulting not only in overdrawal of natural resources but also pollution of air, water, flora and fauna. While development is essential to every economy, it is also essential that no irreparable damage is caused to the eco-system. Hence, the approach would necessarily be that of sustainable development to balance the exigencies of industrial growth against the trade offs in environmental concerns.

Concept of Sustainable Development

Universe is one of the rarest gift that the nature has given to the human being. Even after prolonged experiments the scientist could not establish, that human can survive in any other planet except earth. Therefore humanity must live within the carrying capacity of the earth. It is essential for the people who live now to use the resources of earth sustainably and prudently so that they do not deny certain benefits to future generations. Modern states use the natural resources of the earth recklessly. This will result that the Earth will not be able to support everyone unless there is less waste and extravagance. We should, therefore have, a new approach to future, that is, to secure a widespread and deeply held commitment for sustainable living. We have to integrate conservation and development, conservation to keep our actions within the earths capacity and development to enable the people everywhere to enjoy long, healthy and fulfilling lives.

The concept of sustainable development was first highlighted at the United Nations Conference on the Human Environment held at Stockholm in June, 1972. Since then, various countries such as Japan, US, France, Germany, etc. besides India, have enacted legislative measures for protection of the environment introducing strict penal measures for damages caused due to hazardous substances, etc. Various international conferences have been held on the subject of environmental planning etc. the recent one being the 'The United Nations Conference on Environment and Development popularly known as the Earth Summit held at Rio De Jeneiro in Brazil in June, 1992 which aimed at focusing the attention of the world on problems of our environment and look for ways in which these can be avoided in future. India too has been an active participant at these conferences.

Principles of Sustainable Living

The principles of sustainable development as laid down in strategy for sustainable living, focus on respect and care for the community of life, improving the quality of human life, conserving the earth’s vitality and diversity, minimizing the depletion of non-renewable resources, keeping within the earths carrying capacity,
changing personal attitudes and practices, enabling communities to care for their own environments, providing a natural framework for integrating development and conservation. In addition to the above, more familiar sectors of environment and policy which requires attention are, energy, business, human settlements, fresh water, oceans and coastal areas etc.

How can we achieve this? An ethic based on respect and care for each other and for Earth is the foundation of sustainable living. Development ought not to be at the expense of other groups or later generations. Development should not threaten the survival of other species. The benefits and costs of resource use and environmental conservation should be shared fairly among different communities, among people who are poor and those who are rich and between the present and the future generation.

The other aspect is the improvement of quality of human life. The aim of development is to improve the quality of human life. It should enable people to realize their potential and lead lives of dignity and fulfilment. Economic growth is part of development but it cannot be a goal in itself. Some of universally accepted goals are, healthy life, education, access to the resources needed for a decent standard of living, political freedom etc.

Most important principle of the sustainable development is to conserve the earth's vitality and diversity. Development must be conservation based. It must protect the structure, functions and diversity of the world's natural systems on which our species depends. To this end, we need to conserve life support system, conserve biodiversity and ensure that the use of renewable resources is sustainable. This object can be achieved only if the pollution is prevented. Governments should initiate preventive action by minimizing wherever possible discharges of substances that could be harmful. To use biological resources sustainably, we have to regulate the harvest system on the basis of careful study of stocks so that any over use can be corrected. Efforts should be initiated to minimize the depletion of non-renewable resources like minerals, oil, gas and coal, while these cannot be used sustainably, their life can be extended. This can be done by using less of such resource to make a particular product or by switching to renewable substitutes wherever possible. This is essential if the earth is to sustain billions of more people in future.

Scientists and environmentalists warn that there are finite limits to the carrying capacity of the earths ecosystems. The limits vary from region to region and the impacts depend on how many people are there, and how much food, water, energy and raw material each person uses and wastes. Policies that bring human numbers and life styles into balance with the earth's carrying capacity must be complemented by technologies that enhance that capacity by careful management.

Information must be disseminated through formal and informal education so that actions needed are widely understood. Communities and local groups provide the earliest channels for people to express their concern and take action to create security-based sustainable societies. However, such communities need the authority, power and knowledge to act. People who organise themselves to work for sustainability in their own communities can be an effective force whether their community is rich, poor, urban, sub-urban or rural. All societies need a foundation of information and knowledge, a framework of law and institutions and consistent
economic and social policies if they are to advance in a rational way.

Global sustainability depends upon a firm alliance among all countries. But levels of development in world are unequal and the lower income countries must be helped to develop sustainability and to protect their environments. The ethic of care applies at the international, national as well as individual levels. No nation is self sufficient. All tend to gain from worldwide sustainability and all are threatened if we fail to attain it.

The lower income countries must develop their industry to escape from acute poverty and achieve sustainability. We must adopt practices that build concern for the earth into the structure of business, industry and commerce, we need to introduce processes that minimize the use of raw materials and energy, reduce waste and prevent pollution.

As regards the human settlement, in all countries, changes in the city design, transport systems and resource use are essential to ensure sustainability. More people are hungry now than before, large areas are affected by land degradation resulting from misuse. The increased food requirement to meet the needs of twice as many people must come largely from better use of land already farmed.

Life on earth depends on water but water mismanagement is reducing agricultural productivity, spreading disease and endangering ecological balance. The oceans cover more than two thirds of the placement surface. The coastal zones are increasingly polluted from the adjacent land that impair ecological function and reduce yield of sea products.

It is therefore high time that we have to care for the earth. The challenges we face cannot be solved overnight by some new vision. Action by governments and strengthened international institutions is of primary importance and the attitudes and practices of individuals also count as much.

Government Policy Regarding Environment

The survival and well being of a nation depend on sustainable development. It is a process of social and economic betterment that satisfies the needs and values of all interest groups without foreclosing further options. In the past, we had a great tradition of environment conservation which taught us to respect nature and to take cognizance of the fact that all forms of life-human, animal and plant are closely interlinked and that disturbance in one gives rise to an imbalance in others. This principle is included in the Directive Principles in the Constitution of India. It states that States shall endeavour to protect and improve the environment and to safeguard the forests and wildlife in the country and to protect and improve the natural environment including forests, lakes and rivers and wild life and to have compassion for the living creatures.

Governments National Conservation Strategy and the Policy Statement on Environment and Development is in response to the need for laying down the guidelines to help weave environmental considerations into the fabric of national life and development process. It is an expression of governments commitment for reorienting and action in unison with the environment perspective.
Environmental protection in India – Regulatory framework

In India, as in other developing countries, the environmental problems are not confined to side affects of industrialisation but reflect the inadequacy of resources to provide infrastructural facilities to prevent industrial pollution. Other peculiar problems like population, illiteracy and unemployment obviously also pose questions regarding provisions of food, water, shelter and sanitation.

Though the Indian Penal Code, 1860 contains penal provisions for corrupting or fouling the water or spring or reservoir so as to make it less fit for the purpose for which it is ordinarily used as well as for vitiating the atmosphere so as to make it noxious to the health of any person etc. A number of other Central and State laws covering boilers, dangerous drugs, radiation, forests, etc. were enacted during the middle of the 20th century, however the legislative and administrative measures directed specifically at protection of the environment were introduced in the 1970s and 1980s.

The five-year plans and the Industrial Policies devoted attention to the orderly development of industries, conservation of forests, resources, urban and rural water supply and sanitation, health, and environment with considerable stress on development of industries in backward areas to ensure balanced regional development though no specific attention was paid to the control of pollution problems. However, the Industrial Policy Statement of 1980 laid emphasis on pollution control, and preservation of ecological balance. The locational policy adopted by the Government also had a beneficial impact on balancing regional development and reducing environment pollution in highly industrialised areas.

In 1972, the Department of Science and Technology set up a National Committee on Environmental Planning and Coordination to identify and investigate problems of preserving or improving the human environment and also to propose solutions for environmental problems. In 1977, by an amendment to the Constitution, Article 48A was introduced imposing a duty on the State to protect and improve the environment and safeguard the forests and wildlife of the country. Article 51A also, provides for the protection and improvement of the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.

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In 1986, the Government enacted the Environment Protection Act to provide for
the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property.

THE ENVIRONMENT (PROTECTION) ACT, 1986

Although various legislations dealt with several environmental matters, their focus was either on specific type of pollution or on specific categories of hazardous substances, some major environmental hazards were not covered by these enactments. Moreover, control mechanisms against build up of hazardous substances and linkages in handling matters of industrial and environmental safety were inadequate. Therefore, the need was felt for a general legislation for environmental protection, to further implement the decisions of the Stockholm Conference which would inter alia, enable co-ordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening environment and deterrent punishment to those who endanger human environment, safety and health. In view of the above, the Government in 1986 enacted the Environment Protection Act.

Environment Protection Act, 1986 to provide for the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property.

Scope and Scheme of the Act

The Act come into force on 19.11.1986 and extends to the whole of India. The Act fixes responsibility on persons carrying on industrial operations or handling hazardous substances to comply with certain safeguards for the prevention, control and abatement of environmental pollution and also enjoins upon them responsibility to furnish certain information to the authorities in certain cases. The Central Government has been granted general powers for taking all necessary measures for protecting the quality of the environment, for laying down standards for emission or discharge of environmental pollutants, and safeguards for prevention of accidents and in respect of handling hazardous substances, requiring persons to furnish certain information, issuing directions to persons, planning nationwide pollution control programmes and co-ordination of the actions of various agencies and authorities etc.

DEFINITIONS

Section 2 contains definitions of various terms used in the Act. Some of the important definitions are reproduced below:

Environment

In terms of Section 2(a) the definition of Environment include water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.
Environment pollutant

The term Environment Pollutant has been defined under Section 2(b) as to mean any solid, liquid or gaseous substance present in such concentration as may be, or tend to be injurious to environment.

Environmental Pollution

Section 2(c) defines the term Environmental Pollution, as to mean the presence in the environment of any environmental pollutant.

Handling

The term Handling in relation to any substance has been defined under Section 2(d), as to mean the manufacture, processing, treatment, package, storage transportation, use, collection, destruction, conversion, offering the sale, transfer or the like of such substance.

Hazardous substance

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

Occupier

The term Occupier in relation to any factory or premises has been defined to mean a person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.

General Powers of the Central Government

The Central Government has been granted general powers under Section 3 to take all such measures as it deems necessary, for protecting and improving the quality of the environment and for preventing, controlling and abating environmental pollution. Such measure include with respect to all or any of the following matters:

(i) coordinating the actions of various State Governments, officers and authorities under this Act or rules made thereunder or under any other law concerning environmental pollution;

(ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;

(iii) laying down standards for the quality of environment;

(iv) laying down standards for emission or discharge of environmental pollutants (different standards may be laid down for different sources of emission or discharge of environmental pollutants);

(v) restricting the carrying on of industries, operations or processes in certain areas or permitting them to be carried out subject to certain safeguards;

(vi) laying down procedures and safeguards for the prevention of accidents which
may cause environmental pollution and remedial measures for such accidents;

(vii) laying down procedures and safeguards for the handling of hazardous substances;

(viii) examining manufacturing processes, materials and substances as are likely to cause environmental pollution;

(ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(x) inspecting any premises, plant, equipment, machinery, manufacturing process, materials, etc. and issuing directions to any person officer or authority etc. to take steps for the prevention, control and abatement of environmental pollution;

(xi) establishing or recognising environmental laboratories;

(xii) collecting and disseminating information relating to environmental pollution;

(xiii) preparing manuals, codes, guides etc. to prevent control and abate environmental pollution;

(xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of the Act.

The Central Government is also empowered under Section 3(3) to constitute by order one or more authorities for exercising and performing such powers and functions of the Central Government as may be specified in the order.

Power to Appoint Officers etc.

Section 4 empowers the Central Government to appoint officers and entrust them with certain powers and functions. The authorities and officers so constituted or appointed shall be subject to the general supervision, direction and control of the Central Government.

Power to Issue Directions

In terms of Section 5 of the Act the Central Government may also, in exercise of its powers and performance of its functions, issue any directions in writing to any person, officer or authority including directions for closure, prohibition or regulation of any industry, operation or process or stoppage or regulation of the supply of electricity or water or any other service.

Power to Make Rules

Section 6 empowers the Central Government, to make rules for all or any of the matters listed in Section 3. These rules may provide for all or any of the following matters:

(a) the standards of quality of air, water or soil for various areas and purposes;
(b) the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas;

(c) the procedures and safeguards for the handling of hazardous substances;

(d) the prohibition and restrictions on the handling of hazardous substances in different areas;

(e) the prohibition and restrictions on the location of industries and the carrying on of processes and operations in different areas;

(f) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing of remedial measures for such accident.

Section 25 also empowers the Central Government to make rules for carrying out the purpose of the Act. These rules may provide for all or any of the following matters:

(a) the standards in excess of which environmental pollutants shall not be discharged or emitted under Section 7;

(b) the procedure in accordance with and the safeguards in compliance with which hazardous substances shall be handled or cause to be handled under Section 8;

(c) the authorities or agencies to which intimation of the fact of occurrence or apprehension of occurrence of the discharge of any environmental pollutant in excess of prescribed standards shall be given and to whom all assistance shall be bound to be rendered under Sub-section (1) of Section 9;

(d) the manner in which samples of air, water, soil or other substance for the purpose of analysis shall be taken under Sub-section (1) of Section 11;

(e) the form in which notice of intention to have a sample analysed shall be served under clause (a) of Sub-section (3) of Section 11;

(f) the functions of the environmental laboratories, the procedure for the submission to such laboratories of samples of air, water, soil and other substances for analysis or test; the form of the laboratory report; the fees payable for such report and other matters to enable such laboratories to carry out their functions under Sub-section (2) of Section 12;

(g) the qualifications of Government Analyst appointed or recognised for the purpose of analysis of samples of air, water, soil or other substances under Section 13;

(h) the manner in which notice of the offence and of the intention to make a complaint to the Central Government shall be given under clause (b) of Section 19;

(i) the authority or officers to whom any reports, returns, statistics, accounts or any other information shall be furnished under Section 20;

(j) any other matter which is required to be, or may be, prescribed.

In exercise of its powers under Section 6 and Section 25 the Central Government
has framed the Environment (Protection) Rules, 1986 vide a Notification dated November 19, 1986. The Central Government has also, in exercise of the powers conferred on it by Sections 6, 8 and 25 of the Act, notified the following rules, viz.:

(1) The Hazardous Wastes (Management and Handling) Rules, 1989, and


Nature and Type of Regulation

Chapter III of the Act, comprising Sections 7 to 17 contains provisions for the prevention, control and abatement of environmental pollution.

Standards of Emission

Section 7 prohibits carrying on of any industry, operation or process which discharges or emits, any environmental pollutant in excess of prescribed standards.

Schedule I to the Environment Protection Rules, 1986 specifies the standards for emission or discharge of environmental pollutants. However, the Central/State Boards [constituted under Sections 3 and 4 respectively of the Water (Prevention and Control of Pollution) Act, 1974], have been empowered to prescribe more stringent standards in respect of any specific industry, operation or process. These standards are to be complied within a period of one year of being specified unless the Central/State Board has specified a lesser period or the Central Government has specified any other period in respect of any specific industry, operation or process.

In terms of Section 8 no person is authorised to handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed.

Obligation to Furnish Information

Section 9 casts upon certain persons an obligation to furnish information to authorities and agencies in cases where the discharge of any environmental pollutant is in excess of the prescribed standards occurs or is apprehended to occur due to any accident or other unforeseen act or event. The person responsible for such discharge and the person in charge of the place at which such discharge occurs or is apprehended to occur are not only be bound to prevent or mitigate the environmental pollution caused as a result of such discharge but also to intimate the fact of such occurrence or apprehension of such occurrence to prescribed authorities or agencies and render all assistance to such authorities if called upon to do so. On receipt of such information, the authorities concerned are required to take the necessary remedial measures and the expenses, if any, incurred, in respect thereof may be recovered from the person concerned as arrears of land revenue or of public demand.

Power to Enter, Inspect, Take Samples etc.

The powers of entry and inspection are provided under Section 10 of the Act. Accordingly any person empowered by the Central Government in this behalf has been authorised to enter at all reasonable times, any place for the purpose of

(a) performing any of the functions entrusted to him;
(b) determining whether and if so in what manner, any such functions are to be performed;

(c) determining whether any of the provisions of the Act or rules make thereunder or any notice, order, directions etc. issued under the Act is being or has been complied with;

(d) examining or testing any equipment, industrial plant, record, register document etc. or for conducting a search of any building in which an offence under this Act has been committed or apprehended to be committed. Such a person would also have the right to seize any equipment, industrial plant, record, register, document etc. if he has reason to believe that it may furnish evidence of the commission of an offence punishable under the Act or any rules made thereunder or if he believes that such seizure is necessary to prevent or mitigate environmental pollution.

Section 10(2) obliges every person carrying on any industry, operation or process handling any hazardous substance, to render all assistance to the person empowered by the Central Government for carrying out his functions under the Act and failure to do so without any reasonable cause or excuse, renders him guilty of an offence. In terms of Section 10(3), any person willfully delaying or obstructing any person empowered under Section 10(1) in the performance of his functions, shall also be guilty of an offence.

The Central Government or any officer empowered in this behalf, is authorised under Section 11 of the Act to take, for the purpose of analysis, sample of air, water, soil or other substances from any factory, premises or other place in such manner as may be prescribed. However, the power of the person collecting samples is subject to fulfilment of following requirement:

(i) a notice of the intention to have the sample so analysed is served on the occupier or his agent or the person in charge of place;

(ii) the sample is collected in the presence of the occupier or his agent or the person in charge;

(iii) the container(s) in which the sample has been placed is marked and sealed and signed both by the person taking the sample and the occupier or his agent or the person in charge;

(iv) the samples are sent to the environmental laboratories without any delay [Section 11(3)].

However, in the event of the occupier or his agent or the person-in-charge willfully absenting himself, or being present, refuses to sign the sealed and marked containers bearing the sample, the person taking the sample may cause the container(s) to be sealed, marked and signed by him before sending it to the environmental laboratory and shall inform the Government analyst in writing, about the wilful absence of, or refusal to sign by, the occupier, his agent, or the person in charge.

The procedure for taking samples, service of notice to the occupier, his agent or
the person in charge, submission of samples for analysis, and the form of the laboratory report are provided for in the Environment (Protection) Rules, 1986.

**Environmental Laboratories**

Section 12 of the Act empowers the Central Government to establish by notification in the official Gazette, one or more environmental laboratories or recognise one or more laboratories or institutes as environmental laboratories to carry out certain functions under the Act.

**Functions of Environmental Laboratories**

Rule 9 of the Environment (Protection) Rules, 1986 specified the following functions of environmental laboratories:

(i) To evolve standardised methods for sampling and analysis of various types of environmental pollutants;

(ii) To analyse samples sent by the Central Government or the Officers empowered under Sub-section (1) of Section 11;

(iii) To carry out such investigations as may be directed by the Central Government to lay down standards for the quality of environment and discharge of environmental pollutants, to monitor and to enforce the standards laid down;

(iv) To send periodical reports regarding its activities to the Central Government;

(v) To carry out such other functions as may be entrusted to it by the Central Government from time to time.

These rules also specify the procedure for submission of samples to the laboratories for analysis/tests, form of the laboratory report, fees payable therefor etc.

The Central Government has also been empowered to appoint or recognise, by notification in the Official Gazette, such persons having the prescribed qualifications as Government analysts for the purpose of analysis of samples of air, water, soil or other substances sent to the environmental laboratories. The qualifications of a Government analyst have been prescribed in the Environment (Protection) Rules, 1986. As per the provisions of Section 14, any document purporting to be a report signed by a Government analyst may be used as evidence of facts in any proceeding under Act.

**Offences and Penalties**

**Offences by Companies**

Section 16 deals with offences by the companies and provides that where any offence has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, and the company itself, shall be deemed to be guilty of the offence and shall be liable to be proceeded against. When an offence has been committed by a company, and it is proved that the offence was committed with the consent or connivance of any director, manager, secretary or other officer of the company, such director, manager, secretary or other
officers shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

**What are the consequence if offences conducted by Government Department?**

In the case of an offence committed by any department of the Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Where it is proved that the offence committed by a Government Department has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer other than the Head of the Department, such officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

**Penalties**

Section 15 makes contravention of any of the provisions of the Act or any rules made or, orders, directions issued thereunder, punishable with imprisonment upto 5 years or with fine upto Rs. 1 lakh or with both. An additional fine of Rs. 5,000 would also be leviable for every day of continuing default. Sub-section (2) of Section 15 further provides that where such contravention continues beyond a period of one year from the date of conviction, the offender shall be punishable with imprisonment upto seven years.

**Environmental Clearance and Location of Industries**

Rule 5 of the Environment Protection Rules, 1986, read with Section 3(1) and Section 3(2) empowers the Central Government to prohibit or restrict the location of industries and carrying on of processes and operations in different areas, after taking into consideration factors, such as standards for quality of environment in an area, the maximum allowable limits of concentration of environmental pollutants (including noise) for an area, the likely emission or discharge from the proposed industry, process or operation, the topographic and climatic features of an area, the net adverse environmental impact likely to be caused by the proposed industry process, or operation, the proximity of the proposed project to protected areas and human settlements, etc.

In exercise of the powers under Sections 3(1) and 3(2)(v) of the Act and Rule 5, the Ministry of Environment and Forests has issued notifications restricting location of any industry, mining operations, cutting of trees, grazing by cattle in certain areas, construction of any clusters of dwelling units, farm houses, roads etc. and electrification in the Aravalli range (vide notification dated 9.1.1992). Any person wishing to undertake any of these operations in the said area is required to submit an application in the prescribed form along with an Environment Impact Assessment and an Environmental Management Plan. It has also been notified that the setting up of any new industrial project or the expansion or modernisation of any existing industry shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central or any State Government, as the case may
be. Clearance would be so accorded only on the basis of an Environmental Impact Assessment of the project and the necessary Environmental Management Plan for the prevention, elimination or mitigation of the adverse impacts, right from the inception stage of the project. (vide notification dated 29.1.1992).

Requirements and Procedure for Seeking Environment Clearance of Projects

Any person desirous to undertake any project in any part of India or the expansion or modernisation of any existing industry or project listed in Schedule I shall make an application in the prescribed proforma complete in all respect to the Secretary, Ministry of Environment and Forests, New Delhi.

Environmental Audit

Rule 14 of the Environment Protection Rules, 1986 inserted w.e.f. 13.3.1992 provides for the submission of environmental audit report. Accordingly, every person carrying on an industry, operation or process requiring consent under Section 25 of the Water (Prevention and Control of Pollution) Act or Section 23 of the Air (Prevention and Control of Pollution) Act or both or authorisation under the Hazardous Wastes (Management and Handling) Rules, 1989 is required to submit an environmental audit report in Form V (inserted in the Rules) for the financial year ending on 31st March every year on or before the 15th of May, beginning 1993 to the concerned State Pollution Control Board.

LIABILITY FOR POLLUTION

Liability for pollution, whether the pollution is caused by individual or by a corporation, may be civil or criminal. Civil liability refers to what is known as tortious liability. A tort is a civil wrong for which the ordinary remedy is damages. The duty breached by the wrong-doer is not one owed to any particular person but owed to all persons in general who are likely to be affected by the particular wrongful conduct. Of the various species of torts, negligence is the most directly related tort in the field of pollution. Sometimes the tort applicable in case of pollution may be that of public nuisance.

The 1861 ruling of the English Court in Rylands v. Fletcher provides that the person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep so at his peril and if he fails to do so, is prima facie liable for the damage. The liability under this rule is strict and it is no defence that the thing escaped without that persons wilful act, default or neglect or that he had no knowledge of its existence. This rule laid down the principle of liability that if a person brings on his land and collects and keeps there anything likely to do harm and such thing escaped causing damage to another, he is liable to compensate for the damage caused. This rule applied only to non natural user of land and it did not apply to things naturally on the land or where the escape is due to an act of God, or an act of a stranger or the default of the person injured or where a thing which escapes is present by the consent of the person injured or where there is a statutory authority for doing such act.

Where liability is sought to be assigned against a person for an unintentional wrong on the basis of negligence it must be proved that the defendant owed a duty of
care towards the plaintiff. Generally a person is liable only for a tort committed by himself or assisted or encouraged by him or for a tort in which he has participated. However, if an employee commits a tort within the scope of his employment, the employer also becomes liable. This vicarious liability can be attributed against a corporation also for a tort committed by its employee within the scope of its employment. If the corporation has been guilty of tortious conduct, say for example negligence in the management of a factory causing harmful pollution, can director or other officials be made liable to pay the damages for the tort? Although such extension of liability against the director etc. was not known till recently, the Supreme Courts decision in Shri Ram Fertilisers case is a trend setter in this direction.

The pollution laws at present, are so stringent that non-conforming factories may be asked to even close down. The laws further provide that where a State Pollution Control Board does not act in a particular case, the Central Pollution Control Board shall take suitable action in the matter. The enlargement of the powers of the Central as well as the State Board has not been all that welcome to industry. Industry circles feel that the liability under the Environment Protection Act is rather quite absolute in the sense that any person directly in charge of and responsible for conducting the affairs of the company shall be deemed to be guilty and shall be liable to be proceeded against and punished for an environmental offence, thus making a significant departure from the traditional principle of mens rea, and shifting the onus of 'no-guilt on the person concerned.

The Precursor for most stringent provisions in pollution control law is the Supreme Court judgement in *Shriram Foods and Fertilizer Industries and another v. Union of India and Others* [1986] 1 Comp. LJ 25 (SC)]. The Supreme Court considered a writ petition seeking re-commencement of manufacturing operations in the plant especially after the manufacturing operations were ordered to be closed down because of a major leakage of oleum gas. The Supreme Court allowed the re-commencement of manufacturing operations subject to the condition that the chairman and managing director of the company and also the officers who were in actual management of the plant concerned gave an undertaking that in case there was any escape of chlorine gas resulting in death or injury to the people living in the vicinity as well as to any workman, they shall be personally liable for payment of compensation for such death or injury.

Subsequently, the Court relaxed the condition a little, by ordering that an officer who is the ‘occupier of the plant under the Factories Act, 1948, and/or the officer who is responsible to the management for the actual operation of the caustic chlorine plant as its head shall be the officer who would be personally responsible to the extent of his annual salary with allowances for payment of compensation, in case of any death or injury resulting from any gas leak. The Supreme Court, however, clarified that if the escape of gas took place as a result of vis majeur or sabotage or where the officer proves that he had exercised all due diligence to prevent the escape of the gas, he shall be entitled to be indemnified by the company. The court, however, did not relax the stipulation that the chairman and managing director must be held liable to pay compensation in case of any loss or injury due to gas leak. Here also the Supreme Court clarified that there would not be any liability attached to the chairman/managing director if the gas leak was due to an act of God or vis majeur or sabotage.
Supreme Court in M.C. Mehta and Another v. Union of India and others [(1987) 1 Comp. LJ 99 (SC)] ruled that an application for compensation in a pollution case can be maintained under Article 32 of the Constitution, for, such application is for the protection of the fundamental rights of the people and the Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights. On the question of liability of an enterprise engaged in hazardous activities, the Supreme Court laid down for the first time a far-reaching ruling, that an enterprise which is engaged in hazardous or inherently dangerous activity and an industry which poses a potential threat to the health and safety of the persons working in the factory and of those residing in the surrounding area owes an absolute and non-delegatable duty to the community to ensure that no harm results to any one on account of an hazardous or inherently dangerous nature of the activity which it has undertaken. The Court further reiterated that the rule in Rylands v. Fletcher [(1861-73) All.E.R. 146 HL] of strict liability would apply in India but without any exceptions whatsoever recognised in England. The Court also ruled that the measure of compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect.

Subsequently the In recent times criminal liability of corporations in the sphere of pollution has also been going up. One such important case is a ruling of the Supreme Court in U.P. Pollution Control Board v. Modi Distillery (August 6, 1987) 8 Ind. Jud. Reports (SC) 375, in the context of the Water (Prevention and Control of Pollution) Act, 1974.

The respondent, Modi Distillery, was a company established and owned by a large business organisation known as Modi Industries Ltd. for the manufacture and sale of industrial alcohol. In the course of manufacture of industrial alcohol the industrial unit discharged its highly noxious and polluted trade effluents into a nearby river through a drain which is a stream within the meaning of Section 2(j) of the Water (Prevention and Control of Pollution) Act and thereby caused continuous pollution of the stream without the consent of the Board. Under Section 26 of the Act it is mandatory for every existing industry to obtain the consent of the Pollution Control Board for discharging trade effluents into a stream or well or sewer or on land.

The company and its industrial units applied to the Board for the grant of requisite consent to discharge the trade effluents into the stream. But on scrutiny of the application the Board found that it was incomplete in many respects. Drawing the attention of the respondent the Board asked it to make good the defects. Inspite of letters written to respondent no effort was ever made by it to rectify the defects. When the Board asked the respondent for the name of the managing director and directors and other persons responsible for the conduct of the business of the company, it did not furnish the information called for. Two subsequent letters addressed by the Board to the company did not evoke any response whereupon the Board lodged a complaint against the respondent under Section 44 of the Act in the Court of the Chief Judicial Magistrate. The respondent did not appear before the Magistrate.

In an application under Section 482 of the Cr.P.C. for quashing the proceedings,
a single judge of the High Court held that no vicarious liability could be saddled on the chairman and vice-chairman and managing director and other members of the Board of directors of the company under Section 47 of the Act unless there was prosecution of the company, that is, Modi Industries Ltd.

On the question whether the chairman, vice-chairman, managing director and other members of the Board of directors were liable to be proceeded against under Section 47 of the Act in the absence of a prosecution of the company owning the industrial unit, the Supreme Court held that it is quite clear that the company did not have proper arrangement for treatment of the highly polluted trade effluents discharged by it and although the appellant Board repeatedly required the company to obtain the consent of the Board, the company was intentionally and deliberately avoiding compliance of the requirements of Sections 25(1) and 26 of the Act. The contravention of these provisions is an offence punishable under Section 44. The chairman, vice-chairman, managing director and members of the Board of directors of Modi Industries were in charge of and responsible for the conduct of the business of the company and were therefore deemed to be guilty of the offence and liable to be proceeded against and punished under Section 47 of the Act. It would be travesty of justice if the big business house of Modi Industries Ltd. is allowed to defeat the prosecution launched and avoid facing trial on a technical flaw which is not incurable for their alleged deliberate and wilful breach of the provisions contained in Sections 25(1) and 26 made punishable under Section 44 read with Section 47 of the Act.

The Supreme Court in U.P. Pollution Control Board v. Modi Distillery (August 6, 1987) 8 Ind. Jud. Reports (SC) 375, observed that the High Court had failed to bear in mind that this situation had been brought about by the Modi Distillery of Modi Industries Ltd. because inspite of more than one notice given to it, the respondent deliberately failed to furnish the information called for. Having wilfully failed to furnish requisite information, it is now not open to the chairman and other members of the Board of directors to seek the courts assistance to derive advantage from the lapse committed by their own industrial unit.

The High Court had focussed its attention only on the technical flaw in the complaint and had failed to comprehend that the flaw had occured due to the recalcitrant attitude of the respondent and that the infirmity was one which could be easily removed when the matter was remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make formal amendments to the averments in the complaint.

Although as a pure proposition of law in the abstract the High Courts view that there could be no vicarious liability of the chairman and others under Section 47(1) and (2) unless there was a prosecution against Modi Industries Ltd. (the company owning the industrial unit) can be termed as correct, the objection raised by the respondents in the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum.

It is regrettable that although Parliament enacted the Water (Prevention and Control of Pollution) Act, 1974, to meet the urgent need for introducing a comprehensive legislation with its established unitary agencies in the Centre and
States to provide for the prevention, abatement and the control of pollution of rivers and streams for maintaining or restoring wholesomeness of water resources and for controlling the existing and new discharges of domestic and industrial wastes, which is a matter of great national concern, the manner in which some of the Boards are functioning leaves much to be desired. This is an instance where due to the sheer negligence on the part of the legal advisors in drafting the complaint a large business house was allowed to escape the consequences of the breaches committed by it of the provisions of Act with impunity. (The error pointed out in drafting was that instead of launching prosecution against Modi Industries Ltd. the appellant Board impleaded its industrial unit Modi Distillery as respondent and this was the ground on which the High Court quashed the complaint).

**LESSON ROUND UP**

- The term environment denotes totality of all extrinsic, physical and biotic factors affecting the life and behaviour of all living things. It is therefore important that the environment of which land, water, air, human beings, plants and animals are the components, be preserved and protected from degradation to enable maintenance of the ecological balance.

- The principles of sustainable development as laid down in strategy for sustainable living, focus on respect and care for the community of life, improving the quality of human life, conserving the earth’s vitality and diversity, minimizing the depletion of non-renewable resources, keeping within the earth’s carrying capacity, changing personal attitudes and practices, enabling communities to care for their own environments, providing a natural framework for integrating development and conservation.

- Environment Protection Act to provide for the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property.

- Environment include water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.

- Central Government to establish by notification in the official Gazette, one or more environmental laboratories or recognise one or more laboratories or institutes as environmental laboratories to carry out certain functions under the Act.

- Liability for pollution, whether the pollution is caused by individual or by a corporation, may be civil or criminal.
SELF TEST QUESTIONS

1. Briefly explain the objective of Environment Protection Act, 1986?
2. Enumerate the powers and functions of Central Government?
3. Write short notes on sustainable development.
4. Explain Environmental Audit.
5. Describe functions of Environment Laboratory.
SECTION II
PUBLIC LIABILITY INSURANCE ACT, 1991

LEARNING OBJECTIVE
The objective of this study lesson is to enable the students to understand
- Objective
- Hazardous Substance
- Liability to give relief
- Compulsory Insurance
- Establishment of Environment Relief Fund
- Power of the Central Government
- Offences and Penalty

The Public Liability Insurance Act, 1991, has been enacted for providing immediate relief to the persons affected by accidents occurring while handling any hazardous substance and for other incidental and connected matters.

The growth of hazardous industries, processes and operations in India has been accompanied by growing risks of accidents, not only to the workmen of such undertakings, but also members of the public in the vicinity. Whereas the workers are generally protected under the Workmen’s Compensation Act and the Employees’ State Insurance Act, members of the public who may be victims are not assured of any relief except through long-drawn legal processes. Considering that majority of the affected people belong to weaker sections of the society, and very limited resources available with them to go through legal proceedings, this Act provides for Mandatory Public Liability Insurance to be taken by companies for installations handling any hazardous substance notified under the Environment Protection Act.

Therefore, every owner, before starting handling any hazardous substance, have to take out one or more policies to cover the liability of providing immediate relief on a specified scale to any person who suffers injury or damages to property or, in the event of death, to the legal heirs of the deceased.
Application for relief is to be made by the applicant to the Collector within 5 years of the accident, who, after giving notice to the owner and the insurer and giving the parties an opportunity of being heard, shall make the award determining the amount of relief payable. The victim will however be free to approach the Court for higher compensation.

Definitions

Section 2 of the Act contains definitions of the terms used in the Act. The definitions of important terms such as Accident, Hazardous Substance, Handling, and the owner, are given below:

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

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

**What do you mean by Hazardous Substance under Environment (Protection) Act, 1986?**

The term Hazardous Substance under Section 2(e) Environment (Protection) Act, 1986 means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings, other living creatures, micro-organism, property or the environment.

**Electricity, whether hazardous?**

In UP Electricity Board and Another vs. District Magistrate, Dehradun and Others (AIR 1998 All LJ 1). Allahabad High Court observed that Electricity is hazardous substance covered by definition under section 2(d) of the Act. Electricity is the flow of free electrons in a particular direction at the particular moment. The flow can be any wire or even an atmosphere like lightning or in body or in other body. The electron is very small and it has been discovered by the scientist that an electron is a pins about an excess and it has got organic field. The electron is thus a material article and electricity is the flow of all these material particular in particular direction. The flow consequently is the flow of matter having physico chemical properties like when passed through water, it separate the hydrogen form the Oxygen atoms (electrolysis). Thus electricity is a substance having physico chemical process and also hazardous. Accordingly it is hazardous substance covered by definition under the Act.
Handling in relation to hazardous substance has been defined under Section 2(c) to include manufacture, processing, treatment, package, storage, transportation by vehicle, use, collection, destruction, conversion, offering for sale, transfer or the like of such hazardous substance.

Owner under Section 2(g) means a person who owns or has control over handling any hazardous substance at the time of accident and include partners of a firm, members of an association and in the case of a company, its directors, managers, secretaries, or other officers who is directly incharge of and is responsible to, the company for the conduct of its business.

Liability to give Relief

Section 3 of the Act incorporates the principle of liability without fault and imposes on the owner liability to give relief in case of death or injury to any person or damage to any property, resulting from an accident occuring while handling any hazardous substance. For the purposes of Section 3, injury includes permanent total or permanent partial disability or sickness resulting out of an accident.

Compulsory Insurance

Section 4 requires the owner to take out one or more insurance policies, before starting the handling of hazardous substance. Such insurance policy should provide for contract of insurance, whereby he is insured against liability to give relief under Section 3(1) of the Act. The amount of insurance policy should not be less than the amount of paid up capital of the undertaking handling any hazardous substance and more than the amount, not exceeding rupees fifty crore, as may be prescribed.

Verification and Publication of Accident

Section 5 of the Act requires the collector to verify, whenever it comes to his notice that an accident has occured at any place within his jurisdiction, the occurrence of such accident and cause publicity to be given in such manner as he deems fit for inviting applications for claim for relief as provided under Section 6(1) of the Act.

Application for Claim for Relief

Section 6 deals with manner of making application for claim for relief and provides that an application for claim for relief may be made by the person who has sustained injury; by owner of the property to which damage has been caused; and in the case of death resulting from accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by such person or owner of such property. Every application is required to be submitted to collector in the prescribed form alongwith prescribed documents.

Award of Relief

Section 7 of the Act requires the collector, on receipt of application for claim for relief, to hold an inquiry into the claim or each of the claims, after giving notice of application to owner and after giving the parties an opportunity of being heard and make an award determining the amount of relief payable to person or persons. Sub-section (3) requires the insurers to deposit, within 30 days from the date of announcement of the award, the amount in such manner as specified by the
collector. The collector than arrange to pay from the relief fund to the person or persons such amount in such manner as may be specified in the scheme.

**Immediate – defined?**

In Uttar Pradesh Power Corporation Ltd. & Anr. Vs. Kaliemullah & Ors (AIR 2010 Allahabad 117). Allahabad High Court (Lucknow Bench) held that if the objective of the Act is providing immediate relief is to be achieved, the mandatory public liability insurance should be on the principle of "no fault" liability as it is limited to only relief on a limited scale. However, availability of immediately relief would not prevent the victims to go to Courts for claiming larger compensation. Compensation under no fault liability may be paid by The Collector after due investigation even if no application is moved by the victim who suffered injury or is the dependant of the deceased. In case the provision contained in sub-section (1) of section 3 are interpreted otherwise with regard to award of compensation under no fault liability, then it shall frustrate the very object of the Act with regard to persons who are downtrodden, illiterate or have got no skill, knowledge or capacity to approach the authority for payment of compensation under the Act.

**Establishment of Environment Relief Fund**

Section 7A of the Act empowers the Central Government to establish Environment Relief Fund, by notification in the official Gazette, to be utilised for paying relief under the award made by the collector under Section 7 of the Act.

**Power to Call for Information, Entry and Inspection etc.**

Sections 9, 10 and 11 deal with certain powers for calling for information, entry and inspection and search and seizure. The owner of hazardous installation has been put under obligation to submit to a person authorised by the Central Government such information as that person reasonably thinks necessary for the purpose of ascertaining whether any requirements of the Act, rule or directions made thereunder have been complied with. Any person, authorised by the Central Government under the provisions of Section 10 can rightfully, enter at all reasonable times with the necessary assistance, any place, premises, or vehicle where hazardous substance is handled for determining whether any provision of the Act, rule or direction made thereunder has been complied with. The owner must render all assistance to such persons.

Besides, if a person authorised by the Central Government has reason to believe that handling of any hazardous substances is taking place in any place, premises or vehicle, contravening the provisions of Section 4(1) of the Act, he may search such place, premises or vehicle, and may seize such hazardous substances, the handling of which have been found to have taken place. Such authorised person may also disposed of seized hazardous substances, if in his opinion it is expedient to prevent an accident. The expenses incurred in disposing of such hazardous substances shall be recoverable from the owner.

**Power to Give Directions**

Under Section 12, the Central Government has been empowered to issue
directions in writing as it may deem fit to any owner or any person, officer, authority or agency. The power of the Central Government to give directions may include the power to direct prohibition or regulation of the handling of any hazardous substance, or stoppage or regulation of the supply of electricity, water or any other service.

**Offences and Penalties**

Sections 14 to 18 deal with offences, penalties and procedural provisions connected therewith. The penalties in the case of serious lapses like contravention of any provisions of Sub-section (1) or Sub-section (2) of Section 4 (not taking insurance policies), or failure to comply with any direction issued under Section 12 (in regard to prohibition or regulation of the handling of any hazardous substance or stoppage of supply of electricity, water etc.) are imprisonment for a minimum period of one year and six months but which may extend to six years, or with fine, which shall not be less than one lakh rupees or with both. For second and subsequent offences, the person shall be punishable with the minimum imprisonment of two years but which may extend to seven years and with fine which shall not be less than one lakh rupees.

Additionally lapses like default, in compliance with the directions issued under Section 9 or failure to comply with orders issued under Sub-section (2) of Section 11 or creating obstruction to any person in discharge of his duties under Section 10 or Sub-section (1) or Sub-section (3) of Section 11 shall be punishable with imprisonment which may extend to three months or with fine which may extend to rupees ten thousand or with both.

**LESSON ROUND UP**

- The Public Liability Insurance Act, 1991 enacted for the purpose of providing immediate relief to the persons affected by accidents occurring while handling any hazardous substance and for other incidental and connected matters.

- Every owner, before starting handling any hazardous substance, have to take out one or more policies to cover the liability of providing immediate relief on a specified scale to any person who suffers injury or damages to property or, in the event of death, to the legal heirs of the deceased.

- Collector, on receipt of application for claim for relief, to hold an inquiry into the claim or each of the claims, after giving notice of application to owner and after giving the parties an opportunity of being heard and make an award determining the amount of relief payable to person or persons.

- Central Government to establish Environment Relief Fund, by notification in the official Gazette, to be utilised for paying relief under the award made by the collector.

- Central Government has been empowered to issue directions in writing as it may deem fit to any owner or any person, officer, authority or agency. The power of the Central Government to give directions may include the power to direct prohibition or regulation of the handling of any hazardous substance, or stoppage or regulation of the supply of electricity, water or any other service.
1. Briefly explain Compulsory Insurance.
2. Enumerate the powers and functions of Central Government?
3. Write short notes on Hazardous Substance
4. Explain no fault liability.
5. Describe Compulsory Insurance Policy
SECTION III
THE NATIONAL GREEN TRIBUNAL ACT, 2010

LEARNING OBJECTIVE

The objective of this study lesson is to enable the students to understand

- Hazardous substance
- Establishment of the National Green Tribunal
- Jurisdiction, powers and proceeding of the Tribunal
- Procedure and powers of the Tribunal
- Appeal to the Supreme Court
- Offences, penalties and procedure


The National Green Tribunal Act, 2010 intend to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

DEFINITION

Section 2 contains definitions of various terms used in the Act. Some of the important definitions are reproduced below:

“Accident”

According to clause (a) of Section 2 the term "accident" means an accident involving a fortuitous or sudden or unintended occurrence while handling any hazardous substance or equipment, or plant, or vehicle resulting in continuous or intermittent or repeated exposure to death, of, or, injury to, any person or damage to
any property or environment but does not include an accident by reason only of war or civil disturbance.

"Chairperson"

According to clause (b) of Section 2 the term “Chairperson” means the Chairperson of the National Green Tribunal.

"Environment"

Clause (c) Section 2 defines "environment" to include water, air and land and the inter-relationship, which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property.

"Handling"

As per Section 2(e) "handling", in relation to any hazardous substance, means the manufacture, processing, treatment, package, storage, transportation, use, collection, destruction, conversion, offering for sale, transfer or the like of such hazardous substance.

"Hazardous substance"

Clause (f) Section 2 defines "hazardous substance" as to means any substance or preparation which is defined as hazardous substance in the Environment (Protection) Act, 1986, and exceeding such quantity as specified or may be specified by the Central Government under the Public Liability Insurance Act, 1991.

"Injury"

Clause (g) Section 2 defines "injury" to include permanent, partial or total disablement or sickness resulting out of an accident.

"Person"

As per Section 2(j) the term “person” includes—

(i) an individual,
(ii) a Hindu undivided family
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated or not,
(vi) trustee of a trust,
(vii) a local authority, and
(viii) every artificial juridical person, not falling within any of the preceding sub-clauses.

"Substantial question relating to environment"

According to clause (m) of Section 2 the term “substantial question relating to environment” shall include an instance where,—

(i) there is a direct violation of a specific statutory environmental obligation by a person by which,—

(A) the community at large other than an individual or group of individuals is
affected or likely to be affected by the environmental consequences; or
(B) the gravity of damage to the environment or property is substantial; or
(C) the damage to public health is broadly measurable;
(ii) the environmental consequences relate to a specific activity or a point source of pollution.

"Tribunal"

According to clause (n) of Section 2 the term "Tribunal" means the National Green Tribunal established under section 3.

ESTABLISHMENT OF THE TRIBUNAL

Section 3 of the Act empowers the Central Government, by issue of notification, to establish, a Tribunal to be known as the National Green Tribunal to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under the National Green Tribunal Act, 2010.

COMPOSITION OF THE TRIBUNAL

The Tribunal shall consist of a full time Chairperson; and not less than ten but subject to maximum of twenty full time Judicial Members as the Central Government may, from time to time, notify; and not less than ten but subject to maximum of twenty full time Expert Members, as the Central Government may, from time to time, notify.

The Chairperson of the Tribunal may, if considered necessary, invite any one or more person having specialised knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case.

The Central Government may, in consultation with the Chairperson of the Tribunal, make rules regulating generally the practices and procedure of the Tribunal including—

(a) the rules as to the persons who shall be entitled to appear before the Tribunal;
(b) the rules as to the procedure for hearing applications and appeals and other matters [including the circuit procedure for hearing at a place other than the ordinary place of its sitting falling within the jurisdiction of the Tribunal], pertaining to the applications and appeals;
(c) the minimum number of Members who shall hear the applications and appeals in respect of any class or classes of applications and appeals:

Provided that the number of Expert Members shall, in hearing an application or appeal, be equal to the number of Judicial Members hearing such application or appeal;
(d) rules relating to transfer of cases by the Chairperson from one place of sitting (including the ordinary place of sitting) to other place of sitting.

JURISDICTION, POWERS AND PROCEEDINGS OF THE TRIBUNAL

Tribunal to Settle Dispute

Chapter III of the Act deals with jurisdiction, power and proceeding of the
Tribunal. Sub section (1) of Section 14 provides that the Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I to the Act.

**Schedule I specifies following enactments:**

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

**Relief, Compensation and Reconstitution**

Sub-section (1) of section 15 empower the Tribunal, by an order, to provide,—

(a) relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule I (including accident occurring while handling any hazardous substance);

(b) for restitution of property damaged;

(c) for restitution of the environment for such area or areas, as the Tribunal may think fit.

Sub-section (2) prescribes that the relief and compensation and restitution of property and environment referred to in clauses (a), (b) and (c) of sub-section (1) shall be in addition to the relief paid or payable under the Public Liability Insurance Act, 1991.

No application for grant of any compensation or relief or restitution of property or environment shall be entertained by the Tribunal unless it is made within a period of five years from the date on which the cause for such compensation or relief first arose. However, the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days.

The Tribunal may, having regard to the damage to public health, property and environment, divide the compensation or relief payable under separate heads specified in Schedule II so as to provide compensation or relief to the claimants and for restitution of the damaged property or environment, as it may think fit. Every claimant of the compensation or relief under the Act shall intimate to the Tribunal about the application filed to, or, as the case may be, compensation or relief received from, any other court or authority.
Heads under which Compensation or Relief for Damages may be claimed.

The Schedule II to the Act lists out the following heads under which compensation for damages may be claimed:

(a) Death;
(b) Permanent, temporary, total or partial disability or other injury or sickness;
(c) Loss of wages due to total or partial disability or permanent or temporary disability;
(d) Medical expenses incurred for treatment of injuries or sickness;
(e) Damage to private property;
(f) Expenses incurred by the Government or any local authority in providing relief, aid and rehabilitation to the affected persons;
(g) Expenses incurred by Government for any administrative or legal action or to cope with any harm or damage, including compensation for environmental degradation and restoration of the quality of environment;
(h) Loss to Government or local authority arising out of, or connected with, the activity causing any damage;
(i) Claims on account of any harm, damage or destruction to the fauna including milch and draught animals and aquatic fauna;
(j) Claims on account of any harm, damage or destruction to flora including aquatic flora, crops, vegetables, trees and orchards;
(k) Claim including cost of restoration on account of any harm or damage to environment including pollution of soil, air, water, land and eco-system;
(l) Loss and destruction of any property other than private property;
(m) Loss of business or employment or both;
(n) Any other claim arising out of or connected with, any activity of handling of hazardous substance.

Tribunal to have Appellate Jurisdiction

Section 16 provides that any person aggrieved by,—

(a) an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under section 28 of the Water(Prevention and Control of Pollution) Act, 1974;
(b) an order passed, on or after the commencement of the National Green Tribunal Act, 2010, by the State Government under section 29 of the Water (Prevention and Control of Pollution) Act, 1974;
(c) directions issued, on or after the commencement of the National Green Tribunal Act, 2010, by a Board, under section 33A of the Water (Prevention and Control of Pollution) Act, 1974;
(d) an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under section 13 of the Water (Prevention and Control of Pollution) Cess Act, 1977;

(e) an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the State Government or other authority under section 2 of the Forest (Conservation) Act, 1980;

(f) an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the Appellate Authority under section 31 of the Air (Prevention and Control of Pollution) Act, 1981;

(g) any direction issued, on or after the commencement of the National Green Tribunal Act, 2010, under section 5 of the Environment (Protection) Act, 1986;

(h) an order made, on or after the commencement of the National Green Tribunal Act, 2010, granting environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986;

(i) an order made, on or after the commencement of the National Green Tribunal Act, 2010, refusing to grant environmental clearance for carrying out any activity or operation or process under the Environment (Protection) Act, 1986;

(j) any determination of benefit sharing or order made, on or after the commencement of the National Green Tribunal Act, 2010, by the National Biodiversity Authority or a State Biodiversity Board under the provisions of the Biological Diversity Act, 2002,

may, within a period of thirty days from the date on which the order or decision or direction or determination is communicated to him, prefer an appeal to the Tribunal. However, the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

**Liability to pay relief or compensation**

Section 17 provides that where death of, or injury to, any person (other than a workman) or damage to any property or environment has resulted from an accident or the adverse impact of an activity or operation or process, under any enactment specified in Schedule I, the person responsible shall be liable to pay such relief or compensation for such death, injury or damage, under all or any of the heads specified in Schedule II, as may be determined by the Tribunal.

If the death, injury or damage caused by an accident or the adverse impact of an activity or operation or process under any enactment specified in Schedule I cannot be attributed to any single activity or operation or process but is the combined or resultant effect of several such activities, operations and processes, the Tribunal may, apportion the liability for relief or compensation amongst those responsible for such activities, operations and processes on an equitable basis. The Tribunal shall, in case of an accident, apply the principle of no fault.

**Application or Appeal to the Tribunal**

Section 18 states that without prejudice to the provisions contained in section 16,
an application for grant of relief or compensation or settlement of dispute may be made to the Tribunal by—

(a) the person, who has sustained the injury; or
(b) the owner of the property to which the damage has been caused; or
(c) where death has resulted from the environmental damage, by all or any of the legal representatives of the deceased; or
(d) any agent duly authorised by such person or owner of such property or all or any of the legal representatives of the deceased, as the case may be; or
(e) any person aggrieved, including any representative body or organisation; or
(f) the Central Government or a State Government or a Union territory Administration or the Central Pollution Control Board or a State Pollution Control Board or a Pollution Control Committee or a local authority, or any environmental authority constituted or established under the Environment (Protection) Act, 1986 or any other law for the time being in force;

However, where all the legal representatives of the deceased have not joined in any such application for compensation or relief or settlement of dispute, the application shall be made on behalf of, or, for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined shall be impleaded as respondents to the application. It has been classified that the person, the owner, the legal representative, agent, representative body or organisation shall not be entitled to make an application for grant of relief or compensation or settlement of dispute if such person, the owner, the Legal representative, agent, representative body or organization have preferred an appeal under section 16.

Sub section (3) prescribes that the application, or as the case may be, the appeal filed before the Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application, or, as the case may be, the appeal, finally within six months from the date of filing of the application, or as the case may be, the appeal, after providing the parties concerned an opportunity to be heard.

Procedure and Powers of Tribunal

Sub-section (1) of Section 19 prescribes that, the Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice. The Tribunal has been empowered to regulate its own procedure and also not bound by the rules of evidence contained in the Indian Evidence Act, 1872.

Under Sub-section (4), the Tribunal, for the purpose of discharging its functions, has been entrusted with the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) subject to the provisions of section 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
(e) issuing summons for the examination of witnesses or documents;
(f) reviewing its decisions;
(g) dismissing a representation for default or deciding it ex-parte;
(h) setting aside any order or dismissal of any representation for default or any order passed by it ex parte; and
(i) pass an interim order (including granting an injunction or stay) after providing the parties concerned an opportunity to be heard, on any application made or appeal filed under this Act;
(j) pass an order requiring any person to cease and desist from committing or causing any violation of any enactment specified in Schedule I;
(k) any other matter which is required to be, or may be prescribed by the Central Government.

Sub section (5) provides that all proceedings before the Tribunal shall be deemed to be the judicial proceedings within the meaning of sections 193, 219 and 228 for the purposes of section 196 of the Indian Penal Code and the Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

Tribunal to Apply Certain Principle

Section 20 provides that the Tribunal shall, while passing any order or decision or award, apply the principles of
- sustainable development,
- the precautionary principle and
- the polluter pays principle.

Appeal to the Supreme Court

Section 22 states that any person aggrieved by any award, decision or order of the Tribunal, may, file an appeal to the Supreme Court, within ninety days from the date of communication of the award, decision or order of the Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908. However, the Supreme Court may entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal.

PENALTY

Penalty for failure to comply with order of the Tribunal

Section 26 provides that whoever, fails to comply with any order or award or
decision of the Tribunal, shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten crore rupees, or with both and in case the failure or contravention continues, with additional fine which may extend to twenty-five thousand rupees for every day during which such failure or contravention continues after conviction for the first such failure or contravention:

In case a company fails to comply with any order or award or a decision of the Tribunal, such company shall be punishable with fine which may extend to twenty-five crore rupees, and in case the failure or contravention continues, with additional fine which may extend to one lakh rupees for every day during which such failure or contravention continues after conviction for the first such failure or contravention.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence under this Act shall be deemed to be non-cognizable within the meaning of the said Code.

**Offence by Companies**

Section 27 deals with Offence by Companies and provides that where any offence has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However, no person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. Where an offence has been committed by the company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation to Section 27 classifies that—

(a) "Company" means any body corporate and includes a firm or other association of individuals; and

(b) "Director" in relation to a firm means a partner in the firm.

**Offence by Government Department**

Section 28 provides that where any Department of the Government fails to comply with any order or award or decision of the Tribunal, the Head of the Department shall be deemed to be guilty of such failure and shall be liable to be proceeded against for having committed an offence and punished accordingly. However, such Head of the Department shall not be liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Where an offence has been committed by a Department of the Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any officer, other than the Head of the Department, such officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
LESSON ROUND UP

- National Green Tribunal has been constituted for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

- "handling", in relation to any hazardous substance, means the manufacture, processing, treatment, package, storage, transportation, use, collection, destruction, conversion, offering for sale, transfer or the like of such hazardous substance.

- "substantial question relating to environment" includes an instance where,—
  (i) there is a direct violation of a specific statutory environmental obligation by a person by which,—
    (A) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or
    (B) the gravity of damage to the environment or property is substantial; or
    (C) the damage to public health is broadly measurable;
  (ii) the environmental consequences relate to a specific activity or a point source of pollution.

- Tribunal consists of a full time Chairperson; and not less than ten but subject to maximum of twenty full time Judicial Members and not less than ten but subject to maximum of twenty full time Expert Members.

- The Chairperson of the Tribunal may, if considered necessary, invite any one or more persons having specialised knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case.

- Any person aggrieved by any award, decision or order of the Tribunal, may, file an appeal to the Supreme Court, within ninety days from the date of communication of the award, decision or order of the Tribunal, to him.

- The Supreme Court may entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal.

- Whoever, fails to comply with any order or award or decision of the Tribunal, shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten crore rupees, or with both.

- In case a company fails to comply with any order or award or a decision of the Tribunal, such company shall be punishable with fine which may extend to twenty-five crore rupees.

- Every offence under this Act shall be deemed to be non-cognizable within the meaning of the Cr.PC.
SELF TEST QUESTIONS

1. List out the Acts specified in the 1st Schedule to the National Green Tribunal Act?
2. Enumerate the powers and functions of National Green Tribunal?
3. Write short notes on sustainable development.
4. Explain precautionary principle in Pollution Laws.
5. List out the heads under which compensation or relief for damaged may be claimed under the National Green Tribunal Act.
INTRODUCTION

Until the enactment of the Air (Prevention and Control of Pollution) Act, 1981, there was no concerted effort to legally control air pollution. No doubt, some of the States* have had some enactments or the other to control the nuisance arising out of smoke and other emissions from factories but unfortunately the provisions of these enactments were not effectively enforced. Even the State Municipal Acts have not been effective in having sufficient control over air pollution. With a view to meeting the problem in more concrete terms, the Central Government initiated legislation to prevent pollution. The passing of Water (Prevention and Control of Pollution) Act, 1974 was the first step in this direction and subsequently in the year 1981 the Union Government decided to bring in another legislation to prevent air pollution exclusively. Thus came into being the Air (Prevention and Control of Pollution) Act, 1981. It is also

* First ever pollution control law in India was probably brought under the British Rule in 1912. The Bombay Smoke Nuisance Act, 1912 – to control smoke emissions.
necessary at this stage to note that India was one of the participants at the United Nations Conference on Human Environment held in Stockholm, in June 1972. Therefore, in order to give effect to the decisions taken at the conference, to take appropriate steps for the preservation of the natural resources of the earth which, among other things, included the preservation of the quality of air and control of air pollution, the Parliament enacted Air (Prevention and Control of Pollution) Act, 1981.

An Act to provide the prevention, control and abatement of air pollution, for the establishment, with a view to carrying out the aforesaid purposes, of Boards, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

The Act came into force with effect from 16th day of May, 1981. It extends to the whole of India.

The Act, after it come into force, is being implemented by the Central and State Governments and the Central and State Boards. However, during the implementation of the Act, the implementing agencies experienced some administrative and practical difficulties in effectively implementing the provisions of the Act. The ways and means to remove these difficulties were examined by the Government in consultation with the various Central Government Departments and taking into account the views expressed the Government brought about various amendments to the Act through the Air (Prevention and Control of Pollution) Amendment Act, 1987.

Definitions

Section 2 of the Act contains definitions of the terms used in the Act. The definitions of important terms such as Accident, Hazardous Substance, Handling, and the owner, are given below:

**Air Pollutant [Section 2(a)]**

Air Pollutant means any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.

**Air Pollution [Section 2(b)]**

Air Pollution means the presence in the atmosphere of any air pollutant.

**Approved Appliance [Section 2(c)]**

Approved appliance means any equipment or gadget used for the burning of any combustible material or for generating or consuming any fume, gas or particulate matter and approved by the State Board for the purpose of this Act.

**Approved Fuel [Section 2(d)]**

Approved Fuel means any fuel approved by the State Board for the purposes of this Act.

**Automobile [Section 2(e)]**

Automobile means any vehicle powered either by internal combustion engine or by any method of generating power to drive such vehicle by burning fuel.
**Chimney [Section 2(h)]**

Chimney includes any structure with an opening or outlet from or through which any air pollution may be emitted.

**Control Equipment [Section 2(i)]**

Control Equipment means any apparatus, device, equipment or system to control the quality and manner of emission of any air pollutant and includes any device used for securing the efficient operation of any industrial plant.

**Emission [Section 2(jj)]**

Emission means any solid or liquid or gaseous substance coming out of any chimney duct or flue or any other outlet.

**Industrial Plant [Section 2(k)]**

Industrial Plant means any plant used for any industrial or trade purpose and emitting any air pollutant into the atmosphere.

**Occupier [Section 2(m)]**

Occupier in relation to any factory or premises, means the person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.

**State Board [Section 2(o)]**

State Board means,(i) in relation to a State in which the Water (Prevention and Control of Pollution) Act, 1974 is in force and the State Government has constituted for that State, a State Pollution Control Board under Section 4 of the Act, the said State Board; and (ii) in relation to any other State, the State Board for the Prevention and Control of Air Pollution constituted by the State Government under Section 5 of this Act.

**Central and State Pollution Control Boards**

Section 3 of the Act provides for the constitution of the Central Pollution Control Board for prevention and control of air pollution. Accordingly, the Central Pollution Control Board constituted under Section 3 of the Water (Prevention and Control of Pollution) Act, 1974 shall exercise the powers and perform the functions of the Central Pollution Control Board for the prevention and Control of Air Pollution under the Act.

Section 4 of the Act clarifies that at the State level in which the Water (Prevention and Control of Pollution) Act, 1974 is in force, and the State Government concerned has constituted a State Pollution Control Board then such State Board shall be the State Board for Prevention and Control of Air Pollution under the Act.

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

**Composition of State Boards**

The State Board so constituted shall have the following members:

(a) a Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection to be
nominated by the State Government; provided that the Chairman may be either whole-time or part-time, as the State Government may think fit.

(b) such number of officials, not exceeding five, as the State Government may think fit, to be nominated by the State Government to represent that Government.

(c) such number of persons, not exceeding five, as the State Government may think fit, to be nominated by the State Government from amongst the members of the local authorities functioning within the State.

(d) such number of non-officials, not exceeding three, as the State Government may think fit, to be nominated by the State Government to represent the interests of agriculture, fishery or industry or trade or labour or any other interest, which, in the opinion of the Government, ought to be represented.

(e) two persons to represent the companies or corporations owned, controlled or managed by the State Government, to be nominated by that Government.

(f) a full-time member-secretary having such qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control as may be prescribed to be appointed by the State Government. The State Government should however ensure that not less than two of the members are persons having special knowledge or practical experience in respect of matters relating to the improvement of the quality of air or the prevention, control or abatement of air pollution.

Every State Board constituted under the Act shall be a body corporate with a name specified by the State Government, having perpetual succession and a common seal, with power, subject to the provisions of the Act, to acquire and dispose the property and to contract, and may, by the said name sue or be sued.

Section 6 of the Act provides that the Central Board shall exercise the powers and perform the functions of a State Board in any Union Territory. However the Central Board may delegate all or any of its powers and functions to any person or body of persons as the Central Government may specify.

Section 7 of the Act deals with terms and conditions of service of the members. A member of a State Board shall hold office for three years. Notwithstanding the expiration of his term, a member can hold office until his successor enters upon his office. The term of office of a member nominated by the State Government would come to an end as soon as he ceases to hold office under the State Government or as the case may be, the company, or corporation owned, controlled or managed by the State Government by virtue of which he was nominated. A member (other than a member secretary) may at any time resign, his office by writing under his hand to the Chairman. Likewise the Chairman can resign by writing to the State Government. Absence of a member from three consecutive meetings without sufficient reason would be deemed to be vacation of the office of the member.

A State Board has also been empowered to appoint a qualified person to be the consultant to the Board. A State Board may also, by general or special order, delegate to the Chairman or the member secretary or any officer of the Board such powers and functions as it may deem necessary (Section 15).

Section 8 of the Act deals with disqualification for a person to be a member of a
Accordingly, no person can be a member of the State Board constituted under the Act, who

(a) is or at any time has been, adjudged insolvent, or
(b) is of unsound mind and has been so declared by a competent court, or
(c) is, or has been, convicted of an offence which, in the opinion of the State Government, involves moral turpitude, or
(d) is, or at any time, has been, convicted of an offence under this Act, or
(e) has directly or indirectly, by himself or by any partner, any share or interest in any firm or company carrying on the business of manufacture, sale or hire of machinery, industrial plant, control equipment or any other apparatus for the improvement of quality of air or for the prevention, control or abatement of air pollution, or
(f) is a director or a secretary, manager or other salaried officer or employee of any company or firm having any contract with the Board or with the Government constituting the Board or with a local authority in the State, or with a company or corporation owned, controlled or managed by the Government for the carrying out of programmes for the improvement of the quality of air or for the prevention, control, or abatement of air pollution, or
(g) has so abused, in the opinion of the State Government, his position as a member, as to render his continuance on the State Board detrimental to the interest of the general public.

The State Government is empowered by order in writing, remove any member who is or has become, subject to any disqualification mentioned above after giving a reasonable opportunity to the member concerned to show cause against such removal.

Under Section 9 of the Act if a member of State Board becomes subject to any of the disqualifications mentioned in the Section 8, his seat shall become vacant. Section 10 of the Act deals with meetings of the Board. Accordingly, the Board shall meet at least once in three months and shall observe the rules of procedure prescribed therefor. The Chairman of the Board, however, has powers to convene meeting at such times as he thinks fit, for transacting any business of urgent nature. Copies of the minutes of the meeting are required to be forwarded to the Central Board and to the State Government concerned.

Section 11 of the Act empowers the constitutions of such number of committees of the Board as may be found necessary.

Section 12 of the Act entitles the Board to associate with itself in such manner and for such purpose as may be prescribed, any person whose assistance or advice it may desire to obtain in performing any of its functions under the Act. Such a person, however, shall not have a right to vote at the meeting of the Board. He can, however, participate in the discussions of the Board, relevant to the purpose for which he was associated with the Board.

Powers and Functions of the Central Board

Chapter III of the Act deals with powers and functions of the Board. In terms of Section 16, the main functions of the Central Board are to improve the quality of the air and to prevent, control or abate air pollution in the country. In particular and
without prejudice to the generality of the above functions, the Central Board may:

(a) advise the Central Government on any matter concerning the improvement of the quality of air and prevention, control or abatement of air pollution;
(b) plan and cause to be executed a nation-wide programme for the prevention, control or abatement of air pollution;
(c) co-ordinate the activities of the State Boards and resolve disputes among them;
(d) provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of air pollution and prevention, control or abatement of air pollution.
(dd) perform such of the function of any State Board as may be specified in an order made under Sub-section (2) of Section 18.
(e) plan and organize the training of persons engaged or to be engaged in programmes for the prevention, control and abatement of air pollution on such terms and conditions as the Central Board may specify;
(f) organise through mass media, a comprehensive programme regarding the prevention, control or abatement of air pollution;
(g) collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control and abatement and prepare manuals, codes or guides relating to prevention, control or abatement of air pollution;
(h) lay down standards for the quality of air;
(i) collect and disseminate information in respect of matters relating to air pollution;
(j) perform such other functions as may be prescribed.

The Central Board has been empowered to establish or recognise a laboratory or laboratories to enable the Central Board to perform its functions efficiently. It also has powers to delegate any of its functions generally or specially to any of the committees appointed by it.

Functions of the State Board

Section 17 of the Act dealing with functions of the State Boards, enumerates the following functions of the State Boards:

(a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;
(b) to advise the State Government on any matter concerning the prevention, control or abatement of air pollution;
(c) to collect and disseminate information relating to air pollution;
(d) to collaborate with the Central Board in organising the training of the persons engaged or to be engaged in programmes relating to prevention, control or abatement of air pollution and to organise mass-education programme relating thereto;
(e) to inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution;

(f) to inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air pollution and take steps for the prevention, control or abatement of pollution in such areas;

(g) to lay down, in consultation with the Central Board and having regard to the standards for the quality of air laid down by the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft;

Provided that different standards for emission may be laid down under this clause for different plants having regards to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants.

(h) to advise the State Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;

(i) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Government or the State Government;

(j) to do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

In terms of Section 18 of the Act, the Central Board shall be bound by the directions given to it in writing by the Central Government. Similarly, State Boards shall be bound by the directions given to them by Central Board or the State Government.

Where the direction given by the State Government is inconsistent with the direction given by the Central Government, the matter shall be referred to the Central Government for its decision. Where the Central Government is of the opinion that any State Board has defaulted in complying with any directions given by the Central Board and as a result of such default a grave emergency has arisen and it is expedient, in public interest so to do, it may direct the Central Board to perform any of the functions of the State Board in relation to such area as may be specified in the order.

**Prevention and Control of Air Pollution**

Chapter IV of the Act contains detailed provisions for prevention and control of air pollution. Section 19 empowers the State Government to declare, after consultation with the State Board, any area or areas within the State as air pollution control area or areas for the purpose of the Act. The State Government has been authorised to alter any air pollution control area by way of extension or reduction and also declare a new air pollution control area by merging one or more existing air pollution control area or areas or any part or parts thereof.

If the State Government after consultation with the State Board is of the opinion that the use of any fuel other than approved fuel, in any air pollution control area or
part thereof, may cause or is likely to cause air pollution, it may, by notification in the
Official Gazette, prohibit the use of such fuel in such area or part thereof with effect
from such date (being not less than three months from the date of publication of the
notification) as may be specified in the notification.

The Government may, after consultation with the State Board, by notification in
the Official Gazette, direct that with effect from such date as may be specified therein,
no appliance, other than an approved appliance, shall be used in the premises
situated in an air pollution control area. However different dates may be specified for
different parts of an air pollution control area or for the use of different appliances.

If the State Government, after consultation with the State Board, is of the opinion
that burning of any material (not being fuel) in any air pollution control area or part
thereof may cause or is likely to cause air pollution, it may, by notification in the
Official Gazette, prohibit the burning of such material in such area or part thereof.

Under Section 20 of the Act, The State Government shall, in consultation with the
State Board, give such instructions as it may deem necessary to the concerned
authority incharge of registration of motor vehicles under the Motor Vehicles Act,
1939 (now Motor Vehicles Act, 1988), with a view of ensuring that standards for
emission of air pollutants from automobiles laid down by the State Board are
complied with.

Air Pollution Control Area – Powers of State

Court observed that even if the State Government has not
framed rules prescribing the manner in which the area is to be
declared as air pollution control area, the State Government is
empowered to declare any area within the State as an Air
Pollution Control Area by notification in the Official Gazette. It may, however, be after
consultation with Board and in the manner as may be prescribed. Absence of Rules
will not render the Act inoperative. The Act under section 19 vests the State
Government with power to notify any area, in an official gazette, as Air Pollution
Control Area, but it can not be said that the exercise of such power is solely
dependent upon framing of the rules prescribing the manner in which an area may be
declared as Air Pollution Control Area.

Restrictions on Use of Certain Industrial Plants

Section 21 of the Act deals with restriction on use of certain industrial plants.
Accordingly, no person is allowed, without the previous consent of the State Board, to
establish or operate any industrial plant in an air pollution control area. Prior to
amendment in 1987 this section required only industries specified in the Schedule to
the Act to obtain such consent. However, the amended section, with effect from 1st
April, 1988 requires every industrial plant in an air pollution control area to obtain
prior approval.

Application for approval of the State Board should be made in the prescribed
Form alongwith the prescribed fee. The Rules framed by the respective State Governments specify the procedure for making such applications.

In case, a person operates in any such air pollution control area, from a date prior to the date of declaration of the area as an air pollution control area, such person is also required to make the application in the prescribed manner within 3 months of the declaration of that area to be an air pollution control area. In that case, he shall be deemed to be operating such industrial plants with the consent of the State Board.

Within a period of four months after the receipt of the application, the State Board should, by order in writing and reasons to be recorded in the order, grant the consent applied for, subject to such conditions and for such period as may be specified therein or refuse such consent.

It shall however be open to the State Board to cancel such consent before the expiry of the period for which it was granted or refuse further consent after such expiry if the conditions subject to which such consent was granted have not been fulfilled. But before cancelling the consent or refusing a further consent a reasonable opportunity of being heard should be afforded to the concerned person.

Every person to whom consent has been granted by the State Board has been put under obligation to comply with the following conditions stipulated under Section 21(5), namely:

(i) the control equipment of such specification as the State Board may approve in this behalf shall be installed and operated in the premises where the industry is carried on or proposed to be carried on;

(ii) the existing control equipment, if any, shall be altered or replaced in accordance with the directions of the State Board;

(iii) the control equipment referred to in clause (i) or clause (ii) shall be kept at all times in good running condition;

(iv) chimney, wherever necessary, of such specifications as the State Board may approve in this behalf shall be erected or re-erected in such premises;

(v) such other conditions as the State Board may specify in this behalf, and

(vi) the conditions referred to in clause (i), (iii) and (iv) shall be complied with within such period as the State Board may specify in this behalf. In the case of a person operating any industrial plant in an air pollution control area immediately before the date of declaration of such area as an air pollution control area, the period so specified shall not be less than six months. Further, after the installation of any control equipment or after the alteration or replacement of any control equipment or after the erection or re-erection of any chimney, no control equipment or chimney shall be altered, or replaced or, as the case may be, erected or re-erected except with the previous approval of the State Board.
The State Board has been empowered to vary all or any of the conditions if due to technology improvement or otherwise, it is of the opinion that all or any of those conditions require(s) any variation including change of any control equipment either in whole or in part.

Where a person to whom consent has been granted by the State Board to operate an industrial plant transfers his interest in the industry to any other person, then the consent given by the State Board shall be deemed to have been granted to such other persons who shall be bound to comply with all the conditions subject to which such consent was originally granted.

Emission of air pollution in excess of the standards laid down by the Board is prohibited under Section 22. Accordingly no person operating any industrial plant in any air pollution control area is allowed to discharge or cause or permitted to be discharged the emission of any air pollution in excess of the standards laid down by the State Board under Section 17(1)(g).

Section 22A inserted by the 1987 Amendment Act empowers the Board to make application to court for restraining persons from causing air pollution. Where it is apprehended by the Board that emission of any air pollutant in excess of the standards laid down is likely to occur by reason of any person operating an industrial plant or otherwise in any air pollution control area, it may make an application to a Court not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class for restraining such person from emitting such air pollutant. On receipt of the application the Court may make such order as it may deem fit. Where the Court makes an order restraining any person from discharging or causing or permitting to be discharged the emission of any air pollutant it may direct such person to desist from taking such action as is likely to cause emission. If such direction is not complied with then the Court may authorise the Board to implement the direction in such manner as may be specified by the Court. All expenses incurred by the board in implementing the directions of the Court, are recoverable from the person concerned as arrears of land revenue or of public demand.

Furnishing of Information to State Board and other Agencies in Certain Cases

Section 23 of the Act imposes an obligation on the person in charge of the premises where emission of any air pollutant occurs or is apprehended, to furnish the fact of any occurrence or apprehension of emission of any air pollutant into the atmosphere in excess of the standards laid down by the State Board. Even where the person in charge of the premises apprehends that any air pollutant in excess of these standards is likely to occur due to any accident or other unforeseen act or event, he has to intimate such apprehension to the State Board and to such authorities or agencies as may be prescribed. The State Board or any authority or agency, as the case may be, shall, on receipt of such information, cause such remedial measures to be taken as are necessary to mitigate the emission of such air pollutants. Expenses if any, incurred by the State Board, authority or agency as the case may be, with respect to any such remedial measure shall be recovered from the person in charge of the premises as if they are arrears of land revenue or of public demand.

Power to Entry and Inspection

Under Section 24 of the Act, the State Board is empowered to authorise any
person to enter into any place, with such assistance as he considers necessary, for the purpose of:

(a) performing any of the functions of the State Board;
(b) determining whether and if so in what manner, any such functions are to be performed or whether any provisions of the Act or Rules made thereunder or any notice, order, direction or authorisation served, made, given or granted under the Act is being or has been complied with;
(c) examining and testing any control equipment, industrial plant, record, register, document or any material object or for conducting a search of any place in which he has reason to believe that an offence under this Act or the Rules made thereunder has been or is being or is about to be committed and for seizing any such control equipment, industrial plant, record, register, document or other material object, he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act or the Rules made thereunder.

Every person is bound to render all assistance to the person empowered by the State Board to enter such premises for inspection. A person who wilfully delays or obstructs entry of such person into the premises shall be guilty of an offence under the Act. The provisions of the Code of Criminal Procedure 1973 or any other similar code where the Cr. P.C. is not in force, shall apply so far may be to any search or seizure, as they apply to any search or seizure under the authority of a warrant issued under Section 94 of the Cr. C.P. or as the case may be, under the corresponding provision of the State law.

Power to Obtain Information

For the purposes of carrying out the functions entrusted, the State Board or any officer empowered may call for any information including information regarding the types of air pollutants emitted into the atmosphere and the level of the emission of such air pollutants, from the occupier or any other person carrying on any industry or operating any control equipment or industrial plant. Also for the purposes of verifying the correctness of such information, the State Board or such officer shall have the right to inspect the premises where such industry, control equipment or industrial plant is being carried on or operated. After the 1987 amendments, this section has empowered the Board to obtain information from industries operating even outside the air pollution control areas.

Power to Take Samples

Section 26 of the Act empowers the State Boards or any other officer empowered by it to take for the purpose of analysis, samples of air or emission from any chimney, flue or duct or any other outlet in such manner as may be prescribed.

The result of analysis of such samples shall not be admissible in evidence in any legal proceeding unless the following are compiled with:

(1) When a sample of emission is taken, the person taking the sample shall
(a) serve on the occupier or his agent, a notice, then and there, in such form as may be prescribed, of his intention to have it so analysed;
(b) in the presence of the occupier or his agent collect a sample of emission for his analysis;

(c) cause the sample to be placed in a container or containers to be marked, sealed and signed by both the persons taking the sample and the occupier or his agent;

(d) send, without delay, the container to the laboratory established or recognised by the State Board or to any State Air Laboratory specified under Section 28 of the Act, and

(2) When a sample of emission is taken and the person taking the sample serves the notice as specified above then

(a) in case the occupier or his agent wilfully absents himself, the person taking the sample shall collect the sample of emission for analysis to be placed in a container or containers which shall be marked, sealed and signed by the person taking the sample, and

(b) in case the occupier or his agent is present at the time of taking the sample but refuses to sign the marked and sealed container or containers of the sample of emission, the marked and sealed container or containers shall be signed by the person taking the sample and sent to the laboratory for analysis.

Report of Analysis

Where the sample of emission has been sent to the laboratory, the same shall be analysed and the report thereof shall be submitted in the prescribed form in triplicate to the State Board. On receipt of the report, the State Board shall send one copy of the same to the occupier or his agent of the premises, wherefrom the samples were taken, the second copy shall be preserved for production before the Court in any legal proceedings and the other copy shall be kept by the State Board. Any cost incurred in conducting such analysis shall be borne by the occupier of the premises from where the samples were taken as if they are arrears of land revenue or of public demand.

State Air Laboratory

The State Government have been authorised to establish, by notification in the Official Gazette, one or more laboratories or specify one or more laboratories to carry out functions entrusted to the State Air Laboratory under the Act. The State Government may after consultation with the State Board, make rules prescribing the functions of the State Air Laboratory, the procedure for submission to the State Laboratory of samples for analysis and reports thereon and the fees payable in respect of such reports and such other matter as may be necessary or expedient to enable that Laboratory to carry out its functions.

Section 29 of the Act empowers the State Government to appoint such persons as it thinks fit having the prescribed qualifications, as Government analysts for the purpose of analysis of samples of air or emissions.

Appeal

Section 31 of the Act dealing with appeal provides that any person aggrieved by
an order of the State Board may within 30 days from the date on which the order is communicated to him, prefer an appeal to such authority as the State Government may think fit to constitute. The appellate authority may entertain appeals beyond the 30 days period if such authority is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. The appellate authority is bound to dispose of the appeal as expeditiously as possible after giving the appellant and the State Board a reasonable opportunity of being heard.

**Power to Give Directions**

Section 31A inserted by the Air (Prevention and Control of Pollution) Amendment Act, 1987 empowers the Board to give certain directions. This is a very important provision in view of the nature of the directions that could be given thereunder. This section has been given overriding effect upon other laws. This section provides that notwithstanding anything contained in any other law but subject to the provisions of the Air (Prevention and Control of Pollution) Act and any directions, that may be given by the Central Government, the Board may issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions. The power to issue direction would include the power to direct (i) closure; prohibition or regulation of any industry, operation and process; or (ii) the stoppage, or regulation of supply of electricity, water or any other service.

**Penalties and Procedure**

Chapter VI of the Act contains provisions relating to penalties and other procedures. Under Section 37, failure to comply with the provisions of Section 21 (consent for establishment or operation of industrial plant in an air pollution control area); or Section 22 (emission of air pollutant in excess of the prescribed standards) or directions issued under Section 31A (closure, prohibition, regulation, stoppage of electricity, water etc.), are punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine. Where failure continues, an additional fine is also leviable which may extend to Rs. 5,000 for every day of continuing failure after the conviction for the first such failure. Where the above failure continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine.

Under Section 38 whoever does following acts shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs. 10,000 or with both:

(a) destroys, pulls down, removes, injures, or defaces any pillars post or stake fixed in the ground or any notice or other matter put up, inscribed, or placed by or under the authority of the Board; or

(b) obstructs any person acting under the orders or directions of the Board from exercising his powers and performing his functions under the Act; or

(c) damages any works or property belonging to the Board; or
(d) fails to furnish to the Board or any officer or employee of the Board any information required by the Board or such officer or employee for the purposes of the Act; or

(e) fails to intimate the occurrence of the emission of air pollutants into the atmosphere in excess of the standards laid down by the State Board or the apprehension of such occurrence, to the State Board and other prescribed authorities or agencies as required by Section 23(1); or

(f) in giving any information which he is required to give under the Act, makes a statement which is false in any material particular; or

(g) for the purposes of obtaining any consent under Section 21 makes a statement which is false in any material particular.

In terms of Section 39, the contravention of any provisions of the Act or any order or direction issued thereunder for which no penalty has been provided in the Act, has been made punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs. 10,000 or both. Continuing contravention would attract an additional fine of Rs. 5000 for everyday during which the contravention continues.

Section 40 specifically deals with offences by companies. Accordingly, where an offence has been committed under the Act by a company, every person who, at the time of commission of such offence was directly in charge of and responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Where, however, any person proves that the offence was committed without his knowledge or that he exercised due diligence to prevent commission of such offence, nothing shall render him liable for any punishment. This section further provides for punishment to any person who consents or connives at any offence or where the offence is attributable to the neglect on the part of any director, manager, secretary or other officer of the company.

Cognizance of Offences

Section 43 provides that no Court shall take cognizance of any offence under the Act except on a complaint made by (a) a Board or any officer authorised in that behalf, or (b) any person who has given notice of not less than sixty days in prescribed manner, of the alleged offence and of his intention to make a complaint to the Board or an officer authorised. No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under the Act. Where any person makes a complaint as above, the Board shall, on demand, make available the relevant reports to that person. The Board can refuse to make available such reports, if it is against public interest.

State Government to Supersede State Board

Section 47 of the Act confers an important power on the State Government to supersede the State Board. The State Government, under this section, can supersede the State Board if it is of opinion that the Board has persistently made default in the performance of the functions imposed on it by or under the Act, or that circumstances exist which render it necessary in the public interest so to do; by
notification in the Official Gazette for a period of not exceeding six months. Where the
supersession has to be done on ground of default, a reasonable opportunity shall be
given to the State Board concerned before the notification superseding the Board is
issued. On issue of the supersession notification, the following consequence will
follow:

(a) all members of the Board shall vacate their offices as such;

(b) all powers and functions as well as duties of the Board shall be performed or
discharged by such person or persons as the State Government may direct;

(c) all property owned or controlled by the State Board shall, until the Board is
reconstituted, vest in the State Government.

On the expiry of the period of supersession, the State Government may extend
the period of supersession for such time not exceeding six months or reconstitute the
State Board by a fresh nomination, as the case may be. Even a person who has
vacated the office by virtue of the supersession is eligible for nomination or
appointment.

Control of Noise Pollution

In Bijayanada Patra and others vs. District Magistrate, Cuttack
and Others (AIR 2000 Orissa 70, 71). Orissa High Court
observed that noise pollution simply connotes unwanted sound in
the atmosphere. It is unwanted because it lacks the agreeable
musical quality. Noise is therefore, sound, but it is pollution when
the effects of sound become undesirable. Noise not only causes
irritation or annoyance but it does also constrict the arteries, and increase the flow of
adrenaline and forces the heart to work faster, thereby accelerating the rate of
cardiac ailments, the reason of being that continuous noise causes an increase in the
cholesterol level resulting in rearmament constriction of blood vessels, making one
prone to heart attacks and strokes. The health experts are of opinion that excessive
noise can also lead to neurosis and nervous breakdown. Where noise can be said to
amount to nuisance, the person causing noise can be restrained by injunctions even
though that person was causing noise in the course of conduction his business.

In order to control the noise pollution caused from various sources such as
industrial activity, construction activity, generator sets, loud speakers, public address
system, music systems, vehicular horns and other mechanical devices the Central
Government has framed certain rules known as 'The Noise Pollution (Regulation and
Control) Rules, 2000. The rules provide for the ambient air quality standard in respect
of noise for different areas/zones. An area comprising 100 metres around hospitals,
educational institutions and courts has been declared as the silence area/zone. The
ambient air quality standards shall also be considered by the all development
authorities, local bodies while taking any development activity. A loud speaker or a
public address system shall not be used at night (between 10:00 p.m. to 6:00 a.m.)
except in closed premises for communication. Whoever commits any offence of
playing music or uses any sound amplifiers, beats a drum or blows a horn, etc. in a
silence zone/area shall be liable to a penalty.
What do you mean by noise pollution?

Noise pollution simply connotes unwanted sound in the atmosphere. It is unwanted because it lacks the agreeable musical quality. Noise is therefore, sound, but it is pollution when the effects of sound become undesirable.

LESSON ROUND UP

- Air (Prevention and Control of Pollution) Act, 1981 to provide the prevention, control and abatement of air pollution, for the establishment, with a view to carrying out the aforesaid purposes, of Boards, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

- Air Pollution means the presence in the atmosphere of any air pollutant.

- Air Pollutant means any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.

- Control Equipment means any apparatus, device, equipment or system to control the quality and manner of emission of any air pollutant and includes any device used for securing the efficient operation of any industrial plant.

- Section 19 empowers the State Government to declare, after consultation with the State Board, any area or areas within the State as air pollution control area or areas for the purpose of the Act. The State Government has been authorised to alter any air pollution control area by way of extension or reduction and also declare a new air pollution control area by merging one or more existing air pollution control area or areas or any part or parts thereof.

- Section 21 of the Act deals with restriction on use of certain industrial plants. Accordingly, no person is allowed, without the previous consent of the State Board, to establish or operate any industrial plant in an air pollution control area.

- Emission of air pollution in excess of the standards laid down by the Board is prohibited under Section 22. Accordingly no person operating any industrial plant in any air pollution control area is allowed to discharge or cause or permitted to be discharged the emission of any air pollution in excess of the standards laid down by the State Board.
Board may issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions. The power to issue direction would include the power to direct (i) closure; prohibition or regulation of any industry, operation and process; or (ii) the stoppage, or regulation of supply of electricity, water or any other service.

In order to control the noise pollution caused from various sources such as industrial activity, construction activity, generator sets, loud speakers, public address system, music systems, vehicular horns and other mechanical devices the Central Government has framed certain rules known as 'The Noise Pollution (Regulation and Control) Rules, 2000.

SELF TEST QUESTIONS

1. Briefly explain the objective of Air (Prevention and Control of Pollution) Act, 1981.

2. Enumerate the powers and functions of State Pollution Control Board.

3. Write short notes on
   (i) Air Pollution
   (ii) State Air Laboratory

4. Explain Noise Pollution in Environment.

5. Enumerate briefly the restriction on use of Certain Industrial Plant.
SECTION II
PREVENTION AND CONTROL OF WATER POLLUTION

LEARNING OBJECTIVE
The objective of this study lesson is to enable the students to understand
• Objective of Water (Prevention and Control of Pollution) Amendment Act, 1988
• Meaning of water pollution
• Constitution of Central and State Pollution Control Board
• Functions of the Central and State Pollution Control Board
• Prevention and Control of Water Pollution
• Restriction New Outlets and New Discharges
• Emergency measure
• Power of the Board
• Offences and Penalty

Water (Prevention and Control of Pollution) Act, 1974 has been enacted to provide for the prevention and control of water pollution and maintaining or restoring wholesomeness of water, for the establishment of Boards, with a view to carrying out these purposes, for the prevention and control of water pollution, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

In order to remove administrative and practical difficulties that emerged during the enforcement of the Act, many of the provisions were amended by the Water (Prevention and Control of Pollution) Amendment Act, 1988.

Definitions
The definitions of certain terms used in the Act are important to understand the
provisions of the Act. These are given below:

**Board** means the Central Board or a State Board. [Section 2(a)]

**Central Board** means the Central Pollution Control Board constituted under Section 3 [Section 2(b)]. Prior to the enactment of the 1988 Amendment Act Central Board meant the Central Board for Prevention and Control of Water Pollution. Since the Central Board deals with both Water and Air Pollution Control, it has been renamed as Central Pollution Control Board.

**Occupier** in relation to any factory or premises means the person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance [Section 2(d)].

**Outlet** includes any conduit pipe or channel, open or closed, carrying sewage or trade effluent or any other holding arrangement which causes, or is likely to cause, pollution. [Section 2(dd)]

**Pollution** means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms. [Section 2(e)]

**Sewage effluent** means effluent from any sewerage system or sewage disposal works and includes sullage from open drains. [Section 2(g)].

**Stream, the term stream includes:**

(a) river;

(b) water course (whether flowing or for the time being dry);

(c) inland water (whether natural or artificial);

(d) sub-terranean waters;

(e) sea or tidal waters to such extent or, as the case may be, to such point as the State Government may, by notification in the Official Gazette, specify in this behalf. [Section 2(j)]

**Trade effluent** includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation or process or treatment and disposal system, other than domestic sewage. [Section 2(k)]

**Constitution of Central Pollution Control Board**

Section 3 of the Act empowers the Central Government to constitute a Central Pollution Control Board to exercise such powers and functions as may be conferred upon it. The Central Board shall consists of the following members, namely:

(a) a full-time Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection or person having knowledge and experience in administering institutions dealing
with the matters aforesaid, to be nominated by the Central Government;
(b) such number of officials not exceeding five to be nominated by the Central Government to represent that Government.
(c) such number of officials not exceeding five to be nominated by the Central Government from amongst the members of the State Boards, of whom not exceeding two shall be from amongst the members of the local authorities functioning within the state;
(d) such number of non-officials not exceeding three to be nominated by the Central Government to represent the interests of agriculture, fishery or industry or trade or any other interest, which, in the opinion of the Central Government, ought to be represented;
(e) two persons to represent the companies or corporations owned, controlled or managed by the Central Government, to be nominated by that Government;
(f) a full time member secretary possessing qualifications and experience of scientific, engineering or management aspects of pollution control, to be appointed by the Central Government.

The Central Board shall be a body corporate with a perpetual succession and common seal with a right to own property and right to sue or to be sued.

**Constitution of State Pollution Control Board**

Section 4 of the Act empowers the State Government to constitute the State Boards. The composition of a State Board shall be the following, namely:

(a) a Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection or a person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the State Government. However, the Chairman may be either whole-time or part-time, as the State Government may think fit;
(b) such number of officials not exceeding five, to be nominated by the State Government to represent that Government;
(c) such number of persons not exceeding five to be nominated by the State Government from amongst the members of the local authorities functioning within the State;
(d) such number of non-officials not exceeding three, to be nominated by the State Government to represent the interests of agriculture, fishery or industry or trade or labour or any other interests, which, in the opinion of the Government, ought to be represented;
(e) two persons to represent the companies or corporations owned, controlled or managed by the State Government to be nominated by that Government;
(f) a full-time member secretary having such qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control to be appointed by the State Government.

The State Board shall also be a body corporate as is the Central Board.
The Central Board shall exercise the powers under the Act in relation to a Union Territory. The Central Board may however, delegate its powers in relation to any Union Territory to any person or body of persons.

Section 5 of the Act deals with terms and conditions of service of members. Briefly speaking a member other than a member secretary is entitled to hold office for three years. Notwithstanding the expiry of his term, a member may continue to hold office till his successor enters upon his office. The term of office of a member nominated by the Central/State Government shall come to an end as soon as he ceases to hold office under the Central/State Government etc. Any member of the board may be removed before the expiry of his term of office, after giving a reasonable opportunity of showing cause against such removal. The Chairman or member could resign the office by writing under his hand. A casual vacancy could be filled by a fresh nomination. A member is eligible for renomination. Other terms and conditions of service of the chairman and members shall be such as prescribed in the rules.

Disqualifications

Section 6 of the Act deals with disqualification of a person to be a member of the Board. Accordingly, no person shall be a member of a Board, who:

(a) is or at any time has been adjudged insolvent or has suspended payment of his debt or has compounded with his creditors, or
(b) is of unsound mind or stands so declared by a competent court, or
(c) is, or has been convicted of an offence which, in the opinion of the Central Government, or as the case may be, of the State Government, involves moral turpitude, or
(d) is, or at any time, has been, convicted of an offence under this Act, or
(e) has directly or indirectly, by himself or by any partner, any share or interest in any firm or company carrying on the business of manufacture, sale or hire of machinery, industrial plant, equipment, apparatus or fittings for the treatment of sewage or trade effluents, or
(f) is a director or a secretary, manager or other salaried officer or employee of any company or firm having any contract with the Board, or with the Government constituting the Board, or with a local authority in the State, or with a company or corporation owned, controlled or managed by the Government, for the carrying out of sewage schemes or for the installation of plants for the treatment of sewage or trade effluents, or
(g) has so abused in the opinion of the Central Government or as the case may be, of the State Government, his position as a member, as to render his continuance on the Board detrimental to the interest of the general public.

However, no order of removal shall be made by the Central Government or State Government unless the member concerned has been given reasonable opportunity of showing cause against the same.

Constitution of Joint Board

Section 13 of the Act enables the constitution of Joint Boards by two or more
Governments of contiguous States, or by the Central Government and one or more State Government contiguous to any Union Territory. The Joint Boards are to be constituted by an agreement. Section 14 of the Act provides for the following composition of Joint Boards, constituted under agreement between two or more Governments of contiguous States, namely:

(a) a full-time Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection or person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the Central Government;

(b) two officials from each of the participating State to be nominated by the concerned participating State Government to represent that Government;

(c) one person to be nominated by each of the participating State Governments from amongst the members of the local authorities functioning within the State concerned;

(d) one non-official to be nominated by each of the participating State Governments to represent the interests of agriculture, fishery or industry or trade in the State concerned or any other interest which, in the opinion of the participating State Government, is to be represented;

(e) two persons to be nominated by the Central Government to represent the companies or corporations owned, controlled or managed by the participating State Governments;

(f) a full time member secretary having such qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control to be appointed by the Central Government.

The Joint Board constituted by an agreement by the Central Government in respect of one or more Union Territory and one or more Governments of the State in the vicinity of such Union Territory or Union Territories, shall consists of the following members, namely:

(a) a full-time Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection or person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the Central Government;

(b) two officials to be nominated by the Central Government from the participating Union Territory or each of the participating Union Territories, as the case may be, and two officials to be nominated from the participating State or each of the participating States, as the case may be, by the concerned participating State Government;

(c) one person to be nominated by the Central Government from amongst the members of the local authorities functioning within the participating Union Territory or each of the participating Union Territories, as the case may be, and one person to be nominated from amongst the members of the local authorities functioning within the participating State or each of the participating States, as the case may be, by the concerned participating State Government;

(d) one non-official to be nominated by the Central Government and one person
to be nominated by the participating State Government or State Governments to represent the interests of the agriculture, fishery, or industry or trade in the Union Territory or in each of the Union Territories or the State or in each of the States, as the case may be, or any interest which in the opinion of the Central Government or, as the case may be, of the State Government is to be represented;

(e) two persons to be nominated by the Central Government to represent the companies or corporations owned, controlled or managed by the Central Government and situated in the participating Union Territory or Territories and two persons to be nominated by the Central Government to represent the companies or corporations owned, controlled or managed by the participating State Governments;

(f) a full time member secretary possessing qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control to be appointed by the Central Government.

Special Provisions Relating to Giving of Directions

Section 15 of the Act contains special provisions relating to giving of directions where Joint Boards have been constituted. Accordingly, the Government of the State for which the Joint Board is constituted, shall be competent to give any direction under the Act only in cases where such direction related to a matter within the exclusive territorial jurisdiction of the State and the Central Government alone shall be competent to given any direction under the Act where such directions relates to matters within the territorial jurisdiction of two or more States or pertaining to the Union Territory.

Functions of Central Board

Section 16 of the Act specifically deals with functions of the Central Board. It empowers the Central Board to promote cleanliness of streams and wells in different areas of the States. Besides, the Central Board may perform all or any of the following functions, namely:

(a) advise the Central Government on any matter concerning the prevention and control of water pollution;

(b) co-ordinate the activities of the State Boards and resolve disputes among them;

(c) provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution;

(d) plan and organise the training of persons engaged or to be engaged in programmes for the prevention, control or abatement of water pollution on such terms and conditions as the Central Board may specify;

(e) organise through mass media a comprehensive programme regarding the prevention and control of water pollution;

(f) collect, compile and publish technical and statistical data relating to water pollution and the measures devise for its effective prevention and control and prepare manuals, course or guides relating to retreatment and disposal of
sewage and the trade effluents and disseminate information connected therewith;

(g) lay down, modify or annul, in consultation with the State Government concerned, the standards for a stream or a well. However different standards may be laid down for the same stream or well or for different streams or wells having regard to the quality of water, flow characteristic of stream or well and the nature of the use of water in such stream or well or streams or wells;

(h) plan and cause to be executed a nation-wide programme for prevention, control or abatement of water pollution;

(i) perform such other functions as may be prescribed.

In addition, Central Board shall also perform such of the functions of the State Board as may be specified in an order made under Section 18(2). Under Section 18(2) the Central Government may direct the Central Board to perform the functions of a State Board which had defaulted in complying with any directions given by the Central Government.

The Board is also empowered to establish or recognise a laboratory or laboratories to enable it to perform its functions efficiently, including the analysis of samples of water from any stream or well or of samples or any sewage or trade effluents.

**Functions of the State Board**

The functions of the State Board as prescribed under Section 17 of the Act are:

(a) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof;

(b) to advise the State Government on any matter concerning the prevention, control or abatement of water pollution;

(c) to collect and disseminate information relating to water pollution and the prevention, control and abatement thereof;

(d) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control and abatement of water pollution;

(e) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of water pollution and to organise mass education programmes relating thereto;

(f) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by the Act;

(g) to lay down, modify or annual effluent standards for the sewage and trade effluents and for the quality of receiving waters (not being water in an inter-State stream) resulting from the discharge of effluents and to classify waters
of the State;

(h) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in stream and wells which render it impossible to attain even the minimum degree of dilution;

(i) to evolve methods of utilisation of sewage and suitable trade effluents in agriculture;

(j) to evolve efficient methods of disposal of sewage and trade effluents on land, as are necessary on account of the predominant conditions of scant stream flows that do not provide for major part of the year the minimum degree of dilution;

(k) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair whether dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents;

(l) to make, vary or revoke any order:

(i) for the prevention, control and abatement of discharges of wastes into streams or wells;

(ii) requiring any persons concerned to construct new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures as are necessary to prevent, control or abate water pollution;

(m) to lay down effluent standards to be compiled with by persons while causing discharge of sewage or sullage or both and to lay down, modify or annual effluent standards for the sewage and trade effluents;

(n) to advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well;

(o) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the State Board or the State Government.

The Board may establish or recognise a laboratory or laboratories to enable the Board to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents.

In terms of Section 18 and in the performance of these functions the Central Board shall be bound by such directions in writing as the Central Government may give to it; and every State Board shall be bound by such directions in writing as the Central Board or the State Government may give to it. Where the direction given by the State Government is inconsistent with the direction given by the Central Board, that matter shall be referred to the Central Government for its decision.

Sub-sections (2), (3) and (4) of Section 18 provides that where the Central Government is of the opinion that any State Board had defaulted in complying with any direction given by the Central Board, it may direct the Central Board to perform any of the functions of the State Board. When the Central Board performs any of the functions of the State Board, the expenses incurred in connection therewith could be
recovered by the Central Board with interest provided the State Board was entitled to so recover if it had performed the functions. Such expenses are recoverable as arrears of land revenue or of public demand.

**Prevention and Control of Water Pollution**

Section 19 of the Act empowers the State Government to restrict the application of the Act to only such area or areas as may be declared in the notification published in the Official Gazette in this behalf. Each such Water Pollution Prevention and Control area may be declared either by reference to a map or by reference to a line of any water shed or boundary of any district or partly by one method and partly by another. The State Government has also powers to alter any Water Pollution Prevention and Control Area by way of extension or reduction, or define new Water Pollution Prevention and Control Area in which may be merged one or more Water Pollution Prevention and Control Areas or any parts thereof.

**Power to Obtain Information**

Section 20 of the Act empowers the State Board or any officer empowered by it to make the survey of any area and gauge and keep records of flow or volume and other characteristics of any stream or well in such area and to take steps for the measurement and recording of the rain fall in such area or any part thereof and for the installation and maintenance for those purposes of gauges or other apparatus and works connected therewith and carry out stream surveys and take such other steps as may be necessary in order to obtain any required information.

The State Board has also been empowered to give directions to any person, who in its opinion is abstracting water from any such stream or well in the area in quantities which are substantial in relation to the flow or volume of that stream or well or is discharging sewage or trade effluent into any such stream or well, to give such information as to the abstraction or discharge at such times and in such form as may be specified in the directions. With a view to preventing or controlling pollution of water the State Board may also give directions to any person in charge of any establishment where any industry operation or process or treatment and disposal system is carried on, to furnish to it information regarding the constructions, installation or operation of such establishment or of any disposal system or of any extension or addition thereto in such establishment and such other particulars as may be prescribed.

**Power to Take Samples of Effluents**

Section 21 empowers the State Board or any officer authorised by it in this behalf to take for the purpose of analysis samples of water from any stream or well or samples of any sewage or trade effluent which is passing from any plant or vessel or from or over any place into any such stream or well. However, the result of any analysis of a sample of any sewage or trade effluent shall not be admissible in evidence in any legal proceedings unless the provisions of Sub-section (3), (4) and (5) are complied with.

Sub-section (3) says that when a sample (composite or otherwise as may be warranted by the process used) of any sewage or trade effluent is taken for analysis the person taking the sample shall:

(a) serve on the person incharge of, or having control over, the plant or vessel or
in occupation of the place (which person is hereinafter referred to as the occupier) or any agent of such occupier, a notice, then and there in such form as may be prescribed, of his intention to have it so analysed;

(b) in the presence of the occupier or his agent divide the sample into two parts;

c) cause each part to be placed in a container which shall be marked, sealed and signed by both the person taking the sample and the occupier or his agent;

d) send one container forthwith to the laboratory established or recognised by the Central Board, in case such sample is taken from any area situated in the Union Territory, and in any other case, to the laboratory established or recognised by the State Board and

e) on the request of the occupier or his agent, send the second container to Central Water Laboratory in case such sample is taken from any area situated in the Union Territory and in any other case, to the State Water Laboratory.

When a sample of any sewage or trade effluent is taken for analysis and the person taking the sample serves on the occupier or his agent, a notice as required under clause (a) of Sub-section (3) and the occupier or his agent wilfully absent himself, then, the sample so taken shall be placed in a container which shall be marked, sealed and signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the prescribed laboratory and such person shall inform the Government analyst in writing about the wilful absence of the occupier or his agent.

In the case of a sample of sewage or trade effluent taken for analysis under Sub-section (1) and the person taking the sample serves on the occupier or his agent a notice under clause (a) of Sub-section (3) and the occupier or agent who is present at the time of taking the sample does not make a request for dividing a sample into two parts, then, the sample so taken shall be placed in a container, which shall be marked, sealed and signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the prescribed laboratory.

**Report of Analysis of Samples**

Section 22 provides for the analysis of the samples, taken under Section 21, by the concerned Board analyst and submission of report of analysis to the concerned Board, in triplicate. On receipt of the report one copy shall be sent to the occupier or his agent. Another copy shall be preserved for production in any court in any legal proceedings and the other copy shall be kept by the concerned Board. In the case of any inconsistency or discrepancy or variation in the results of analysis carried out by the laboratories established or recognised by the Central Board or the State Board, and that of laboratory established or specified under Section 51 or Section 52, the report of the latter laboratory shall prevail.

**Power of Entry and Inspection**

Section 23 of the Act provides that any person empowered by the State Board in this behalf shall have a right at any time to enter with such assistance as he considers necessary, any place for the purpose of:

(a) performing any of the functions of the Board entrusted to him;
(b) determining whether and if so in what manner, any such functions are to be performed or whether any provision of the act or the rules made thereunder or any notice, order, direction or authorisation served, made, given or granted under the act is being or has been complied with;

(c) examining any plant, record, register, document or any other material object or for conducting a search of any place in which he has reason to believe that an offence under this act or the rules made thereunder has been or is being or is about to be committed for seizing any such plant, record, register, document or other material object, if he has reason to believe that it may furnish evidence of the commission of an offence punishable under the act or the rules made thereunder.

However, these powers of inspection of a well, shall be exercised only at reasonable hours in a case where such well is situated in any premises used for residential purposes and the water thereof is used exclusively for domestic purposes.

The provisions of the Code of Criminal Procedure 1973 or any other corresponding law in force in any State in relation to which Cr. P.C. is not in operation, may apply as they apply to any search or seizure made under the authority of a warrant issued under Section 94 of the Cr. P.C. or as the case may be, under the corresponding law of the State.

**Prohibition on Use of Stream or Well for Disposal of Polluting Matter**

Section 24 prohibits any person to knowingly cause or permit any poisonous, or noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter whether directly or indirectly into any stream or well, or sewer or on land. This section also prohibits any person to knowingly cause or permit to enter into any stream any other matter which may tend either directly or in combination with similar matters to impede the proper flow of water of the stream in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes or of its consequences.

However, no person shall be guilty of an offence in respect of matters mentioned above by reason only of having done or caused to be done any of the following acts, namely:

(i) constructing, improving or maintaining in or across or on the bank or bed of any stream any buildings, bridge, weir, dam, sluice, dock, pier, drain or sewer or other permanent works which he has a right to construct, improve or maintain;

(ii) depositing any materials on the bank or in the bed of any stream for the purpose of reclamining land or for supporting, repairing or protecting the bank or bed of such stream provided such materials are not capable of polluting such stream;

(iii) putting into any stream any sand or gravel or other natural deposit which has flowed from or been deposited by current of such streams;

(iv) causing or permitting, with the consent of the State Board, the deposit accumulated in a well, pond or reservoir to enter into any stream.

**Restriction on New Outlets and New Discharges**

Section 25 of the Act which places certain restrictions on new outlets and new discharges is an important one. This section was extensively amended by the 1988
Amendment Act thereby making it obligatory on the part of a person to obtain the consent of the Board for establishing or taking any steps to establish any industry, operation or process which is likely to cause pollution of water and also empowering the Boards to limit their consents for suitable period so as to enable them to monitor observance of the prescribed conditions.

Without the previous consent of the State Pollution Control Board no person is authorised to:

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

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

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

The application for consent should be made in the specified form and manner accompanied by the prescribed fee. When an application for consent is received the State Board make such enquiry as it may deem fit. The procedure for making such enquiry is specified in the Rules framed by the State Government. While granting consent for establishment of any industry, operation etc. or for bringing into use any new or altered outlet, the Board may impose conditions as to the point of discharge of sewage or trade effluent. In the case of consent for new discharge, it may impose conditions as to the nature and composition, temperature, volume or rate of discharge of the effluent from the land or premises from which the discharge or new discharge is to be made. Such consent would be valid only for such period as may be specified in the order. The conditions imposed by the Board are binding on the person establishing or taking steps to establish any industry, operation etc. or using the new or altered outlet or discharging the effluent from the land or premises.

The Board can also refuse to grant consent for reasons to be recorded in writing. Where without the consent of the Board any of the aforesaid acts like establishment of industry, operation, bringing into use outlet or effecting discharge of effluents etc. are done by any person, the Board may serve on the person concerned a notice imposing, such conditions as it might have imposed on an application for its consent in respect of such establishment outlet or discharge.

Section 18(6) obligates every State Board to maintain a register containing particulars of the conditions imposed. So much of the register as related to any outlet or to any effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises as the case may be or by any person authorised by him in this behalf and the conditions so contained in such register shall be conclusive proof that the consent was granted subject to such conditions.

When an application for consent is made, the consent shall, unless given or
refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the making of the application.

'New or altered outlet has been defined to mean any outlet which is wholly or partly constructed on or after the commencement of the Act or which whether so constructed or not is substantially altered after such commencement. New discharge, means discharge which is not, as respects the nature and composition, temperature, volume and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet) so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid, shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of discharge of the effluent as compared with the previous discharge.

Refusal or Withdrawal of Consent by a State Board

Section 27 empowers a State Board to grant or refuse to grant its consent for the establishment of any industry, operation or process or treatment and disposal system or extension or addition thereto or to the bringing into use of a new or altered outlet, unless the industry, operation or process or treatment and disposal system or extension/addition thereto or the outlet is so established as to comply with the conditions imposed by the Board, in order to enable it to exercise its right to take samples of the effluent. A State Board is also empowered to review any condition imposed under Section 25 or Section 26 and may serve on the person to whom consent under these sections had been granted, a notice, making any reasonable variation of or revoking any such condition. The refusal of any consent can also be reviewed by the Board. Where any variation is made of the conditions, such conditions shall continue to be in force until revoked by the Board.

Appeal

Section 28 of the Act deals with appeals and entitles any person aggrieved by an order of the State Board to prefer an appeal with such appellate authority as the State Government may constitute within 30 days from the date on which the order is communicated to him. The Appellate Authority may extend time for filing an appeal if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. The Appellate Authority after giving the appellant and the State Board an opportunity of being heard, shall dispose of the appeal as expeditiously as possible. The appellate authority may direct annulment or substitution of any unreasonable condition imposed by the State Board.

Power of the State Board to Carry Out Certain Works

When the State Board imposes any conditions while granting consent under Section 25 or Section 26 and such conditions require the person concerned to execute any work in connection therewith, but the person fails to execute the same within the specified time, then the Board may serve a notice requiring the person to execute the specified work within prescribed time. Such time shall not be less than thirty days. If in spite of such notice the person fails to execute the work, then after the expiration of the time specified in the notice, the Board itself may execute or cause to be executed such work. All expenses incurred by the Board for execution of the work, together with interest, could be recovered as arrears of land revenue or of public demand.
Furnishing of Information to State Board and other Agencies

Section 31 requires the person incharge of any place where any industry, operation, or process or any treatment and disposal system or any extension or addition thereto is being carried on, to intimate to the State Board or any prescribed authority/agency the occurrence of any accident or other unforeseen act or event as a result of which any poisonous, noxious or polluting matter is being discharged, or is likely to be discharged in such stream or well or sewer or on land and as a result of such discharge, the water in such stream or well being polluted or is likely to be polluted. The provisions of this section are also applicable to any local authority which operates any sewage system or sewage works.

What are the Emergency Measures taken by State Board in Case of Pollution of Stream or Well?

Section 32 empowers the State Board to take certain emergency measures. Accordingly where it appears to the State Board that any poisonous, noxious or polluting matter is present in any stream or well or on land by reason of the discharge of such matter in such stream or well or on land, or has entered into that stream or well due to any accident or unforeseen act or event, and the Board is of the opinion that it is necessary or expedient to take immediate action, then it may for reasons to be recorded in writing, carry out such operations as it may consider necessary for all or any of the following purposes, namely:

(a) removing that matter from stream or well and disposing it of in such manner as the Board considers appropriate;

(b) remedying or mitigating any pollution caused by its presence in the stream or well,

(c) issuing orders immediately restraining or prohibiting the person concerned from discharging any poisonous, noxious or polluting matter into the stream or well or on land or from making insanitary use of the stream or well.

Boards Power to Make Application to Courts

Section 33 of the Act deals with the power of Board to make application to Courts for restraining apprehended pollution of water in streams or wells.

Where it is apprehended by a Board that the water in any stream or well is likely to be polluted by reason of the disposal or likely disposal of any matter in such stream or well or in any sewer or on any land or otherwise, the Board may make an application to the court, not inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the first class, for restraining the person from so causing the pollution. On receipt of an application the court may make such order as it deems fit. Where the court makes an order restraining any person from polluting the water in any stream or well, it may direct the person who is likely to cause or has caused the pollution of the water in the stream or well, to desist from taking such action as is likely to cause pollution or, as the case may be, to remove from such stream or well, such matter. The Court may also authorise the Board, if the direction particularly in respect of removal of any matter from such stream or well has not been complied with by the
person to whom such direction is issued, to undertake the removal and disposal of the matter in such manner as may be specified by the court.

All expenses incurred by the Board in removing any matter in pursuance of the authorisation or in the disposal of any such matter may be defrayed out of any money obtained by the Board from such disposal and any balance outstanding shall be recoverable from the person concerned as arrears of land revenue or of public demand.

### Power to Give Directions

Section 33A introduced by the 1988 Amendment Act is a very important provision under which the Board has been empowered to give directions including that of closure of an offending industry. Under this section which has overriding effect over other law, and subject to the directions that may be given by the Central Government, a Board may in the exercise of its powers and performance of its functions, issue directions in writing to any person, officer or authority including a direction for the closure, prohibition, regulation of any industry, operation or process or a direction for the stoppage or regulation of supply of electricity, water or any other service. The person or authority to whom such directions are issued is bound to comply with the same.

### Penalties and Procedure

Chapter VII of the Act contains provisions relating to penalties and procedure. Under Section 41 failure to comply with the directions given under Section 20(2) (Information about abstraction of water or discharge of effluence) or Section 20(3) (Information regarding construction, installation or operation of any establishment or any disposal system etc.) within the time specified in the direction, would on conviction, be punishable with imprisonment for three months or with fine upto Rs. 10,000 or with both. Where the failure continues, a fine of Rs. 5,000 for each such day of continuance is also leviable.

Failure to comply with an order issued under Section 31(l)(c) (restraint or prohibition from discharging poisonous, noxious or polluting matter into stream or well or on land); or any direction issued by court under Section 33(2) (directing any person from desisting from causing any pollution of the water in any stream or well etc.); or any direction issued under Section 33A (direction regarding closure, regulation, stoppage of electricity etc.) is also punishable on conviction, with imprisonment for a period ranging from eighteen months to six years and with fine. Continuing contravention attracts an additional fine of Rs. 5,000 for each day after the conviction for the first such offence. Where such failure continues beyond one year the offender can be punished with imprisonment for a period of two to seven years and with fine also.

In terms of Section 42, whoever does the following acts shall be liable to imprisonment for a period of three months or fine upto Rs. 10,000 or with both:

(i) destroys, pulls down, removes, injures or defaces any pillar, post, or stake fixed in the ground or any notice or other matter put up, inscribed, or placed
by or under the authority of the Board; or
(ii) obstructs any person acting under the orders or directions of the Board from exercising his powers and performing his functions under the Act; or
(iii) damages any works or property belonging to the Board;
(iv) fails to furnish to any officer or other employee of the Board any information;
(v) fails to intimate the occurrence of any accident or other unforeseen act or event to the Board or other authorities or agencies;
(vi) makes false statement knowingly or wilfully in giving any information which he is required to give or for obtaining the consent from the Board under the Act.

Contravention of the provisions of Section 24 (Prohibition or use of stream or well for disposal of polluting matter), Section 25 (Restrictions on new outlets and new discharges) and Section 26 (consent for operating existing discharge outlets etc.) attracts imprisonment ranging from eighteen months to six years and also fine.

Section 45 of the Act specifies that if any person convicted of any offence under Section 24 or Section 25 or Section 26 is again found guilty of an offence involving a contravention of the same provision, he shall on the second and on every subsequent conviction be punishable with imprisonment for a term which shall not be less than one and half year but may extend to six years and with fine. But no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

Contravention of any provision of the Act or order or direction issued thereunder for which no penalty is provided in the Act, is punishable with imprisonment for a period upto three months and with fine upto Rs. 10,000. Continuing contravention attracts a penalty of Rs. 5,000 for each day default after the first contravention.

Offences by Companies

Section 47 of the Act provides that where an offence has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However, if any such person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence, he shall not be liable to punishment. Where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Section 48 of the Act provides that where the offence under the Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. But the head of the Department shall not be liable to punishment if he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent commission of such offence.
Power to Supersede the Board

Section 61 of the Act empowers the Central Government to supersede the Central Board and the Joint Boards under certain circumstances. Similarly, under Section 62, State Government has been empowered to supersede the State Boards under following circumstances:

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

(ii) circumstances exist which render it necessary in the public interest to so supersede the Board.

Water (Prevention and Control of Pollution) Cess Act, 1977

With a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution, the Water (Prevention and Control of Pollution) Cess Act, 1977 has been brought on the statute book. This Act authorises the levy and collection of a cess on water consumed by person carrying on certain industries and by local authorities. The object of the Cess Act is to ensure that the State or Central Boards are able to raise sufficient finance other than the funds that are being contributed by the Central Government and States and also by way of gifts and donations, in the effective discharge of functions contemplated under the Pollution Control Laws.

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LESSON ROUND UP

- Water (Prevention and Control of Pollution) Act, 1974 has been enacted to provide for the prevention and control of water pollution and maintaining or restoring wholesomeness of water, for the establishment of Boards, with a view to carrying out these purposes, for the prevention and control of water pollution, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.
- Water (Prevention And Control of Pollution) Act, 1974 empowers the Central Government to constitute a Central Pollution Control Board to exercise such powers and functions as may be conferred upon it.
- Water (Prevention And Control of Pollution) Act, 1974 empowers the State Government to constitute the State Boards.
- Water (Prevention And Control of Pollution) Act, 1974 empowers the State Government to restrict the application of the Act to only such area or areas as may be declared in the notification published in the Official Gazette in this behalf.
- Water (Prevention And Control of Pollution) Act, 1974 empowers the State Board to take certain emergency measures.
- Board may in the exercise of its powers and performance of its functions, issue directions in writing to any person, officer or authority including a direction for the closure, prohibition, regulation of any industry, operation or process or a direction for the stoppage or regulation of supply of electricity, water or any other service.
SELF TEST QUESTIONS

1. What are the provisions relating to prevention and control of water pollution?

2. Discuss briefly the restriction on new outlets and new discharges under the Water (Prevention and Control of Pollution) Act.

3. Write note on the following:
   (i) Restrictions on use of certain Industrial Plants.
   (ii) Powers to take samples of effluents.

4. What are the powers of State Boards in taking samples?

5. What are the disqualifications of a person to be a member of State Pollution Control Board?
Concept of Patent

Generally speaking, Patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. Underlying economic and commercial justification for the patent system is that it acts as a stimulus to investment in the Industrial innovation. Innovative technology leads to the maintenance of and increase in nations stock of valuable, tradeable and industrial assets.

The grant of first patent can be traced as far back as 500 B.C. It was the city dominated by gaurmands, it was perhaps the first to grant what we now-a-days call
patent right to promote culinary art. For it conferred exclusive rights of sale to any confectioner who first invented a delicious dish. As the practice was extended to other Greek cities and to other crafts and commodities, it acquired a name ‘monopoly’, a Greek Portmanteau word from mono (alone) and polein (sale).

Evidences of grant to private individuals by kings and rulers of exclusive property rights to inventors dates back to the 14th Century, but their purpose had varied throughout the history. History shows that in 15th Century Venice there had been systematic use of monopoly privileges for inventors for the encouragement of invention. Utility and novelty of the invention were the important considerations for granting a patent privilege. The inventors were also required to put his invention in commercial use within a specified period. In 16th Century the German princes awarded inventors of new arts and machines and also took into consideration the utility and novelty of inventions. Early laws in American colonies served primarily to encourage foreign manufacturers to establish new industries in the colonies by providing them protected domestic markets.

By the late 15th Century, the English monarchy increasingly started using monopoly privilege to reward court favourites, to secure loyalty and to secure control over the industry but these privileges were not used to encourage inventions. In 1623, the English Parliament adopted a Statute of monopolies which recognised the inventors patent as a justifiable monopoly to be distinguished from other monopoly privileges. The Statute outlawed the awarding of monopoly privileges except for first and true inventor of a new manufacture.

In England, during the 16th and 17th Century the inventors patent of monopoly had become of great national importance. From the mid-seventeenth Century through the mid-nineteenth Century, the laws recognising the patent monopoly spread throughout Europe and North America, but these privileges were not granted without the opposition. In India, the law relating to Patents is contained in the Patents Act, 1970, which was last amended in the year 1999.

The law relating to patents contained in the Patents Act, 1970 has been amended in the year 1995, 1999, 2002 and 2005 to meet India’s obligations under the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) forming part of the Agreement establishing the World Trade Organisation (WTO). The Patents Act has been amended keeping in view the development of technological capability in India, coupled with the need for integrating the intellectual property system with international practices and intellectual property regimes. The amendments have also been aimed at making the Act a modern, harmonised and user-friendly legislation to adequately protect national and public interests while simultaneously meeting India’s international obligations. The provisions of Patents Act, 1970 as amended by Patents (Amendment) Act, 2005 are as under:

Definitions

Section 2 of the Patents Act, 1970 defines various terms used in the Act. The definition of some notable terms is given below:
Assignee

Section 2(a) of the Act defines the term assignee as to include the legal representative of a deceased assignee, and references to the assignee of any person include references to the assignee of the legal representative or assignee of that person.

Budapest Treaty

Budapest Treaty has been defined under Section 2(aba) to mean the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure done at Budapest on April 28, 1977 as amended and modified from time to time.

Convention Application

Section 2(c) defines the convention application as to mean an application for a patent made by virtue of Section 135.

Exclusive Licence

According to Section 2(f) exclusive licence means a licence from a patentee which confers on the licencee, or on the licencee and persons authorised by him, to the exclusion of all other persons (including the patentee), any right in respect of the patented invention and exclusive licencee shall be construed accordingly.

Invention

Section 2(j) defines invention as to mean a new product or process involving an inventive step and capable of Industrial application.

Inventive Step

Section 2(ja) defines the term ‘inventive step’ as to mean a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both that makes the invention not obvious to a person skilled in the art.

New Invention

Section 2(l) defines the term new invention as to mean any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen into public domain or that it does not form part of the state of the art.

Opposition Board

The term Opposition Board has been defined under section 2(la) as to mean Opposition Board under section 25(3) of the Act.
What is not inventions

The following are not inventions within the meaning of Section 3 of the Act:

(a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;
(b) an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;
(c) the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature;
(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any property or mere new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. Explanation to clause (d) clarifies that salts, esters, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.
(e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;
(f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;
(g) omitted by Patents (Amendment) Act, 2002.
(h) a method of agriculture or horticulture;
(i) any process for the medicinal, surgical, curative, prophylactic diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products;
(j) plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals;
(k) a computer programme per se other than its technical application to industry or a combination with hardware;
(l) a literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television productions;
(m) a mere scheme or rule or method of performing mental act or method of playing game;
(n) a presentation of information;
(o) topography of integrated circuits;
(p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.
Section 4 prohibits the grant of patent in respect of an invention relating to atomic energy falling within Sub-section (1) of Section 20 of the Atomic Energy Act, 1962.

Persons Entitled to make Application for Patent

Section 6 of the Act provides that an application for a patent for an invention may be made by any of the following persons, that is to say:

(a) by any person claiming to be the true and first inventor of the invention;
(b) by any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application;
(c) by the legal representative of any deceased person who immediately before his death was entitled to make such an application.

The application may be made by one of the persons either alone or jointly with any other person.

Form of Application and Provisional & Complete Specification

Section 7 dealing with form of application requires every application for a patent to be made for one invention only. Where the application is made by virtue of an assignment of the right to apply for a patent for the invention, there shall be furnished with the application proof of the right to make the application.

Every international application under the Patent Cooperation Treaty (PCT) for a patent, as may be filed designating India shall be deemed to be an application under the Act, if a corresponding application has also been filed before Controller in India. The filing date of such application and its complete specification processed by patent office as designated office or elected office shall be the international filing date accorded under the PCT. Section 7(4) provides that every such application, not being a convention application or an application filed under PCT designating India, shall be accompanied by a provisional or a complete specification.

Section 9 stipulates that where an application for a patent (not being a convention application or an application filed under PCT designating India) is accompanied by a provisional specification, a complete specification shall be filed within twelve months from the date of filing of the application, and if the complete specification is not so filed, the application shall be deemed to be abandoned. Where two or more applications in the name of the same applicant are accompanied by provisional specifications in respect of inventions which are cognate or of which one is a modification of another and the Controller is of opinion that the whole of such inventions are such as to constitute a single invention and may properly be included in one patent, he may allow one complete specification to be filed in respect of all such provisional specifications.

However, the period of twelve months shall be reckoned from the date of filing of the earliest provisional specification.

Where an application for a patent (not being a convention application or an application filed under PCT designating India) is accompanied by a specification purporting to be a complete specification, the Controller may, if the applicant so requests at any time within twelve months from the date of filing of the application,
direct that such specification shall be treated as a provisional specification and proceed with the application accordingly.

Where a complete specification has been filed in pursuance of an application for a patent accompanied by a provisional specification or by a specification treated by virtue of a direction under sub-section (3) as a provisional specification, the Controller may, if the applicant so requests at any time before the grant of patent, cancel the provisional specification and post-date the application to the date of filing of the complete specification.

**Does a Patent obtained in India give protection worldwide?**

Patent protection is territorial right and therefore it is effective only within the territory of India. However, filing an application in India enables the applicant to file a corresponding application for same invention in convention countries, within or before expiry of twelve months from the filing date in India. Therefore, separate patents should be obtained in each country where the applicant requires protection of his invention in those countries. There is no patent valid worldwide.

**Is it possible to file international application under Patent Cooperation Treaty (PCT) in India?**

It is possible to file an international application known as PCT application in India in the Patent Offices located at Kolkata, Chennai, Mumbai and Delhi. All these offices act as Receiving Office (RO) for International application.

**Contents of Specifications**

Section 10 dealing with contents of Specifications provides that every specification, whether provisional or complete, shall describe the invention and begin with a title sufficiently indicating the subject matter to which the invention relates.

Every complete specification is required to -

(a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed;

(b) disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection;

(c) end with a claim or claims defining the scope of the invention for which protection is claimed; and

(d) be accompanied by an abstract to provide technical information on the invention.

However, the Controller may amend the abstract for providing better information.
to third parties and if the applicant mentions a biological material in the specification which may not be described in such a way as to satisfy clauses (a) and (b) above and if such material is not available to the public, the application shall be completed by depositing the material to an International Depository Authority under the Budapest Treaty and by fulfilling the following conditions, namely:

(i) the deposit of the material shall be made not later than the date of filing the patent application in India and a reference thereof shall be made in the specification within the prescribed period;

(ii) all the available characteristics of the material required for it to be correctly identified or indicated are included in the specification including the name, address of the depository institution and the date and number of the deposit of the material at the institution;

(iii) access to the material is available in the depository institution only after the date of the application for patent in India or if a priority is claimed after the date of the priority;

(iv) disclose the source and geographical origin of the biological material in the specification, when used in an invention.

In case of an international application designating India the title, description, drawings, abstracts and claims filed with the application shall be taken as the complete specification for the purposes of the Act.

The claim or claims of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept, shall be clear and succinct and shall be fairly based on the matter disclosed in the specification.

**Publication of Applications**

Section 11A(1) provides that save as provided otherwise, no application for patents shall ordinarily be open to public for such period as may be prescribed. Sub-section (2) entitles an applicant to request the Controller, in the prescribed manner, to publish his application at any time before the expiry of the period prescribed under sub-section (1) and subject to the provisions of sub-section (3). The Controller on receipt of such request shall publish such application as soon as possible. Every application for patent shall be published on expiry of the period specified in sub-section (1) except those applications in which secrecy direction is imposed under section 35; or application has been abandoned under section 9(1); or application has been withdrawn three months prior to the period specified under sub-section (1).

The publication of every application shall include the particulars of the date of application, number of application, name and address of the applicant identifying the application and an abstract. Upon publication of an application for a patent, the depository institution shall make the biological material mentioned in the specification available to the public. The patent office may, on payment of prescribed fee make the specification and drawings, if any, of such application available to the public.

Section 11A(7) provides that on or from the date of publication of the application for patent and until the date of grant of a patent in respect of such application, the applicant shall have the like privileges and rights as if a patent for invention had been
granted on the date of publication of application. However, the applicant shall have no right to institute any proceedings for infringement until the patent has been granted. Additionally, the rights of a patentee in respect of applications made under Section 5(2) before January 1, 2005 shall accrue from the date of grant of patent.

Moreover, after the patent is granted in respect of applications made under Section 5(2), the patent holder shall only be entitled to receive reasonable royalty from such enterprises which have made significant investment and were producing and marketing concerned product prior to January 1, 2005 and which continue to manufacture the product covered by the patent on the date of grant of the patent and no infringement proceedings shall be instituted against such enterprises.

Request for Examination

Section 11B provides that no application for a patent shall be examined unless the applicant or any other interested person makes a request in the prescribed manner for such examination within the prescribed period. In case of an application in respect of a claim for a patent filed under Section 5(2) before January 1, 2005, a request for examination shall be made in the prescribed manner for such examination within the prescribed period, by the applicant or any other interested person.

In case the applicant or any other interested person does not make a request for examination of the application for a patent within the specified period, the application shall be treated as withdrawn by the applicant. However the applicant may, at any time after filing the application but before the grant of the patent, withdraw the application by making a request in the prescribed manner; and in a case secrecy direction has been issued under Section 35, the request for examination may be made within the prescribed period from the date of revocation of the secrecy direction.

Examination of Application

Section 12 dealing with examination of application provides that when the request for examination has been filed in respect of an application for a patent in the prescribed manner under Section 11B(1) or (3), the application and specification and other documents related thereto shall be referred at the earliest by the Controller to an examiner for making a report to him in respect of the following matters, namely:

(a) whether the application and the specification and other documents relating thereto are in accordance with the requirements of the Act and of any rules made thereunder;
(b) whether there is any lawful ground of objection to the grant of the patent in pursuance of the application;
(c) the result of investigations made under Section 13, and
(d) any other matter which may be prescribed.

The examiner to whom the application and the specification and other documents relating thereto are referred shall ordinarily make the report to the Controller within the prescribed period.

Search for Anticipation by Previous Publication and by Prior Claim

Section 13 dealing with search for anticipation by previous publication and by
prior claim provides that the examiner to whom the application for a patent is referred shall make investigation for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification:

(a) has been anticipated by publication before the date of filing of the applicant’s complete specification in any specification filed in pursuance of an application for a patent made in India and dated on or after the 1st day of January, 1912;

(b) is claimed in any claim of any other complete specification published on or after the date of filing of the applicant’s complete specification, being a specification filed in pursuance of an application for a patent made in India and dated before or claiming the priority date earlier than that date.

The examiner shall, in addition, make such investigation for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification has been anticipated by publication in India or elsewhere in any document other than those mentioned in Section 13(1) before the date of filing of the applicant’s complete specification. In case a complete specification has been amended before the grant of a patent, the amended specification shall be examined and investigated in the like manner as the original specification.

Consideration of the Report of Examiner by Controller

Section 14 provides that in case the report of the examiner is adverse to the applicant and requires any amendment of the application, specification or other documents, the Controller shall, before proceeding to dispose of the application, communicate the gist of obligations to the applicant as expeditiously as possible and afford him an opportunity of hearing.

Power of Controller to Refuse or Require Amended Application in Certain matters

Section 15 empowers the Controller to refuse the application or to require the application, specification or other documents to be amended, if he is satisfied that the application or any specification or any other document filed in pursuance thereof does not comply with the provisions of the Act and the rules made thereunder.

Power of Controller to make Orders Respecting Dating of Application and Cases of Anticipation

Section 17 provides that at any time after the filing of an application and before the grant of the patent, the Controller may at the request of the applicant direct that the application shall be post-dated to such date as may be specified in the request and proceed with the application accordingly. However, no application shall be post-dated to a date later than six months from the date on which it was actually made or would be deemed to have been made.

Where an application or specification (including drawings) or any other document is required to be amended under Section 15, the application or specification or other document shall, if the Controller so directs, be deemed to have been made on the date on which the requirement is complied with or where the application or specification or other document is returned to the applicant, the date on which it is refiled after complying with the requirement.

Section 18 says that where it appears to the Controller that the invention so far
as claimed in any claim of the complete specification has been anticipated, he may refuse the application unless the applicant:

(a) shows to the satisfaction of the Controller that the priority date of the claim of his complete specification is not later than the date on which the relevant document was published; or

(b) amends his complete specification to the satisfaction of the Controller.

If it appears to the Controller that the invention is claimed in a claim of any other complete specification, he may, direct that a reference to that other specification be inserted in the applicant's complete specification unless the applicant shows to the satisfaction of the Controller that the priority date of his claim is not later than the priority date of the claim of the said other specification; or the complete specification has been amended to his satisfaction.

Similar provision also applies in the case where it appears to the Controller that the invention so far claimed in any claim of the applicant's complete specification has been claimed in other complete specification referred to in section 13(1)(a) and that such other complete specification was published on or before the priority date of the applicant's claim.

Potential infringement

Section 19 provides that if in consequence of the investigations it appears to the Controller that an invention in respect of which an application for a patent has been made cannot be performed without substantial risk of infringement of a claim of any other patent, he may direct that a reference to that other patent, be inserted in the applicant's complete specification by way of notice to the public within such time as may be prescribed, unless

(a) the applicant shows to the satisfaction of the Controller that there are reasonable grounds for contesting the validity of the said claim of the other patent; or

(b) the complete specification is amended to the satisfaction of the Controller.

The reference shall be inserted in the following form, namely:

"Reference has been directed, in pursuance of Section 19(2) of the Patents Act, 1970 to Patent No. ...".

Where after a reference to another patent has been inserted in a complete specification in pursuance of a direction under Section 19(1):

(a) that other patent is revoked or otherwise ceases to be in force; or

(b) the specification of that other patent is amended by the deletion of the relevant claim; or

(c) it is found, in proceedings before the court or the Controller, that the relevant claim of that other patent is invalid or is not infringed by any working of the applicant's invention, the Controller may, on the application of the applicant delete the reference to that other patent.

Substitution of applicants etc.

Section 20 says that if the Controller is satisfied, on a claim made in prescribed
manner at any time before a patent has been granted that by virtue of any assignment or agreement in writing made by the applicant or one of the applicants for the patent or by operation of law, the claimant would, if the patent were then granted, be entitled thereto or to the interest of the applicant therein, or to an undivided share of the patent or of that interest, the Controller may direct that the application shall proceed in the name of the claimant or in the names of the claimants and the applicant or the other joint applicant or applicants, accordingly as the case may be. No such direction shall however, be given by virtue of any assignment or agreement made by one of the two or more joint applicants for a patent except with the consent of the other joint applicant or applicants. Further, no such direction shall be given by virtue of any assignment or agreement for the assignment of the benefit of an invention unless:

(a) the invention is identified therein by reference to the number of the applications for the patent; or

(b) there is produced to the Controller an acknowledgement by the person by whom the assignment or agreement was made that the assignment or agreement relates to the invention in respect of which that application is made; or

(c) the rights of the claimant in respect of the invention have been finally established by the decision of court; or

(d) the Controller gives directions for enabling the application to proceed or for regulating the manner in which it should be proceeded with under subsection (5).

Where one of the two or more joint applicants for a patent dies at any time before the patent has been granted, the Controller may upon a request made by the survivor or survivors and with the consent of the legal representative of the deceased direct that the application shall proceed in the name of the survivor or survivors alone.

If any dispute arises between joint applicants for a patent whether or in what manner the application should be proceeded with, the Controller may upon an application made by any of the parties, and after giving to all parties concerned an opportunity of being heard, give such directions as he thinks fit for enabling the application to proceed in the name of one or more of the parties alone or for regulating the manner in which it should be proceeded with.

**Time for Putting Application in Order for Grant**

Section 21 of the Act provides that an application for a patent shall be deemed to have been abandoned unless, the applicant has complied within the prescribed period with all the requirements imposed on him by or under the Act, whether in connection with the complete specification or otherwise in relation to the application from the date on which the first statement of objections to the application or complete specification or other documents related thereto is forwarded to the applicant by the Controller.

Explanation to section 21(1) clarifies that where the application for a patent or any specification or, in the case of a convention application or an application filed under the PCT designating India any document filed as part of the application has been returned to the applicant by the Controller in the course of the proceedings, the
applicant shall not be deemed to have complied with such requirements unless and until he has re-filed it or the applicant proves to the satisfaction of the Controller that for the reasons beyond his control such document could not be re-filed.

Sub-section (2) of Section 21 provides that if at the expiration of the period as prescribed under sub-section (1) an appeal to the High Court is pending in respect of the application for the patent for the main invention; or in the case of an application for a patent of addition, an appeal to the High Court is pending in respect of either that application or the application for the main invention, the time within which the requirements of the Controller shall be complied with shall, on an application made by the applicant before the expiration of the period as prescribed under sub-section (1), be extended until such date as the High Court may determine. In case, the time within which the appeal mentioned in sub-section (2) may be instituted has not expired, the Controller may extend the period as prescribed under sub-section (1), to such further period as he may determine. However, in case of an appeal filed during the said further period, and the High Court has granted any extension of time for complying with the requirements of the Controller, then the requirements may be complied with within the time granted by the High Court.

OPPOSITION TO THE PATENT

Section 25 of the Act deals with opposition to grant of patent and provides that where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the following grounds and the Controller on request of such person shall hear him and dispose of the representation in the prescribed manner and specified time:

(a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim —

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document:

Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29;

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant’s claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant’s claim;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation — For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a
product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant’s claim;

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the applicant has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mention the source of geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

Section 25(2) entitles any interested person to give notice of opposition, to the Controller in the prescribed manner at any time after the grant of patent but before the expiry of a period of one year from the date of publication of grant of a patent, on any of the following grounds only :-

(a) that the patentee or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or in India or elsewhere, in any other document. However, the ground that the invention so far claimed in any claim of complete specification has been published before the priority date of the claim in India or elsewhere in any other document shall not be available where such publication does not constitute an anticipation of the invention by virtue of section 29(2) or (3);

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the claim of the patentee and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the claim of the patentee;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.
Explanation to clause (d) of Section 25(3) clarifies that an invention relating to a process for which a patent is granted shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only.

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the claim;

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the patentee has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a patent granted on convention application, the application for patent was not made within twelve months from the date of the first application for protection for the invention made in a convention country or in India by the patentee or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

Controller to Treat Application as Application of Opponent

Section 26 of the Act provides that where in any opposition proceeding the Controller finds that the invention, so far as claimed in any claim of the complete specification, was obtained from the opponent in the manner set out in section 25(2)(a) and revokes the patent on that ground, he may, on request by such opponent made in the prescribed manner, direct that the patent shall stand amended in the name of the opponent; or a part of an invention described in the complete specification was so obtained from the opponent, he may pass an order requiring that the specification be amended by the exclusion of that part of the invention.

Where an opponent has, before the date of the order of the Controller requiring the amendment of a complete specification referred to in section 26(1)(b), filed an application for a patent for an invention which included the whole or a part of the invention held to have been obtained from him and such application is pending, the Controller may treat such application and specification in so far as they relate to the invention held to have been obtained from him, as having been filed, for the purposes of the priority dates of claims of the complete specification, on the date on which the corresponding document was or deemed to have been filed by the patentee in the earlier application but for all other purposes the application of the opponent shall be proceeded with as an application for a patent.
Constitution of Opposition Board and its proceeding

Section 25(3) provides that where any such notice of opposition is duly given under sub-section (2), the Controller shall notify the patentee and constitute a Board by order in writing to be known as the Opposition Board consisting of such officers as he may determine and refer such notice of opposition along with the documents to that Board for examination and submission of its recommendation. Every Opposition Board is required to conduct the examination in accordance with the prescribed procedure. Sub-section (4) provides that the Controller shall on receipt of the recommendation of the Opposition Board and after giving the patentee and the opponent an opportunity of being heard, order either to maintain or amend or revoke the patent.

However, the Controller while passing the order shall not take into account any personal document or secret trial or secret use in case the opposition is based on the grounds mentioned under sub-section (2)(d) & (e). In case the Controller issues an order under sub-section (4) that the patent shall be maintained subject to amendment of the specification or any other document, the patent shall stand amended accordingly.

Secrecy of Certain Inventions

Chapter VII of the Act containing Sections 35-40 provides for secrecy of certain inventions. Section 35 deals with secrecy directions relating to inventions relevant for defence purposes. Section 36 provides for periodical review of secrecy directions, Section 37 deals with consequences, Section 38 deals with revocation, Section 39 prohibits residents from applying for patent outside India without the prior permission and Section 40 deals with liabilities.

Secrecy Directions for Defence Purposes

Section 35 provides that where, in respect of an application, it appears to the Controller that the invention is one of a class notified to him by the Central Government as relevant for defence purposes, or, where otherwise the invention appears to him to be so relevant, he may give directions for prohibiting or restricting the publication of information with respect to the invention or the communication of such information to any person or class of persons specified in the directions.

Sub-section (2) requires the Controller to give notice of the application and the directions so issued to the Central Government. The Central Government, upon receipt of such notice, consider whether the publication of the invention would be prejudicial to the defence of India, and if upon such consideration, it appears to it that the publication of the invention would not so prejudice, give notice to the Controller to that effect, who shall thereupon revoke the directions and notify the applicant accordingly. Sub-section (3) provides that where the Central Government is of the opinion that an invention in respect of which the Controller has not given any directions, is relevant for defence purposes, it may at any time before grant of patent notify the Controller to that effect, and thereupon the Controller shall give notice to the Central Government of the directions issued by him.

Review of Secrecy directions

Section 36 deals with the question as to whether an invention in respect of which directions have been given continues to be relevant for defence purposes and
empowers the Central Government to reconsider the direction at intervals of six months from the date of issue of such directions or on a request made by the applicant which is found to be reasonable by the Controller.

On such reconsideration if it appears to the Central Government that the publication of the invention would no longer be prejudicial to the defence of India it shall give notice to the Controller accordingly and the Controller shall thereupon revoke the directions given previously. Sub-section (2) requires the result of every reconsideration to be communicated to the applicant within specified time and prescribed manner.

**RESIDENTS NOT TO APPLY FOR PATENTS OUTSIDE INDIA WITHOUT PRIOR PERMISSION**

Section 39 of the Act provides that no person resident in India shall, except under the authority of a written permit sought in the prescribed manner and granted by or on behalf of the Controller, make or cause to be made any application outside India for the grant of a patent for an invention unless an application for a patent for the same invention has been made in India, not less than six weeks before the application outside India and either no direction has been given under of section 35(1) in relation to the application in India, or all such directions have been revoked.

Sub-section (2) obliges the Controller to dispose of every such application within the prescribed period. However, if the invention is relevant for defence purpose or atomic energy, the Controller shall not grant permit without the prior consent of the Central Government. Sub-section (3) clarifies that the provisions of section 39 shall not apply in relation to an invention for which an application for protection has first been filed in a country outside India by a person resident outside India.

**GRANT OF PATENTS**

Section 43 dealing with grant of patents provides that where an application for a patent has been found to be in order for grant of the patent and either the application has not been refused by the Controller by virtue of any power vested in him by the Act; or the application has not been found to be in contravention of any of the provisions of the Act, the patent shall be granted as expeditiously as possible to the applicant or, in the case of a joint application, to the applicants jointly, with the seal of the patent office and the date on which the patent is granted shall be entered in the register. The Controller has been put under obligation to publish the fact that the patent has been granted and thereupon the application, specification and other documents related thereto shall be open for public inspection.

**Grant of patents subject to conditions**

Section 47 dealing with grant of patents subject to conditions provides that the grant of a patent shall be subject to the conditions that:

1. any machine, apparatus or other article in respect of which the patent is granted or any article made by using a process in respect of which the patent is granted, may be imported or made by or on behalf of the Government for the purpose merely of its own use;

2. any process in respect of which the patent is granted may be used by or on behalf of the Government for the purpose merely of its own use;

3. any machine, apparatus or other article in respect of which the patent is
granted or any article made by the process in respect of which the patent is granted, may be made or used, and any process in respect of which the patent is granted may be used by any person, for the purpose merely of experiment or research including the imparting of instructions to pupils; and

(4) in the case of a patent in respect of any medicine or drug, the medicine or drug may be imported by the Government for the purpose merely of its own use or for distribution in any dispensary, hospital or other medical institution maintained by or on behalf of the Government or any other dispensary, hospital or other medical institution which the Central Government may, having regard to the public service that such dispensary, hospital or medical institution renders, specify in this behalf by notification in the Official Gazette.

### TERM OF PATENT

Section 53 provides that the term of every patent granted after the commencement of the Patents (Amendment) Act, 2002 and the term of every patent which has not expired and has not ceased to have effect, on the date of such commencement, shall be twenty years from the date of filing of application for the patent.

Explanation to Section 53(1) clarifies that the term of patent in case of international applications filed under the Paris Convention Treaty (PCT) designating India, shall be twenty years from the international filing date accorded under the Patent Cooperation Treaty.

A patent shall cease to have effect on the expiration of the period prescribed for the payment of any renewal fee, if that fee is not paid within the prescribed period or within such extended period as may be prescribed. Further on cessation of the patent right due to non-payment of renewal fee or on expiry of the term of patent, the subject matter covered by the said patent shall not be entitled to any protection.

### PATENTS OF ADDITION

Section 54, 55 and 56 deals with patents of addition. Section 54 provides that where an application is made for a patent in respect of any improvement in or modification of an invention described or disclosed in the complete specification, namely the main invention and the applicant also applies or has applied for a patent for that invention or is the patentee in respect thereof, the Controller may, if the applicant so requests, grant the patent for the improvement or modification as a patent of addition.

Where an invention being an improvement in or modification of another invention, is the subject of an independent patent and the patentee in respect of that patent is also the patentee in respect of the patent for the main invention, the Controller may, if the patentee so requests, revoke the patent for the improvement or modification and grant to the patentee a patent of addition in respect thereof, bearing the same date of the patent so revoked. However a patent shall not be granted as a patent of addition unless the date of filing of the application is the same as or later than the date of filing of the application in respect of the main invention. A patent of addition shall not be granted before the grant of the patent for the main invention.

Section 55 deals with term of patents of addition and provides that a patent of
addition is granted for a term equal to that of the patent for the main invention or so much thereof as has not expired and remains in force during that term or until the previous cesser of the patent for the main invention and no longer. No renewal fees is payable in respect of a patent of addition, but if any such patent becomes an independent patent the same fees shall thereafter be payable upon the same dates, as if the patent had been originally granted as an independent patent.

Section 56 which deals with validity of patents of addition provides that the grant of a patent of addition shall not be refused and a patent granted as a patent of addition shall not be revoked or invalidated, on the ground only that the invention claimed in the complete specification does not involve any inventive step having regard to any publication or use of the main invention described in the complete specification relating thereto; or any improvement in or modification of the main invention described in the complete specification of a patent of addition to the patent for the main invention or of an application for such a patent of addition, and the validity of a patent of addition shall not be questioned on the ground that the invention ought to have been the subject of an independent patent. In this context, it is clarified that in determining the novelty of the invention claimed in the complete specification filed in pursuance of an application for a patent of addition regard shall be had also to the complete specification in which the main invention is described.

RESTORATION OF LAPSED PATENTS

Section 60 provides that where a patent has ceased to have effect by reason of failure to pay any renewal fee within the period prescribed under section 53 or within period as may be allowed under section 142(4), the patentee or his legal representative and where the patent was held by two or more persons jointly, then with the leave of the Controller one or more of them without joining the others, may within eighteen months from the date on which the patent ceased to have effect, make an application for the restoration of the patent.

Procedure for disposal of applications for restoration of lapsed patents

Section 61 provides that if, after hearing the applicant in cases where the applicant so desires or the Controller thinks fit, the Controller is prima facie satisfied that the failure to pay the renewal fee was unintentional and that there has been no undue delay in the making of the application, he shall publish the application in the prescribed manner; and within the prescribed period, any person interested may give notice to the Controller of opposition thereto on either or both of the following grounds that —

(a) the failure to pay the renewal fee was not unintentional; or
(b) there has been undue delay in the making of the application.

If notice of opposition is given within the prescribed period aforesaid, the Controller shall notify the applicant, and shall give to him and to the opponent an opportunity to be heard before deciding the case. If no notice of opposition is given within the prescribed period aforesaid or if in the case of opposition, the decision of the Controller is in favour of the applicant, the Controller shall, upon payment of any unpaid renewal fee and such additional fee as may be prescribed, restore the patent and any patent of addition specified in the application which has ceased to have effect on the cesser of that patent. The Controller may, if he thinks fit as a condition of restoring the patent, require that an entry shall be made in the register of any
document or matter which has to be entered in the register but which has not been so
entered.

Rights of patentees of lapsed patents which have been restored

Section 62 provides that where a patent is restored, the rights of the patentee
shall be subject to such conditions as may be prescribed and to such other conditions
as the Controller thinks fit to impose for the protection or compensation of persons
who may have begun to avail themselves of, or have taken definite steps by contract
or otherwise to avail themselves of, the patented invention between the date when
the patent ceased to have effect and the date of the publication of the application for
restoration of the patent. No suit or other proceeding shall be commenced or
prosecuted in respect of an infringement of a patent committed between the date on
which the patent ceased to have effect and the date of the publication of the
application for restoration of the patent.

SURRENDER AND REVOCATION OF PATENTS

Section 63 entitles the patentee to offer to surrender his patent, at any time by
giving notice to the Controller. Where such an offer is made, the Controller shall
publish the offer in the prescribed manner and also notify every person other than the
patentee whose name appears in the register as having an interest in the patent. Any
person interested may, within the prescribed period after such publication, give notice
of opposition to the Controller and where such notice in given the Controller shall
notify the patentee. If the Controller is satisfied after hearing the patentee and any
opponent, if desirous of being heard, that the patent may properly be surrendered, he
may accept the offer and by order revoke the patent.

Section 64 deals with revocation of patents, section 65 deals with revocation of
patent and amendment of complete specification on directions of the Government in
cases relating to atomic energy and section 66 deals with revocation of patents in
public interest. Section 65 as amended by Patents (Amendment) Act, 2005 provides
that where at any time after grant of a patent, the Central Government is satisfied that
a patent is for an invention relating to atomic energy for which no patent can be
granted under sub-section (1) of section 20 of the Atomic Energy Act, 1962, it may
direct the Controller to revoke the patent, and thereupon the Controller, after giving
notice, to the patentee and every other person whose name has been entered in the
register as having an interest in the patent, and after giving them an opportunity of
being heard, may revoke the patent. Sub-section 2 empowers the Controller allow the
patentee to amend the complete specification in such manner as he considers
necessary instead of revoking the patent.

WORKING OF PATENTED INVENTIONS – GENERAL PRINCIPLES

Section 83 dealing with general principles applicable to working of patented invention
provides that in exercising the powers conferred for working of patents and compulsory
licences, regard shall be had to the following general considerations, namely:

(a) that patents are granted to encourage inventions and to secure that the
inventions are worked in India on a commercial scale and to the fullest extent
that is reasonably practicable without undue delay;

(b) that they are not granted merely to enable patentees to enjoy a monopoly for
the importation of the patented article;

(c) that the protection and enforcement of patent rights contribute to the
promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;

(d) that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio-economic and technological development of India;

(e) that patents granted do not in any way prohibit Central Government in taking measures to protect public health;

(f) that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and

(g) that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.

COMPULSORY LICENCES

Section 84 provides that at any time after the expiration of three years from the date of the sealing of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:

(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

(b) that the patented invention is not available to the public at a reasonably affordable price, or

(c) that the patented invention is not worked in the territory of India.

An application for compulsory licence may be made by any person notwithstanding that he is already the holder of a licence under the patent and no person shall be estopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price by reason of any admission made by him, whether in such a licence or otherwise or by reason of his having accepted such a licence.

Sub-section (3) requires every application for compulsory licence to contain a statement setting out the nature of the applicant’s interest together with such particulars as may be prescribed and the facts upon which the application is based. The Controller on being satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or the patented invention is not worked in the territory of India or the patented invention is not available to the public at a reasonably affordable price, may grant a licence upon such terms as he may deem fit.

In considering the application of compulsory licence, the Controller is required to take into account —

(i) the nature of the invention, the time which has elapsed since the sealing of
the patent and the measures already taken by the patentee or any licencsee to make full use of the invention;

(ii) the ability of the applicant to work the invention to the public advantage;

(iii) the capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted;

(iv) as to whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit.

However, the Controller is under no obligation to take into account matters subsequent to the making of the application. It has been clarified that the reasonable period shall be construed as a period not ordinarily exceeding a period of six months. In this context, it has been clarified that, the reasonable requirements of the public shall be deemed not to have been satisfied if —

(a) by reason of refusal of the patentee to grant a licence or licences on reasonable terms,—

(i) an existing trade or industry or the development thereof or the establishment of any new trade or industry in India or the trade or industry in India or the trade or industry of any person or class of persons trading or manufacturing in India is prejudiced; or

(ii) the demand for the patented article has not been met to an adequate extent or on reasonable terms; or

(iii) a market for export of the patented article manufactured in India is not being supplied or developed; or

(iv) the establishment or development of commercial activities in India is prejudiced; or

(b) by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of any trade or industry in India, is prejudiced; or

(c) the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention to challenges to the validity of patent or coercive package licensing; or

(d) the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable; or

(e) the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by —

(i) the patentee or persons claiming under him; or

(ii) persons directly or indirectly purchasing from him; or

(iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement.

REVOCATION OF PATENTS BY THE CONTROLLER FOR NON-WORKING

Section 85 deals with revocation of patents by Controller for non-working and
provides that where, in respect of a patent, a compulsory licence has been granted, the Central Government or any person interested may, after the expiration of two years from the date of the order granting the first compulsory licence, apply to the Controller for an order revoking the patent on the ground that the patented invention has not been worked in the territory of India or reasonable requirements of the public with respect to the patented invention has not been satisfied or the patented invention is not available to the public at a reasonably affordable price.

Every application for revocation should contain prescribed particulars, the facts upon which the application is based, and, in the case of an application other than by the Central Government, should also set out the nature of the applicant’s interest. The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention has not been satisfied or patented invention has not been worked in the territory of India or is not available to the public at a reasonably affordable price, may make an order revoking the patent. The controller has however been put under obligation to ordinarily decide such application within one year of its presentation.

Procedure for dealing with applications

Section 87 provides that where the Controller is satisfied, upon consideration of an application for compulsory licence or revocation of patent, that a prima facie case has been made out for the making of an order, he shall direct the applicant to serve copies of the application upon the patentee and any other person appearing from the register to be interested in the patent in respect of which the application is made, and shall publish the application in the Official Journal.

The patentee or any other person desiring to oppose the application may, within prescribed time or within such further time as the Controller may on application allow, give to the Controller notice of opposition. Any such notice of opposition should contain a statement setting out the grounds on which the application is opposed. Where any such notice of opposition is duly given, the Controller shall notify the applicant, and shall give to the applicant and the opponent an opportunity to be heard before deciding the case.

Powers of Controller in granting compulsory licences

Section 88 provides that where the Controller is satisfied that the manufacture, use or sale of materials not protected by the patent is prejudiced by reason of conditions imposed by the patentee upon the grant of licences under the patent, or upon the purchase, hire or use of the patented article or process, he may order the grant of licences under the patent to such customers of the applicant as he thinks fit as well as to the applicant.

Where an application for compulsory licence is made under Section 84 by a person being the holder of a licence under the patent, the Controller may, if he makes an order for the grant of a licence to the applicant, order the existing licence to be cancelled, or may, if he thinks fit, instead of making an order for the grant of a licence to the applicant, order the existing licence to be amended.

Where two or more patents are held by the same patentee and an applicant for a compulsory licence establishes that the reasonable requirements of the public have not been satisfied with respect to only some of the said patents, then, if the Controller is satisfied that the applicant cannot efficiently or satisfactorily work the licence granted to him under those patents without infringing the other patents held by the
patentee and if those patents involve important technical advancement or considerable economic significance in relation to the other patents, he may, by order, direct the grant of a licence in respect of the other patents also to enable the licencee to work the patent or patents in regard to which a licence is granted.

Where the terms and conditions of a licence have been settled by the Controller, the licencee may, at any time after he has worked the invention on a commercial scale for a period of not less than twelve months, make an application to the Controller for the revision of the terms and conditions on the ground that the terms and conditions settled have proved to be more onerous than originally expected and that in consequence thereof the licencee is unable to work the invention except at a loss. However no such application shall be entertained a second time by the Controller.

Terms and conditions of compulsory licences

Section 90 provides that in settling the terms and conditions of a compulsory licence, the Controller shall endeavour to secure that —

(i) the royalty and other remuneration, if any, reserved to the patentee or other person beneficially entitled to the patent, is reasonable, having regard to the nature of the invention, the expenditure incurred by the patentee in making the invention or in developing it and obtaining a patent and keeping it in force and other relevant factors;

(ii) the patented invention is worked to the fullest extent by the person to whom the licence is granted and with reasonable profit to him;

(iii) the patented articles are made available to the public at reasonably affordable prices;

(iv) the licence granted is a non-exclusive licence;

(v) the right of the licencee is non-assignable;

(vi) the licence is for the balance term of the patent unless a shorter term is consistent with public interest;

(vii) the licence is granted with a predominant purpose of supply in the Indian market and the licencee may also export the patented product if need be in accordance with section 84(7)(a)(iii).

(viii) in the case of semi-conductor technology, the licence granted is to work the invention for public non-commercial use.

(ix) in case the licence is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, the licencee shall be permitted, if need be, to export the patented product.

Section 90(2) provides that no licence granted by the Controller shall authorise the licencee to import the patented article or an article or substance made by a patented process from abroad where such importation would, but for such authorisation, constitute an infringement of the rights of the patentee. However in
terms of Sub-section (3) the Central Government may direct the Controller to authorise any licencsee in respect of a patent to import the patented article or an article or substance made by a patented process from abroad (subject to such conditions as it considers necessary to impose relating among other matters to the royalty and other remuneration, if any, payable to the patentee, the quantum of import, the sale price of the imported article and the period of importation), if it is necessary to do so in public interest and thereupon the Controller shall give effect to the directions.

**Licensing of Related Patents**

Section 91 provides that at any time after the sealing of a patent, any person who has the right to work any other patented invention either as patentee or as licencsee thereof, exclusive or otherwise, may apply to the Controller for the grant of a licence of the first mentioned patent on the ground that he is prevented or hindered without such licence from working the other invention efficiently or to the best advantage possible. However, no order for grant of such licence shall be made unless the Controller is satisfied that the applicant is able and willing to grant, or procure the grant to the patentee and his licencsees if they so desire, of a licence in respect of the other invention on reasonable terms; and the other invention has made a substantial contribution to the establishment or development of commercial or industrial activities in the territory of India.

When the Controller is satisfied that the conditions mentioned in Section 91(1) have been established by the applicant, he may make an order granting a licence under the first mentioned patent and a similar order under the other patent if so requested by the proprietor of the first mentioned patent or his licencsee. However the licence granted by the Controller shall be non-assignable except with the assignment of the respective patents.

**Compulsory licences on Notifications by Central Government**

Section 92 provides that if the Central Government is satisfied, in respect of any patent in force in circumstances of national emergency or in circumstances of extreme urgency or in case of public non-commercial use, that it is necessary that compulsory licences should be granted at any time after the sealing thereof to work the invention, it may make a declaration to that effect, by notification in the Official Gazette, and thereupon the Controller shall on application made at any time, after the notification, by any person interested, grant to the applicant a licence under the patent on such terms and conditions as he thinks fit. In settling the terms and conditions of a licence the Controller shall endeavour to secure that the articles manufactured under the patent shall be available to the public at the lowest prices consistent with the patentees deriving a reasonable advantage from their patent rights.

**Compulsory Licence for Export of Patented Pharmaceutical Products in Certain Exceptional Circumstances**

Patents (Amendment) Act, 2005 inserted new section 92A dealing with compulsory licence for export of patented pharmaceutical products in certain exceptional circumstances. The new section provides that compulsory licence shall be available for manufacture and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector.
for the concerned product to address public health problems, provided compulsory licence has been granted by such country or such country has, by notification or otherwise allowed importation of patented pharmaceutical products from India. Sub-
section (2) empowers the Controller, on receipt of an application in the prescribed manner, to grant, on such terms and conditions as he may specify, a compulsory licence solely for manufacture and export of the concerned pharmaceutical product to such country.

Explanation to Section 92A defines the pharmaceutical products as to mean any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address public health problems and shall be inclusive of ingredients necessary for their manufacture and diagnostic kits required for their use.

Termination of compulsory licence

Section 94 provides that on an application made by the patentee or any other person deriving title or interest in the patent, a compulsory licence may be terminated by the Controller, provided the circumstances that give rise to the grant thereof no longer exist and such circumstances are unlikely to recur. In this regard the holder of the compulsory licence has been entitled to object to such termination.

INTERNATIONAL ARRANGEMENTS

Section 133 to 139 deal with international arrangements. Section 133 deals with convention countries; section 134 deals with notification as to countries not providing for reciprocity; section 135 provides for convention applications; section 136 contains special provisions relating to convention applications; section 137 provides for multiple priorities; section 138 deals with supplementary provisions as to convention applications; and section 139 provides for application of other provisions of the Act to convention applications.

In terms of Section 133 a convention country is that country, which is a signatory or party or a group of countries, union of countries or intergovernmental organizations which are signatories or parties to an international, regional or bi-lateral treaty, convention or arrangement to which India is also a signatory or party and which affords to the applicants for patents in India or to citizens of India similar privileges as are granted to their own citizens or citizens to their member countries in respect of the grant of patents and protection of patent rights.

Section 134 provides that where any country notified by the Central Government as Convention Country does not accord to citizens of India the same rights in respect of the grant of patents and the protection of patent rights as it accords to its own nationals, no national of such country shall be entitled either solely or jointly with any other person:

(a) to apply for the grant of a patent or be registered as the proprietor of a patent;
(b) to be registered as the assignee of the proprietor of a patent; or
(c) to apply for a licence or hold any licence under a patent granted under the Act.

Section 135 provides that where a person has made an application for a patent in respect of an invention in a convention country (basic application) and that person or
legal representative or assignee of that person makes an application under the Act for a patent within twelve months after the date on which the basic application was made, the priority date of a claim of the complete specification being a claim based on matter disclosed in the basic application, is the date of making of the basic application. The explanation to Section 135(1) clarifies that where applications have been made for similar protection in respect of an invention in two or more convention countries, the period of twelve months shall be reckoned from the date on which the earlier or earliest of the said applications was made. In case of an application filed under the Patent Cooperation Treaty designating India and claiming priority from a previously filed application in India, the provisions of sub-sections (1) and (2) shall apply as if the previously filed application were the basic application. However, a request for examination under section 11B shall be made only for one of the applications filed in India.

Section 136 containing special provisions relating to convention applications requires every convention application to be accompanied by a complete specification; and specify the date on which and the convention country in which the application for protection, or as the case may be, the first of such application was made; and to state that no application for protection in respect of the invention had been made in a convention country before that date by the applicant or by any person from whom he derives title.

A complete specification filed with a convention application may include claims in respect of developments of, or additions to, the invention in respect of which the application for protection was made in a convention country, being developments or additions in respect of which the applicant would be entitled under the provisions of Section 6 to make a separate application for a patent. Sub-section (3) prohibits a convention application to be post-dated to a date later than the date on which the application could have been made under the Act.

Section 138 requires the applicant of a convention application to furnish, in addition to the complete specification, copies of the specifications or corresponding documents filed or deposited by the applicant in the patent office of the convention country and verified to the satisfaction of the Controller within the prescribed period from the date of communication by the Controller. If any such specification or other document is in a foreign language, a translation into English of the specification or document verified by affidavit or otherwise to the satisfaction of the Controller are required to be furnished.

**PATENT AGENT**

The work relating to drafting of specifications, making of application for a patent, subsequent correspondence with the Patent office on the objections raised, representing the applicant’s case at the hearings, filing opposition and defending application against opposition is entrusted to a qualified Patent Agent. Sections 125-132 of the Patents Act, 1970 deal with the Patent Agents.

**Qualifications for Registration as Patent Agent**

Section 126 provides that a person shall be qualified to have his name entered in the register of patent agent, if he is a citizen of India, completed the age of 21 years, has obtained a degree in science, engineering or technology from any university established under law for the time being in force in the territory of India or possesses such other equivalent qualifications as the Central Government may specify in this
behalf and in addition has passed the qualifying examination prescribed for the purpose or has, for a total period of not less than ten years, functioned either as an examiner or discharged the functions of the Controller under Section 73 or both, but cease to hold any such capacity at the time of making the application for registration and paid prescribed fees. However, a person who has been registered as a patent agent before the commencement of Patents (Amendment) Act, 2005 shall be entitled to continue to be, or when required to be re-registered, as a patent agent, on payment of prescribed fee.

Section 132 entitles the applicant for a patent to draft any specification or appear or act before the Controller. Section 132 also allows an advocate, not being a patent agent, to take part in any proceeding before the Controller on behalf of a party who is taking part in any proceeding under the Act.

Rights and Powers of the Patent Agent

Section 127 empowers the patent agent to practice before the Controller and to prepare all documents, transact all business and discharge such other functions as may be prescribed in connection with any proceeding before the Controller under the Act. In accordance with the provisions of section 128, the patent agent may sign under authorisation in writing in this behalf by the person concerned all applications and communication to the Controller.

LESSON ROUND UP

- The law relating to patents contained in the Patents Act, 1970 has been amended in the year 1995, 1999, 2002 and 2005 to meet India's obligations under the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) forming part of the Agreement establishing the World Trade Organisation (WTO).
- Application for a patent for an invention may be made (a) by any person claiming to be the true and first inventor of the invention; (b) by any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application; (c) by the legal representative of any deceased person who immediately before his death was entitled to make such an application.
- Patents Act deals with opposition to grant of patent and provides that where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the certain grounds.
- The work relating to drafting of specifications, making of application for a patent, subsequent correspondence with the Patent office on the objections raised, representing the applicant's case at the hearings, filing opposition and defending application against opposition is entrusted to a qualified Patent Agent.
- At any time after the expiration of three years from the date of the sealing of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent.
SELF TEST QUESTIONS

1. Discuss in detail the provisions of the Patents Act in relation to compulsory licences.

2. Discuss in detail the provisions relating to patent in addition.

3. Write short note on the following:
   (i) Inventive step.
   (ii) Patent agent.

4. Discuss the grounds on which the registration of a patent can be refused?

5. Elaborate the provisions relating to infringement of patent.
LEARNING OBJECTIVE

The objective of this study lesson is to enable the students to understand

- Concept of Trade Mark
- Registrar and Trade Mark Registry
- Procedure for and duration of registration of Trade Mark
- Effect of registration
- Assignment and Transmission of Trade Mark
- Use of trademark and registered users
- Rectification and Correction of the register
- Collective marks
- Certification trade marks
- Appellate Board
- Offences, penalties and procedure

Concept of Trade Mark

A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. A trade mark may consist of a device depicting the picture of animals, human beings etc., words, letters, numerals, signatures or any combination thereof. Since a trade mark indicates relationship in the course of trade, between trader and goods, it serves as a useful medium of advertisement for the goods and their quality. The object of trademark law is to permit an enterprise by registering its trademark to obtain an exclusive right to use, share, or assign a mark. Closely related to trademarks are service marks which distinguish the services of an enterprise from the services of other enterprise.

In view of developments in trading and commercial practices, increasing globalisation of trade and industry, the need to encourage investment flows and
transfer of technology, need for simplification and harmonization of trade mark management systems and to give effect to important judicial decisions, a new Trade Marks Act, 1999 have been enacted to provide for registration of trade mark for goods as well as services including prohibition to the registration of imitation of well known trade marks, and expansion of grounds for refusal of registration.

A trade mark performs four functions

- It identifies the goods / or services and its origin.
- It guarantees its unchanged quality.
- It advertises the goods/services.
- It creates an image for the goods/services.

Definitions and Interpretations

Following are some of the important terms defined in the Act

“Certification Trade Mark”

Section 2(1)(e) defines the term certification trade mark as to mean a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registerable as such in respect of those goods or services in the name, as proprietor of the certification trade mark, of that person.

‘Mark’

The term mark under Section 2(1)(m) has been defined to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

‘Package’

In terms of clause (q) of Section 2(1) the term package include any case, box, container, covering, folder, receptacle, vessel, casket, bottle, wrapper, label, band, ticket, reel, frame, capsule, cap, lid, stopper and cork.

‘Permitted Use’

Section 2(1)(r) defines the term permitted use, in relation to a registered trade mark, as to mean the use of trade mark-

(i) by a registered user of the trade mark in relation to goods or services -
(a) with which he is connected in the course of trade; and
(b) in respect of which the trade mark remains registered for the time being; and
(c) for which he is registered as registered user; and
(d) which complies with any conditions or limitations to which the registration
of registered user is subject; or

(ii) by a person other than the registered proprietor and registered user in relation to goods or services
(a) with which he is connected in the course of trade; and
(b) in respect of which the trade mark remains registered for the time being; and
(c) by consent of such registered proprietor in a written agreement; and
(d) which complies with any conditions or limitations to which such user is subject and to which the registration of the trade mark is subject.

‘Service’

The term service under clause (z) of Sub-section (1) of Section (2) has been defined as to mean service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.

‘Trade mark’

The term trade mark has been defined under Section 2(1)(zb) of the Act as to mean a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and

(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and

(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark.

‘Well-Known Trade Mark’

In terms of Section 2(1)(zg), a well known trade mark in relation to any goods or services means a mark which has become so to the substantial segment of the public which uses such goods or services such that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

Appointment of Registrar and Trade Mark Registry

Section 3 provides for appointment of the Registrar and other officers and Section 4 empowers the Registrar to withdraw any matter pending before an officer
and deal with such matter himself or transfer it to another officer with reasons for such transfer to be recorded therein.

Section 5 deals with the establishment of the Trade Marks Registry and branch offices and provides that the Trade Marks Registry established under the Trade and Merchandise Marks Act, 1958 shall continue to be the Trade Marks Registry for the purposes of this Act.

**Single Register of Trade Marks**

Section 6 contains provisions relating to maintenance of a single Register of Trade Marks at Head Office including therein particulars of registered trade marks and other prescribed particulars, except notice of trust. A copy of the Register is to be kept at each branch office. Sub-section (2) allows the maintenance of records in computer floppies or diskettes or in any other electronic form subject to the prescribed safeguards.

**Classification of Goods and Services and Publication of Index**

Section 7 empowers the Registrar to classify goods and services according to international classification of goods and services and to determine any question related thereto. Section 8 requires the Registrar to publish an alphabetical index of classification of goods and services.

### Prerequisites for a trade mark to be registered

- The selected mark should be capable of being represented graphically (that is in the paper form).
- It should be capable of distinguishing the goods or services of one undertaking from those of others.
- It should be used or proposed to be used mark in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services and some person have the right to use the mark with or without identity of that person.

### Absolute Grounds for Refusal of Registration

Section 9(1) of the Act containing provisions relating to absolute grounds for refusal for registration prohibit the registration of those trade marks which are devoid of any distinctive character or which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, etc., or which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade. However, a trademark shall not be refused registration, if the mark has in fact acquired a distinctive character as a result of use or is a well known trade mark before the date of application. In short, a trade mark which has been demonstrated to be distinctive in the market place shall be regarded as distinctive in law as well and be registerable.

Sub-section (3) prohibits registration of a mark, if it consists exclusively of shape
of goods which result from the nature of the goods themselves or which is necessary to obtain a technical result or which gives substantial value to the goods. It is, however, explained that the nature of goods or services in relation to which the Trade Mark is used or proposed to be used shall not be a ground for refusal of registration.

Relative Grounds for Refusal of Registration

Section 11 stipulates that where there exists a likelihood of confusion on the part of the public because of the identity with an earlier trade mark or similarity of goods or services, the trade mark shall not be registered. The registration of a mark which is merely reproduction or imitation of well-known mark is also prohibited. Accordingly, it has been stipulated that a trade mark which is identical with or similar to an earlier trade mark and is to be registered for good or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, shall not be registered if and to the extent the earlier trade mark is well known trade mark in India and the use of the later trade mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark. Sub-section (3) prohibits the registration of a trade mark, if or to the extent that, its use will be prevented by law of passing off or under the law of copyright unless the proprietor of earlier trade mark consents to such registration.

The Explanation to this section defines the term Earlier trade mark as to mean a registered trade mark or a convention application which has a date of application earlier than the trade mark in question, or a trade mark, which on the date of application or on the date of priority claimed was entitled to protection as a well known trade mark. Sub-section (5) entitles the proprietor of earlier trade mark, to oppose the registration and prove it. The Act provides that in an opposition proceeding the Registrar shall protect a well-known trade mark against identical or similar trade marks and take into consideration the bad faith of either the applicant or the opponent affecting the rights relating to the trade mark. This section also lays down the factors which the Registrar is required to take into account while determining the status of a well-known trade mark. The Act also lays down the facts to be considered by the Registrar in determining whether a trade mark is known or recognised in a relevant section of the public.

Procedure for Registration

Section 18 deals with the procedure for making an application for registration. Unlike the old Act where separate applications were required to be made if the applicants desire to register a trade mark in more than one class, Sub-section (2) of Section 18 allows registration in several classes of goods or services by means of a single application. However, the fee payable is to be calculated on the basis of the number of classes in which registration is sought.

Section 23 places obligation on the Registrar to register the trade mark where the procedure for registration of a trade mark has been completed viz., the application has been accepted and either the application has not been opposed or the opposition has been dismissed.

Duration, Renewal, Removal and Restoration of Registration

Section 25 of the Act deals with duration, renewal of registration, for removal and
restoration of registration. It allows registration of a trademark for a period of 10 years. In keeping with the generally accepted international practice and to reduce the work-load of the Trade Marks Office, Section 25 allows renewal of registration for successive periods of 10 years, from the date of the original registration or the last renewal. With a view to facilitate renewal of registration, Section 25(4) provides for restoration of removed trade marks on payment of renewal fee.

**Infringement of Registered Trade Marks**

Section 29 dealing with infringement of trade marks, explicitly enumerates the grounds which constitute infringement of a trademark. This section lays down that when a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement. This section clearly states that a registered trade mark is infringed, if

(a) the mark is identical and is used in respect of similar goods or services; or

(b) the mark is similar to the registered trade mark and there is an identity or similarity of the goods or services covered by the trade mark; or

(c) the trade mark is identical and is used in relation to identical goods or services;

and that such use is likely to cause confusion on the part of the public or is likely to be taken to have an association with the registered trade mark. Additionally in respect of cases falling in category (c) above, there will be a legal presumption of likelihood of confusion on the part of the public.

A person shall be deemed to have infringed a registered trade mark, if he uses a mark which is identical with or similar to the registered trade mark, and is used in relation to goods or services which are not similar to those for which trademark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause would take unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark. A person has also been prohibited from adopting someone else's trade mark, as his trade name or name of his business concern or part of the name of his business concern dealing with goods or services in respect of which trade mark is registered. A person shall be deemed to have used a registered trade mark in circumstances which include affixing the mark to goods or packaging, offering or exposing the goods for sale or supply of services, importing or exporting the goods, the use of the mark as trade name or trade mark on business paper or in advertising. A person shall be deemed to have infringed a trade mark if he applies such registered trade mark knowing that application of such mark is not authorised by the proprietor or licensee. Advertising of a trade mark to take unfair advantage of, or against the reputation of the trade mark also constitutes an infringement under Section 29(8) of the Act. Where the distinctive element of a registered trade mark consists of words, the spoken use of such words as well as visual representation for promoting the sale of goods or promotion of service would constitute infringement under Sub-section (9) of the Act.

**Limits on Effect of Registered Trade Mark**

Section 30 enumerates certain acts which do not constitute infringement. This section explicitly states that there will be no infringement, if the use of a mark is in
accordance with honest practices in industrial or commercial matters and is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of a trade mark. This section further enumerates the following acts as not constituting an infringement of trade mark:

(i) where the use is in relation to goods or services to indicate the kind, quality, quantity, etc. of the goods or of rendering of services, or other characteristic of goods or services.

(ii) where a trade mark is registered subject to conditions or limitations, the use of the trade mark in a manner outside the scope of registration.

(iii) where a person uses the mark in relation to goods or services for which the registered owner had once applied the mark, and had not subsequently removed it or impliedly consented to its use.

(iv) a trade mark registered for any goods may be used in relation to parts and accessories to other goods or services and such use is reasonably necessary and its effect is not likely to deceive as to the origin.

(v) the use of a registered trade mark being one of two or more registered trade marks which are identical or nearly resemble each other, in exercise of the right to the use of that registered trade mark.

Deceptive Similarity

In Mahendra and Mahendra Paper Mills Ltd. Vs. Mahindra and Mahindra Ltd. [AIR 2002 SC117] Supreme Court broadly stated, in an action for passing – off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors are to be considered—

- The nature of the marks i.e. whether the marks are word marks or labels marks or composite marks i.e. both words and label works.
- The degree of resembleness between the marks, phonetically similar and hence similar in idea.
- The nature of the goods in respect of which they are used as trade marks.
- The similarity in nature, character and performance of the goods of the rival traders
- Class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.
- The mode of purchasing the goods or placing orders for the goods.
- Any other surrounding circumstances which may be relevant in the extant of dissimilarity between the competing marks.

Weightage to be given to each of the aforesaid factors depending upon facts of each case and the same weightage cannot be given to each factor in every case.
Registration to be *prima facie* evidence of validity

Section 31 of the Act stipulates that in all legal proceedings relating to trade mark registered under the Act, the original registration and all subsequent assignments and transmission thereof shall be *prima facie* evidence of its validity. However, as per Section 34 the proprietor or a registered user of a registered trademark is not entitled to interfere with or restrain the use by any person of a trademark identical with or nearly resembling it in relation to goods or services in relation to which that person or a predecessor in title of his has continuously used that trade mark from a prior date.

Therefore, in case of unregistered marks, the owner of the trade mark may lodge a case against passing off action in case his trademark is used by some other person. It has been held by the courts in various cases and the ownership of a trademark is decided by its usage in commercial transactions.

**Inherently Distinctive marks**

The Supreme Court in Uniply Industries Ltd. v. Unicorn Plywood Pvt. Ltd. and Others observed that

(i) for inherently distinctive marks ownership is governed by priority of use for such marks. The first user of sale of goods/services is the owner who is senior to others.

(ii) These marks are given legal protection against infringement immediately upon adoption and use in trade.

(iii) Some courts indicate that even prior sales of goods – though small in size with the mark – are sufficient to establish priority, the test being to determine continuous prior user and the volume of sale or the degree of familiarity of the public with the mark.

*Therefore, the proprietorship of the trademark is decided by the date of usage of the mark by a person in business transactions.*

Assignment and Transmission

Section 37 entitles the registered proprietor of a trademark to assign the trade mark and to give effectual receipts for any consideration for such assignment. Section 38 deals with the assignability and transmissibility of a registered trade mark with or without goodwill of the business either in respect of all goods or services or part thereof. Section 39 provides that unregistered trade mark may be assigned or transmitted with or without the goodwill of the business concerned.

Section 40 contains restriction on assignments or transmissions of trade mark where multiple exclusive rights would be created in more than one person in relation to same goods or services; same description of goods or services; goods or services or description of goods or services which are associated with each other, which would be likely to deceive or cause confusion. Nevertheless, such assignment is not deemed to be invalid, if having regard to the limitations imposed, the goods are to be sold in different markets - either within India or through exports.
The Act under Section 42 stipulates conditions for assignment of a trade mark without goodwill of business. Such an assignment shall not take effect unless the assignor obtains directions of the Registrar and advertises the assignment in accordance with the directions of the Registrar and as per the prescribed manner.

Section 43 deals with the assignability and transmissibility of certification trade marks and provides that the assignment of certification trade mark can only be done only with the consent of the Registrar. Section 44 states that associated trade marks shall be assignable and transmissible only as a whole but they will be treated as separate trade marks for all other purposes. Section 45 deals with the procedure for registration of assignment and transmission and provides that where the validity of an assignment is in dispute between the parties, the Registrar may refuse to register the assignment or transmission unless the rights of parties are determined by the competent court.

**Proposed Use of Trade Mark by Company to be formed etc.**

Section 46 empowers the Registrar to allow registration of a trademark, if he is satisfied that (i) a company is about to be formed and registered under the Companies Act and that the applicant intends to assign the trademark to that company with a view to use thereof in relation to those goods and services by the company or (ii) the proprietor intends it to be used by a person, as a registered user after the registration of trademark.

**Removal of Trade Mark for Non-use**

Section 47 deals with removal of a trade mark from the register on the ground of non-use and provides that a trade mark which is not used within five years of its registration, becomes liable for removal either completely or in respect of those goods or services for which the mark has not been used. The five years period starts from the date on which the trade mark is actually entered on the register. However, Section 47(3) protects a mark from being removed from the register on ground of non-use if such non-use is shown to have been due to special circumstances in the trade which may include restriction imposed by any law or regulation on the use of trade mark in India.

**Registered User**

Section 48 deals with registered users. Section 49 provides for registration as registered user. Section 50 deals with the power of the Registrar to vary or cancel registration as registered user on the ground that the registered user has used the trade mark otherwise than in accordance with the agreement or in such a way as to cause or likely to cause confusion, or deception or the proprietor/registered user misrepresented or has failed to disclose any material facts for such registration or the stipulation in the agreement regarding the quality of goods is not enforced or the circumstances have changed since the date of registration, etc. However, Registrar has been put under obligation to give reasonable opportunity of hearing before cancellation of registration.

In view of the simplification of the procedure for registration of registered user and to ascertain whether the registered user agreement is in force, Section 51 empowers the Registrar to require the proprietor to confirm at any time during the continuation of registration as registered user, whether the agreement, on the basis
of which registered user was registered is still in force, and if such confirmation is not received within a period of one month, the Registrar shall remove the entry thereof from the Register in the prescribed manner. Section 52 recognises the right of registered user to take proceedings against infringement. Section 54 provides that the registered user will not have a right of assignment or transmission. However, it is clarified that where an individual registered user enters into partnership or remains in a reconstituted firm, the use of the mark by the firm would not amount to assignment or transmission.

**Collective Marks**

Collective Marks means a trade mark distinguish the goods or services of members of an association of person not being a partnership within the meaning of the Indian Partnership Act, 1932 which is the proprietor of the mark from those of others.

Sections 61 to 68 contain provisions relating to the registration of Collective trade marks. These sections provide for registration of a collective mark which belongs to a group or association of persons and the use thereof is reserved for members of the group or association of persons. Collective marks serve to distinguish characteristic features of the products or services offered by those enterprises. It may be owned by an association which may not use the collective mark but whose members may use the same. The association ensures compliance of certain quality standards by its members, who may use the collective mark if they comply with the prescribed requirements concerning its use. The primary function of a collective mark is to indicate a trade connection with the Association or Organisation.

**Certification Trade Marks**

Certification trade mark as to mean a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registerable as such in respect of those goods or services in the name, as proprietor of the certification trade mark, of that person.

Sections 69 to 78 deal with registration of certification trade mark. The purpose of certification trade mark is to show that the goods on which the mark is used have been certified by some competent person in respect of certain characteristics of the goods such as origin, mode of manufacture, quality, etc. The proprietor of a certification trade mark does not himself deal in the goods. A certification trade mark may be used in addition to the user's own trade mark on his goods. Central Government empower the final authority for registration of certification trade mark to the Registrar.

**Intellectual Property Appellate Board**

Sections 83-99 deal with the constitution of an Intellectual Property Appellate Board to hear appeals against the decisions of the Registrar and matters incidental thereto. Section 83 deals with establishment of Appellate Board; Section 84 provides
for composition; Section 85 deals with qualifications for appointment as Chairman, Vice-chairman and members of Appellate Board; Section 86 provides for term of office; Section 88 deals with salaries allowance etc.; Section 89 deals with resignation and removal; Section 90 deals with staff of Appellate Board and Section 91 provides for appeal to Appellate Board.

Section 92 empowers the Appellate Board to prescribe its own procedure. The Appellate Board will have the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908. With a view to facilitate speedy disposal of cases, this section lays down that the Board shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 but be guided by the principles of natural justice. Section 93 bars any Court or other authority from exercising jurisdiction, powers or authority in relation to the appeals under Section 91 of the Act.

Who benefits from a trade mark?

**Registered Proprietor:** The Registered Proprietor of a trade mark can stop other traders from unlawfully using his trade mark, sue for damages and secure destruction of infringing goods and or labels.

**Government:** The Trade Marks Registry is earning revenue.

**Professionals:** The Trade Marks Registration system is driven by professionals like Company Secretaries who act as trademark agents for the clients in the processing of the trade marks application.

**Purchaser** and ultimately **Consumers** of trade marks goods and services.

Offences and Penalties

Sections 101 to 121 deal with the matters relating to offences, penalties and procedure. Some of the important provisions are discussed below.

**Penalty for Applying False Trade Marks, Trade Descriptions etc.**

Section 103 deals with the penalty for applying false trade mark, trade description, etc.. Accordingly, the penalty for applying false trade mark or false trade description, etc. shall be imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees. However, the court has been empowered, for adequate and special reasons to be mentioned in the judgement, to impose a sentence lower than the normal punishment.

**Penalty for Falsely Representing a Trademark as Registered**

Section 107 makes it an offence if a person falsely represent a trade mark as registered. Section 107(3) clarifies that the use in relation to a trade mark of the word registered or any other expression, symbol or sign referring whether expressly or impliedly to registration shall be deemed to import a reference to registration in the
register, except

(i) where that word or other expression, symbol or sign is used in direct association with other words delineated in characters at least as large as those in which that word or other expression, symbol or sign is delineated and indicating that the reference is to registration as a trade mark under the law of a country outside India being a country under the law of which the registration referred to is in fact in force; or

(ii) where that other expression, symbol or sign is of itself such as to indicate that the reference is to such registration as is mentioned above; or

(iii) where that word is used in relation to a mark registered as a trade mark under the law of a country outside India and in relation solely to goods to be exported to that country or in relation to services for use in that country.

**Penalty for Improperly Describing a Place of Business as Connected with the Trade Marks Office**

In terms of Section 108, the use of any words which would lead to the belief that a person's place of business is officially connected with the Trade Mark Office shall be treated as an offence and punishable with imprisonment for a term which may extend to two years or fine or with both.

Section 109 provides penalty for falsification of entries in the register. The offence is punishable with imprisonment extending up to two years or fine or with both.

**Offences by Companies**

Section 114 deals with offences by companies and provides that where a person committing an offence is a company, every person incharge of and responsible to the company for the conduct of its business will be liable. Where a person accused proves that the offence was committed without his knowledge or he has exercised all due diligence to prevent the commission of such offence, he will not be liable. However, where it is proved that an offence has been committed with the consent or connivance or is attributable to any neglect of any Director, Manager, Secretary or any other officer of the company, he shall be deemed to be guilty of the offence. Explanation to this section defines a company as to mean body corporate and includes a firm or other association of individuals. The explanation also defines director in relation to a firm, as to mean a partner in the firm.

**Trade Mark Agent**

Section 145 deals with agents and provide that if any act is required to be done before the Registrar by any person, this may be done by a person duly authorised in the prescribed manner who is a legal practitioner, a trade marks agent or by his employee if he is duly authorised by him.
**LESSON ROUND UP**

- Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. A trade mark may consist of a device depicting the picture of animals, human beings etc., words, letters, numerals, signatures or any combination thereof.

- A trade mark performs four functions:
  - It identifies the goods / or services and its origin.
  - It guarantees its unchanged quality
  - It advertises the goods/services
  - It creates an image for the goods/ services.

- A well known trade mark in relation to any goods or services means a mark which has become so to the substantial segment of the public which uses such goods or services such that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

- When a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement.

- A person shall be deemed to have infringed a registered trade mark, if he uses a mark which is identical with or similar to the registered trade mark, and is used in relation to goods or services which are not similar to those for which trademark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause would take unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark.

- There will be no infringement of trade mark, if the use of a mark is in accordance with honest practices in industrial or commercial matters and is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of a trade mark.

- The registered proprietor of a trademark to assign the trade mark and to give effectual receipts for any consideration for such assignment.

- A trade mark which is not used within five years of its registration becomes liable for removal either completely or in respect of those goods or services for which the mark has not been used.

- Intellectual Property Appellate Board to hear appeals against the decisions of the Registrar.
1. What is a trade mark?
2. How to apply for a trade mark in respect of particular goods or services?
3. Discuss in detail the provisions relating to registered user of trademarks.
4. Benefit from trademark to all stakeholders. Comment.
5. Discuss Penal provisions for Falsely Representing a Trademark.
SECTION III
COPYRIGHT LAW
(GENESIS, DEVELOPMENT AND LEGAL FRAMEWORK)

LEARNING OBJECTIVE
The objective of this study lesson is to enable the students to understand
- Concept of Copyright
- Meaning of Copyright
- Term of Copyright
- Assignment of Copyright
- Mode of Assignment
- Copyright Board
- Copyright Society
- International Copyright
- Registration of Copyright
- Infringement of Copyright
- Statutory Exception
- Remedies against Infringement of Copyright
- Author Special Right
- Offences and Penalty
- Power of Police to seizure Infringement Copies

Concept of Copy Right

The idea of Copyright protection only began to emerge with the invention of printing, which made it for literary works to be duplicated by mechanical processes instead of being copied by hand. This led to the grant of privileges, by authorities and kings, entitling beneficiaries exclusive rights of reproduction and distribution, for limited period, with remedies in the form of fines, seizure, confiscation of infringing copies and possibly damages.

However, the criticism of the system of privileges led to the adoption of the Statute of Anne in 1709, the first copyright Statute. In the 18th century there was
dispute over the relationship between copyright subsisting in common law and copyright under the Statute of Anne. This was finally settled by House of Lords in 1774 which ruled that at common law the author had the sole right of printing and publishing his book, but that once a book was published the rights in it were exclusively regulated by the Statute. This common law right in unpublished works lasted until the Copyright Act, 1911, which abolished the Statute of Anne.

Thus, the copyright deals with the rights of intellectual creators in their creation. The copyright law deals with the particular forms of creativity, concerned primarily with mass communication. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information. The copyright law, however, protects only the form of expression of ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colours, shapes and so on. In India, the law relating to copyright is contained in Copyright Act 1957, which was last amended in the year 1999.

Introduction

Copyright is a well recognised form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country. Copyright as the name suggests arose as an exclusive right of the author to copy the literature produced by him and stop others from doing so. There are well-known instances of legal intervention to punish a person for copying literary or aesthetic output of another even before the concept of copyright took shape. The concept of idea was originally concerned with the field of literature and arts. In view of technological advancements in recent times, copyright protection has been expanded considerably. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts, cable programmes and typographical arrangements of publications. Computer programs have also been brought within the purview of copyright law.

In India, the law relating to copyright is governed by the Copyright Act, 1957 which has been amended in 1983, 1984, 1985, 1991, 1992, 1994 and 1999. The amendment introduced in 1984 included computer program within the definition of literary work and a new definition of computer program was inserted by the 1994 amendment. The philosophical justification for including computer programs under literary work has been that computer programs are also products of intellectual skill like any other literary work.

In 1999, the Copyright Act, 1957 has been amended to give effect to the provisions of Article 14 of the TRIPs agreement providing term of protection to performers rights at least until the end of a period of fifty years computed from the end of the calendar year in which the performance took place. The Amendment Act also inserted new Section 40A empowering the Central Government to extend the provisions of the Copyright Act to broadcasts and performances made in other countries subject to the condition however that such countries extend similar protection to broadcasts and performances made in India. Another new Section 42A empowers the Central Government to restrict rights of foreign broadcasting organisations and performers.
Why should copyright be protected?

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.

Definitions

Section 2 of the Act defines the terms used in the Act. The definition of some notable terms is given below:

**Literary work** includes computer programmes, tables and compilations including computer data bases.

**Computer** includes any electronic or similar device having information processing capabilities and computer programme means a set of instructions expressed in words, codes, schemes, or in any other form including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

**Artistic Work** means a painting, a sculpture, a drawing (including a diagram, map, chart, or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; a work of architecture and any other work of artistic craftsmanship.

**Dramatic Work** includes any place for recitation choreographic work or entertainment in dumb show the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film.

**Musical Work** means a work consisting of music and includes any graphical notation of such work but does not include any works or any action intended to be sung, spoken, or performed with the music.

**Cinematograph film** means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and cinematograph shall be construed as including any work produced by any process analogous to cinematography including video films.

**Sound Recording** means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which such sounds are produced.
Meaning of Copyright

Section 14 of the Act defines the term Copyright as to mean the exclusive right to do or authorise the doing of the following acts in respect of a work or any substantial part thereof, namely

**Copyright in the case of literary, dramatic or musical work:**

(i) reproducing the work in any material form which includes storing of it in any medium by electronic means;

(ii) issuing copies of the work to the public which are not already in circulation;

(iii) performing the work in public or communicating it to the public;

(iv) making any cinematograph film or sound recording in respect of the work;

(v) making any translation or adaptation of the work. Further any of the above mentioned acts in relation to work can be done in the case of translation or adaptation of the work.

**Copyright in the case of a computer programme:**

(i) to do any of the acts specified in respect of a literary, dramatic or musical work; and

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme. However, such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

**Copyright in the case of artistic work:**

(i) reproducing the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) communicating the work to the public;

(iii) issuing copies of work to the public which are not already in existence;

(iv) including work in any cinematograph film;

(v) Making adaptation of the work, and to do any of the above acts in relation to an adaptation of the work.
Copyright in the case of cinematograph film and sound recording:

(i) making a copy of the film including a photograph of any image or making any other sound recording embodying it;

(ii) selling or giving on hire or offer for sale or hire any copy of the film/sound recording even if such copy has been sold or given on hire on earlier occasions; and

(iii) communicating the film/sound recording to the public.

Term of Copyright

Sections 22-29 deal with term of copyright in respect of published literary, dramatic, musical and artistic works; anonymous and pseudonymous; posthumous, photographs, cinematograph films, sound recording, Government works, works of PSUs and works of international organisations.

The Copyright (Amendment) Act 1992, has extended the period of copyright by another 10 years. Now literary, dramatic, musical or artistic works enjoy copyright protection for the life time of the author plus 60 years beyond i.e. 60 years after his death. In the case of joint authorship which implies collaboration of two or more authors in the production of the work, the term of copyright is to be construed as a reference to the author who dies last.

In the case of copyright in posthumous, anonymous and pseudonymous works, photographs, cinematograph films, sound recordings, works of Government, public undertaking and international organisations, the term of protection is 60 years from the beginning of the calendar year next following the year in which the work has been first published.

The Copyright (Amendment) Act, 1994 has given special right to every broadcasting organisation known as broadcast reproduction right in respect of its broadcasts. This right is to be enjoyed by every broadcasting organisation for a period of twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made. In terms of Copyright (Amendment) Act, 1999 if any performer appears or engages in any performance, he has a special right in relation to such performance called performers right to be enjoyed for a period of fifty years.

Copyright Board

Section 11 of the Act provides for the establishment of the Copyright Board and empowers the Central Government to constitute the same consisting of a Chairman and not less than two, not more than fourteen members. Chairman of the Board shall be a sitting or retired judge of the High Court or a person qualified to be appointed as judge of the High Court. The Registrar of Copyright to act as Secretary of the Copyright Board.
Functions of the Copyright Board

The main functions of the Copyright Board are as under:

1. Settlement of disputes as to whether copies of any literary, dramatic or artistic work or records are issued to the public in sufficient numbers.
2. Settlement of disputes as to whether the term of copyright for any work is shorter in any other country than that provided for that work under the Act.
3. Settlement of disputes with respect to assignment of copyright as dealt with in Section 19A.
4. Granting of compulsory licences in respect of Indian works withheld from public.
5. Granting of compulsory licence to publish unpublished Indian works.
6. Granting of compulsory licence to produce and publish translation of literary and dramatic works.
7. Granting of compulsory licence to reproduce and publish literary, scientific or artistic works for certain purposes.
8. Determination of royalties payable to the owner of copyright.
9. Determination of objection lodged by any person as to the fees charged by Performing Rights Societies.
10. Rectification of Register on the application of the Registrar of Copyright or of any person aggrieved.

The Copyright Board has no powers to limit the user of copyright to any particular territorial area. An appeal against orders passed by the Copyright Board except under Section 6 lies to the High Court within whose jurisdiction the appellant resides or carries on business.

Assignment of Copyright

A copyright owner possesses the right to dispose of the manuscript and an individual right of exclusive enjoyment similar to that of a patentee of an invention. Mere transfer of the manuscript does not transfer the copyright therein. The purchaser of a literary or artistic work, in the absence of an agreement to the contrary, obtains no right to its reproduction, and the right still remains with the author. A person can acquire a right to reproduce a work that is the copyright by assignment of it to himself. An assignment may be defined as the transfer of a particular right, leaving nothing with the assignor by virtue of assigning a particular right, and bestowing on the assignee the whole of the legal interest in the right issued.

Section 18 of the Copyright Act provides for the assignment of copyright in an existing work as well as future work. In both the cases an assignment may be made
of the copyright either wholly or partially and generally or subject to limitations and
that too for the whole period of copyright or part thereof. However, in case of
assignment of copyright in any future work, the assignment has the real effect only
when the work comes into existence. Section 18(3) explains that a assignee in
respect of assignment of the copyright in future work include the legal representative
of the assignee, if the assignee dies before the work comes into existence.

Mode of Assignment

Section 19 of the Act provides that an assignment of copyright should be in
writing signed by the owner of the copyright. Mere acceptance of remuneration or
delivery of manuscript does not constitute an assignment of copyright. Copyright is
different from the material object which is the subject of the copyright. So it should be
clear that the transfer of the material object does not necessarily involve a transfer of
the copyright. The assignment of copyright should specify the assigned work, rights
including duration, territorial extent of assignment and the amount of royalty.
However, in the absence of duration and territorial extent, the assignment shall be
valid for a period of five years and within the territory of India.

In case assignee does not exercise his rights within a period of one year from the
date of assignment, the assignment in respect of such rights lapsed after the expiry of
said period, unless otherwise specified in the assignment.

Licences

Chapter VI containing Sections 30-32B deal with licences. Section 30 deals with
licences by owners of copyright; Section 30A contains provisions regarding
application of Sections 19 and 19A; section 31 provides for compulsory licence in
works withheld from public; Section 31A deals with compulsory licences in
unpublished Indian works; Section 32 deals with licences to produce and publish
translations; Section 32A provides for licence to reproduce and publish works for
certain purposes; and Section 32B deals with termination of licences.

Licences by Owners of Copyright

Section 30 of the Act empowers the owner of the copyright in any existing work
or the prospective owner of the copyright in any future work to grant any interest in
the right by licence in writing signed by him or by his duly authorised agent. However,
in the case of a licence relating to copyright in any future work, the licence shall take
effect only when the work comes into existence. Explanation to this section clarifies
that where a person to whom a licence relating to copyright in any future work is
granted, dies before the work comes into existence, his legal representatives shall, in
the absence of any provision to the contrary in the licence, be entitled to the benefit of
the licence.

Compulsory Licence in Works Withheld from Public

Section 31 provides that if at any time during the term of copyright in any Indian
work which has been published or performed in public, a complaint is made to the
Copyright Board that the owner of copyright in the work has refused to re-publish or
allow the re-publication of the work or has refused to allow the performance in public
of the work, and by reason of such refusal the work is withheld from the public or has
refused to allow communication to the public by broadcast of such work or in the case of a sound recording; the work recorded in such sound recording, on terms which the complainant considers reasonable, the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public by broadcast, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine.

**Compulsory Licence in Unpublished Indian Works**

Section 31A(1) provides that in the case of an Indian work (the author of which, in the case of unpublished work was at the time of making the work, a citizen of India), the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Copyright Board for a licence to publish such work or a translation thereof in any language.

The Copyright Board after holding inquiry direct the Registrar of Copyrights to grant to the applicant a licence to publish the work or a translation thereof in the language mentioned in the application subject to the payment of such royalty and terms and conditions as the Copyright Board may determine, and thereupon the Registrar of Copyrights shall grant the licence to the applicant in accordance with the direction of the Copyright Board.

**Licence to Produce and Publish Translations**

Section 32 entitles any person to apply to the Copyright Board for a licence to produce and publish a translation of a literary or dramatic work in any language after a period of seven years from the first publication of the work. However, in respect of teaching, scholarship or research Section 32(1A) allows any person to apply to the Copyright Board for a licence to produce and publish a translation, in printed or analogous forms of reproduction, of a literary or dramatic work, other than an Indian work, in any language in general use in India after a period of three years from the first publication of such work. Further, where such translation is in a language not in general use in any developed country, such application may be made after a period of one year from such publication.

**Termination of Licence**

Section 32B of the Act deals with termination of licences and provides that if at any time after the granting of a licence, the owner of the copyright in the work or any person authorised by him publishes a translation of such work in the same language and which is substantially the same in content at a price reasonably related to the price normally charged in India for the translation of works of the same standard on the same or similar subject, the licence so granted shall be terminated. However, such termination shall take effect only after the expiry of a period of three months from the date of service of a notice in the prescribed manner on the person holding such licence by the owner of the right of translation intimating the publication of the translation.
Copyright Societies

The Copyright (Amendment) Act, 1994 added a new Chapter VII on Copyright Societies. Section 33(1) prohibits any person or association of persons to commence or carry on the business of issuing or granting licences in respect of any work in which copyright subsists or any other rights conferred by the Act. The aforesaid restriction is not applicable to Copyright Societies registered under Section 33(3) of the Copyright Act.

Under clause (3) of Section 33 Central Government has been authorised to register association of persons as copyright society after taking into account the following factors:

(i) the interests of the authors and other owners of rights under the Copyright Act;
(ii) the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the relevant rights; and
(iii) the ability and professional competence of the applicants.

However, an owner of copyright in his individual capacity continues to have the right to grant licences in respect of his own works consistent with his obligations as a member of the registered Copyright society. The Central Government cannot register more than one copyright society to do business in respect of the same class of works.

The Central Government has been empowered to cancel the registration of a Copyright Society if its management is detrimental to the interests of the owners of rights concerned. The registration can also be suspended by the Government for a period of one year if it is necessary in the interest of the owners of the rights concerned and the government has to appoint an administrator to discharge the functions of the Copyright Society.

Administration of Rights of Owner by Copyright Society

Section 34 of the Act empowers a Copyright Society to accept exclusive authorisation from an owner of Copyright to administer any right in any work by issuing licences or collection of licence fee or both. Such authorisation can be withdrawn by an owner without prejudice to the rights of the Copyright Society.

A Copyright Society under the Act is competent to enter into agreement with any foreign society or organisation, administering rights corresponding to rights under the Indian Copyright Act, to entrust such foreign society or organisations the administration in any foreign country of rights administered by the said Copyright Society in India or for administering in India the rights administered in a foreign country by such foreign society or organisation.

Section 34(3) empowers the Copyright Society to:

(i) issue licences under Section 30 in respect of any rights under the Act;
(ii) collect fees in pursuance of such licences;
(iii) distribute such fees among owners of rights after making deductions for its
own expenses; and
(iv) perform any other function consistent with the provisions of Section 35.

Section 35 deals with control over the society by the owner of rights and provides that every Copyright Society is subject to the collective control of the owners of the rights whose rights it administers. It does not include owners of right administered by a foreign society or organisation.

Rights of Broadcasting Organisation and Performers

Chapter VIII of the Act containing Section 37-39A deals with rights of broadcasting organisations and of performers.

Section 37 entitles every broadcasting organisation to have a special right known as broadcast reproduction right in respect of its broadcasts, for a period of twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made. Section 38 of the Act protects the performers rights for a period of fifty years.

Acts not constituting Infringement of Broadcast Reproduction Right and Performers Right

Section 39 stipulates situations in which no broadcast reproduction right or performers right shall be deemed to be infringed. These include:

(a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research; or
(b) the use, consistent with fair dealing of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; or
(c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52.

International Copyright

Copyright Protection to Foreign Works

The Copyright Act applies only to works first published in India, irrespective of the nationality of the author. However Section 40 of the Act empowers the Government of India to extend the benefits of all or any of the provisions of the Act to works first published in any foreign country. The benefits granted to foreign works will not extend beyond what is available to the works in the home country and that too on a reciprocal basis i.e. the foreign country must grant similar protection to works entitled to copyright under the Act. The term of Copyright in India to the foreign work, will not exceed that conferred by the foreign country.

Government of India has passed the International Copyright Order, 1958. According to this order any work first published in any country which is a member of the Berne Convention or the Universal Copyright Convention will be accorded the same treatment as if it was first published in India.
Conditions of Copyright Protection

The following are the requisites for conferring copyright protection to works of international organisations:

(a) The work must be made or first published by or under the direction or control of the International Organisation.

(b) There should be no copyright in the work in India at the time of making or on the first publication of the work.

(c) If the work is published in pursuance of an agreement with the author, such agreement should not reserve the author any copyright in the work or any copyright in the work should belong to the organisation.

Power of Central Government to apply Chapter VIII to Broadcasting Organisations and Performers in Certain other Countries

New Section 40A inserted by the Copyright (Amendment) Act, 1999 provides that subject to the satisfaction of Central Government that a foreign country (other than a country with which India has entered into a treaty or which is a party to a Convention relating to rights of broadcasting organisations and performers to which India is a party) has made or has undertaken to make such provisions, if any, as it appears to the Central Government expedient to require, for the protection in that foreign country, of the rights of broadcasting organizations and performers as is available under this Act, it may, by order, published in the Official Gazette, direct that the provisions of Chapter VIII shall apply:

(a) to broadcasting organizations whose headquarters is situated in a country to which the order relates or, the broadcast was transmitted from a transmitter situated in a country to which the order relates as if the headquarters of such organisation were situated in India or such broadcast were made from India;

(b) to performances that took place outside India to which the order relates in like manner as if they took place in India;

(c) to performances that are incorporated in a sound recording published in a country to which the order relates as if it were published in India;

(d) to performances not fixed on a sound recording broadcast by a broadcasting organisation the headquarters of which is located in a country to which the order relates or where the broadcast is transmitted from a transmitter which is situated in a country to which the order relates as if the headquarters of such organisation were situated in India or such broadcast were made from India.

Section 40A(2) also provides that the order so made by the Central Government may provide that:

(i) the provisions of Chapter VIII shall apply either generally or in relation to such class or classes of broadcasts or performance or such other class or
classes of cases as may be specified in the order;

(ii) the term of the rights of broadcasting organisations and performers in India shall not exceed such term as is conferred by the law of the country to which the order relates;

(iii) the enjoyment of the rights conferred by Chapter VIII shall be subject to the accomplishment of such conditions and formalities, if any, as may be specified in that order;

(iv) chapter VIII or any part thereof shall not apply to broadcast and performances made before the commencement of the order or that Chapter VIII or any part thereof shall not apply to broadcasts and performances broadcast or performed before the commencement of the order;

(v) in case of ownership of rights of broadcasting organisations and performers, the provisions of Chapter VIII shall apply with such exceptions and modifications as the Central Government, may having regard to the law of the foreign country, consider necessary.

**Power to Restrict Rights of Foreign Broadcasting Organisations and Performers**

Newly inserted Section 42A provides that if it appears to the Central Government that a foreign country does not give or has not undertaken to give adequate protection to rights of broadcasting organisations or performers, the Central Government may, by order, published in the Official Gazette, direct that such of the provisions of this Act as confer right to broadcasting organizations or performers, as the case may be, shall not apply to broadcasting organizations or performers whereof are based or incorporated in such foreign country or are subjects or citizens of such foreign country and are not incorporated or domiciled in India, and thereupon those provisions shall not apply to such Broadcasting organizations or performers.

**Registration of Copyright**

Chapter X of the Act containing Sections 4450A deals with various aspects of registration of copyright.

The mechanism of registration of copyright has been contemplated under Section 44 of the Act. It is evident from the provisions of the aforesaid section that registration of the work under the Copyright Act is not compulsory and is not a condition precedent for maintaining a suit for damages, if somebody infringes the copyright. Sections 44 and 45 of the Copyright Act are only enabling provisions and do not affect the common law right to sue for infringement of copyright. An action for infringement can be brought even if the registration has not been done. The only effect of registration is that it is the prima facie evidence of the particulars entered in the register.

The Register of Copyrights is to be maintained by the Copyright Office to enter the names or titles of works and the names and addresses of authors, publishers and owners of copyright. The Register of Copyrights is to be kept in Six parts, namely, Part I Literary works other than computer programmes, tables and compilations including computer data bases and dramatic works; Part II Musical works; Part III Artistic works; Part IV Cinematograph films; Part V Sound Recording; and Part VI Computer programmes, tables and compilations including computer data bases.
Infringement of Copyright

Copyright protection gives exclusive rights to the owners of the work to reproduce the work enabling them to derive financial benefits by exercising such rights. If any person without authorisation from the owner exercises these rights in respect of the work which has copyright protection it constitutes an infringement of the copyright. If the reproduction of the work is carried out after the expiry of the copyright term it will not amount to an infringement.

Section 51 of the Act contemplates situation in which a copyright shall be deemed to be infringed. This Section says that a copyright is infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyright or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority does

(1) anything for which the exclusive right is conferred upon the owner of the copyright, or

(2) permits for profit any place to be used for the communication of the work to public where such a communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication would be an infringement of copyright.

(3) when any person (i) makes for sale or hire or lets for hire or by way of trade display or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or (iii) by way of trade, exhibits in public, or (iv) imports into India any infringing copies of the work.

However, import of one copy of any work is allowed for private and domestic use of the importer. Explanation to Section 51 clarifies that the reproduction of literary, dramatic musical or artistic work in the form of cinematograph film shall be deemed to be an infringing copy.

Statutory Exceptions

Certain exceptions to infringement have been stipulated by the Copyright Act. The object of these exceptions is to enable the reproduction of the work for certain public purposes, and for encouragement of private study, research and promotion of education. The list of acts which do not constitute infringement of copyright has been provided under Section 52 of the Act. These include

(i) a fair dealing with a literary, dramatic musical or artistic work not being a computer programme, for the purposes of private use, including research, criticism or review, whether of that work or of any other work;

(ii) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy-in order to utilise the computer programme for the purpose for which it was supplied; or to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied;
(iii) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available; the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underlie any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied; the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use; a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events in a newspaper, magazine or similar periodical, or by broadcast or in a cinematograph film or by means of photographs.

However, it is clarified that the publication of a compilation of addresses or speeches delivered in public is not a fair dealing of such work.

(iv) the reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purposes of a report of a judicial proceeding in any work prepared by the Secretariat of a Legislature or, where the Legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature in a certified copy made or supplied in accordance with any law for the time being in force;

(v) the reading or recitation in public of any reasonable extract from a published literary or dramatic work;

(vi) the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, but themselves published for the use of educational institutions, in which copyright subsists.

(vii) the reproduction of a literary, dramatic musical or artistic work by a teacher or a pupil in the course of instruction; or as part of the question to be answered in an examination; or in answers to such questions;

(viii) the performance in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording, if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording;

(ix) the making of sound recordings in respect of any literary, dramatic or musical work, if sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work; the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by
him, at the rate fixed by the Copyright Board in this behalf.

However, no alterations are allowed be made which have not been made previously by or with the consent of the owner of rights, or which are not reasonably necessary for the adaptation of the work for the purpose of making the sound recordings; the sound recordings shall not be issued in any form of packaging or with any label which is likely to mislead or confuse the public as to their identity; no such sound recording shall be made until the expiration of two calendar years after the end of the year in which the first sound recording of the work was made; and the person making such sound recordings shall allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such sound recording.

The Act further provides that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made and the Copyright Board on being satisfied that the complaint is genuine may pass an order ex parte directing the person making the sound recording to cease from making further copies and after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty.

(x) the causing of a recording to be heard in public by utilising it in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or as part of the activities of a club or similar organisation which is not established or conducted for profit.

(xi) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;

(xii) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction;

(xiii) the publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public;

(xiv) the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library, if such book is not available for sale in India;

(xv) the reproduction, for the purpose of research or private study or with a view to publication of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access.

However where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the above exemption shall apply only if such reproduction is made at a time more than sixty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the
identity of more authors than one is known from the death of such of those authors who dies last;

(xvi) the reproduction or publication of any matter which has been published in any Official Gazette except an Act of a Legislature; any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter; the report of any committee, commission, council, board or other like body appointed by the government if such report has been laid on the table of the Legislature, unless the reproduction or publication of such report is prohibited by the government; any judgement or order of a court, Tribunal or other judicial authority, unless the reproduction or publication of such judgement or order is prohibited by the court, the Tribunal or other judicial authority, as the case may be;

(xvii) the production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made thereunder if no translation of such Act or rules or orders in that language has previously been produced or published by the government; or where a translation of such Act or rules or orders in that language has been produced or published by the government, if the translation is not available for sale to the public provided that such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the government;

(xviii) the making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture;

(xix) the making or publishing of a painting, drawing, engraving or photograph of sculpture, or other artistic work falling under sub-clause (iii) of clause (c) of Section 2, if such work is permanently situate in a public place or any premises to which the public has access;

(xx) the inclusion in a cinematograph film of any artistic work permanently situate in a public place or any premises to which the public has access; or any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film;

(xxi) the use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work:

Provided that he does not thereby repeat or imitate the main design of the work;

(xxii) the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed;

(xxiii) in relation to a literary, dramatic or musical work recorded or reproduced in any cinematograph film, the exhibition of such film after the expiration of the term of copyright therein;

(xxiv) the making of an ephemeral recording, by a broadcasting organisation using its own facilities for its own broadcasting organisation of a work which it has the right to broadcast; and the retention of such recording for archival
purposes on the ground of its exceptional documentary character;

(xxv) the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.

Remedies against Infringement of Copyright

Section 55 provides for the civil remedies for infringement of copyright and entitles the owner of the copyright to all such remedies by way of injunction, damages, accounts and otherwise as may be conferred by law for the infringement of copyright. Section 54 defines the term owner of copyright. Section 58 entitles the owner of the copyright to initiate proceedings for the possession of infringing copies and other materials related thereto. In this context, the section clarifies that all infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright.

Who is an author?

- In the case of a literary or dramatic work the author, i.e., the person who creates the work.
- In the case of a musical work, the composer.
- In the case of a cinematograph film, the producer.
- In the case of a sound recording, the producer.
- In the case of a photograph, the photographer.
- In the case of a computer generated work, the person who causes the work to be created.

Authors Special Rights

Apart from remedies for infringement of copyright, the Act expressly provides for the protection of special rights of the author known as moral rights. Under Section 57 of the Act an author of copyright work can restrain or claim damages in respect of any distortion, mutilation of the work or any other action in relation to the said work which would be prejudicial to his honour or reputation. These rights can be exercised even after the assignment of the copyright. They can be enforced by an action for breach of contract or confidence, a suit for defamation, or passing off as the case may be.

What are the moral rights of an author?

The author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned.
Offences and Penalties

Chapter XIII of the Act containing Sections 6370 deal with offences and penalties. Section 63 deals with offences of infringement of copyright or other rights conferred by the Copyright Act, 1957. This section makes, any person who knowingly infringes or abates the infringement of the copyright in a work or any other right conferred under the Act (except for resale share right in original copies), liable to imprisonment for a minimum period of six months which may extend to three years and with minimum fine of fifty thousand rupees which may extend upto rupees two lakhs. However, the court has been empowered to impose a sentence less than six months or a fine less than fifty thousand, if the infringement had not been made for gain in the course of trade or business. In such situations, the section requires the courts to mention adequate and special reasons in the judgement.

Section 63A deals with second and subsequent convictions and provides for imprisonment not less than one year extendable to three years and the fine not less than one lakh rupees, extendable to rupees two lakhs.

Power of Police to Seize Infringing Copies

Section 64 of the Act empowers any Police Officer, not below the rank of a sub-inspector, to seize without warrant, all copies of the work and all plates used for the purpose of making infringing copies of the work, wherever they are found. However such Police Officer has to satisfy himself before such seizure, that an offence under Section 63 in respect of the infringement of copyright in any work has been, is being or is likely to be committed. Further, such Police Officer has been put under obligation to produce before the Magistrate, as soon as practicable, all copies and plates so seized.

Any interested person may make an application to Magistrate, with in fifteen days of such seizure, for restoring to him such copies and plates. Section 65 makes liable, any person, who knowingly makes or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists, to imprisonment which may extend to two years and also fine.

Section 67 treats the making of false entries in register etc. for producing or tendering false entries, a punishable offence with imprisonment which may extend to one year or with fine or both.

Section 68 treats the making of false statement for the purpose of deceiving or influencing any officer or authority, a punishable offence with imprisonment upto one year or with fine or both.

Section 68A deals with penalty for contravention of Section 52A and provides that any person who publishes a sound recording or a video film in contravention of the provisions of Section 52A (particulars to be included in sound recording video film) shall be punishable with imprisonment which may extend to three years and shall also be liable to fine.
LESSON ROUND UP

- The idea of Copyright protection only began to emerge with the invention of printing, which made it for literary works to be duplicated by mechanical processes instead of being copied by hand. This led to the grant of privileges, by authorities and kings, entitling beneficiaries exclusive rights of reproduction and distribution, for limited period, with remedies in the form of fines, seizure, confiscation of infringing copies and possibly damages.

- The philosophical justification for including computer programs under literary work has been that computer programs are also products of intellectual skill like any other literary work.

- The Copyright (Amendment) Act 1992 has extended the period of copyright by another 10 years. Now literary, dramatic, musical or artistic works enjoy copyright protection for the life time of the author plus 60 years beyond i.e. 60 years after his death. In the case of joint authorship which implies collaboration of two or more authors in the production of the work, the term of copyright is to be construed as a reference to the author who dies last.

- Section 18 of the Copyright Act provides for the assignment of copyright in an existing work as well as future work. In both the cases an assignment may be made of the copyright either wholly or partially and generally or subject to limitations and that too for the whole period of copyright or part thereof.

- Copyright protection gives exclusive rights to the owners of the work to reproduce the work enabling them to derive financial benefits by exercising such rights. If any person without authorisation from the owner exercises these rights in respect of the work which has copyright protection it constitutes an infringement of the copyright.

- Certain exceptions to infringement have been stipulated by the Copyright Act. The object of these exceptions is to enable the reproduction of the work for certain public purposes, and for encouragement of private study, research and promotion of education.

- The Copyright Act provides for the civil remedies for infringement of copyright and entitles the owner of the copyright to all such remedies by way of injunction, damages, accounts.
SELF TEST QUESTIONS

1. Briefly explain the concept of copyright.
2. Discuss in detail the Copyright Board.
3. Discuss in detail the provisions relating to infringement of copyright.
4. Write short note on the following:
   (i) Government work.
   (ii) Term of Copyright.
5. Elaborate the provisions relating to certain exception to infringement have been stipulated by the Copyright Act.
INTRODUCTION

The globalization process, driven by advancements in communications and information technology, have made the international system more interactive, integrated, interrelated, and interconnected. This dynamic has unleashed the floodgates of opportunities for criminals to expand, widen and deepen their reach, become more sophisticated in their operations, and intensify their level and pace of transactions. Equipped with the power of technology, disregard for human life and values, and indiscreet ruthlessness, these criminals are able to corrupt the societies with little regard for national boundaries, state sovereignty and levels of economic development. Because of the opportunities and needs created by the global dimension of business, crimes such as fraud, counterfeiting, corruption and embezzlement have opportunities to shift from individual or family ambit to more organized and competitive global structures.

Indeed, underground criminal organizations operate like multinational companies, establishing affiliates, maintaining strategic alliances, investing legitimately in foreign countries, and extending their capacities and range across regions.
**What is Money Laundering?**

Money laundering is the processing of criminal proceeds to disguise its illegal origin. Terrorism, illegal arms sales, financial crimes, smuggling, and the activities of organised crime, including drug trafficking and prostitution rings, generate huge sums. Embezzlement, insider trading, bribery and computer fraud also produce large profits and create an incentive to legitimise the ill-gotten gains through money laundering. When a criminal activity generates substantial profits, the individual or group involved in such activities route the funds to safe heavens by disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention.

Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.

**How is Money Laundered?**

The process of money laundering can be classified into three stages, namely, placement, layering and integration.

In the initial or placement stage of money laundering, the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments that are later collected and deposited into accounts at another location.

After the funds are entered into the financial system, the layering takes place. In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source. The funds might be channeled through the purchase and sale of investment instruments, or the launderer might simply wire the funds through a series of accounts at various banks across the globe.

After successful processing of criminal profits through the first two phases of the money laundering process, the launderer moves them to integration. In this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.

**Impact of Money Laundering on Development**

Economies with growing or developing financial centers, but inadequate controls are particularly vulnerable to money laundering, as against the established financial center countries, which implement comprehensive anti-money laundering regimes. The gaps in a national anti-money laundering system are exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures. As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country’s commercial and financial sectors are perceived to be subject to the control and influence of organised crime.

In times of decelerating growth, an infusion of hard currency can bolster a country’s foreign reserves, ease the hardship associated with budget tightening policies and moderate foreign indebtedness. While these are short-term benefits
associated with an inflow of criminal monies, the long-term effects are mostly negative. One difference between official borrowing and laundered funds is that the former can be controlled by Government, whereas the funds owned by criminals escape the government's ability to control and regulate the economy.

The possible social, economic and political effects of money laundering, if left unchecked or dealt with ineffectively, are serious. Through the process of money laundering, organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. Thus, the economic and political influence of criminal organisations can weaken the social fabric, ethical standards and ultimately the democratic institutions of society.

### What is the connection of money laundering with society at large?

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

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

### Prevention of Money Laundering – Global Initiatives

Since money laundering is an international phenomenon, transnational co-operation is of critical importance in the fight against this menace. A number of initiatives have been taken to deal with the problem at international level. In this context, the United Nations or the Bank for International Settlements, took some initiatives in 1980s to address the problem of money laundering. However, with the creation of the Financial Action Task Force (FATF) in 1989, regional groupings, such as the European Union, Council of Europe, and organisation of American States also established anti-money laundering standards for their member countries.

The major international agreements addressing money laundering include the United Nations Convention against Illicit Trafficking in Drugs and Psychotropic Substances (the Vienna Convention) and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. The role of financial institutions in preventing and detecting money laundering has also been the subject of pronouncements by the Basle Committee on Banking Regulation Supervisory Practices, the European Union and the International Organization of Securities Commissions.

### The Vienna Convention

The first major initiative in the prevention of money laundering was the United
Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in December 1988 (popularly known as Vienna Convention). This convention laid the groundwork for efforts to combat money laundering by obliging the member states to criminalize the laundering of money from drug trafficking. It promotes international cooperation in investigations and makes extradition between member states applicable to money laundering. The convention also establishes the principle that domestic bank secrecy provisions should not interfere with international criminal investigations.

Council of Europe Convention

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, 1990 establishes a common policy on money laundering. It sets out a common definition of money laundering and common measures for dealing with it. The Convention lays down the principles for international cooperation among the member states, which may also include states outside the Council of Europe. This convention came into force in September 1993. One of the purposes of the convention is to facilitate international cooperation as regards investigative assistance, search, seizure and confiscation of the proceeds of all types of criminality, particularly serious crimes, such as, drug offences, arms dealing, terrorist offences etc. and other offences which generate large profits.

European Union Money Laundering Directive

In response to the new opportunities for money laundering opened up by the liberalization of capital movements and cross-border financial services in the European Union, the Council of the European Communities in June, 1991 issued a directive on the Prevention of Use of the Financial System for the Purpose of Money Laundering. The directive requires member states to outlaw money laundering. The member states have been put under obligation to require financial institutions to establish and maintain internal systems to prevent laundering, to obtain the identification of customers with whom they enter into transaction of more than a particular amount and to keep proper records for at least five years. The financial institutions are also required to report suspicious transactions and ensure that such reporting does not result in liability for the institution or its employees.

Basle Committee’s Statement of Principles

In December 1988 the Basle Committee on Banking Regulation Supervisory Practices issued a statement of principles to be complied by the international banks of member states. These principles include identifying customers, avoiding suspicious transactions, and cooperating with law enforcement agencies. The statement aims at encouraging the banking sector to adopt common position in order to ensure that banks are not used to hide or launder funds acquired through criminal activities.

Resolution of the International Organization of Securities Commissions

The International Organization of Securities Commissions (IOSCO) adopted, in October 1992, a resolution encouraging its members to take necessary steps to combat money laundering in securities and futures markets.

The Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) is an inter-governmental body whose
purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. The Task Force is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

Since its creation the FATF has spearheaded the effort to adopt and implement measures designed to counter the use of the financial system by criminals. It established a series of Recommendations in 1990, revised in 1996 and in 2003 to ensure that they remain up to date and relevant to the evolving threat of money laundering that set out the basic framework for anti-money laundering efforts and are intended to be of universal application.

The FATF monitors members’ progress in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In performing these activities, the FATF collaborates with other international bodies involved in combating money laundering and the financing of terrorism.

The FATF does not have a tightly defined constitution or an unlimited life span. The Task Force periodically reviews its mission. The FATF has been in existence since 1989. The FATF currently comprises 34 members’ jurisdictions and 2 regional organizations, representing most major financial centers in all parts of the globe. India became 34th member of FATF in the year 2010.

History of the FATF

In response to mounting concern over money laundering, the Financial Action Task Force on Money Laundering (FATF) was established by the G-7 Summit that was held in Paris in 1989. Recognising the threat posed to the banking system and to financial institutions, the G-7 Heads of State or Government and President of the European Commission convened the Task Force from the G-7 member States, the European Commission and eight other countries.

The Task Force was given the responsibility of examining money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering. In April 1990, less than one year after its creation, the FATF issued a report containing a set of Forty Recommendations, which provide a comprehensive plan of action needed to fight against money laundering.

In 2001, the development of standards in the fight against terrorist financing was added to the mission of the FATF. In October 2001 the FATF issued the Eight Special Recommendations to deal with the issue of terrorist financing. The continued evolution of money laundering techniques led the FATF to revise the FATF standards comprehensively in June 2003. In October 2004 the FATF published a Ninth Special Recommendations, further strengthening the agreed international standards for combating money laundering and terrorist financing - the 40+9 Recommendations.

The 40 Recommendations provide a complete set of counter-measures against money laundering (ML) covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation. They have been recognised, endorsed, or adopted by many international bodies. The Recommendations are neither complex nor difficult, nor do they compromise the
freedom to engage in legitimate transactions or threaten economic development. They set out the principles for action and allow countries a measure of flexibility in implementing these principles according to their particular circumstances and constitutional frameworks. Though not a binding international convention, many countries in the world have made a political commitment to combat money laundering by implementing the 40 Recommendations.

**Forty Recommendations are as follows:**

- **Recommendations 1, 2** - Scope of the criminal offence of money laundering
- **Recommendation 3** - Provisional measures and confiscation
- **Recommendation 4** - Measures to be taken by Financial Institutions and Non-Financial Businesses and Professions to prevent Money Laundering and Terrorist Financing
- **Recommendations 5, 6, 7, 8, 9, 10, 11, 12** - Customer due diligence and record-keeping
- **Recommendations 13, 14, 15, 16** - Reporting of suspicious transactions and compliance
- **Recommendations 17, 18, 19, 20** - Other measures to deter money laundering and terrorist financing
- **Recommendations 21, 22** - Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations
- **Recommendations 23, 24, 25** - Regulation and supervision
- **Recommendations 26, 27, 28, 29, 30, 31, 32** - Institutional and other measures necessary in systems for combating Money Laundering and Terrorist Financing - Competent authorities, their powers and resources
- **Recommendations 33, 34** - Transparency of legal persons and arrangements
- **Recommendation 35** - International Co-operation
- **Recommendations 36, 37, 38, 39** - Mutual legal assistance and extradition
- **Recommendation 40** - Other forms of co-operation

**Nine special recommendations on Terrorist Financing (TF) are as follows:**

- Ratification and implementation of UN instruments
- Criminalising the financing of terrorism and associated money laundering
- Freezing and confiscating terrorist assets
- Reporting suspicious transactions related to terrorism
- International co-operation
- Alternative remittance
**Wire transfers**

**Non-profit organisations**

**Cash couriers**

**United Nations Global Programme Against Money Laundering**

Office of the Drug Control and Crime Prevention implement this programme against Money Laundering with a view to increase the effectiveness of international action against money laundering through comprehensive technical cooperation services offered to Governments. The programme encompasses following three areas of activities, providing various means to states and institutions in their efforts to effectively combat money laundering:

(i) Technical cooperation is the main task of the Programme. It encompasses activities of creating awareness, institution building and training.

(ii) The research and analysis aims at offering States Key Information to better understand the phenomenon of money laundering and to enable the international community to devise more efficient and effective countermeasure strategies.

(iii) The commitment to support the establishment of financial investigation services for raising the overall effectiveness of law enforcement measures.

The implementation of the Global Programme against Money Laundering is carried out in the spirit of cooperation with other international, regional and national organizations and institutions.

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<th>What influence does money laundering have on economic development?</th>
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<td>Launderers are continuously looking for new routes for laundering their funds. Economies with growing or developing financial centres, but inadequate controls are particularly vulnerable as established financial centre countries implement comprehensive anti-money laundering regimes. Differences between national anti-money laundering systems will be exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures. Some might argue that developing economies cannot afford to be too selective about the sources of capital they attract. But postponing action is dangerous. The more it is deferred, the more entrenched organised crime can become. As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country’s commercial and financial sectors are perceived to be subject to the control and influence of organised crime. Fighting money laundering and terrorist financing is therefore a part of creating a business friendly environment which is a precondition for lasting economic development.</td>
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**Prevention of Money Laundering – Indian Initiatives**

In view of an urgent need for the enactment of a comprehensive legislation for
preventing money-laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the Prevention of Money-Laundering Bill 1998 was introduced in the Parliament on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to Lok Sabha. After incorporating the recommendations of the Standing Committee, the Government introduced the Prevention of Money Laundering Bill 1999 in the Parliament on October 29, 1999. The Bill received the assent of the President and became Prevention of Money Laundering Act, 2002 on 17th January 2003. The Act has come into force with effect from July 1, 2005.

Prevention of Money Laundering Act, 2002

Scheme of the Act

The Prevention of Money Laundering Act, 2002 consists of ten chapters containing 75 sections and one Schedule divided into five parts. Chapter I containing section 1 and 2 deals with short title, extent and commencement and definitions. Chapter II containing sections 3 and 4 provides for offences and punishment for money laundering. Chapter III (Section 5-11) provides for attachment, adjudication and confiscation and Chapter IV (Sections 12-15) deals with obligations of banking companies, financial institutions and intermediaries. Chapter V (Sections 16-24) relates to Summons, Searches and Seizures etc.

The Act provides for establishment of Appellate Tribunal and thus sections 25-42 under Chapter VI provides for composition, procedure, power, jurisdiction etc. of the Appellate Tribunal. Chapter VII (Sections 43-47) deals with Special Courts, and Chapter VIII (Sections 48-54) provides for various authorities under the Act, their appointment, powers, jurisdiction etc. Chapter IX (Sections 55-61) deals with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Chapter X containing Sections 62-75 deals with miscellaneous provisions including punishment for, vexatious search, false information etc., cognizance of offences, and offences by companies, among others.

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

Major Provisions of the Act

Definitions

Section 2 of the Act defines various terms used in the Act. Some of the important definitions are given below:

Attachment

Sub-section 1(d) defines attachment as to mean prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III.

Proceeds of Crime

Section 2(1)(u) defines the term 'proceeds of crime as to mean any property
derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.

**Property**

The term ‘property used in sub-section 1(v) of Section 2 means any property or assets of every description, whether, corporeal or incorporeal, movable or immovable, tangible or intangible and includes, deeds and instruments evidencing title to, or interest in such property or assets wherever located.

**Intermediary**

The term intermediary under sub-section 1(n) of Section 2 has been defined as to mean a stock broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment advisor, and any other intermediary associated with securities market and registered under Section 12 of the SEBI Act, 1992.

**Investigation**

Sub-section 2(1)(na) defines investigation to include all the proceedings under the Act conducted by the Director or by an authority authorized by the Central Government under this Act for the collection of evidence.

**Money Laundering**

Section 3 of the Act states that whoever, acquires, owns, possesses, or transfers any proceeds of crime or knowingly enters into any transaction which is related to proceeds of crime directly or indirectly or conceals or aids in the concealment of the proceeds of crime, shall be guilty of offence of money laundering.

Section 4 provides that any person who commits the offence of money laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and also liable to fine which may extend to five lakh rupees. However, where the proceeds of crime involved in money laundering relates to any offence specified under the Narcotic Drugs and Psychotropic Substances Act, the punishment may extend to rigorous imprisonment for ten years.

**Attachment of property involved in money laundering**

Where the Director or any officer not below the rank of Deputy Director authorised by him, has reason to believe on the basis of material in his possession that any person is in possession of any proceeds of money laundering; such person has been charged of having committed a scheduled offence and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, such officer may by order in writing, provisionally attach such property for a period not exceeding 150 days from the date of the order, in the manner provided in the Second Schedule of the Income-tax Act, 1961.

Every order of attachment shall cease to have effect after the expiry of ninety days from the date of the order or on the date of the order made by the
Administrating Officer finding the person interested is not prevented from the enjoyment of property attached. ‘Person interested in relation to any immovable property includes all persons claiming or entitled to claim any interest in the property. The Director or any other officer who provisionally attaches any property shall, within a period of 30 days from such attachment file a complaint, stating the facts of such attachment before the Adjudicating Authority.

**Adjudicating Authority**

Section 6 empowers the Central Government to appoint, by notification, one or more persons not below the rank of Joint Secretary to the Government of India as Adjudicating Authority to exercise the jurisdiction, powers and authority conferred on or under the Act.

**Adjudication**

Section 8 dealing with the adjudication provides that on receipt of a complaint from the Director or any other officer who provisionally attaches any property or an application made by such officer for retention of seized record or property, the Adjudicating Authority may, on reason to believe that any person has committed an offence of money laundering, serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached or seized, the evidence on which he relies and other relevant information and particulars and show cause why all or any of such property should not be declared to be the properties involved in money laundering and confiscated by the Central Government. Where a notice specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person. Similar notice is required to be served on all persons when such property is held jointly by more than one person.

**Vesting of Property in Central Government**

Section 9 provides that an order of confiscation made, in respect of any property of a person, vests in the Central Government all the rights and title in such property free from all incumbrances. The Adjudicating Authority after giving an opportunity of being heard to any other person interested in the property attached or seized is of the opinion that any encumbrances on the property or lease hold interest has been created with a view to defeat the provisions of the Act, it may, by order declare such encumbrances or lease hold interest to be void and thereupon the property shall vest in the Central Government free from such encumbrances or lease hold. However, this provision shall not discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages.

**Obligation of Banking Companies, Financial Institutions and Intermediaries**

Chapter IV of the Act deals with obligations of Banking companies, financial institutions and intermediaries. Section 12 requires every banking company, financial institution and intermediary to maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place within a month. These informations are
required to be furnished to the Director within such time as may be prescribed. Banks and financial institutions are required to verify and maintain the records of the identity of all its clients, in such manner as may be prescribed. The records as mentioned above are required to be maintained for a period of ten years from the date of cessation of the transactions between the clients and the banking company, financial institution or intermediary.

Section 13 states that the Director may, either on his own motion, or on an application made by any authority, officer, or person, call for records of all transactions and make such inquiry or cause such inquiry to be made, as he thinks fit. In the course of any inquiry, if the Director finds that a banking company, financial institution or an intermediary or any of its officers has failed to maintain or retain records in accordance with the provisions of the Act, he may, by an order, levy a fine on such banking company, financial institution or intermediary which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.

Section 15 empowers the Central Government to prescribe, in consultation with the Reserve Bank of India, the procedure and the manner of maintaining and furnishing information for the purpose of implementation of the provisions of the Act.

**Summon, Searches and Seizures, etc.**

Section 16 empowers an authority to enter, on having reason to believe that an offence under Section 3 has been committed, any place within the limits of the area assigned to him or in respect of which he is authorised. Section 16(3) requires such authority to place marks of identification on the records inspected by him and make or cause to be made extracts or copies therefrom, make an inventory of any property checked or verified by him and record the statement of any person present in the place which may be useful for, or relevant to, any proceedings under the Act.

Section 18 of the Act deals with search of persons and provides that if an authority authorised in this behalf by the Central Government by general or special order has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

**Retention of Property**

Under Section 20, where any property has been seized under Section 17 or Section 18 and the officer authorised by the Director has reason to believe that such property is required to be retained for the purposes of adjudication under Section 8, such property may be retained for a period of not exceeding three months from the end of the month in which such property was seized and on expiry of the period of three months the property shall be returned to the person from whom such property was seized unless the Adjudicating Authority permits the retention of such property beyond the said period. Sub-Section (4) requires the Adjudicating Authority, before authorizing the retention of such property beyond the period specified, to satisfy himself that the property is prima facie involved in money laundering and the property is required for the purposes of adjudication under Section 8.
Presumption in Inter-connected Transactions

Section 23 of the Act deals with presumption in inter-connected transactions and provides that where money laundering involves two or more transactions and one or more such transactions is or are proved to be involved in money laundering, then for the purposes of adjudication or confiscation under Section 8, it shall be presumed that the remaining transactions form part of such interconnected transactions, unless otherwise proved to the satisfaction of the Adjudicating Authority.

Appellate Tribunal

Chapter VI of the Act deals with Appellate Tribunal. Section 25 empowers the Central Government, to establish an Appellate Tribunal to hear appeals against the orders of Adjudicating Authority and other authorities under the Act.

Appeal to High Court

Section 42 entitles any person aggrieved by any decision or order of the Appellate Tribunal to file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order. However, the High Court, if satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, may allow it to be filed within a further period not exceeding sixty days.

Special Courts

Sections 43 to 47 of the Act deal with provisions relating to Special Courts. Section 43(1) empowers the Central Government to designate, in consultation with the Chief Justice of the High Court, one or more Courts of Session as Special Courts or Court for such area or areas or for such case or class or group of cases as may be specified in the notification, for trial of offence punishable under Section 4.

Offences Triable by Special Courts

Section 44(1) provides that the offence punishable under Section 4, shall be triable only by the Special Court constituted for the area in which the offence has been committed or a special court may, upon a complaint made by an authority authorised in this behalf take cognizance of the offence for which the accused is committed to it for trial.

Offences to be cognizable and Non-bailable

Section 45 declares every offence punishable under the Act to be cognizable. It provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, a person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall not be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release; and where the Public Prosecutor opposes the application, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while in bail.

However the special court shall not take cognizance of any offence punishable under Section 4, except upon a complaint in writing made by (i) the Director or (ii) any
officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or special order made by that Government.

Sub-section 1A inserted by Prevention of Money Laundering (Amendment) Act, 2005 provides that notwithstanding anything contained in Code of Criminal Procedure, 1973 or any other provision of this Act, no police officer shall investigate into an offence under this Act, unless specifically authorized, by the Central Government by a general or special order, and subject to such conditions as may be prescribed.

**Power of Central Government to Issue Directions**

Section 52 empowers the Central Government to issue, from time to time, such orders, instructions and directions to the authorities as it may deem fit for the proper administration of this Act. The authorities and all other persons employed in execution of the Act have been put under obligation to observe and follow such orders, instructions and directions of the Central Government. However, no such orders, instructions or directions shall be issued so as to require any authority to decide a particular case in a particular manner or interfere with the discretion of the Adjudicating Authority in exercise of his functions.

**Agreement with Foreign Countries**

Section 56 empowers the Central Government to enter into an agreement with the Government of any country for enforcing the provisions of the Act and also for exchange of information for the prevention of any offence under the this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under the Act.

**Assistance to a Contracting State in Certain Cases**

Section 58 provides that, where a letter of request is received by the Central Government, from a court or authority in a contracting State requesting for investigation into an offence or proceedings under the Act and forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority as it thinks fit for execution of such request in accordance with the provisions of the Act or as the case may be, any other law for the time being in force.

**Reciprocal Arrangements for Processes and Assistance for Transfer of Accused Persons**

Section 59(1) prescribes that where Special Court, in relation to an offence punishable under Section 4 desires that a summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other thing, or to produce a document or other things or to produce it; or a search warrant issued by it, shall be served or executed at any place in any contracting state, it shall send such summons or warrant in duplicate in such form, to such court, Judge or Magistrate through such authorities as the Central Government may by notification, specify in that behalf and that court, Judge or Magistrate, as the case may be, shall cause the same to be executed.
Sub-Section (2) stipulates that where a Special Court, in relation to an offence punishable under Section 4 has received for service or execution, summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other things or to produce it; or a search warrant; issued by a court, Judge or Magistrate in a contracting State, it shall cause the same to be served or executed as if it were a summon or warrant received by it from another court in the said territories for service or execution within its jurisdiction. Where a warrant of arrest has been executed, the person arrested shall, so far as possible be dealt with in accordance with the procedure specified under Section 19 and where a search warrant has been executed, the things found in the search shall so far as possible be dealt with in accordance with the procedure specified under Section 17 or 18.

However, where a summon or search warrant received from a contracting state has been executed, the documents or other things produced or things found in the search shall be forwarded to the court issuing the summon or search warrant through such authority as the Central Government may by notification specify in this behalf.

**Attachment, Seizure and Confiscation of Property, etc.**

Section 60(1) provides that where the Director has made an order for attachment of any property under Section 5 or where Adjudicating Authority has made an order confirming such attachment or confiscation of any property under Section 8 and such property is suspected to be in a contracting state, the Special Court on an application by the Director or the Administrator appointed under Section 10(1) as the case may be, may issue a letter of request to a court or an authority in the contracting state for execution of such order.

Section 60(2) prescribes that when a letter of request is received by the Central Government from a court or an authority in a contracting state requesting attachment or confiscation of the property in India derived or obtained directly or indirectly, by any person from the commission of an offence under Section 3 committed in that contracting state, the Central Government may forward such letter of request to the Director as it thinks fit, for execution in accordance with the provisions of the Act. Sub-Section (3) stipulates that the Director shall on receipt of a letter of request under Section 58 or Section 59 direct any authority under the Act to take all steps necessary for tracing and identifying such property.

**(KYC) Norms/ (AML) Measures/ (CFT) Guidelines – Anti Money Laundering Standards**

RBI issued Master Circular on Know Your Customer (KYC) norms/Anti-Money Laundering (AML) standards/Combating of Financing of Terrorism (CFT)/Obligation of banks under Prevention of Money Laundering Act, (PMLA), 2002 and Banks were advised to follow certain customer identification procedure for opening of accounts and monitoring transactions of a suspicious nature for the purpose of reporting it to appropriate authority. These ‘Know Your Customer’ guidelines have been revisited in the context of the Recommendations made by the Financial Action Task Force (FATF) on Anti Money Laundering (AML) standards and on Combating Financing of Terrorism (CFT). Banks have been advised to ensure that a proper policy framework on ‘Know Your Customer’ and Anti-Money Laundering measures with the approval of the Board is formulated and put in place.
The objective of KYC Norms/AML Measures/CFT Guidelines

The objective of Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Measures/Combating of Financing of Terrorism (CFT) guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently.

Obligation of Banks

- Banks should keep in mind that the information collected from the customer for the purpose of opening of account is to be treated as confidential and details thereof are not to be divulged for cross selling or any other like purposes. Banks should, therefore, ensure that information sought from the customer is relevant to the perceived risk, is not intrusive, and is in conformity with the guidelines issued in this regard. Any other information from the customer should be sought separately with his/her consent and after opening the account.

- Banks should ensure that any remittance of funds by way of demand draft, mail/telegraphic transfer or any other mode and issue of travellers’ cheques for value of Rupees fifty thousand and above is effected by debit to the customer’s account or against cheques and not against cash payment.

- Banks should ensure that the provisions of Foreign Contribution (Regulation) Act, 1976 as amended from time to time, wherever applicable are strictly adhered to.

KYC Policy

Banks should frame their KYC policies incorporating the following four key elements:

- Customer Acceptance Policy;
- Customer Identification Procedures;
- Monitoring of Transactions; and
- Risk Management.

For the purpose of KYC policy, a ‘Customer’ is defined as:

- a person or entity that maintains an account and/or has a business relationship with the bank;

- one on whose behalf the account is maintained (i.e. the beneficial owner). [Ref: Government of India Notification dated February 12, 2010 - Rule 9, sub-rule (1A) of PMLA Rules - 'Beneficial Owner’ means the natural person who ultimately owns or controls a client and or the person on whose behalf a transaction is being conducted, and includes a person who exercise ultimate effective control over a juridical person]

- beneficiaries of transactions conducted by professional intermediaries, such as Stock Brokers, Chartered Accountants, Solicitors etc. as permitted under the law, and
any person or entity connected with a financial transaction which can pose significant reputational or other risks to the bank, say, a wire transfer or issue of a high value demand draft as a single transaction.

**Introduction of New Technologies – Credit cards/debit cards/ smart cards/gift cards**

Banks should pay special attention to any money laundering threats that may arise from new or developing technologies including internet banking that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes. Many banks are engaged in the business of issuing a variety of Electronic Cards that are used by customers for buying goods and services, drawing cash from ATMs, and can be used for electronic transfer of funds. Banks are required to ensure full compliance with all KYC/AML/CFT guidelines issued from time to time, in respect of add-on/ supplementary cardholders also. Further, marketing of credit cards is generally done through the services of agents. Banks should ensure that appropriate KYC procedures are duly applied before issuing the cards to the customers. It is also desirable that agents are also subjected to KYC measures.

**Information to be preserved**

Banks are required to maintain all necessary information in respect of transactions to permit reconstruction of individual transaction, including the following information:

(a) the nature of the transactions;
(b) the amount of the transaction and the currency in which it was denominated;
(c) the date on which the transaction was conducted; and
(d) the parties to the transaction

**Maintenance and Preservation of record**

(a) Banks are required to maintain the records containing information of all transactions. Banks should take appropriate steps to evolve a system for proper maintenance and preservation of account information in a manner that allows data to be retrieved easily and quickly whenever required or when requested by the competent authorities.

(b) Banks should ensure that records pertaining to the identification of the customer and his address (e.g. copies of documents like passports, identity cards, driving licenses, PAN card, utility bills etc.) obtained while opening the account and during the course of business relationship, are properly preserved. The identification records and transaction data should be made available to the competent authorities upon request.

(c) Banks have been advised to pay special attention to all complex, unusual large transactions and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. It is further clarified that the background including all documents/office records/memorandums pertaining to such transactions and purpose thereof should, as far as possible, be examined and the findings at branch as well as Principal Officer level should be properly recorded. Such records and related documents should be made available to help auditors in their day-to-day work relating to scrutiny of transactions and also to Reserve Bank/other relevant authorities.
Reporting to Financial Intelligence Unit – India

In terms of the PMLA Rules, banks are required to report information relating to cash and suspicious transactions and all transactions involving receipts by non-profit organisations of value more than rupees ten lakh or its equivalent in foreign currency to the Director, Financial Intelligence Unit-India (FIU-IND) in respect of transactions.

Freezing of Assets under Section 51A of Unlawful Activities (Prevention) Act, 1967

The Unlawful Activities (Prevention) Act, 1967 (UAPA) has been amended by the Unlawful Activities (Prevention) Amendment Act, 2008. Government has issued an Order dated August 27, 2009 detailing the procedure for implementation of Section 51A of the Unlawful Activities (Prevention) Act, 1967 relating to the purposes of prevention of, and for coping with terrorist activities. In terms of Section 51A, the Central Government is empowered to freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities Listed in the Schedule to the Order, or any other person engaged in or suspected to be engaged in terrorism and prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of the individuals or entities Listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism.

LESSON ROUND UP

- Money laundering is the processing of criminal proceeds to disguise its illegal origin.
- The process of money laundering can be classified into three stages, namely, placement, layering and integration.
- The Act contains provisions pertaining to offences and punishment for money laundering, attachment, adjudication and confiscation, obligations of banking companies, financial institutions and intermediaries, Summons, Searches and Seizures etc.
- The Act states that whoever, acquires, owns, possesses, or transfers any proceeds of crime or knowingly enters into any transaction which is related to proceeds of crime directly or indirectly or conceals or aids in the concealment of the proceeds of crime, shall be guilty of offence of money laundering.
- Every banking company, financial institution and intermediary is required to maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place within a month.
- Reserve Bank of India issued Know Your Customer (KYC) Guidelines.
1. Define the term money laundering and explain the process of money laundering.

2. Briefly discuss the international efforts in preventing the money laundering.


4. Write short note on the following:
   (a) Impact of money laundering on the Development.
   (b) Obligation of banking companies, financial institutions and intermediaries.
   (c) Attachment, seizure and confiscation of property etc.

5. What are the objectives of KYC guidelines and when does KYC norms apply?
PART B – LABOUR LAWS

STUDY XIII
MINIMUM WAGES ACT, 1948

LEARNING OBJECTIVE

The Minimum Wages Act prescribes minimum wages for all employees in all establishments or working at home in certain employments specified in the schedule of the Act. Central and State Governments revise minimum wages specified in the schedule. The objective of this study lesson is to thoroughly acclimatize the students with the law relating to minimum wages.

At the end of the study lesson, you should be able to understand:

- Object and scope the Act
- Important definitions
- Manner of fixation of minimum wages
- Procedure for fixation and revising minimum wages
- Advisory Board
- Central Advisory Board
- Authority claims
- Offences and penalties
- Compliances under the Act

OBJECT AND SCOPE OF THE LEGISLATION

The Minimum Wages Act was passed in 1948 and it came into force on 15th March, 1948. The National Commission on Labour has described the passing of the Act as landmark in the history of labour legislation in the country. The philosophy of the Minimum Wages Act and its significance in the context of conditions in India, has been explained by the Supreme Court in *Unichoyi v. State of Kerala* (A.I.R. 1962 SC 12), as follows:
“What the Minimum Wages Act purports to achieve is to prevent exploitation of labour and for that purpose empowers the appropriate Government to take steps to prescribe minimum rates of wages in the scheduled industries. In an underdeveloped country which faces the problem of unemployment on a very large scale, it is not unlikely that labour may offer to work even on starvation wages. The policy of the Act is to prevent the employment of such sweated labour in the interest of general public and so in prescribing the minimum rates, the capacity of the employer need not to be considered. What is being prescribed is minimum wage rates which a welfare State assumes every employer must pay before he employs labour”.

According to its preamble the Minimum Wages Act, 1948, is an Act to provide for fixing minimum rates of wages in certain employments. The employments are those which are included in the schedule and are referred to as ‘Scheduled Employments’. The Act extends to whole of India.

IMPORTANT DEFINITIONS

Appropriate Government [Section 2(b)]

“Appropriate Government” means-

(i) in relation to any scheduled employment carried on by or under the authority of the Central or a railway administration, or in relation to a mine, oilfield or major part or any corporation established by a Central Act, the Central Government, and

(ii) in relation to any other scheduled employment, the State Government.

Employee [Section 2(i)]

“Employee” means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes an outworker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale purpose of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises, net being premises under the control and management of that person; and also includes an employee declared to be an employee by the appropriate Government; but does not include any member of Armed Forces of the Union.

Employer [Section 2(e)]

“Employer” means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, and includes, except, in sub-section (3) of Section 26—

(i) in a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any
person named under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948, as manager of the factory;

(ii) in any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such Government for the supervision and control of employees or where no person of authority is so appointed, the Head of the Department;

(iii) in any scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the Chief Executive Officer of the local authority;

(iv) in any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person responsible to the owner of the supervision and control of the employees or for the payment of wages.

The definitions of “employees” and “employer” are quite wide. Person who engages workers through another like a contractor would also be an employer (1998 LLJ I Bom. 629). It was held in Nathu Ram Shukla v. State of Madhya Pradesh A.I.R. 1960 M.P. 174 that if minimum wages have not been fixed for any branch of work of any scheduled employment, the person employing workers in such branch is not an employer with the meaning of the Act. Similarly, in case of Loknath Nathu Lal v. State of Madhya Pradesh A.I.R. 1960 M.P. 181 an out-worker who prepared goods at his residence, and then supplied them to his employer was held as employee for the purpose of this Act.

Scheduled employment [Section 2(g)]

“Scheduled employment” means an employment specified in the Schedule or any process or branch of work forming part of such employment.

Note: The schedule is divided into two parts namely, Part I and Part II. When originally enacted Part I of Schedule had 12 entries. Part II relates to employment in agriculture. It was realised that it would be necessary to fix minimum wages in many more employments to be identified in course of time. Accordingly, powers were given to appropriate Government to add employments to the Schedule by following the procedure laid down in Section 21 of the Act. As a result, the State Government and Central Government have made several additions to the Schedule and it differs from State to State.

Wages [Section 2(h)]

“Wages” means all remunerations capable of being expressed in terms of money, which would, if the terms of the contract of employment, express of implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance but does not include:

(i) the value of:

(a) any house accommodation, supply of light, water medical;
(b) any other amenity or any service excluded by general or social order of the appropriate Government;

(ii) contribution by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance;

(iii) any traveling allowance or the value of any traveling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment;

(v) any gratuity payable on discharge.

Test your knowledge

Choose the correct answer

What does ‘Appropriate Government’ mean in relation to any scheduled employment?

(a) The Central Government

(b) The railway administration

(c) The municipal administration

(d) The State Government

Correct answer: (a), (b) and (d)

FIXATION OF MINIMUM RATES OF WAGES [Section 3(1)(a)]

Section 3 lays down that the ‘appropriate Government’ shall fix the minimum rates of wages, payable to employees in an employment specified in Part I and Part II of the Schedule, and in an employment added to either part by notification under Section 27. In case of the employments specified in Part II of the Schedule, the minimum rates of wages may not be fixed for the entire State. Parts of the State may be left out altogether. In the case of an employment specified in Part I, the minimum rates of wages must be fixed for the entire State, no parts of the State being omitted. The rates to be fixed need not be uniform. Different rates can be fixed for different zones or localities: [Basti Ram v. State of A.P. A.I.R. 1969, (A.P.) 227].

The constitutional validity of Section 3 was challenged in Bijoy Cotton Mills v. State of Ajmer, 1955 S.C. 3. The Supreme Court held that the restrictions imposed upon the freedom of contract by the fixation of minimum rate of wages, though they interfere to some extent with freedom of trade or business guarantee under Article 19(1)(g) of the Constitution, are not unreasonable and being imposed and in the interest of general public and with a view to carrying out one of the Directive Principles of the State Policy as embodied in Article 43 of the Constitution, are protected by the terms of Clause (6) of Article 9.
Notwithstanding the provisions of Section 3(1)(a), the “appropriate Government” may not fix minimum rates of wages in respect of any scheduled employment in which less than 1000 employees in the whole State are engaged. But when it comes to its knowledge after a finding that this number has increased to 1,000 or more in such employment, it shall fix minimum wage rate.

REVISION OF MINIMUM WAGES

According to Section 3(1)(b), the ‘appropriate Government' may review at such intervals as it may thing fit, such intervals not exceeding five years, and revise the minimum rate of wages, if necessary. This means that minimum wages can be revised earlier than five years also.

MANNER OF FIXATION/REVISION OF MINIMUM WAGES

According to Section 3(2), the ‘appropriate Government’ may fix minimum rate of wages for:

(a) time work, known as a Minimum Time Rate;
(b) piece work, known as a Minimum Piece Rate;
(c) a “Guaranteed Time Rate” for those employed in piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis; (This is intended to meet a situation where operation of minimum piece rates fixed by the appropriate Government may result in a worker earning less than the minimum wage), and
(d) a “Over Time Rate” i.e. minimum rate whether a time rate or a piece rate to apply in substitution for the minimum rate which would otherwise be applicable in respect of overtime work done by employee.

Section 3(3) provides that different minimum rates of wages may be fixed for –

(i) different scheduled employments;
(ii) different classes of work in the same scheduled employments;
(iii) adults, adolescents, children and apprentices;
(iv) different localities

Further, minimum rates of wages may be fixed by any one or more of the following wage periods, namely:

(i) by the hour,
(ii) by the day,
(iii) by the month, or
(iv) by such other large wage periods as may be prescribed;

and where such rates are fixed by the day or by the month, the manner of calculating wages for month or for a day as the case may be, may be indicated.

However, where wage period has been fixed in accordance with the Payment of
Wages Act, 1986 vide Section 4 thereof, minimum wages shall be fixed in accordance therewith [Section 3(3)].

**MINIMUM RATE OF WAGES (Section 4)**

According to Section 4 of the Act, any minimum rate of wages fixed or revised by the appropriate Government under Section 3 may consist of –

(i) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct to accord as nearly as practicable with the variation in the cost of living index number applicable to such worker (hereinafter referred to as the cost of living allowance); or

(ii) a basic rate of wages or without the cost of living allowance and the cash value of the concession in respect of supplies of essential commodities at concessional rates where so authorized; or

(iii) an all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any.

The cost of living allowance and the cash value of the concessions in respect of supplies essential commodities at concessional rates shall be computed by the competent authority at such intervals and in accordance with such directions specified or given by the appropriate Government.

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**Test your knowledge**

According to Section 3(2), what does the ‘Appropriate Government’ fix minimum rate of wages for?

(a) Time work  
(b) Piece work  
(c) Manual work  
(d) Guaranteed Time Rate

Correct answer: (a), (b) and (d)

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**PROCEDURE FOR FIXING AND REVISION MINIMUM WAGES (Section 5)**

In fixing minimum rates of wages in respect of any scheduled employment for the first time or in revising minimum rates of wages, the appropriate Government can follow either of the two methods described below.

*First Method [Section 5(1)(a)]*

This method is known as the ‘Committee Method’. The appropriate Government may appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision as the case may be. After considering the advice of the committee or committees, the appropriate
Government shall, by notification in the Official Gazette fix or revise the minimum rates of wages. The wage rates shall come into force from such date as may be specified in the notification. If no date is specified, wage rates shall come into force on the expiry of three months from the date of the issue of the notification.

**Note:** It was held in *Edward Mills Co. v. State of Ajmer* (1955) A.I.R. SC, that Committee appointed under Section 5 is only an advisory body and that Government is not bound to accept its recommendations.

As regards composition of the Committee, Section 9 of the Act lays down that it shall consist of persons to be nominated by the appropriate Government representing employers and employee in the scheduled employment, who shall be equal in number and independent persons not exceeding 1/3rd of its total number of members. One of such independent persons shall be appointed as the Chairman of the Committee by the appropriate Government.

**Second Method [Section 5(1)(b)]**

The method is known as the ‘Notification Method’. When fixing minimum wages under Section 5(1)(b), the appropriate Government shall by notification, in the Official Gazette publish its proposals for the information of persons likely to be affected thereby and specify a date not less than 2 months from the date of notification, on which the proposals will be taken into consideration.

The representations received will be considered by the appropriate Government. It will also consult the Advisory Board constituted under Section 7 and thereafter fix or revise the minimum rates of wages by notification in the Official Gazette. The new wage rates shall come into force from such date as may be specified in the notification. However, if no date is specified, the notification shall come into force on expiry of three months from the date of its issue. Minimum wage rates can be revised with retrospective effect. [1996 II LLJ 267 Kar.].

**ADVISORY BOARD**

The advisory board is constituted under Section 7 of the Act by the appropriate Government for the purpose of co-ordinating the work of committees and sub-committees appointed under Section 5 of the Act and advising the appropriate Government generally in the matter of fixing and revising of minimum rates of wages. According to Section 9 of the Act, the advisory board shall consist of persons to be nominated by the appropriate Government representing employers and employees in the scheduled employment who shall be equal in number, and independent persons not exceeding 1/3rd of its total number of members, one of such independent persons shall be appointed as the Chairman by the appropriate Government.

It is not necessary that the Board shall consist of representatives of any particular industry or of each and every scheduled employment; *B.Y. Kashatriya v. S.A.T. Bidi Kamgar Union* A.I.R. (1963) S.C. 806. An independent person in the context of Section 9 means a person who is neither an employer nor an employee in the employment for which the minimum wages are to be fixed. In the case of *State of Rajasthan v. Hari Ram Nathwani*, (1975) SCC 356, it was held that the mere fact that a person happens to be a Government servant will not divert him of the character of the independent person.
CENTRAL ADVISORY BOARD

Section 8 of the Act provides that the Central Government shall appoint a Central Advisory Board for the purpose of advising the Central Government and State Governments in the matters of fixation and revision of minimum rates of wages and other matters under the Minimum Wages Act and for coordinating work of the advisory boards. The Central Advisory Board shall consist of persons to be nominated by the Central Government representing employers and employees in the scheduled employment who shall be equal in number and independent persons not exceeding $\frac{1}{3}$ of its total number of members, one of such independent persons shall be appointed as the Chairman of the Board by Central Government.

Test your knowledge

State whether the following statement is ‘True’ or ‘False’

The first method used by the ‘Appropriate Government’ to fix minimum wages in respect of scheduled employment is called the ‘Committee Method’.

- True

MINIMUM WAGE – WHETHER TO BE PAID IN CASH OR KIND

Section 11 of the Act provides that minimum wages payable under the Act shall be paid in cash. But where it has been the custom to pay wages wholly or partly in kind, the appropriate Government, on being satisfied, may approve and authorize such payments. Such Government can also authorize for supply of essential commodities at concessional rates. Where payment is to be made in kind, the cash value of the wages in kind or in the shape of essential commodities on concessions shall be estimated in the prescribed manner.

PAYMENT OF MINIMUM WAGES IS OBLIGATORY ON EMPLOYER (Section 12)

Payment of less than the minimum rates of wages notified by the appropriate Government is an offence. Section 12 clearly lays down that the employer shall pay to every employee engaged in a scheduled employment under him such wages at a rate not less than the minimum rate of wages fixed by the appropriate Government under Section 5 for that class of employment without deduction except as may be authorized, within such time and subject to such conditions, as may be prescribed.

FIXING HOURS FOR A NORMAL WORKING DAY (Section 13)

Fixing of minimum rates of wages without reference to working hours may not achieve the purpose for which wages are fixed. Thus, by virtue of Section 13 the appropriate Government may –

(a) fix the number of work which shall constitute a normal working day, inclusive of one or more specified intervals;
(b) provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such day of rest;

(c) provide for payment of work on a day of rest at a rate not less than the overtime rate.

The above stated provision shall apply to following classes of employees only to such extent and subject to such conditions as may be prescribed:

(a) Employees engaged on urgent work, or in any emergency, which could not have been foreseen or prevented;

(b) Employees engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working in the employment concerned;

(c) Employees whose employment is essentially intermittent;

(d) Employees engaged in any work which for technical reasons, has to be completed before the duty is over;

(e) Employees engaged in any work which could not be carried on except at times dependent on the irregular action of natural forces.

For the purpose of clause (c) employment of an employee is essentially intermittent when it is declared to be so by the appropriate Government on ground that the daily hours of the employee, or if these be no daily hours of duty as such for the employee, the hours of duty, normally includes period of inaction during which the employee may be on duty but is not called upon to display either physical activity or sustained attention.

There is correlation between minimum rates of wages and hours of work. Minimum wages are to be fixed on basis of standard normal working hours, namely 48 hours a week; Benode Bihari Shah v. State of W.B. 1976 Lab I.C. 523 (Cal).

Test your knowledge
State whether the following statement is ‘True’ or ‘False’

Under this Act, payment of less than the minimum rates of wages notified by the ‘Appropriate Government’ is an offence.

- True
- False

Correct answer: True

PAYMENT OF OVERTIME (Section 14)

Section 14 provides that when an employee, whose minimum rate of wages is fixed under this Act by the hours, the day or by such longer wage period as may be
prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or part of an hour so worked in excess at the overtime rate fixed under this Act or under any other law of the appropriate Government for the time being in force whichever is higher. Payment for overtime work can be claimed only by the employees who are getting minimum rate of wages under the Act and not by those getting better wages. (1998 LLJ I SC 815).

**WAGES OF A WORKER WHO WORKS LESS THAN NORMAL WORKING DAY (Section 15)**

Where the rate of wages has been fixed under the Act by the day for an employee and if he works on any day on which he employed for a period less than the requisite number of hours constituting a normal working day, he shall be entitled to receive wages for that day as if he had worked for a full working day.

Provided that he shall not receive wages for full normal working day—

(i) if his failure to work is caused by his unwillingness to work and not by omission of the employer to provide him with work, and

(ii) such other cases and circumstances as may be prescribed.

**MINIMUM TIME – RATE WAGES FOR PIECE WORK (Section 17)**

Where an employee is engaged in work on piece work for which minimum time rate and not a minimum piece rate has been fixed, wages shall be paid in terms of Section 17 of the Act at minimum time rate.

**MAINTENANCE OF REGISTERS AND RECORDS (Section 18)**

Apart from the payment of the minimum wages, the employer is required under Section 18 to maintain registers and records giving such particulars of employees under his employment, the work performed by them, the receipts given by them and such other particulars as may be prescribed. Every employee is required also to exhibit notices, in the prescribed form containing particulars in the place of work. He is also required to maintain wage books or wage-slips as may be prescribed by the appropriate Government and the entries made therein will have to be authenticated by the employer or his agent in the manner prescribed by the appropriate Government.

**AUTHORITY AND CLAIMS (Section 20-21)**

Under Section 20(1) of the Act, the appropriate Government, may appoint any of the following as an authority to hear and decide for any specified area any claims arising out of payment of less than the minimum rate of wages or in respect of the payment of remuneration for the days of rest or of wages at the rate of overtime work:

(a) any Commissioner for Workmen’s Compensation; or

(b) any officer of the Central Government exercising functions as Labour Commissioner for any region; or

(c) any officer of the State Government not below the rank of Labour Commissioner; or
(d) any other officer with experience as a Judge of a Civil Court or as the Stipendiary Magistrate.

The authority so appointed shall have jurisdiction to hear and decide claims arising out of payment of less than the minimum rates of wages or in respect of the payment of remuneration for days of rest or for work done on such days or for payment of overtime.

The provisions of Section 20(1) are attracted only if there exists a disputed between the employer and the employee as to the rates of wages. Where no such dispute exists between the employer and employees and the only question is whether a particular payment at the agreed rate in respect of minimum wages, overtime or work on off days is due to an employee or not, the appropriate remedy is provided by the Payment of Wages Act, 1936.

OFFENCES AND PENALTIES

Section 22 of the Act provides that any employer who (a) pays to any employee less than the minimum rates of wages fixed for that employee’s class of work or less than the amount due to him under the provisions of this Act or contravenes any rule or order made under Section 13, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both.

While imposing any fine for an offence under this section the court shall take into consideration the amount of any compensation already awarded against the accused in any proceedings taken under section 20.

It is further stipulated under Section 22A of the Act that any employer who contravenes any provision of this Act or of any rule or order made thereunder shall if no other penalty is provided for such contravention by this Act be punishable with fine which may extend to five hundred rupees.

Test your knowledge

Choose the correct answer

Under Section 20(1) of the Act, which of the following, may the ‘Appropriate Government’ appoint as an authority to hear and decide cases related to payment of wages?

(a) Any Commissioner for Workmen’s Compensation
(b) Any officer of the Central Government exercising functions as Labour Commissioner for any region
(c) Any officer of the State Government
(d) All the above

Correct answer: (d)
COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The Establishment is covered by the definition “Scheduled Employment” with effect from ……

2. The Government revised the minimum wages once/twice/thrice during the financial year under reference and the Establishment has paid to all its employees minimum wages in accordance with the rates at respective point of time and at the respective rates specified in notification under Section 5 of the MWA.

3. The Establishment has issued wage slips to all its employees in respect of each of the wage period………

4. Where the services of any employee were terminated for any reason whatsoever, the wages were paid within two working days from the date of such termination.

5. The Establishment did not make any unauthorized deduction from the wages of any of its employees. Further, the deductions if any, made were within the limits of fifty percent (or seventy five percent in case of cooperatives) of wages earned by such employees during the period under reference.

6. Where the Establishment was constrained to impose any fine or deduct wages on account of damages caused by any employee, the latter was given an opportunity of being heard in the presence of a neutral person and was also communicated the amount of fine imposed or deduction made from the wages.

7. The Establishment has eight working hours per day, inclusive of half an hour of interval.

8. All claims under Section 20 of the MWA were paid within the time limit specified in the Order.

LESSON ROUND UP

- The Minimum Wages Act, empowers the Government to fix minimum wages for employees working in specified employments. It provides for review and revision of minimum wages already fixed after suitable intervals not exceeding five years.
- It extends to the whole of India and applies to scheduled employments in respect of which minimum rates of wages have been fixed under this Act.
- The appropriate government shall fix the minimum rates of wages payable to employees employed in a scheduled employment.
It may review at such intervals not exceeding five years the minimum rates of wages so fixed, and revise the minimum rates if necessary.

The employer shall pay to every employee in a scheduled employment under him wages at the rate not less than the minimum rates of wages fixed under the Act.

The Act also provides for regulation or working hours, overtime, weekly holidays and overtime wages. Period and payment of wages, and deductions from wages are also regulated.

The Act provides for appointment the authorities to hear and decide all claims arising out of payment less than the minimum rates of wages or any other monetary payments due under the Act. The presiding officers of the Labour court and Deputy Labour Commissioners are the authorities appointed.

SELF TEST QUESTIONS

1. Discuss the object and scope of the Minimum Wages Act.
2. Who is authorize to fix minimum wages and in what manner?
3. What points should be taken into consideration while fixing minimum wages?
4. Enumerate the procedure fro fixing and revising the minimum wages.

Suggested Readings:

(1) The Minimum Wages Act, 1936 — (Bare Act)
(2) Industrial Law—P.L. Malik
(3) Labour Laws—H.L. Kumar
(4) Labour & Industrial Laws (Legal Manual 2007)—Universal
STUDY XIV
PAYMENT OF BONUS ACT, 1965

LEARNING OBJECTIVE

The Payment of Bonus Act, 1965 provides for payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected therewith. The students must be familiar with the basic legal framework envisaged under the Act to understand the main principles involved in the grant of bonus to workers.

At the end of the study lesson, you should be able to understand:
- Scope and application of the Act
- Eligibility for bonus and its payment
- Bonus linked with production
- Exemption
- Compliances under the Act
- Offences and penalties

INTRODUCTION

The term “bonus” is not defined in the Payment of Bonus Act, 1965. Websters International Dictionary, defines bonus as “something given in addition to what is ordinarily received by or strictly due to the recipient”. The Oxford Concise Dictionary defines it as “something to the good into the bargain (and as an example) gratuity to workmen beyond their wages”. The purpose of payment of bonus is to bridge the gap between wages paid and ideal of a living wage.

OBJECT AND SCOPE OF THE ACT

The object of the Act is to provide for the payment of bonus to persons employed in certain establishments and for matters connected therewith. Shah J. observed in Jalan Trading Co. (Pvt.) Ltd. v. Mill Mazdor Sabha, AIR 1967 S.C. 691, that the “object of the Act being to maintain peace and harmony between labour and capital by allowing the employees to share the prosperity of the establishment and prescribing the maximum and minimum rates of bonus together with the scheme of “set-off” and “set on” not only secures the right of labour to share in the profits but also ensures a reasonable degree of uniformity”.

453
On the question whether the Act deals only with profit bonus, it was observed by the Supreme Court in Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai, (1976) II LLJ 186, that “bonus” is a word of many generous connotations and, in the Lord’s mansion, there are many houses. There is profit based bonus which is one specific kind of claim and perhaps the most common. There is customary or traditional bonus which has its emergence from long, continued usage leading to a promissory and expectancy situation materialising in a right. There is attendance bonus and what not. The Bonus Act speak and speaks as a whole Code on the sole subject of profit based bonus but is silent and cannot, therefore, annihilate by implication, other distinct and different kinds of bonuses, such as the one oriented on custom. The Bonus Act, 1965 as it then stood does not bar claims to customary bonus or those based on conditions of service. Held, a discerning and concrete analysis of the scheme of the Bonus Act and reasoning of the Court leaves no doubt that the Act leaves untouched customary bonus.

The provision of the Act have no say on customary bonus and cannot, therefore, be inconsistent therewith. Conceptually, statutory bonus and customary bonus operate in two fields and do not clash with each other (Hukamchand Jute Mills Limited v. Second Industrial Tribunal, West Bengal; 1979-I Labour Law Journal 461).

APPLICATION OF THE ACT

According to Section 1(2), the Act extends to the whole of India, and as per Section 1(3) the Act shall apply to

(a) every factory; and

(b) every other establishment in which twenty or more persons are employed on any day during an accounting year.

Provided that the appropriate Government may, after giving not less than two months notice of its intention so to do, by notification in the Official Gazette apply the provisions of this Act with effect from such accounting year as may be specified in the notification to any establishment including an establishment being a factory within the meaning of sub-clause (ii) of clause (m) of Section 2 of the Factories Act, 1948 employing such number of persons less than twenty as may be specified in the notification; so, however, that the number of persons so specified shall in no case be less than ten.

Save as otherwise provided in this Act, the provisions of this Act shall, in relation to a factory or other establishment to which this Act applies, have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year:

Provided that in relation to the State of Jammu and Kashmir, the reference to the accounting year commencing on any day in the year 1964 and every subsequent accounting year shall be construed as reference to the accounting year commencing on any day in the year 1968 and every subsequent accounting year.
Provided further that when the provisions of this Act have been made applicable to any establishment or class of establishments by the issue of a notification under the proviso to sub-section (3), the reference to the accounting year commencing on any day in the year 1964 and every subsequent accounting year, or, as the case may be, the reference to the accounting year commencing on any day in the year 1968 and every subsequent accounting year, shall, in relation to such establishment or class of establishments, be construed as a reference to the accounting year specified in such notification and every subsequent accounting year [Section 1(4)].

An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein falls below twenty, or, as the case may be, the number specified in the notification issued under the proviso to sub-section (3).

**ACT NOT TO APPLY TO CERTAIN CLASSES OF EMPLOYEES**

Section 32 of this Act provides that the Act shall not apply to the following classes of employees:

(i) employees employed by any insurer carrying on general insurance business and the employees employed by the Life Insurance Corporation of India;

(ii) seamen as defined in clause (42) of Section 3 of the Merchant Shipping Act, 1958;

(iii) employees registered or listed under any scheme made under the Dock Workers (Regulation of Employment) Act, 1948 and employed by registered or listed employers;

(iv) employees employed by an establishment engaged in any industry called on by or under the authority of any department of Central Government or a State Government or a local authority;

(v) employees employed by
   (a) the Indian Red Cross Society or any other institution of a like nature including its branches;
   (b) universities and other educational institutions;
   (c) institutions (including hospitals, chambers of commerce and social welfare institutions) established not for the purpose of profit;

(vi) & (vii) …..(omitted).

(viii) employees employed by the Reserve Bank of India;

(ix) employees employed by
   (a) the Industrial Finance Corporation of India;
   (b) any Financial Corporation established under Section 3, or any Joint Financial Corporation established under Section 3A of the State Financial Corporations Act, 1951;
   (c) the Deposit Insurance Corporation;
   (d) the National Bank for Agriculture and Rural Development;
(e) the Unit Trust of India;
(f) the Industrial Development Bank of India;
(fa) the Small Industries Development Bank of India established under Section 3 of the Small Industries Development Bank of India Act, 1989;
(fb) the National Housing Bank;
(g) any other financial Institution (other than Banking Company) being an establishment in public sector, which the Central Government may by notification specify having regard to (i) its capital structure; (ii) its objectives and the nature of its activities; (iii) the nature and extent of financial assistance or any concession given to it by the Government; and (iv) any other relevant factor;
(x) ……. (omitted).
(xi) employees employed by inland water transport establishments operating on routes passing through any other country.

Apart from the above, the appropriate Government has necessary powers under Section 36 to exempt any establishment or class of establishments from all or any of the provisions of the Act for a specified period having regard to its financial position and other relevant circumstances and if it is of the opinion that it will not be in the public interest to apply all or any of the provisions of this Act thereto. It may also impose such conditions while according the exemptions as it may consider fit to impose.

**Test your knowledge**

*What are the different types of bonus?*

(a) Profit based bonus
(b) Customary bonus
(c) Attendance bonus
(d) Voluntary bonus

**Correct answer:** (a), (b) and (c)

**IMPORTANT DEFINITIONS**

*Accounting Year*

“Accounting Year” means

(i) in relation to a corporation, the year ending on the day on which the books and accounts of the corporation are to be closed and balanced;

(ii) in relation to a company, the period in respect of which any profit and loss account of the company laid before it in annual general meeting is made up, whether that period is a year or not;

(iii) in any other case
(a) the year commencing on the 1st day of April; or

(b) if the accounts of an establishment maintained by the employer thereof are closed and balanced on any day other than the 31st day of March, then, at the option of the employer, the year ending on the day on which its accounts are so closed and balanced;

Provided that an option once exercised by the employer under paragraph (b) of this sub-clause shall not again be exercised except with the previous permission in writing of the prescribed authority and upon such conditions as that authority may think fit. [Section 2(1)]

Allocable Surplus

It means –

(a) in relation to an employer, being a company (other than a banking company) which has not made the arrangements prescribed under the Income-tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of Section 194 of that Act, sixty-seven per cent of the available surplus in an accounting year;

(b) in any other case sixty per cent of such available surplus. [Section 2(4)]

Available Surplus

It means the available surplus under Section 5. [Section 2(6)]

Award

“Award” means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Tribunal Constituted under the Industrial Disputes Act, 1947 or by any other authority constituted under any corresponding law relating to investigation and settlement of industrial disputes in force in a State and includes an arbitration award made under Section 10A of that Act or under that law. [Section 2(7)]

Corporation

“Corporation” means any body corporate established by or under any Central, Provincial or State Act but does not include a company or a co-operative society. [Section 2(11)]

Employee

“Employee” means any person (other than an apprentice) employed on a salary or wages not exceeding Rs. 10,000 per mensem in any industry to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work of hire or reward, whether the terms of employment be express or implied. [Section 2(13)]

Part time permanent employees working on fixed hours are employees (1971 (22) FLR 98).
Employer

“Employer” includes:

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as a manager of the factory under Clause (f) of Sub-section 7(1) of the Factories Act, 1948, the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent. [Section 2(14)]

Establishment in Private Sector

It means any establishment other than an establishment in public sector. [Section 2(15)]

Establishment in Public Sector

It means an establishment owned, controlled or managed by:

(a) a Government company as defined in Section 617 of the Companies Act, 1956;

(b) a corporation in which not less than forty percent of its capital is held (whether singly or taken together) by:

(i) the Government; or

(ii) the Reserve Bank of India; or

(iii) a corporation owned by the Government or the Reserve Bank of India. [Section 2(16)]

Test your knowledge

State whether the following statement is “True” or “False”

In relation to a corporation, “Accounting Year” means the year ending on 1st May.

- True
- False

Correct answer: False

Salary or Wage

The “salary or wage” means all remuneration (other than remuneration in respect of over-time work) capable of being expressed in terms of money, which would, if the
terms of employment, express or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowance (that is to say, all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living) but does not include:

(i) any other allowance which the employee is for the time being entitled to;

(ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

(iii) any travelling concession;

(iv) any bonus (including incentive, production and attendance bonus);

(v) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force;

(vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any ex-gratia payment made to him;

(vii) any commission payable to the employee. [Section 2(21)]

The Explanation appended to the Section states that where an employee is given in lieu of the whole or part of the salary or, wage payable to him, free food allowance or free food by his employer, such food allowance or the value of such food shall, for the purpose of this clause, be deemed to form part of the salary or wage of such employee.

The definition is wide enough to cover the payment of retaining allowance and also dearness allowance paid to the workmen. It is nothing but remuneration (Chalthan Vibhag Sahakari Khand Udyog v. Government Labour Officer AIR 1981 SC 905). Subsistence allowance given during suspension is not wages. However lay-off compensation is wages.

Establishment — Meaning of

Section 3 of the Act provides that the word establishment shall include all its departments, undertakings and branches wherever it has so whether situated in the same place or in different places and the same shall be treated as parts of the same establishment for the purpose of computation of bonus under this Act:

Provided that where for any accounting year, a separate balance-sheet and profit and loss account are prepared and maintained in respect of any such department or undertaking or branch then such department, undertaking or branches shall be treated as a separate establishment for the purpose of computation of bonus under this Act for that year, unless such department, or undertaking or branch was, immediately before the commencement of that accounting year treated as part of establishment for the purpose of computation of bonus.

CALCULATION OF AMOUNT PAYABLE AS BONUS

The Act has laid down a detailed procedure for calculating the amount of bonus
payable to employees. First of all, Gross Profit is calculated as per First or Second Schedule. From this Gross Profit, the sums deductible under Section 6 are deducted. To this figure, we add the sum equal to the difference between the direct tax calculated on gross profit for the previous year and direct tax calculated on gross profit arrived at after deducting the bonus paid or payable to the employees. The figure so arrived will be the available surplus. Of this surplus, 67% in case of company (other than a banking company) and 60% in other cases, shall be the “allocable surplus” which is the amount available for payment of bonus to employees. The details of such calculations are given below.

(i) Computation of gross profits

As per Section 4, the gross profits derived by an employer from an establishment in respect of any accounting year shall:

(a) in the case of banking company be calculated in the manner specified in the First Schedule.

(b) in any other case, be calculated in the manner specified in the Second Schedule.

(ii) Deductions from gross profits

According to Section 6, the sums deductible from gross profits include

(a) any amount by way of depreciation admissible in accordance with the provisions of Section 32(1) of the Income-tax Act, or in accordance with the provisions of the Agricultural Income-tax Law, as the case may be:

Provided that where an employer has been paying bonus to his employees under a settlement or an award or agreement made before the 29th May, 1965, and subsisting on that date after deducting from the gross profits notional normal depreciation, then, the amount of depreciation to be deducted under this clause shall, at the option of such employer (such option to be exercised once and within one year from that date) continue to be such notional normal depreciation.

What is deductible under Section 6(a), is depreciation admissible in accordance with the provisions of Section 32(1) of the Income-tax Act and not depreciation allowed by the Income-tax Officer in making assessment on the employer.

(b) any amount by way of development rebate, investment allowance, or development allowance which the employer is entitled to deduct from his income under the Income Tax Act.

(c) subject to the provisions of Section 7, any direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during the year.

(d) such further sums as are specified in respect of the employer in the Third Schedule.

(iii) Calculation of direct tax payable by the employer

Under Section 7, any direct tax payable by the employer for any accounting year
shall, subject to the following provisions, be calculated at the rates applicable to the income of the employer for that year, namely:

(a) in calculating such tax no account shall be taken of

(i) any loss incurred by the employer in respect of any previous accounting year and carried forward under any law for the time being in force relating to direct taxes;

(ii) any arrears of depreciation which the employer is entitled to add to the amount of the allowance for depreciation for any following accounting year or years under sub-section (2) of Section 32 of the Income-tax Act;

(iii) any exemption conferred on the employer under Section 84 of the Income-tax Act or of any deduction to which he is entitled under sub-section (1) of Section 101 of that Act, as in force immediately before the commencement of the Finance Act, 1965;

(b) where the employer is a religious or a charitable institution to which the provisions of Section 32 do not apply and the whole or any part of its income is exempt from tax under the Income-tax Act, then, with respect to the income so exempted, such institution shall be treated as if it were a company in which the public are substantially interested within the meaning of that Act;

(c) where the employer is an individual or a Hindu undivided family, the tax payable by such employer under the Income-tax Act shall be calculated on the basis that the income derived by him from the establishment is his only income.

(iv) Computation of available surplus

The available surplus in respect of any accounting year shall be the gross profits for that year after deducting therefrom the sums referred to in Section 6.

Provided that the available surplus in respect of the accounting year commencing on any day in the year 1968 and in respect of every subsequent accounting year shall be the aggregate of—

(a) the gross profits for that accounting year after deducting therefrom the sums referred to in Section 6; and

(b) an amount equal to the difference between

(i) the direct tax, calculated in accordance with the provisions of Section 7, in respect of an amount equal to the gross profits of the employer for the immediately preceding accounting year; and

(ii) the direct tax calculated in accordance with the provisions of Section 7 in respect of an amount equal to the gross profits of the employer for such preceding accounting year after deducting therefrom the amount of bonus which the employer has paid or is liable to pay to his employees in accordance with the provisions of this Act for that year.

(Section 5)
ELIGIBILITY FOR BONUS AND ITS PAYMENT

(i) Eligibility for bonus

Every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year. (Section 8)

An employee suspended but subsequently reinstated with full back wages can not be treated to be ineligible for bonus for the period of suspension. [Project Manager, Ahmedabad Project, ONGC v. Sham Kumar Sahegal (1995) 1 LLJ 863]

(ii) Disqualification for bonus

An employee shall be disqualified from receiving bonus under this Act, if he is dismissed from service for:

(a) fraud; or

(b) riotous or violent behaviour while on the premises or the establishment; or

(c) theft, misappropriation or sabotage of any property of the establishment. (Section 9)

This provision is based on the recommendations of the Bonus Commission which observed"after all bonus can only be shared by those workers who promote the stability and well-being of the industry and not by those who positively display disruptive tendencies. Bonus certainly carries with it obligation of good behaviour".

If an employee is dismissed from service for any act of misconduct enumerated in Section 9, he stands disqualified from receiving any bonus under the Act, and not the bonus only for the accounting year in which the dismissal takes place (Pandian Roadways Corpn. Ltd. v. Preseding Officer, Principal Labour Court, (1996) 2 LLJ 606).

(iii) Payment of minimum bonus

Section 10 states that subject to the other provisions of this Act, every employer shall be bound to pay to every employee in respect of any accounting year a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees whichever is higher, whether or not the employer has any allocable surplus in the accounting year:

Provided that where an employee has not completed fifteen years of age at the beginning of the accounting year, the provisions of this Section shall have effect in
relation to such employee as if for the words one hundred rupees the words sixty rupees were substituted.

Section 10 of the Act is not violative of Articles 19 and 301 of the Constitution. Even if the employer suffers losses during the accounting year, he is bound to pay minimum bonus as prescribed by Section 10 (State v. Sardar Singh Majithia (1979) Lab. I.C.).

(iv) Maximum bonus

(1) Where in respect of any accounting year referred to in Section 10, the allocable surplus exceeds the amount of minimum bonus payable to the employees under that Section, the employer shall, in lieu of such minimum bonus, be bound to pay to every employee in respect of that accounting year bonus which shall be an amount in proportion to the salary or wage earned by the employee during the accounting year subject to a maximum of twenty per cent of such salary or wage.

(2) In computing the allocable surplus under this Section, the amount set on or the amount set off under the provisions of Section 15 shall be taken into account in accordance with the provisions of that Section. (Section 11)

(iv-A) Calculation of bonus with respect to certain employees

Where the salary or wage of an employee exceeds three thousand and five hundred rupees per mensem, the bonus payable under Section 10 or 11 shall be calculated as if his salary or wage were three thousand and five hundred rupees per mensem. (Section 12)

(v) Proportionate reduction in bonus in certain cases

Where an employee has not worked for all the working days in an accounting year, the minimum bonus of one hundred rupees or, as the case may be, of sixty rupees, if such bonus is higher than 8.33 per cent of his salary or wage for the days he had worked in that accounting year, shall be proportionately reduced. (Section 13)

(vi) Computation of number of working days

For the purposes of Section 13, an employee shall be deemed to have worked in an establishment in any accounting year also on the days on which:

(a) he has been laid off under an agreement or as permitted by standing orders under the Industrial Employment (Standing Orders) Act, 1946 or under the Industrial Disputes Act, 1947 or under any other law applicable to the establishment;

(b) he has been on leave with salary or wage;

(c) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(d) the employee has been on maternity leave with salary or wage, during the accounting year. (Section 14)
(vii) **Set on and set off of allocable surplus**

(1) Where for any accounting year, the allocable surplus exceeds the amount of maximum bonus payable to the employees in the establishment under Section 11, then, the excess shall, subject to a limit of twenty per cent of the total salary or wage of the employees employed in the establishment in that accounting year, be carried forward for being set on in the succeeding accounting year and so on up to and inclusive of the fourth accounting year to be utilized for the purpose of payment of bonus in the manner illustrated in the Fourth Schedule. (Section 15)

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**Test your knowledge**

Choose the correct answer

What is the minimum amount of bonus payable to an employee?

(a) 8.33% of the salary earned during the accounting year or Rs. 100 whichever is higher.

(b) 8.63% of the salary earned during the accounting year or Rs. 100 whichever is higher.

(c) 8.73% of the salary earned during the accounting year or Rs. 100 whichever is higher.

(d) 8.83% of the salary earned during the accounting year or Rs. 100 whichever is higher.

**Correct answer: (a)**

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**THE FOURTH SCHEDULE**

(See Sections 15 and 16)

In this Schedule, the total amount of bonus equal to 8.33 per cent of the annual salary or wage payable to all the employees is assumed to be Rs. 1,04,167. Accordingly, the maximum bonus to which all the employees are entitled to be paid (Twenty per cent of the annual salary or wage of all the employees) would be Rs. 2,50,000.

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount equal to sixty per cent or sixty-seven per cent, as the case may be, of available surplus allocable as bonus</th>
<th>Amount payable as bonus</th>
<th>Set on or set off of the year carried forward</th>
<th>To set on set off carried forward</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
<td>(4)</td>
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<tr>
<td>1.</td>
<td>Rs.</td>
<td>Rs.</td>
<td>Rs.</td>
<td>Rs. of (year)</td>
</tr>
<tr>
<td></td>
<td>1,04,167</td>
<td>1,04,167**</td>
<td>NIL</td>
<td>NIL</td>
</tr>
<tr>
<td>2.</td>
<td>6,35,000</td>
<td>2,50,000</td>
<td>Set on 2,50,000*</td>
<td>Set on 2,50,000 (2)</td>
</tr>
<tr>
<td>3.</td>
<td>2,20,000</td>
<td>2,50,000*</td>
<td>NIL</td>
<td>Set on 2,20,000 (2)</td>
</tr>
<tr>
<td></td>
<td>(Inclusive of 30,000 from year 2)</td>
<td></td>
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</tr>
<tr>
<td>4.</td>
<td>3,75,000</td>
<td>2,50,000*</td>
<td>Set on 1,25,000</td>
<td>Set on 1,25,000 (2)</td>
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<td>(4)</td>
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<tr>
<td>5.</td>
<td>1,40,000</td>
<td>2,50,000</td>
<td>NIL</td>
<td>Set on 1,10,000 (2)</td>
</tr>
<tr>
<td></td>
<td>(Inclusive of 1,10,000 from year 2)</td>
<td></td>
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</tr>
<tr>
<td>6.</td>
<td>3,10,000</td>
<td>2,50,000*</td>
<td>Set on 60,000</td>
<td>Set on NIL £ (2)</td>
</tr>
<tr>
<td></td>
<td>(4)</td>
<td></td>
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<tr>
<td>7.</td>
<td>1,00,000</td>
<td>2,50,000</td>
<td>Nil</td>
<td>Set on 1,25,000 (4)</td>
</tr>
<tr>
<td></td>
<td>(Inclusive of 1,25,000 from year 4 and 25,000 from 6 year)</td>
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<tr>
<td>8.</td>
<td>Nil</td>
<td>1,04,167**</td>
<td>Set off 69,167</td>
<td>Set off 69,167 (8)</td>
</tr>
<tr>
<td></td>
<td>(due of loss)</td>
<td>(Inclusive of 35,000 from 6 year)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9.</td>
<td>10,000</td>
<td>1,04,167*</td>
<td>Set off 69,167</td>
<td>Set off 94,167 (9)</td>
</tr>
<tr>
<td>10.</td>
<td>2,15,000</td>
<td>1,04,167*</td>
<td>Nil</td>
<td>Set off 52,501 (9)</td>
</tr>
<tr>
<td></td>
<td>(After setting off 67,167 from year 8 and 41,666 from year 9)</td>
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</table>

**Notes:** * Maximum ** Minimum  £. The balance of Rs. 1,10,000 set on from year 2 lapses.

(2) Where for any according year, there is no available surplus or the allocable
surplus in respect of that year falls short of the amount of minimum bonus payable to
the employees in the establishment under Section 10, and there is no amount or
sufficient amount carried forward and set on under sub-section (1) which could be
utilized for the purpose of payment of the minimum bonus, then, such minimum
amount or the deficiency, as the case may be, shall be carried forward for being set
off in the succeeding accounting year and so on up to and inclusive of the fourth
accounting year in the manner illustrated in the Fourth Schedule.

(3) The principle of set on and set off as illustrated in the Fourth Schedule shall
apply to all other cases not covered by sub-section (1) or sub-section (2) for the
purpose of payment of bonus under this Act.

(4) Where in any accounting year any amount has been carried forward and set
on or set off under this Section, then, in calculating bonus for the succeeding
accounting year, the amount of set on or set off carried forward from the earliest
accounting year shall first be taken into account.

Apart from the provisions contained in Section 15(1), there is no statutory
obligation on an employer to set apart any part of the profits of the previous year for
payment of bonus for subsequent years.

(viii) Adjustment of customary or interim bonus

Where in any accounting year (a) an employer has paid any puja bonus or other
customary bonus to an employee; or (b) an employer has paid a part of the bonus
payable under this Act to an employee before the date on which such bonus
becomes payable; then, the employer shall be entitled to deduct at the amount of
bonus so paid from the amount of bonus payable by him to the employee under this
Act in respect of that accounting year and the employee shall be entitled to receive
only the balance. (Section 17)

In Hukam Chand Jute Mills Ltd. v. Second Industrial Tribunal,
West Bengal, AIR 1979 SC 876, the Supreme Court held that the
claim for customary bonus is not affected by 1976 Amendment
Act. In fact, it has left Section 17 intact which refers to puja
bonus or other customary bonus. Section 31A (see later) speaks
about productivity bonus but says nothing about other kinds of
bonuses. The contention that all agreements inconsistent with
the provisions of the Act become inoperative, has no substance vis-a-vis customary
bonus. Conceptually statutory bonus and customary bonus operate in two fields and
do not clash with each other.

(ix) Deductions of certain amounts from bonus

Where in any accounting year, an employee is found guilty of misconduct
causing financial loss to the employer, then, it shall be lawful for the employer to
deduct the amount of loss from the amount of bonus payable by him to the employee
under this Act, in respect of that accounting year only and the employee shall be
entitled to receive the balance, if any. (Section 18)

(x) Time limit for payment of bonus

(a) Where there is a dispute regarding payment of bonus pending before any
authority under Section 22, all amounts payable to an employee by way of bonus under this Act shall be paid in cash by his employer, within a month from the date from which the award becomes enforceable or the settlement comes into operation, in respect of such dispute;

(b) in any other case, the bonus should be paid within a period of eight months from the close of the accounting year. However, the appropriate Government or such authority as the appropriate Government may specify in this behalf may, upon an application made to it by the employer and for sufficient reasons, by order, extend the said period of 8 months to such further period or periods as it thinks fit, so, however, that the total period so extended shall not in any case exceed two years. (Section 19)

(xi) Recovery of bonus from an employer

Where any money is due to an employee by way of bonus from his employer under a settlement or an award or agreement, the employee himself or any other person authorised by him in writing in this behalf, or in the case of the death of the employee, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government or such authority as the appropriate Government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue:

Provided that every such application shall be made within one year from the date on which the money become due to the employee from the employer:

Provided further that, any such application may beentertainedafter the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

Explanation: In this Section and in Sections 22, 23, 24 and 25, employee includes a person who is entitled to the payment of bonus under this Act but who is no longer in employment. (Section 21)

Mode of recovery prescribed in Section 21 would be available only if bonus sought to be recovered is under settlement or an award or an agreement. Bonus payable under Bonus Act is not covered by Section 21 (1976-I Labour Law Journal 511).

Test your knowledge

Choose the correct answer

The bonus should be paid within how many months from the close of the accounting year?

(a) One Month
(b) Two Months
(c) Twelve Months
(d) Eight Months

Correct Answer: (d)
BONUS LINKED WITH PRODUCTION OR PRODUCTIVITY

Section 31A enables the employees and employers to evolve and operate a scheme of bonus payment linked to production or productivity in lieu of bonus based on profits under the general formula enshrined in the Act. However, bonus payments under Section 31A are also subject to the minimum (8.33 per cent) and maximum (20 per cent). In other words, a minimum of 8.33 per cent is payable in any case and the maximum cannot exceed 20 per cent. (Section 31-A)

POWER OF EXEMPTION

If the appropriate Government, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion that it will not be in public interest to apply all or any of the provisions of this Act thereto, it may, by notification in the Official Gazette, exempt for such period as may be specified therein and subject to such conditions as it may think fit to impose, such establishment or class of establishments from all or any of the provisions of this Act. (Section 36)

Government should consider public interest, financial position and whether workers contributed to the loss, before grant of exemption (J.K. Chemicals v. Maharashtra, 1996 III CLA Bom. 12).

PENALTIES

If any person contravenes any of the provisions of this Act or any rule made thereunder; he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Likewise, if any person, to whom a direction is given or a requisition is made under this Act, fails to comply with the direction or requisition, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (Section 28)

OFFENCES BY COMPANIES

If the person committing an offence under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Further, if an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be proceeded against and punished accordingly. (Section 29)

For the purpose of Section 29, ‘company’ means any body corporate and includes a firm or other association of individuals, and ‘director’, in relation to a firm, means a partner in the firm.
COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The total number of employees who are entitled to bonus in department/undertaking (a) are ..... and (b) are ....

2. The total number of employees who are not entitled to bonus in view of their having worked for less than thirty days during the accounting year in case of department (a) are ..... and (b) are ....

3. The Establishment did not pay bonus to .... employees in view of their dismissal from service for (a) fraud or (b) riotous behaviour on the premises of Establishment or (c) theft, misappropriation or sabotage of any property of the establishment.

4. The Establishment has made deductions from the amount of bonus payable under PBA in respect of .... employees in view of their being found guilty of misconduct causing financial loss to the Establishment. The quantum of deduction was only to the extent of amount of loss suffered by the Establishment.

5. The Establishment has computed the gross profit and available surplus in accordance with the provisions of the Act read with the rules made thereunder.

6. In relation to the year ended 31\textsuperscript{st} March 2000, the Establishment paid bonus in cash/cheque(s) or electronic clearance system (ECS) or other electronic mode to its employees at the rate of ..... which is not less than the minimum statutory requirement as specified under PBA on 15\textsuperscript{th} January 2000, which is within eight months from the close of the accounting year.

7. During the accounting year, the Establishment opened a separate bank account for transfer of unpaid/unclaimed bonus in respect of employees who have either not been paid bonus for any reason or not collected their bonus for the accounting year ended on 31\textsuperscript{st} March 2004 with ....... Bank (Branch) ..... The unpaid/unclaimed bonus has been deposited with the concerned welfare Board.

8. During the year, the Establishment transferred on ...... to Labour Welfare Fund a sum of Rs. ..... being the unpaid/unclaimed bonus of ...... employees, whose entitlement under PBA remained unpaid/unclaimed since ...... being the last date on which the bonus was to be paid to those .... for the year ended 31\textsuperscript{st} March 2000.

9. In relation to the year ended 31\textsuperscript{st} March 2000, the Establishment has filed Annual Return with the Inspector appointed under the Act on ......., which is within thirty days from the date of payment of bonus under Section 19 of the PBA.
The Payment of Bonus Act provides for payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected therewith.

It extends to the whole of India and is applicable to every factory and to every other establishment where 20 or more workmen are employed on any day during an accounting year. The Act does not apply to certain classes of employees specified therein.

The Act has laid down a detailed procedure for calculating the amount of bonus payable to employees.

Every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year.

An employee shall be disqualified from receiving bonus under this Act, if he is dismissed from service for fraud; or riotous or violent behaviour while on the premises of the establishment; or theft, misappropriation or sabotage of any property of the establishment.

Every employer shall be bound to pay to every employee in respect of any accounting year a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees whichever is higher, whether or not the employer has any allocable surplus in the accounting year.

In case of newly set up establishments provisions have been made under Section 16 for the payment of bonus.

If there is a dispute regarding payment of bonus pending before any authority under Section 22, all amounts payable to an employee by way of bonus under this Act shall be paid in cash by his employer, within a month from the date from which the award becomes enforceable or the settlement comes into operation, in respect of such dispute.

In any other case, the bonus should be paid within a period of eight months from the close of the accounting year.

If any dispute arises between an employer and his employee with respect to the bonus payable under this Act or with respect to the application of this Act to an establishment in public sector, then, such dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947, or any corresponding law relating to investigation and settlement of industrial disputes in force in a State and provisions of that Act, shall, save as otherwise expressly provided, apply accordingly.

The Act enables the employees and employers to evolve and operate a scheme of bonus payment linked to production or productivity in lieu of bonus based on profits under the general formula enshrined in the Act.
SELF TEST QUESTIONS

1. Describe the scope and object of the Payment of Bonus Act, 1965.

2. Write short notes on:
   (a) accounting year;
   (b) allocable surplus;
   (c) employee and employer;
   (d) salary and wages.

3. What is allocable surplus? How does it differ from available surplus?

4. Enumerate the categories of employees who are not covered under the Payment of Bonus Act.

5. What is the eligibility limit for payment of bonus? Who is disqualified from getting bonus under the Act?

Suggested Readings

1. The Payment of Bonus Act, 1965 – Bare Act
2. Industrial Law – P.L. Malik
3. Labour and Industrial Laws (Pocket Edn., 2007) - P.L. Malik
The Payment of Gratuity Act provides for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments. Gratuity is a lump sum payment made by the employer as a mark of recognition of the service rendered by the employee when he retires or leaves service. The object of this lesson is to impart knowledge to the students about the legal framework pertaining to payment of gratuity.

At the end of the study lesson, you should be able to understand:

- Application of the Act
- Important definitions
- When gratuity is payable
- Amount of gratuity payable
- Forfeiture of gratuity
- Controlling authority and the appellate authority
- Obligations and rights of the employer
- Compliances under the Act

INTRODUCTION

“Gratuity” is an old age retirement social security benefit. It is a lump sum payment made by an employer to an employee in consideration of his past service when the employment is terminated. In the case of employment coming to an end due to retirement or superannuation, it enables the affected employee to meet the new situation which quite often means a reduction in earnings or even total stoppage of earnings. In the case of death of an employee, it provides much needed financial assistance to the surviving members of the family. Gratuity schemes, therefore, serve as instruments of social security and their significance in a developing country like India where the general income level is low cannot be over emphasised.

The Payment of Gratuity Act has been amended from time to time to bring it in tune with the prevailing situation. Recently the Act has been amended twice to enhance the ceiling on amount of gratuity from Rs.3.50 lakh to Rs.10 lakh as well as
to widen the scope of the definition of “employee” under section 2 (e) of the Act. These amendments have been introduced by the Payment of Gratuity (Amendment) Act, 2010 with effect from May 24, 2010 and the Payment of Gratuity (Amendment) Act, 2009 with effect from April 3, 2007 1997 respectively.

APPLICATION OF THE ACT

Application of the Act to an employed person depends on two factors. Firstly, he should be employed in an establishment to which the Act applies. Secondly, he should be an “employee” as defined in Section 2(e).

ESTABLISHMENTS TO WHICH THE ACT APPLIES

According to Section 1(3), the Act applies to:

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day of the preceding twelve months as the Central Government may, by notification specify in this behalf.

In exercise of the powers conferred by clause (c), the Central Government has specified Motor transport undertakings, Clubs, Chambers of Commerce and Industry, Inland Water Transport establishments, Solicitors offices, Local bodies, Educational Institutions, Societies, Trusts and Circus industry, in which 10 or more persons are employed or were employed on any day of the preceding 12 months, as classes of establishments to which the Act shall apply.

A shop or establishment to which the Act has become applicable once, continues to be governed by it, even if the number of persons employed therein at any time after it has become so applicable falls below ten. (Section 3A)

WHO IS AN EMPLOYEE?

The definition of “employee” under section 2 (e) of the Act has been amended by the Payment of Gratuity (Amendment) Act, 2009 to cover the teachers in educational institutions retrospectively with effect from 3rd April, 1997. The amendment to the definition of “employee” t has been introduced in pursuance to the judgment of Supreme Court in Ahmedabad Private Primary Teachers’ Association v. Administrative Officer, AIR 2004 SC 1426. The ceiling on the amount of gratuity from Rs.3.50 lakh to Rs.10 lakh has been enhanced by the Payment of Gratuity (Amendment) Act, 2010.

According to Section 2(e) as amended by the Payment of Gratuity (Amendment) Act, 2009 ”employee” means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine,
oilyfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity. The wage ceiling of Rs. 3,500/- which was earlier in the Act has been removed. With the removal of ceiling on wage every employee will become eligible for gratuity, irrespective of his wage level w.e.f. 24th May, 1994.

Teacher was held to be not an employee (LAB 1C Pat 365) under the Act. The teachers are clearly not intended to be covered by the definition of 'employee'. [Ahmedabad Pvt. Primary Teachers Association v. Administrative Officer, LLJ (2004) SC]

Now the controversy has been set at rest. The Payment of Gratuity (Amendment) Act, 2009 has amended the definition of 'employee' including teachers in educational institutions within the purview of the Act retrospectively in pursuance to the judgement of Supreme Court in the above mentioned case.

Test your knowledge
Choose the correct answer
What is the minimum number of employees required in an establishment for it to come under the purview of the Payment of Gratuity Act?
(a) 10
(b) 15
(c) 20
(d) 25
Correct answer: (a)

OTHER IMPORTANT DEFINITIONS
Appropriate Government
"Appropriate Government" means:
(i) in relation to an establishment:
   (a) belonging to, or under the control of, the Central Government,
   (b) having branches in more than one State,
   (c) of a factory belonging to, or under the control of the Central Government.
   (d) of a major port, mine, oilfield or railway company, the Central Government.
(ii) in any other case, the State Government. [Section 2(a)]

It may be noted that many large establishments have branches in more than one State. In such cases the 'appropriate Government' is the Central Government and any dispute connected with the payment or non-payment of gratuity falls within the
jurisdiction of the ‘Controlling Authority’ and the ‘Appellate Authority’ appointed by the Central Government under Sections 3 and 7.

A Company Secretary should know whether the ‘appropriate Government’ in relation to his establishment is the Central Government or the State Government. He should also find out who has been notified as the ‘Controlling Authority’ and also who is the ‘Appellate Authority’. It may be noted that any request for exemption under Section 5 of the Act is also to be addressed to the ‘appropriate Government’. It is, therefore, necessary to be clear on this point.

Continuous Service

According to Section 2A, for the purposes of this Act:

(1) An employee shall be said to be in ‘continuous service’ for a period if he has, for that period been in un-interrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), layoff, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1) for any period of one year or six months, he shall be deemed to be in continuous service under the employer:

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than:

   (i) one hundred and ninety days in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

   (ii) two hundred and forty, days in any other case;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than:

   (i) ninety five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

   (ii) one hundred and twenty days in any other case;

Explanation: For the purpose of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which:

   (i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under the Industrial Disputes Act, 1947, or under any other law applicable to the establishment;
(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks.

(3) Where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1) for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five per cent, of the number of days on which the establishment was in operation during such period.

Service is not continuous, in case of legal termination of service and subsequent re-employment.

Gratuity cannot be claimed on the basis of continuous service on being taken back in service after break in service of one and a half year on account of termination of service for taking part in an illegal strike, where the employee had accepted gratuity for previous service and later withdrawn from the industrial dispute (Baluram v. Phoenix Mills Ltd., 1999 CLA Bom.19).

Family

Family, in relation to an employee, shall be deemed to consist of:

(i) in case of a male employee, himself, his wife, his children, whether married or unmarried, his dependent parents and the dependent parents of his wife and the widow and children of his predeceased son, if any,

(ii) in the case of a female employee, herself, her husband, her children, whether married or unmarried, her dependent parents and the dependent parents of her husband and the widow and children of her predeceased son, if any. [Section 2(h)]

Explanation: Where the personal law of an employee permits the adoption by him of a child, any child lawfully adopted by him shall be deemed to be included in his family, and where a child of an employee has been adopted by another person and such adoption is, under the personal law of the person making such adoption lawful, such child shall be deemed to be excluded from the family of the employee.

Retirement

"Retirement" means termination of the service of an employee otherwise than on superannuation. [Section 2(q)]

Superannuation

"Superannuation" in relation to an employee, means the attainment by the employee of such age as is fixed in the contract or conditions of service as the
age on the attainment of which the employee shall vacate the employment. [Section 2(r)]

Wages

“Wages” means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance. [Section 2(s)]

WHEN IS GRATUITY PAYABLE?

According to Section 4(1) of the Payment of Gratuity Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years:

(a) on his superannuation, or
(b) on his retirement or resignation, or
(c) on his death or disablement due to accident or disease.

Note: The completion of continuous service of five years is not necessary where the termination of the employment of any employee is due to death or disablement.

Further, the period of continuous service is to be reckoned from the date of employment and not from the date of commencement of this Act (CLA-1996-III-13 Mad.). Mere absence from duty without leave can not be said to result in breach of continuity of service for the purpose of this Act. [Kothari Industrial Corporation v. Appellate Authority, 1998 Lab IC, 1149 (AP)]

Test your knowledge

Which of the following are not included in ‘wages’?

(a) Dearness allowance
(b) Bonus
(c) House rent allowance
(d) Basic salary

Correct answer: (b) and (c)

TO WHOM IS GRATUITY PAYABLE?

It is payable normally to the employee himself. However, in the case of death of the employee, it shall be paid to his nominee and if no nomination has been made, to his heirs and where any such nominee or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.
AMOUNT OF GRATUITY PAYABLE

Gratuity is calculated on the basis of continuous service as defined above i.e. for every completed year of service or part in excess of six months, at the rate of fifteen days wages last drawn. The maximum amount of gratuity allowed under the Act is Rs. 10 lakh. The ceiling on the amount of gratuity from Rs.3.50 lakh to Rs.10 lakh has been enhanced by the Payment of Gratuity (Amendment) Act, 2010.

NOMINATION

An employee covered by the Act is required to make nomination in accordance with the Rules under the Act for the purpose of payment of gratuity in the event of his death. The rules also provide for change in nomination.

FORFEITURE OF GRATUITY

The Act deals with this issue in two parts. Section 4(6)(a) provides that the gratuity of an employee whose services have been terminated for any act of willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, gratuity shall be forfeited to the extent of the damage or loss or caused. The right of forfeiture is limited to the extent of damage. In absence of proof of the extent of damage, the right of forfeiture is not available (LLJ- II-1996-515 MP).

Section 4(6)(b) deals with a case where the services of an employee have been terminated:

(a) for riotous and disorderly conduct or any other act of violence on his part, or

(b) for any act which constitutes an offence involving moral turpitude provided that such offence is committed by him in the course of his employment.

In such cases the gratuity payable to the employee may be wholly or partially forfeited. Where the service has not been terminated on any of the above grounds, the employer cannot withhold gratuity due to the employee. Where the land of the employer is not vacated by the employee, gratuity cannot be withheld (Travancore Plywood Ind. v. Regional JLC, Kerala, 1996 LLJ-II-14 Ker.). Assignment of gratuity is prohibited, it cannot be withheld for non vacation of service quarters by retiring employees (Air India v. Authority under the Act, 1999 CLA 34 Bom. 66).

EXEMPTIONS

The appropriate Government may exempt any factory or establishment covered by the Act or any employee or class of employees if the gratuity or pensionary benefits for the employees are not less favourable than conferred under the Act.

THE CONTROLLING AUTHORITY AND THE APPELLATE AUTHORITY

The controlling authority and the Appellate Authority are two important functionaries in the operation of the Act. Section 3 of the Act says that the appropriate
Government may by notification appoint any officer to be a Controlling Authority who shall be responsible for the administration of the Act. Different controlling authorities may be appointed for different areas.

Section 7(7) provides for an appeal being preferred against an order of the Controlling Authority to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf.

RIGHTS AND OBLIGATIONS OF EMPLOYEES

Application for Payment of Gratuity

Section 7(1) lays down that a person who is eligible for payment of gratuity under the Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer. Rule 7 of the Payment of Gratuity (Central) Rules, 1972, provides that the application shall be made ordinarily within 30 days from the date gratuity becomes payable. The rules also provides that where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before 30 days of the date of superannuation or retirement.

A nominee of an employee who is eligible for payment of gratuity in the case of death of the employee shall apply to the employee ordinarily within 30 days from the date of the gratuity becomes payable to him. [Rule 7(2)]

Although the forms in which the applications are to be made have been laid down, an application on plain paper with relevant particulars is also accepted.

The application may be presented to the employer either by personal service or be registered post with acknowledgement due. An application for payment of gratuity filed after the period of 30 days mentioned above shall also be entertained by the employer if the application adduces sufficient cause for the delay in preferring him claim. Any dispute in this regard shall be referred to the Controlling Authority for his decision.

Test your knowledge

Which of the following authorities are the important functionaries in the operation of the Payment of Gratuity Act?

(a) Controlling Authority
(b) Appellate Authority
(c) Concessional Authority
(d) Adjunct Authority

Correct answer: (a) and (b)

RIGHTS AND OBLIGATIONS OF THE EMPLOYER

Employers Duty to Determine and Pay Gratuity

Section 7(2) lays down that as soon as gratuity becomes payable the employer
shall, whether the application has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the Controlling Authority, specifying the amount of gratuity so determined.

Section 7(3) of the Act says that the employer shall arrange to pay the amount of gratuity within thirty days from the date of its becoming payable to the person to whom it is payable.

Section 7(3A): If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at the rate of 10 per cent per annum:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

Dispute as to the Amount of Gratuity or Admissibility of the Claim

If the claim for gratuity is not found admissible, the employer shall issue a notice in the prescribed form to the applicant employee, nominee or legal heir, as the case may be, specifying reasons why the claim for gratuity is not considered admissible. A copy of the notice shall be endorsed to the Controlling Authority.

If the disputes relates as to the amount of gratuity payable, the employer shall deposit with the Controlling Authority such amount as he admits to be payable by him. According to Section 7(4)(e), the Controlling Authority shall pay the amount of deposit as soon as may be after a deposit is made

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the nominee or heir of the employee if the Controlling Authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

RECOVERY OF GRATUITY

Section 8 provides that if the gratuity payable under the Act is not paid by the employer within the prescribed time, the Controlling Authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same together with the compound interest thereon at such rate as the Central Government may be notification, specify, from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto:

"Provided that the controlling authority shall, before issuing a certificate under this section, give the employer a reasonable opportunity of showing cause against the issue of such certificate:

Provided further that the amount of interest payable under this section shall, in no case, exceed the amount of gratuity payable under this Act".
PROTECTION OF GRATUITY

Gratuity has been exempted from attachment in execution of any decree or order of any Civil, Revenue or Criminal Court. This relief is aimed at providing payment of gratuity to the person or persons entitled there to without being affected by any order of attachment by an decree of any Court.

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The Establishment has observed the following while paying the gratuity to the persons who are entitled to it:
   (a) It has paid gratuity at the rate of fifteen days wages for every completed year of service or part thereof in excess of six months, calculated on the rates of wages last drawn by the employee concerned. Since the employees of the establishment are monthly rated employees, the fifteen days wages were calculated by dividing the monthly rates of wages drawn by him by twenty-six and multiplying the quotient by fifteen.

   OR

   Since the employees were employed on piece rate basis, the gratuity was paid at the rate of fifteen days wages for every completed year of service calculated at an average total wages during a period of three months immediately preceding the termination of employment.

   OR

   Since the Registered Establishment is a seasonal establishment, gratuity was paid at the rate of seven days for each season.

   (b) In the event of death or disablement of any employee due to accident or disease, the gratuity was paid without the requirement of five years of continuous service.

   (c) In the event of death, the gratuity was paid to nominees or legal heir(s) or where the person entitled was a minor, the gratuity was deposited with the Controlling Authority.

   (d) The maximum amount of gratuity paid to any employee did not exceed Rs. 10,00,000/-. 

2. The Establishment made deductions from the gratuity in respect of those employees who were liable for any act, wilful omission or negligence, which caused damages or loss to, or destruction of, property of the Registered Establishment. The total deductions were only to the extent of loss or damages so caused.

3. The Establishment also made deductions from the gratuity in respect of an employee whose services were terminated for an offence involving moral turpitude.
4. The Establishment has paid its liability under PGA within thirty days from the date it became payable.

5. The Establishment has deposited with the Controlling Authority the liability under PGA to the extent admitted by it, which was disputed by the person entitled to it. The Establishment has, accordingly, made application to the Controlling Authority for the settlement of dispute.

6. (a) The Establishment sent Notice to the person entitled to gratuity under the PGA within fifteen days from the date of receipt of application for gratuity from such person with the directions to collect the gratuity within thirty days from the date of receipt of application.

(b) Where the Establishment did not admit its liability under the PGA, it has specified the reasons for the same

(c) Copies of Notices under clause (a) and (b) were also endorsed to the Controlling Authority.

7. The liability of gratuity was settled in cash or at the request of the person claiming by Demand Draft or Banker’s Cheque. Where the amount of gratuity was less than Rs. 1,000/-, the same was sent by Postal Money Order. The Controlling Authority was given details of all payments made.

Test your knowledge

State whether the following statement is “True” or “False”

Gratuity has been exempted from attachment in execution of any decree or order of any Civil, Revenue or Criminal Court.

True
False

Correct answer: True

LESSON ROUND UP

- The Act is applicable to every factory, shop or an establishment, in which ten or more persons are employed, or were employed on any day of the proceeding twelve months.
- A shop or establishment to which the Act has become applicable shall continue to be governed by the Act even if the number of persons employed falls below 10 at any subsequent stage.
- An employee is eligible for receiving gratuity payment only after he has completed five years of continuous service. This condition of five years is not necessary if the termination of the employment of an employee is due to death or disablement. The maximum amount of Gratuity payable is Rs. 10 lakhs.
Each employee is required to nominate one or more member of his family, as defined in the Act, who will receive the gratuity in the event of the death of the employee.

Any person to whom the gratuity amount is payable shall make a written application to the employer. The employer is required to determine the amount of gratuity payable and give notice in writing to the person to whom the same is payable and to the controlling authority thereby specifying the amount of gratuity payable.

The employer is under obligation to pay the gratuity amount within 30 days from the date it becomes payable. Simple interest at the rate of 10% p.a. is payable on the expiry of the said period.

Gratuity can be forfeited for any employee whose services have been terminated for any act, willful omission or negligence causing damage or destruction to the property belonging to the employer. It can also be forfeited for any act which constitutes an offence involving moral turpitude.

If any person makes a false statement for the purpose of avoiding any payment to be made by him under this Act, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both. If an employer contravenes any provision of the Act, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with a fine, which may vary from ten thousand rupees to twenty thousand rupees.

SELF TEST QUESTIONS

1. State the scope and object of the Payment of Gratuity Act?
2. Define the following terms:
   (i) Continuous service
   (ii) Employee
   (iii) Wages.
3. When gratuity becomes payable? To whom gratuity is payable?
4. Who are entitled for payment of gratuity?
5. Whether gratuity is liable to be forfeited? If so, under what circumstances?

Suggested Readings:
(1) The Payment of Gratuity Act, 1972—Bare Act
(2) Industrial Law—P.L. Malik
(3) Labour Laws (2000)—Taxmann
LEARNING OBJECTIVE

The Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 is a social welfare legislation to provide for the institution of Provident Fund, Pension Fund and Deposit Linked Insurance Fund for employees working in factories and other establishments. Students must have knowledge of the provisions of this Act to be aware of the statutory obligations under the Act.

At the end of the study lesson, you should be able to understand:

- Application of the Act
- Important definitions
- Schemes under the Act
- Determination of moneys due from employers
- Protection against attachment
- Exemption and compliances

INTRODUCTION

Provident Fund schemes for the benefit of the employees had been introduced by some organisations even when there was no legislation requiring them to do so. Such schemes were, however, very few in number and they covered only limited classes/groups of employees. In 1952, the Employees Provident Funds Act was enacted to provide institution of Provident Fund for workers in six specified industries with provision for gradual extension of the Act to other industries/classes of establishments. The Act is now applicable to employees drawing pay not exceeding Rs. 6,500/- per month. The Act extends to whole of India except Jammu and Kashmir. The term pay includes basic wages with dearness allowance, retaining allowance (if any), and cash value of food concession.

The following three schemes have been framed under the Act by the Central Government:

(a) The Employees’ Provident Fund Schemes, 1952;
(b) The Employees’ Pension Scheme, 1995; and
(c) The Employees’ Deposit-Linked Insurance Scheme; 1976.
The three schemes mentioned above confer significant social security benefits on workers and their dependents.

APPLICATION OF THE ACT

According to Section 1(3), the Act, subject to the provisions of Section 16, applies:

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed; and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months notice of its intention to do so by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.

The Central Government can extend the provisions of the Act to any establishment [including the co-operative society to which under Section 16(1) the provisions of the Act are not applicable by notification in Official Gazette when the employer and the majority of employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to them [Section 1(4)]. However, before notification is made, parties can opt out of such an agreement (1996 20 CLA 25 Bom.). Once an establishment falls within the purview of the Act, it shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty. [Section 1(5)] Where an establishment to which this Act applied was divided among the partners, the Act would continue to apply to the part of each ex-partner even if the number of persons employed in each part is less than twenty (1986 2 LLJ 137). Where as a result of real and bona fide partition among the owners, an establishment was disrupted and separate and distinct establishments come into existence, allottees with no regular employee, cannot be saddled with liability to pay minimum administrative charges as before (1993 I LLN 698). For compliance with the Act and the scheme, for an establishment there should be an employer and one or more employees are required to be in existence at least. When there is not even one employee, it would be difficult to contend that the Act continues to apply to the establishment (1998 LLJ I Kar. 780).

The constitutional validity of this Act was challenged on the ground of discrimination and excessive delegation. It was held that the law lays down a rule which is applicable to all the factories or establishments similarly placed. It makes a reasonable classification without making any discrimination between factories placed in the same class or group (Delhi Cloth and General Mills v. R.P.F. Commissioner A.I.R. 1961 All. 309).

The liability to contribute to the provident fund is created the moment the Scheme is applied to a particular establishment.
On the question whether casual or temporary workmen should be included for the purpose of ascertaining the strength of workmen in terms of Section 1(3) it was held by the Rajasthan High Court in Bikaner Cold Storage Co. Ltd. v. Regional P.F. Commissioner, Rajasthan, 1979 Lab. I.C. 1017, that persons employed in the normal course of the business of the establishment should be considered as the persons employed for the purposes of Section 1(3)(a) and persons employed for a short duration or on account of some urgent necessity or abnormal contingency, which was not a regular feature of the business of the establishment cannot be considered as employees for the purpose of determining the employment strength in relation to the applicability of Section 1(3)(a). In the case of P.F. Inspector v. Harihan, AIR 1971 S.C. 1519, the Supreme Court held that casual workers are not covered under Section 1(3).

Section 1(3)(b) empowers the Central Government to apply the Act to trading or commercial establishments whether, such establishments are factories or not.

Non-applicability of the Act to certain establishments

Section 16(1) of the Act provides that the Act shall not apply to certain establishments as stated thereunder. Such establishments include (a) establishments registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to co-operative societies, employing less than 50 persons and working without the aid of power; or (b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or (c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

According to Section 16(2), if the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt that class of establishments from the operation of this Act for such period as may be specified in the notification.

The date of establishment of a factory is the date when the factory starts its manufacturing process. A change in the ownership does not shift the date of establishment. A mere change in the partnership deed, does not mean that a new business has come into existence for the purpose of Section 16(1) (P.G. Textile Mills v. Union of India (1976) 1 LLJ 312).
Test your knowledge

Which of the following schemes have been framed under the Employees’ Provident Funds and Miscellaneous Provisions Act?

(a) The Employees’ Provident Fund Schemes, 1952
(b) The Employees’ Pension Scheme, 1995
(c) The Employees’ Gratuity Scheme, 1992
(d) The Employees’ Deposit-Linked Insurance Scheme, 1976

Correct answer: a, b and d

IMPORTANT DEFINITIONS

To understand the meaning of different Sections and provisions thereto, it is necessary to know the meaning of important expressions used therein. Section 2 of the Act explains such expressions which are given below:

(i) Appropriate Government

“Appropriate Government” means:

(i) in relation to those establishments belonging to or under the control of the Central Government or in relation to an establishment connected with a railway company, a major port, a mine or an oil field or a controlled industry, or in relation to an establishment having departments or branches in more than one State, the Central Government; and

(ii) in relation to any other establishment, the State Government. [Section 2(a)]

(ii) Basic Wages

“Basic Wages” means all emoluments which are earned by an employee while on duty or on leave or on holiday with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include:

(i) the cash value of any food concession;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house- rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer. [Section 2(b)]

(iii) Contribution

“Contribution” means a contribution payable in respect of a member under a Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. [Section 2(c)]
(iv) **Controlled Industry**

“Controlled Industry” means any industry the control of which by the Union has been declared by the Central Act to be expedient in the public interest. [Section 2(d)]

(v) **Employer**

“Employer” means

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and where a person has been named as a manager of the factory under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948, the person so named; and

(ii) in relation to any other establishment, the person who or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director, or managing agent, such manager, managing director or managing agent. [Section 2(e)]

(vi) **Employee**

“Employee” means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and includes any person

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under Apprentices Act, 1961 or under the standing orders of the establishment. [Section 2(f)]

The definition is very wide in its scope and covers persons employed for clerical work or other office work in connection with the factory or establishment. The inclusive part of the definition makes it clear that even if a person has been employed through a contract in or in connection with the work of the establishment, he would yet fall within the description of employee within the meaning of the Act.

The dominant factor in the definition of ‘employee in Section 2(f) of the Act is that a person should be employed in or in connection with the work of the establishment. Sons being paid wages are employees (Goverdhanlal v. REPC 1994 II LLN 1354). In case of doubt whether a particular person is an employee or not, both the parties should be heard by the Commissioner before deciding the issue (1976-II Labour Law Journal, 309).

The definition of employee in Section 2(f) of the Act is comprehensive enough to cover the workers employed directly or indirectly and therefore, wherever the word employee is used in this Act, it should be understood to be within the meaning of this definition (Malwa Vanaspati and Chemical Co. Ltd. v. Regional Provident Fund Commissioner, M.P. Region, Indore, 1976-I Labour Law Journal 307).

The definition of “employee”, includes a part-time employee, who is engaged for any work in the establishment, a sweeper working twice or thrice
in a week, a night watchman keeping watch on the shops in the locality, a
gardener working for ten days in a month, etc. (Railway Employees Co-
operative Banking Society Ltd. v. The Union of India, 1980 Lab. IC 1212). The
Government of India, by certain notification extended the application of Act and EPF
scheme to beedi industry. It was held that the workers engaged by beedi
manufacturers directly or through contractors for rolling beedi at home subject to
rejection of defective beedies by manufacturers, were employees (1986 1 SCC 32).
But working partners drawing salaries or other allowances are not employees. When
members of cooperative society do work in connection with that of society and when
wages are paid to them, there would be employer-employee relationship and such
member-workers would be covered under the definition (1998 LLJ I Mad. 827).

(vii) Exempted Employee

It means an employee to whom a Scheme or the Insurance Scheme as the case
may be would, but for the exemption granted under Section 17, have applied.
[Section 2(ffi)]

(viii) Exempted Establishment

It means an establishment in respect of which an exemption has been granted
under Section 17 from the operation of all or any of the provisions of any Scheme or
the Insurance Scheme as the case may be whether such exemption has been
granted to the establishment as such or to any person or class of persons employed
therein. [Section 2(fff)]

(ix) Factory

It means any premises including the precincts thereof, in any part of which a
manufacturing process is being carried on or ordinarily so carried on, whether with
the aid of power or without the aid of power. [Section 2(g)]

(x) Fund

It means Provident Fund established under the Scheme. [Section 2(h)]

(xi) Industry

It means any industry specified in Schedule I, and includes any other industry
added to the Schedule by notification under Section 4. [Section 2(i)]

(xii) Insurance Fund

It means the Deposit-Linked Insurance Fund established under sub-section (2) of
Section 6-C. [Section 2(i-a)]

(xiii) Insurance Scheme

It means the Employees Deposit-Linked Insurance Scheme framed under sub-
section (1) of Section 6-C. [Section 2(i-b)]

(xiv) Manufacture or Manufacturing Process

It means any process for making, altering, repairing, ornamenting, finishing,
packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or
adapting any article or substance with a view to its use, sale, transport, delivery or disposal. [Section 2(i-c)]

(xv) Member

“Member” means a member of the Fund. [Section 2(j)]

(xvi) Occupier of a Factory

It means the person, who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory. [Section 2(k)]

(xvii) Pension Fund

“Pension Fund” means the Employees Pension Fund established under subsection (2) of Section 6A. [Section 2(kA)]

(xviii) Pension Scheme

“Pension Scheme” means the Employees Pension Scheme framed under subsection (1) of Section 6A. [Section 2(kB)]

(xix) Scheme

It means the Employees’ Provident Fund Scheme framed under Section 5. [Section 2(l)]

(xx) Superannuation

“Superannuation”, in relation to an employee, who is the member of the Pension Scheme, means the attainment, by the said employee, of the age of fifty-eight years. [Section 2(ll)]

Different departments or branches of an establishment

Where an establishment consists of different departments or branches situated in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. (Section 2A)

SCHEMES UNDER THE ACT

In exercise of the powers conferred under the Act, the Central Government has framed the following three schemes:

(A) Employees Provident Fund Scheme

The Central Government has framed a Scheme called Employees Provident Fund Scheme. The Fund vests in and is administered by the Central Board constituted under Section 5A.

Administration of the Fund

(a) Board of Trustees or Central Board: Section 5A provides for the
administration of the Fund. The Central Government may by notification in the Official Gazette constitute with effect from such date as may be specified therein, a Board of Trustees, for the territories to which this Act extends.

The Employees Provident Fund Scheme contains provisions regarding the terms and conditions subject to which a member of the Central Board may be appointed and of procedure of the meetings of the Central Board. The Scheme also lays down the manner in which the Board shall administer the funds vested in it however subject to the provisions of Section 6AA and 6C of the Act. The Board also performs functions under the Family Pension Scheme and the Insurance Scheme.

Class of employees entitled and required to join Provident Fund

Every employee employed in or in connection with the work of a factory or other establishment to which this scheme applies, other than an excluded employee, shall be entitled and required to become a member of the fund from the date of joining the factory or establishment.

The term “excluded employee” has been defined in para 2(f) of the Employees’ Provident Fund Scheme, 1952 as follows:

‘Excluded employee’ means:

(i) an employee who, having been a member of the Fund, withdraw the full amount of his accumulations in the Fund under clause (a) or (c) of sub-paragraph 69;

(ii) an employee whose pay at the time be is otherwise entitled to become a member of the Fund, exceeds five thousand rupees per month.

Explanation: “Pay” includes basic wages with dearness allowance retaining allowance (if any) and cash value of food concession admissible thereon.

(iii) An apprentice.

Explanation: An apprentice means a person who, according to the certified standing orders applicable to the factory or establishment is an apprentice, or who is declared to be an apprentice by the authority specified in this behalf by the appropriate Government.

Contributions

As per Section 6, the contribution which shall be paid by the employer to the Fund shall be 10%, of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or through a contractor and the employees contribution shall be equal to the contribution payable by the employer. Employees, if they desire, may make contribution exceeding the prescribed rate but subject to the condition that employer shall not be under any obligation to contribute over and above the contribution payable as prescribed by the Government from time to time under the Act. The Government has raised the rate of Provident Fund Contribution from the current 8.33% to 10% in general and in cases of establishments specially notified by the Government, from 10% to 12% with effect from September 22, 1997.
Each contribution shall be calculated to the nearest rupee, fifty paise or more to be counted as the next higher rupee and fraction of a rupee less than fifty paise to be ignored.

Dearness allowance shall include the cash value of any food concession allowed to an employee. Retaining allowance is the allowance payable to an employee for retaining his services, when the establishment is not working.

The Provident Fund Scheme has made the payment of contribution mandatory and the Act provides for no exception under which a specified employer can avoid his mandatory liability (State v. S.P. Chandani, AIR 1959 Pat. 9).

Investment: The amount received by way of Provident Fund contributions is invested by the Board of Trustees in accordance with the investment pattern approved by the Government of India. The members of the Provident Fund get interest on the money standing to their credit in their Provident Fund Accounts. The rate of interest for each financial year is recommended by the Board of Trustees and is subject to final decision by the Government of India.

Advances/Withdrawals: Advances from the Provident Fund can be taken for the following purposes subject to conditions laid down in the relevant paras of the Employees Provident Fund Scheme:

1. Non-refundable advance for payment of premia towards a policy or policies of Life Insurance of a member;

2. Withdrawal for purchasing a dwelling house or flat or for construction of a dwelling house including the acquisition of a suitable site for the purpose, or for completing/continuing the construction of a dwelling house, already commenced by the member or the spouse and an additional advance for additions, alteration or substantial improvement necessary to the dwelling house;

3. Non-refundable advance to members due to temporary closure of any factory or establishment for more than fifteen days, for reasons other than a strike or due to non-receipt of wages for 2 months or more, and refundable advance due to closure of the factory or establishment for more than six months;

4. (i) Non-refundable in case of:
   (a) hospitalisation lasting one month or more, or
   (b) major surgical operation in a hospital, or
   (c) suffering from T.B., Leprosy, Paralysis, Cancer, Mental derangement or heart ailment, for the treatment of which leave has been granted by the employer;

   (ii) Non-refundable advance for the treatment of a member of his family, who has been hospitalised or requires hospitalisation, for one month or more:

   (a) for a major surgical operation; or
(b) for the treatment of T.B., Leprosy, Paralysis, Cancer, mental derangement or heart ailment;

(5) Non-refundable advance for daughter/sons marriage, self-marriage, the marriage of sister/brother or for the post matriculation education of son or daughter;

(6) Non-refundable advance to members affected by cut in the supply of electricity;

(7) Non-refundable advance in case property is damaged by a calamity of exceptional nature such as floods, earthquakes or riots;

(8) Withdrawals for repayment of loans in special cases; and

(9) Non-refundable advance to physically handicapped members for purchasing an equipment required to minimise the hardship on account of handicap.

Final withdrawal: Full accumulations with interest thereon are refunded in the event of death, permanent disability, superannuation, retrenchment or migration from India for permanent settlement abroad/taking employment abroad, voluntary retirement, certain discharges from employment under Industrial Disputes Act, 1947, transfer to an establishment/factory not covered under the Act.

In other cases, with permission of commissioner or any subordinate officer to him, a member is allowed to draw full amount when he ceases to be in employment and has not been employed in any establishment to which the Act applies for a continuous period of atleast 2 months. This requirement of 2 months waiting period shall not apply in cases of female members resigning from service for the purpose of getting married.

Test your knowledge

Choose the correct answer:

What percentage of the basic wage, dearness allowance and retaining allowance of an employee is paid as contribution by the employer?

(a) 8%
(b) 10%
(c) 12%
(d) 13%

Correct answer: (b)

(B) Employees' Pension Scheme

Under Section 6A, Government has introduced a new pension scheme styled Employees' Pension Scheme, 1995 w.e.f. 16.11.1995, in place of Family Pension Scheme, 1971.

The Employees' Pension Scheme is compulsory for all the persons who were members of the Family Pension Scheme, 1971. It is also compulsory for the persons
who become members of the Provident Fund from 16.11.1995 i.e. the date of introduction of the Scheme. The PF subscribers who were not members of the Family Pension Scheme, have an option to join this Pension Scheme. The Scheme came into operation w.e.f. 16.11.1995, but the employees, including those covered under the Voluntary Retirement Scheme have an option to join the scheme w.e.f. 1.4.1993.

Minimum 10 years contributory service is required for entitlement to pension. Normal superannuation pension is payable on attaining the age of 58 years. Pension on a discounted rate is also payable on attaining the age of 50 years. Where pensionable service is less than 10 years, the member has an option to remain covered for pensionary benefits till 58 years of age or claim return of contribution/withdrawal benefits.

The Scheme provides for payment of monthly pension in the following contingencies(a) Superannuation on attaining the age of 58 years; (b) Retirement; (c) Permanent total disablement; (d) Death during service; (e) Death after retirement/superannuation/permanent total disablement; (f) Children Pension; and (g) Orphan pension.

The amount of monthly pension will vary from member to member depending upon his pensionable salary and pensionable service.

The formula for calculation of monthly members pension is as under:

\[
\text{Members Pension} = \frac{\text{Pensionable Salary} \times (\text{Pensionable Service} + 2)}{70}
\]

To illustrate, if the contributory service is 33 years and pensionable salary is Rs. 5,000 per month, the above formula operates as given below:

\[
\text{Members Pension} = \frac{\text{Rs. 5,000} \times (33 + 2)}{70} = \text{Rs. 2,500 p.m}
\]

In case where the contributory service is less than 20 years but more than 10 years, monthly pension is required to be determined as if the member has rendered eligible service of 20 years. The amount so arrived shall be reduced at the rate of 3 per cent for every year by which the eligible service falls short of 20 years, subject to maximum reduction of 25 per cent.

A separate formula for pension has been prescribed for the members of the ceased Family Pension Scheme, 1971. In the case of members who contributed to the Family Pension Scheme for 24 years, the minimum amount of pension will be Rs. 500 per month. Depending upon the retirement date, the amount of pension for such members may go even beyond Rs. 800 per month. The Family Pension members retiring in November, 1995 after having membership of only 10 years will also get a minimum pension of Rs. 265 p.m. In addition such Family Pension members will get back their full provident fund including the employers share along with interest accumulated in their account upto 15.11.1995.

(a) The rate of minimum widow pension is Rs. 450 p.m. The maximum may go

* Pensionable salary will be average of last 12 months pay.
upto Rs. 2,500 p.m. payable as normal members pension on completion of nearly 33 years of service. Family pension upto Rs. 1,750 p.m. is also payable to the widow of the member who has contributed only for one month to the pension fund.

(b) In addition to the widow pension, the family is also entitled to children pension. The rate of children pension is 25 per cent of widow pension for each child subject to a minimum of Rs. 115 p.m. per child payable upto two children at a time till they attain the age of 25 years.

(c) If there are no parents alive, the scheme provides for orphan pension at 75 per cent of the widow pension payable to orphans subject to the minimum of Rs. 170 p.m. per orphan.

The scheme has been amended making dependent parents eligible for pension. Further disabled children are also made eligible for life long pension.

Under the Pension Scheme, the employees have an option to accept the admissible pension or reduced pension with return of capital. In the case of employee opting for 10% less pension than the actual entitlement, the scheme provides for return of capital equivalent to 100 times of the original pension in the event of death of the pensioner. For example, if the monthly pension is Rs. 2,000 p.m. and the employee opts for reduced pension of Rs. 1,800 the family will have refund of the capital amounting to Rs. 2,00,000 on death of the pensioner. In addition, the widow and two children will continue to get pension for life or up to the age of 25 years, as the case may be.

Under the Scheme, neither the employer nor the employee is required to make any additional contribution. A Pension Fund has been set up from 16.11.95, and the employers share of PF contribution representing 8.33% of the wage is being diverted to the said Fund. All accumulations of the ceased Family Pension Fund have been merged in the Pension Fund. The Central Government is also contributing to the Pension Fund at the rate of 1.16% of the wage of the employees.

(C) Employees’ Deposit-Linked Insurance Scheme

The Act was amended in 1976 and a new Section 6C was inserted empowering the Central Government to frame a Scheme to be called the Employees’ Deposit-Linked Insurance Scheme for the purpose of providing life insurance benefit to the employees of any establishment or class of establishments to which the Act applies.


1. Application of the Scheme: The Employees Deposit-Linked Insurance Scheme, 1976 is applicable to all factories/establishments to which the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 applies.

All the employees who are members of the Provident Funds in both the exempted and the unexempted establishments are covered under the scheme.

2. Contributions to the Insurance Fund: The employees are not required to contribute to the Insurance Fund. The employers are required to pay contributions to
the Insurance Fund at the rate of 1% of the total emoluments, i.e., basic wages, dearness allowance including, cash value of any food concession and retaining allowance, if any.

3. **Administrative expenses:** The employers of all covered establishments are required to pay charges to the Insurance Fund, at the rate of 0.01% of the pay of the employee-members for meeting the administrative charges, subject to a minimum of Rs. 2/- per month.

4. **Nomination:** The nomination made by a member under the Employee Provident Fund Scheme 1952 or in the exempted provident fund is treated as nomination under this scheme. Provisions of Section 5 have overriding effect and will override the personal laws of the subscriber in the matters of nominations (LLJ I 1996 All. 236).

5. **Payment of assurance benefit:** In case of death of a member, an amount equal to the average balance in the account of the deceased during the preceding 12 months or period of membership, whichever is less shall be paid to the persons eligible to receive the amount or the Provident Fund accumulations. In case the average balance exceeds Rs. 50,000, the amount payable shall be Rs. 50,000 plus 40% of the amount of such excess subject to a ceiling of Rs. one lakh.

6. **Exemption from the Scheme:** Factories/establishments, which have an Insurance Scheme conferring more benefits than those provided under the statutory Scheme, may be granted exemption, subject to certain conditions, if majority of the employees are in favour of such exemption.

**DETERMINATION OF MONEYS DUE FROM EMPLOYERS**

(i) **Determination of money due**

Section 7A vests the powers of determining the amount due from any employer under the provisions of this Act and deciding the dispute regarding applicability of this Act in the Central Provident Fund Commissioner, Additional Provident Fund Commissioner, Deputy Provident Fund Commissioner, or Regional Provident Fund Commissioner. For this purpose he may conduct such inquiry as he may deem necessary.

Central Government has already constituted Employees Provident Fund Appellate Tribunal, consisting of a presiding officer who is qualified to be a High Court Judge or a District Judge with effect from 1st July, 1997 in accordance with provisions of Section 7D. The term, service conditions and appointment of supporting staff are governed by Sections 7E to 7H. Any person aggrieved by order/notification issued by Central Government/authority under Sections 1(3), 1(4), 3, 7A(1), 7C, 14B or 7B (except an order rejecting an application for review) may prefer an appeal. The tribunal shall prescribe its own procedure and have all powers vested in officers under Section 7A.

The proceedings before the tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for Section 196 of Indian Penal Code and Civil, 1908, it shall be deemed to be a Civil Court for all purposes of
Section 195 and Chapter XXVI of Code of Procedure. The appellant can take assistance of legal practitioner and the Government shall appoint a presenting officer to represent it. Any order made by the Tribunal finally disposing of the appeal cannot be questioned in any Court.

(ii) Mode of recovery of moneys due from employers

Section 8 prescribes the mode of recovery of moneys due from employers by the Central Provident Fund Commissioner or such officer as may be authorised by him by notification in the Official Gazette in this behalf in the same manner as an arrear of land revenue. Recovery of arrears of Provident Fund cannot be effected from unutilised part of cash-credit of an industrial establishment (1998 LAB IC Kar 3044).

(iii) Recovery of moneys by employers and contractors

Section 8A lays down that the amount of contribution that is to say the employer’s contribution as well as the employee’s contribution and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor, may be recovered by such employer from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

A contractor from whom the amounts mentioned above, may be recovered in respect of any employee employed by or through him, may recover from such employee, the employee’s contribution under any scheme by deduction from the basic wages, dearness allowance and retaining allowance, if any, payable to such employee. However, notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer’s contribution or the charges referred to above from the basic wages, dearness allowance and retaining allowance payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee.

(iv) Measures for recovery of amount due from employer

The authorised officer under this Act shall issue a certificate for recovery of amount due from employer to the Recovery Officer. The Recovery Officer has got the powers to attach/sell the property of employer, call for arrest and detention of employer, etc. for effecting recovery. The employer cannot challenge the validity of the certificate. The authorised officer can grant time to the employer to make the payment of dues.

The Central Provident Fund Commissioner may require any person, from whom amount is due to the employer, to pay directly to the Central Provident Fund Commissioner/Officer so authorised and the same will be treated as discharge of his liability to the employer to the extent of amount so paid. (Sections 8B to 8G)

(v) Priority of payment of contributions over other debts

Section 11 of the Act provides that the contribution towards Provident Fund shall rank prior to other payments in the event of employer being adjudicated insolvent or where it is a company on which order of winding up has been made. The amount shall include:
(a) the amount due from the employer in relation to an establishment to which any Scheme or Insurance Scheme applies in respect of any contribution payable to the Fund, or the Insurance, damages recoverable under Section 14B, accumulations required to be transferred under sub-section (2) of Section 15 or any charges payable by him under any other provisions of this Act or of any provision of the Scheme or the Insurance Scheme; or
(b) the amount due from employer in relation to an exempted establishment in respect of any contribution to the Provident Fund or any Insurance Fund in so far as it relates to exempted employees under the rules of the Provident Fund, or any Insurance Fund or any contribution payable by him towards the Pension Fund under Sub-section (6) of Section 17, damages recoverable under Section 13B or any charges payable by him to the appropriate Government under any provisions of this Act or any of the conditions specified under Section 17.

EMPLOYER NOT TO REDUCE WAGES

Section 12 prohibits an employer not to reduce directly or indirectly the wages of any employee to whom the Scheme or the Insurance Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity or provident fund or life insurance to which the employee is entitled under the terms of employment, express or implied, simply by reason of his liability for the payment of any contribution to the Fund or the Insurance Fund or any charges under this Act or the Scheme or the Insurance Scheme.

Test your knowledge

Choose the correct answer:

Which authority has been constituted by the Central Government to preside over the cases regarding determination of monies due from employers?

(a) Employees Provident Fund Appellate Tribunal
(b) Employees Provident Fund Consultancy Tribunal
(c) Employees Provident Fund Helpdesk
(d) Employees Provident Fund Information Centre

Correct answer: (a)

TRANSFER OF ACCOUNTS

Section 17A(1) of the Act provides that where an employee employed in an establishment to which this Act applies leaves his employment and obtain re-employment in another establishment to which this Act does not apply, the amount of accumulations to the credit of such employee in the Fund, or as the case may be, in the Provident Fund of the establishment left by him shall be transferred within such time as may be specified by Central Government in this behalf to the credit of his account in the Provident Fund of the establishment in which he is re-employed, if the employee so desires and the rules in relation to that Provident Fund permit such transfer.

Sub-section (2) further provides that where as employee employed in an
establishment to which this Act does not apply, leaves his employment and obtains re-employment in another establishment to which this Act applies, the amount of accumulations to the credit of such employee in the Provident Fund of the establishment left by him, may, if the employee so desires and also rules in relation to such Provident Fund permit, be transferred to the credit of his account in the Fund or as the case may be, in the Provident Fund of the establishment in which he is re-employed.

PROTECTION AGAINST ATTACHMENT

Statutory protection is provided to the amount of contribution to Provident Fund under Section 10 from attachment to any Court decree. Sub-section (1) of Section 10 provides that the amount standing to the credit of any member in the Fund or any exempted employee in a Provident fund shall not in any way, be capable of being assigned or charged and shall not be liable to attachment under any decree or order or any Court in respect of any debt or liability incurred by the member or the exempted employee and neither the official assignee appointed under the Presidency Towns Insolvency Act, 1909 nor any receiver appointed under the Provincial Insolvency Act, 1920 shall be entitled to or have any claim on any such amount.

It is further provided in sub-section (2) that any amount standing to the credit of a member in the Fund or of an exempted employee in a Provident Fund at the time of his death and payable to his nominee under the Scheme or the rules of the Provident Fund shall, subject to any deduction authorised by the said scheme or rules, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member or of the exempted employee and shall also not be liable to attachment under any decree or order of any Court. There is a statutory vesting of the fund on dependents after the death of the subscriber which on such vesting becomes absolute property of dependent and cannot be held to have inherited by dependent.

The above provision shall apply in relation to the Employees’ Pension Scheme or any other amount payable under the Insurance Scheme as they apply in relation to any amount payable out of the fund.

POWER TO EXEMPT

Section 17 authorises the appropriate Government to grant exemptions to certain establishments or persons from the operation of all or any of the provisions of the Scheme. Such exemption shall be granted by notification in the Official Gazette subject to such conditions as may be specified therein.

Test your knowledge

State whether the following statement is “True” or “False”:

Statutory protection is provided to the amount of contribution to Provident Fund under Section 12 from attachment to any court decree.

- True
- False

Correct answer: False
COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from……..

Or

The factory/establishment is covered under the provisions of this Act by a notification dated ………. given by the government in the official gazette.

2. The establishment has duly paid its contribution to Employees’ Provident Fund, Employees’ Family Pension Scheme, Employees’ Deposit Linked Insurance Scheme set up under the Act during the financial year.

3. The establishment has set up a separate Provident Fund Trust and has complied with the provisions of the Act during the financial year.

4. The establishment has sent a consolidated return within fifteen days of the commencement of the Employees’ Provident Fund Scheme to the commissioner during the financial year.

Or

The establishment has no employees entitled to become members of the Employees’ Provident Fund during the financial year. Therefore, the establishment has duly filed the ‘NIL’ return to the Commissioner.

5. During the year under review, the establishment has duly filed returns with the Commissioner in respect of employees qualifying to become members of the Employees’ Provident Fund and employees leaving the service during the financial year.

6. The establishment has sent a consolidated return within three months of the commencement of the Employees’ Pension Scheme to the commissioner.

Or

The establishment has no employees entitled to become members of the Employees’ Family Pension Fund during the financial year. Therefore the establishment has duly filed the ‘NIL’ return to the Commissioner.

7. The establishment has also duly sent to the commissioner, the consolidated annual contribution statement showing the total amount of recoveries made during the year from the wages of each member and the total amount contributed by the employer in respect of each such member during the financial year.

8. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.
The Employee's Provident Funds and Miscellaneous Provisions Act, 1952 is a welfare legislation enacted for the purpose of instituting a Provident Fund for employees working in factories and other establishments.

The Act aims at providing social security and timely monetary assistance to industrial employees and their families when they are in distress and/or unable to meet family and social obligations and to protect them in old age, disablement, early death of the bread winner and in some other contingencies.

Presently, the following three Schemes are in operation under the Act: Employees' Provident Funds Scheme, 1952; Employees' Deposit Linked Insurance Scheme, 1976; Employees' Pension Scheme, 1995.

The Act is applicable to factories and other classes of establishments engaged in specific industries, classes of establishments employing 20 or more persons.

The Central Government is empowered to apply the provisions of this Act to any establishment employing less than 20 persons after giving not less than two months notice of its intent to do so by a notification in the official gazette.

Once the Act has been made applicable, it does not cease to be applicable even if the number of employees falls below 20. An establishment/factory, which is not otherwise coverable under the Act, can be covered voluntarily with mutual consent of the employers and the majority of the employees under Section 1(4) of the Act.

Thus, membership of the fund is compulsory for employees drawing a pay not exceeding Rs. 6500 per month (at the time of joining). Every employee employed in or in connection with the work of a factory or establishment shall be entitled and required to become a member of the fund from the date of joining the factory or establishment.

The employees drawing more than Rs.6500/- per month at the time of joining may become member on a joint option of the employer and employee.

Statutory protection is provided to the amount of contribution to Provident Fund under Section 10 from attachment to any Court decree. The Act authorises the appropriate Government to grant exemptions to certain establishments or persons from the operation of all or any of the provisions of the Scheme.
SELF TEST QUESTIONS

1. Describe the applicability and non-applicability of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 to establishments and the employees.

2. Explain the Schemes provided under the Employees’ Provident Fund and Miscellaneous Provisions Act.

3. Whether payment of contribution has priority over other debts?

Suggested Readings:

(1) The Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 - Bare Act
(2) Industrial Law - P.L. Malik
(3) Handbook of Industrial Law - N.D. Kapoor
(4) Labour & Industrial Laws (Legal Manual 2007) - Universal
LEARNING OBJECTIVE

The Employees’ State Insurance Act was promulgated by the Parliament of India in the year 1948. It was the first major legislation on Social Security in independent India to provide certain benefits to the employees in the organized sector in case of sickness, maternity and employment injury. It is important for the students to be thoroughly acclimatized with this branch of law to know its practical significance.

At the end of the study lesson, you should be able to understand:

- Application of the Act
- Important definitions
- Employees’ State Insurance
- Employees’ State Insurance Scheme
- Administration ESI Corporation
- Benefits
- ESI Court
- Exemption and compliances

INTRODUCTION

The Employees’ State Insurance Act, 1948 provides for certain benefits to employees in case of sickness, maternity and employment injury and also makes provisions for certain other matters in relation thereto. The Act has been amended by the Employees’ State Insurance (Amendment) Act, 2010. The changes inserted in the Act by the aforesaid amendment have been incorporated at the relevant places in this study lesson.

The Act extends to the whole of India. The Central Government is empowered to enforce the provisions of the Act by notification in the Official Gazette, to enforce different provisions of the Act on different dates and for different States or for different parts thereof [Section 1(3)]. The Act applies in the first instance to all factories (including factories belonging to the Government) other than seasonal factories [Section 1(4)]. According to the proviso to Section 1(4) of the Act, nothing contained in sub-section (4) of Section 1 shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise
in receipt of benefits substantially similar or superior to the benefits provided under
the Act. Section 1(5) of the Act empowers the appropriate Government to extend any
of the provisions of the Act to any other establishment or class of establishments,
industrial, commercial, agricultural or otherwise after giving one month’s notice in the
Official Gazette. However, this can be done by the appropriate Government, only in
consultation with the Employees’ State Insurance Corporation set up under the Act
and, where the appropriate Government is a State Government, it can extend the
provisions of the Act with the approval of the Central Government.

Under these enacting provisions, the Act has been extended by many State
Governments to shops, hotels, restaurants, cinemas, including preview theatres,
newspaper establishments, road transport undertakings, etc., employing 20 or more
persons. **It is not sufficient that 20 persons are employed in the shop. They
should be employee as per Section 2(9) of the Act, getting the wages
prescribed therein (ESIC v. MM Suri & Associates Pvt. Ltd., 1999 LAB IC SC
956).** According to the proviso to sub-section (5) of Section 1 where the provisions
of the Act have been brought into force in any part of a State, the said provisions shall
stand extended to any such establishment or class of establishment within that part, if
the provisions have already been extended to similar establishment or class of
establishments in another part of that State.

**Test your knowledge**

Which of the following establishments come under the Central Government, with the
Central Government acting as the “Appropriate Government”?

(a) Establishments under railway administration
(b) Establishments under a major port
(c) Establishments under an oil-field or mine
(d) Establishments under the state ministry

Correct answer: (a), (b) and (c)

**IMPORTANT DEFINITIONS**

(i) **Appropriate Government**

“Appropriate Government” means in respect of establishments under the control of
the Central Government or a railway administration or a major port or a mine or oil-field;
the Central Government, and in all other cases, the State Government. [Section 2(1)]

(ii) Confinement

“Confinement” means labour resulting in the issue of a living child or labour after 26 weeks of pregnancy resulting in the issue of child whether alive or dead. [Section 2(3)]

(iii) Contribution

“Contribution” means the sum of money payable to the Corporation by the principal employer in respect of an employees and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act. [Section 2(4)]

(iv) Dependent

“Dependent” under Section 2(6A) of the Act (as amended by the Employees’ State Insurance (Amendment) Act, 2010) means any of the following relatives of a deceased insured person namely:

(i) a widow, a legitimate or adopted son who has not attained the age of twenty-five years,, an unmarried legitimate or adopted daughter,

(ia) a widowed mother,

(ii) if wholly dependent on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of 25 years and is infirm;

(iii) if wholly or in part dependent on the earnings of the insured person at the time his death:

(a) a parent other than a widowed mother,

(b) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and minor or if widowed and a minor,

(c) a minor brother or an unmarried sister or a widowed sister if a minor,

(d) a widowed daughter-in-law,

(e) a minor child of a pre-deceased son,

(f) a minor child of a pre-deceased daughter where no parent of the child is alive or,

(g) a paternal grand parent if no parent of the insured person is alive.

Test your knowledge

State whether the following statement is “True” or “False”

As per the Employees’ State Insurance Act, 1948, it is provided that an employee whose wages (excluding remuneration for overtime work) exceeds Rs. 10,000 a month at any time after and not before the beginning of the contribution period, shall continue to be an employee until the end of the period.

- True
- False

Correct answer: False
(v) Employment Injury

It means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India. [Section 2(8)]

It is well settled that an employment injury need not necessarily be confined to any injury sustained by a person within the premises or the concern where a person works. Whether in a particular case the theory of notional extension of employment would take in the time and place of accident so as to bring it within an employment injury, will have to depend on the assessment of several factors. There should be a nexus between the circumstances of the accident and the employment. On facts no case could be an authority for another case, since there would necessarily be some differences between the two cases. Therefore, each case has to be decided on its own facts. It is sufficient if it is proved, that the injury to the employee was caused by an accident arising out of and in the course of employment no matter when and where it occurred. There is not even a geographical limitation.

The accident may occur within or outside the territorial limits of India. However, there should be a nexus or casual connection between the accident and employment. The place or time of accident should not be totally unrelated to the employment (Regional Director, E.S.I. Corp., v. L. Ranga Rao, 1982 I.L.L.J. 29). Where an employee who is on his way to factory meets with an accident, one K.M. from the place of employment, the Court held that the injury cannot be said to be caused by accident arising out of and in the course of his employment. Mere road accident on a public road while employee was on his way to place of employment cannot be said to have its origin in his employment in the factory (Regional Director ESI v. Francis de Costa, 1997 LLJ I 34 SC).

In E.S.I. Corp. Indore v. Babulal, 1982 Lab. I.C. 468, the M.P. High Court held that injury arose out of employment where a workman attending duty in spite of threats by persons giving call for strike and was assaulted by them while returning after his duty was over. A worker was injured while knocking the belt of the moving pulley, though the injury caused was to his negligence, yet such an injury amounts to an employment injury (Jayanthilal Dhanji Co. v. E.S.I.C., AIR AP 210).

The word injury does not mean only visible injury in the form of some wound. Such a narrow interpretation would be inconsistent with the purposes of the Act which provides certain benefits in case of sickness, maternity and employment injury (Shyam Devi v. E.S.I.C., AIR 1964 All. 42).

(vi) Employee

“Employee” according to Section 2(9) as amended by the Employees’ State Insurance (Amendment) Act, 2010 means any person employed for wages in connection with the work of a factory or establishment to which this Act applies and:

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory or
establishment, whether such work is done by employee in the factory or establishment; or elsewhere, or

(ii) who is employed by or through a immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent, on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person, whose services are so lent or let on hire, has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof, or with the purchase of raw materials of, or the distribution or sale of the product of the factory or establishment; or any person engaged as an apprentice, not being an apprentice engaged under Apprentices Act, 1961 and includes such person engaged as apprentice whose training period is extended to any length of time, but does not include:

(a) any member of the Indian Naval, Military or Air Forces; or
(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government.

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period shall continue to be an employee until the end of that period. The Central Government has since prescribed by a Notification under Rule 50 of the E.S.I. Rules, 1950 the wage limit for coverage of an employee under Section 2(9) of the Act as Rs. 10,000 per month. Further, it is provided that an employee whose wages (excluding remuneration for overtime work) exceed Rs. 10,000 a month at any time after and not before the beginning of the contribution period, shall continue to be an employee until the end of the period.

In the case of Royal Talkies Hyderabad v. E.S.I.C., AIR 1978 SC 1476, there was a canteen and cycle stand run by private contractors in a theatre premises. On the question of whether the theatre owner will be liable as principal employer for the payment of E.S.I. contributions, the Supreme Court held that the two operations namely keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre and the workers engaged therein are covered by the definition of employee as given in E.S.I. Act. The Supreme Court observed that the reach and range of Section 2(9) is apparently wide and deliberately transcends pure contractual relationship.

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Section 2(9) contains two substantive parts. Unless the person employed qualifies under both, he is not an employee. First, he must be employed in or in connection with the work of an establishment. The expression in connection with the
work of an establishment ropes in a wide variety of workmen who may not be employed in the establishment but may be engaged only in connection with the work of establishment. Some nexus must exist between the establishment and the work of employee but it may be a loose connection. The test of payment of salary or wages is not a relevant consideration. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment.

The word employee would include not only persons employed in a factory but also persons connected with the work of the factory. It is not possible to accept the restricted interpretation of the words “employees in factories”. The persons employed in zonal offices and branch offices of a factory and concerned with the administrative work or the work of canvassing sale would be covered by the provisions of the Act, even though the offices are located in different towns (Hyderabad Asbestos Cement Products, etc. v. ESIC, AIR 1978 S.C. 356). The Act is a beneficial piece of legislation to protect interest of the workers. The employer cannot be allowed to circumvent the Act in the disguise of ambiguous designations such as ‘trainees, ‘apprentices etc. who are paid regular wages, basic wages plus allowances. Such workers also fall under the Act (LLJ-II-1996 389 AP). Managing director could be an employee of the company. There could be dual capacity i.e. as managing director as well as a servant of the company (ESIC v. Apex Engg. Pvt. Ltd., Scale (1997) 6 652).

(vii) Exempted Employee

"Exempted Employee" means an employee who is not liable under this Act to pay the employees contribution. [Section 2(10)]

(viii) Principal Employer

“Principal Employer” means the following:

(i) in a factory, owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed the head of the Department.

(iii) in any other establishment, any person responsible for the supervision and control of the establishment. [Section 2(17)]

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**Test your knowledge**

State whether the following statement is “True” or “False”

The Managing Director cannot be an employee of the company.

- True
- False

Correct answer: False
(ix) Family

“Family” under Section 2(11) as amended by the Employees’ State Insurance (Amendment) Act, 2010 means all or any of the following relatives of an insured person, namely:

(i) a spouse;

(ii) a minor legitimate or adopted child dependent upon the insured person;

(iii) a child who is wholly dependent on the earnings of the insured person and who is:

(a) receiving education, till he or she attains the age of twenty-one years,

(b) an unmarried daughter;

(iv) a child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person, so long as the infirmity continues.

(v) dependent parents whose income from all sources does not exceed such income as may be prescribed by the Central Government.

(vi) In case the insured person is unmarried and his or her parents are not alive, a minor brother or sister wholly dependant upon the earnings of the insured person.

(x) Factory

The definition of the factory as amended by the Employees’ State Insurance (Amendment) Act, 2010 is as follows:

“Factory” means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not including a mine subject to the operation of the Mines Act, 1952 or a railway running shed.

It may be noted that the terms manufacturing process, occupier and power, shall have the meaning assigned to them in the Factories Act, 1948. [Section 2(12)]

(xi) Immediate Employer

“Immediate Employer” means a person, in relation to employees employed by or through him, who has undertaken the execution on the premises of a factory or an establishment to which this Act applies or under the supervision of principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on, in or incidental to the purpose of any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor. [Section 2(13A)] It would not be necessary that the work undertaken by immediate employer should be in the premises where the factory of principal employer is situated (1997-II LLJ 31 Pat.).
(xii) Insurable Employment

It means an employment in factory or establishment to which the Act applies. [Section 2(13A)]

(xiii) Insured person

It means a person who is or was an employee in respect of whom contributions are, or were payable under the Act and who is by reason thereof entitled to any of the benefits provided under the Act. [Section 2(14)]

(xiv) Permanent Partial Disablement

It means such disablement of a permanent nature, as reduced the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

Provided that every injury specified in Part II of the Second Schedule to the Act shall be deemed to result in permanent partial disablement. [Section 2(15A)]

(xv) Permanent Total Disablement

It means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident resulting in such disablement:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part-I of the Second Schedule to the Act or from any combination of injuries specified in Part-II thereof, where the aggregate percentage of the loss of earning capacity, as specified in the said Part-II against those injuries, amounts to one hundred per cent or more. [Section 2(15B)]

(xvi) Seasonal Factory

It means a factory which is exclusively engaged in one or more of the following manufacturing processes namely, cotton ginning, cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year:

(a) in any process of blending, packing or repacking of tea or coffee; or

(b) in such other manufacturing process as the Central Government may by notification in the Official Gazette, specify. [Section 2(19A)]

(xvii) Sickness

It means a condition which requires medical treatment and attendance and necessitates, abstention from work on medical grounds. [Section 2(20)]

(xviii) Temporary Disablement

It means a condition resulting from an employment injury which requires medical treatment and renders an employee as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of injury. [Section 2(21)
(xix) **Wages**

“Wages” means all remuneration paid or payable in cash to an employee if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration if any, paid at intervals not exceeding two months but does not include:

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment, or

(d) any gratuity payable on discharge. [Section 2(22)]

Wages include other additional remuneration paid at intervals not exceeding two months wages. It is question of fact in each case whether sales commission and incentive are payable at intervals not exceeding two months (Handloom House Ernakulam v. Reg. Director, ESIC, 1999 CLA 34 SC 10). Travelling allowance paid to employees is to defray special expenses entitled on him by nature of his employment. It does not form part of wages as defined under Section 2(22) of the E.S.I. Act. Therefore, employer is not liable to pay contribution on travelling allowance. [S. Ganesan v. The Regional Director, ESI Corporation, Madras, 2004 Lab.I.C 1147]

**REGISTRATION OF FACTORIES AND ESTABLISHMENTS UNDER THIS ACT**

Section 2A of the Act lays down that every factory or establishment to which this Act applies shall be registered within such time and in such manner as may be specified in the regulations made in this behalf.

**EMPLOYEES’ STATE INSURANCE**

Section 38 of the Act makes compulsory that subject to the provisions of the Act all the employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act. Such insured persons shall pay contributions towards Insurance Fund through their employers who will also pay their own contribution. Such insured persons are entitled to get certain benefits from that fund which shall be administered by the Corporation. Any dispute will be settled by the Employees’ Insurance Court.

**ADMINISTRATION OF EMPLOYEES’ STATE INSURANCE SCHEME**

For the administration of the scheme of Employees’ State Insurance in accordance with the provisions of this Act, the Employees’ State Insurance Corporation Standing Committee and Medical Benefit Council have been constituted. Further, ESI Fund has been created which is held and administered by ESI Corporation through its executive committee called Standing Committee with the assistance, advice and expertise of Medical Council, etc. and Regional and Local Boards and Committees.
EMPLOYEES’ STATE INSURANCE CORPORATION

Section 3 of this Act provides for the establishment of Employees’ State Insurance Corporation by the Central Government for administration of the Employees’ State Insurance Scheme in accordance with the provisions of Act. Such Corporation shall be body corporate having perpetual succession and a common seal and shall sue and be sued by the said name.

Constitution

The Central Government appoints a chairman, a vice-chairman and other members representing interests of employers, employees, state governments/union territories and medical profession. Three members of the Parliament and the Director General of the Corporation are its ex-officio members. [Section 4]

Powers and duties of the Corporation

Section 19 empowers the Corporation, to promote (in addition to the scheme of benefits specified in the Act), measures for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured and incur in respect of such measures expenditure from the funds of the Corporation within such limits as may be prescribed by the Central Government.*

Section 29 empowers the Corporation (a) to acquire and hold property both movable and immovable, sell or otherwise transfer the said property; (b) it can invest and reinvest any moneys which are not immediately required for expenses and or realise such investments; (c) it can raise loans and discharge such loans with the previous sanction of Central Government; (d) it may constitute for the benefit of its staff or any class of them such provident or other benefit fund as it may think fit. However, the powers under Section 29 can be exercised subject to such conditions as may be prescribed by the Central Government.

Appointment of Regional Boards etc.

The Corporation may appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such areas and in such manner, and delegate to them such powers and functions, as may be provided by the regulations. (Section 25)

WINGS OF THE CORPORATION

The Corporation to discharge its functions efficiently, has been provided with two wings:

Standing Committee

The Act provides for the constitution of a Standing Committee under Section 8 from amongst its members.

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* The Employees State Insurance Corporation has enhanced the wage ceiling for the purpose of coverage of employees under the ESI Scheme from Rs. 10,000 to Rs. 15,000 per month. The new wage ceiling came into force from 1st May, 2010. The enhancement of wage ceiling follows the notification dated 20th April, 2010 by the Central Government.
Power of the Standing Committee

The Standing Committee has to administer affairs of the Corporation and may exercise any of the powers and perform any of the functions of the Corporation subject to the general superintendence and control of the Corporation. The standing Committee acts as an executive body for administration of Employees State Insurance Corporation. Medical Benefit Council

Section 10 empowers the Central Government to constitute a Medical Benefit Council. Section 22 determines the duties of the Medical Benefit Council stating that the Council shall:

(a) advise the Corporation and the Standing Committee on matters relating to administration of medical benefit, the certification for purposes of the grant of benefit and other connected matters;

(b) have such powers and duties of investigation as may be prescribed in relation to complaints against medical practitioners in connection with medical treatment and attendance; and

(c) perform such other duties in connection with medical treatment and attendance as may be specified in the regulations.

Test your knowledge

Multiple choice question

Which of the following executives are ex-officio members of the Employees’ State Insurance Corporation?

(a) Three members of Parliament
(b) Director General of the Corporation
(c) Chairman of the Board of the Corporation
(d) Vice-president of the Corporation

Correct answer: (a) and (b)

EMPLOYEES’ STATE INSURANCE FUND

Creation of Fund

Section 26 of the Act provides that all contributions paid under this Act and all other moneys received on behalf of the Corporation shall be paid into a Fund called the Employees’ State Insurance Fund which shall be held and administered by the Corporation for the purposes of this Act. The Corporation may accept grants, gifts, donations from the Central or State Governments, local authority, or any individual or body whether incorporated or not, for all, or any of the purposes of this Act. A Bank account in the name of Employees’ State Insurance Fund shall be opened with the Reserve Bank of India or any other Bank approved by the Central Government. Such account shall be operated on by such officers who are authorised by the Standing
Committee with the approval of the Corporation.

Purposes for which the Fund may be expended

Section 28 provides that Fund shall be expended only for the following purposes:

(i) payment of benefits and provisions of medical treatment and attendance to insured persons and, where the medical benefit is extended to their families, in accordance with the provisions of this Act and defraying the charge, and costs in connection therewith;

(ii) payment of fees and allowances to members of the Corporation, the Standing Committee and Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils;

(iii) payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of officers and other services set up for the purpose of giving effect to the provisions of this Act;

(iv) establishment and maintenance of hospitals, dispensaries and other institutions and the provisions of medical and other ancillary services for the benefit of insured persons and where the medical benefit is extended to their families, their families;

(v) payment of contribution to any State Government, local authority or any private body or individual towards the cost of medical treatment and attendance provided to insured persons and where the medical benefit is extended to their families, their families including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation;

(vi) defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of the assets and liabilities;

(vii) defraying the cost (including all expenses) of Employees Insurance Courts set up under this Act;

(viii) payment of any sums under any contract entered into for the purposes of this Act by the Corporation or the Standing Committee or by any officer duly authorised by the Corporation or the Standing Committee in that behalf;

(ix) payment of sums under any decree, order or award, of any court or tribunal against the Corporation or any of its officers or servants for any act done in execution of his duty or under a compromise or settlement of any suit or any other legal proceedings or claims instituted or made against the Corporation;

(x) defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act;
(xi) defraying expenditure within the limits prescribed, on measure for the
improvement of the health and welfare of insured persons and for the
rehabilitation and re-employment of insured persons who have been
disabled or injured; and

(xii) such other purposes as may be authorised by the Corporation with the
previous approval of the Central Government.

CONTRIBUTIONS

The contributions have to be paid at such rates as may be prescribed by the
Central Government. The present rates of contribution are 4.75 percent and 1.75
percent of workers wages by employers and employees respectively. The wage
period in relation to an employee shall be the unit in respect of which all contributions
shall be payable. The contributions payable in respect of each wage period shall
ordinarily fall due on the last day of the wage period and where an employee is
employed for part of the wage period, or is employed under two or more employers
during the same wage period, the contributions shall fall due on such days as may be
specified in the regulations.

Principal employer to pay contributions in the first instance

According to Section 40 of the Act, it is incumbent upon the principal employer to
pay in respect of every employee whether directly employed by him or by or through
an immediate employer, both the employers contributions and the employees
contribution. However, he can recover from the employee (not being an exempted
employee) the employees contribution by deduction from his wages and not
otherwise. Further Section 40 provides that the principal employer has to bear the
expenses of remitting the contributions to that Corporation.

According to Section 39(5) of the Act, if any contribution payable is not paid by
the principal employer on the date on which such contribution has become due, he
shall be liable to pay simple interest at the rate of 12 per cent per annum or at such
higher rate as may be specified in the regulations, till the date of its actual payment.
However, according to proviso to sub-section (5) of Section 39, higher interest
specified in the regulations should not exceed the lending rate of interest charged by
any scheduled bank. It may be noted that any interest recoverable as stated above
may be recovered as an arrear of land revenue or under newly introduced Sections
45-C to 45-I of the Act.

Recovery of contribution from immediate employer

According to Section 41, principal employer who has paid contribution in respect
of an employee employed by or through an immediate employer is entitled to recover
the amount of contribution so paid (both employers and employees contribution) from
the immediate employer either by deduction from any amount payable to him by the
principal employer under any contract or as a debt payable by the immediate
employer. However the immediate employer is entitled to recover the employees
contribution from the employee employed by or through him by deduction from wages
and not otherwise. The immediate employer is required to maintain a register of
employees employed by or through him as provided in the Regulations and submit
the same to the principal employer before the settlement of any amount payable. He
is not required to have separate account with ESI (LAB IC 1999 Kar 1369).
Method of payment of contribution

Section 43 provides for the Corporation to make regulations for payment and collection of contribution payable under this Act and such regulations may provide for:

(a) the manner and time for payment of contribution;
(b) the payment of contributions by means of adhesive or other stamps affixed to or impressed upon books, cards or otherwise and regulating the manner, times and conditions in, at and under which, such stamps are to be affixed or impressed;
(c) the date by which evidence of contributions having been paid is to be received by the Corporation;
(d) the entry in or upon books or cards or particulars of contribution paid and benefits distributed in the case of the insured persons to whom such books or card relate; and
(e) the issue, sale, custody, production, inspection and delivery of books or cards and the replacement of books or cards which have been, lost, destroyed or defaced.

BENEFITS

Under Section 46 of the Act, the insured persons, their dependants are entitled to the following benefits on prescribed scale:

(a) periodical payments in case of sickness certified by medical practitioner;
(b) periodical payments to an insured workman in case of confinement or miscarriage or sickness arising out of pregnancy, confinement;
(c) periodical payment to an insured person suffering from disablement as a result of employment injury;
(d) periodical payment to dependants of insured person;
(e) medical treatment and attendance on insured person;
(f) payment of funeral expenses on the death of insured person at the prescribed rate of Rs. 1,500/-.

General provisions relating to Benefits

Right to receive benefits is not transferable or assignable. When a person receives benefits under this Act, he is not entitled to receive benefits under any other enactment.

An insured person is not entitled to receive for the same period more than one benefit, e.g. benefit of sickness cannot be combined with benefit of maternity or disablement, etc.

EMPLOYEES’ INSURANCE COURT (E.I. COURT)

Constitution

Section 74 of the Act provides that the State Government shall by notification in
the Official Gazette constitute an Employees’ Insurance Court for such local area as may be specified in the notification. The Court shall consist of such number of judges as the State Government may think fit. Any person who is or has been judicial officer or is a legal practitioner of 5 years standing shall be qualified to be a judge of E.I. Court. The State Government may appoint the same Court for two or more local areas or two or more Courts for the same local area and may regulate the distribution of business between them.

**Matters to be decided by E.I. Court**

**(i) Adjudication of disputes**

The Employees’ Insurance Court has jurisdiction to adjudicate disputes, namely, whether any person is an employee under the Act, rate of wages/contribution, as to who is or was the principal employer, right of a person to any benefit under the Act.

**(ii) Adjudication of claims**

The E.I Court also has jurisdiction to decide claims for recovery of contribution from principal employer or immediate employer, action for failure or negligence to pay contribution, claim for recovery of any benefit admissible under the Act.

Proceedings in both the above cases can be initiated by filing application in the prescribed form by the employee or his dependent or employer or the corporation depending who has cause of action.

No Civil Court has power to decide the matters falling within the purview/jurisdiction of E.I. Court.

**EXEMPTIONS**

The appropriate Government may exempt any factory/establishment from the purview of this Act, as well as any person or class of persons employed in any factory/establishment, provided the employees employed therein are in receipt of benefits superior to the benefits under the Act. Such exemption is initially given for one year and may be extended from time to time. The applicant has to submit application justifying exemption with full details and satisfy the concerned Government.

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**Test your knowledge**

What is the minimum qualification required for a person to qualify as a judge of the E.I, Court?

(a) Judicial officer with minimum 5 years standing
(b) Legal practitioner with minimum 5 years standing
(c) Chartered Accountant with minimum 5 years standing
(d) Special Legal Officer with minimum 5 years standing

**Correct answer: (a) and (b)**
COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from ........
2. During the year under review, the provisions of this Act continued to have effect notwithstanding any reduction in the employees below the Statutory Minimum.
3. The factory/establishment had made an application to the regional office within 15 days from the date on which this Act became applicable and the Employer’s code number is ..................
4. The factory/establishment/class of factory/class of establishment is exempted from complying with the provisions of the Act/any specified area from the operation of this Act vide notification issued by the appropriate government in the official gazette, during the financial year.
5. The factory/establishment has ....... number of employees as defined under section 2 (9) of the Act during the said financial year.
6. All the employees in the factory/establishment to which this Act applies have been insured in the manner provided by the Act.
7. The total contribution (both employer and employee share) at the rates prescribed by the central government was deposited in .......... with the designated branches of .................... Bank on or before 21st of the month following the calendar month in which the wages fall due during the financial year.
8. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.

LESSON ROUND UP

- The law relating to employees’ State Insurance is governed by the Employees’ State Insurance Act, 1948.
- The objective of the act is to provide for certain benefits to employees in case of sickness, maternity and employment injury and to provide for certain other matters in relation there to.
- The Act is applicable to all factories including factories belonging to the Government other than seasonal factories. The appropriate Government may after giving a notice of not less than one month and by notification in the official Gazette, extend the application of the Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise. Once the Act becomes applicable, the Act shall continue to apply irrespective of the reduction in number of employees or cessation of manufacturing process with the aid of power.
Every factory or establishment to which this Act applies has to be registered within the specified time and the regulations made in this behalf. All the employees in factories or establishments to which this Act applies shall be insured in prescribed manner. Such insured persons shall pay contributions towards Insurance Fund through their employers who will also pay their own contribution.

The ESI Act authorises Central Government to establish Employees State Insurance Corporation for administration of the Employees State Insurance Scheme. Such Corporation shall be body corporate having perpetual succession and a common seal and shall sue and be sued by the said name. All contributions paid under this Act and all other moneys received on behalf of the Corporation shall be paid into a Fund called the Employees State Insurance Fund which shall be held and administered by the Corporation for the purposes of this Act.

The insured persons, their dependants are entitled to various benefits on prescribed scale. Right to receive benefits is not transferable or assignable. When a person receives benefits under this Act, he is not entitled to receive benefits under any other enactment.

The Act empowers State Government to constitute an Employees Insurance Court. The Employees Insurance Court has jurisdiction to adjudicate disputes, namely, whether any person is an employee under the Act, rate of wages/contribution, as to who is or was the principal employer, right of a person to any benefit under the Act.

The EI Court also has jurisdiction to decide claims for recovery of contribution from principal employer or immediate employer, action for failure or negligence to pay contribution, claim for recovery of any benefit admissible under the Act.

SELF TEST QUESTIONS

1. Discuss the object and scope of the Employees’ State Insurance Act, 1948.
2. What are the different kinds of benefits provided under the E.S.I. Act.
3. How is the Employees’ Insurance Court constituted and what are the matters to be decided by such a Court?

Suggested Readings:

(1) The Employees’ State Insurance Act, 1948 - Bare Act
(2) Industrial Law - P.L. Malik
(3) Handbook of Industrial Law - N.D. Kapoor
(4) Labour & Industrial Laws (Legal Manual 2007) – Universal
STUDY XVIII

EMPLOYEES’ COMPENSATION ACT, 1923*

LEARNING OBJECTIVE

The passing of the Workmen’s Compensation Act now renamed as Employees' Compensation Act in 1923 was the first step towards social security of workmen. It aims at providing financial protection to workmen and their dependants in case of accidental injury by means of payment of compensation by the employers. Therefore, it is essential for the students to be familiar with the general principles of employee’s compensation stipulated under the Act.

At the end of the study lesson, you should be able to understand:

- Object and scope
- Important Definitions
- Employer’s liability for compensation
- Employer’s liability when contractor is engaged
- Compensation
- Obligations and responsibility of an employer
- Procedure before the Commissioner
- Penalties
- Special provisions relating to Masters and Seamen
- Special provisions relating to Captains and other Members of Crew of Aircrafts
- Special provisions relating to Workmen Abroad of Companies and Motor Vehicles

*The Workmen's Compensation Act, 1923 has been renamed as “The Employees' Compensation Act, 1923” and the term “workman” or “workmen” as “employee” and “employees” for making the Act gender neutral. For the words “workman” and “workmen” in the Principal Act, the words “employee” and “employees” have been substituted respectively.

The amendment has been brought about by the Workmen’s Compensation (Amendment) Act, 2009 w.e.f January 18, 2010. The amendments applicable to this study lesson have been incorporated at relevant places.

OBJECT AND SCOPE

The Employees’ Compensation Act is social security legislation. It imposes
statutory liability upon an employer to discharge his moral obligation towards his employees when they suffer from physical disabilities and diseases during the course of employment in hazardous working conditions. The Act also seeks to help the dependents of the employee rendered destitute by the "accidents" and from the hardship arising out from such accidents. The Act provides for cheaper and quicker mode of disposal of disputes relating to compensation through special proceedings than possible under the civil law. The Act extends to the whole of India.

DEFINITIONS

Some important definitions are given below:

(i) 

Dependant

Section 2(1)(d) of the Act defines "dependant" as to mean any of the following relatives of a deceased employee, namely:

(i) a widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter, or a widowed mother, and

(ii) if wholly dependent on the earnings of the employee at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm; and

(iii) if wholly or in part dependent on the earnings of the employee at the time of his death:

(a) a widower,
(b) a parent other than a widowed mother,
(c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or illegitimate or adopted if married and a minor, or if widowed and a minor,
(d) a minor brother or an unmarried sister, or a widowed sister if a minor,
(e) a widowed daughter-in-law,
(f) a minor child of a pre-deceased son,
(g) a minor child of a pre-deceased daughter where no parent of the child is alive or
(h) a paternal grandparent, if no parent of the employee is alive.

Explanation — For the purpose of sub-clause (ii) and items (f) and (g) of sub-clause (iii) references to a son, daughter or child include an adopted son, daughter or child respectively.

(ii) 

Employee

The definition of workmen has been replaced by the definition of employee. The term "employee" has been inserted by the Workmen's Compensation (Amendment) Act, 2009 under a new clause (dd) in Section 2 of the Act. Clause (n) defining "workman" has been omitted.

Under Section 2(dd) "employee" has been defined as follows:

"Employee" means a person, who is—

(i) a railway servant as defined in clause (34) of section 2 of the Railways Act,
1989 (24 of 1989), not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II; or

(ii) (a) a master, seaman or other members of the crew of a ship,
(b) a captain or other member of the crew of an aircraft,
(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle.
(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India; or

(iii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to any employee who has been injured shall, where the employee is dead, include a reference to his dependants or any of them;

(ii) clause (n) shall be omitted.

(ii) Employer

The following persons are included in the definition of “employer”:

(a) any body of persons incorporated or not;
(b) any managing agent of the employer;
(c) legal representative of a deceased employer. Thus, one who inherits the estate of the deceased, is made liable for the payment of compensation under the Act. However, he is liable only up to the value of the estate inherited by him;
(d) any person to whom the services of a employee are temporarily lent or let on hire by a person with whom the employee has entered into a contract of service or apprenticeship. [Section 2(1)(e)]

A contractor falls within the above definition of the employer. Similarly, a General Manager of a Railway is an employer (Bajnath Singh v. O.T. Railway, A.I.R. 1960 All 362).

(iii) Seaman

“Seaman” under Section 2(1)(k) means any person forming part of the crew of any ship but does not include the master of the ship.

(iv) Wages

According to Section 2(1)(m), the term “wages” include any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the
value of any travelling concession or a contribution paid by the employer to an employee towards any pension or provident fund or a sum paid to employee to cover any special expenses entailed on him by the nature of his employment.

Wages include dearness allowance, free accommodation, overtime pay, etc. (Godawari Sugar Mills Ltd. v. Shakuntala; Chitrì Tanti v. TISCO; and Badri Prasad v. Trijugi Sitaram).

The driver of a bus died in an accident. On a claim for compensation made by widow it was held that line allowance and night out allowance came under the privilege or benefit which is capable of being estimated in money and can be taken into consideration in computing compensation as part of wages (KSRTC Bangalore v. Smt. Sundari, 1982 Lab. I.C. 230). The claim of bonus being a right of the workman is a benefit forming part of wages and the same can be included in wages (LLJ-II 536 Ker.).

Test your knowledge

Which of the following terms are defined in the Workmen’s Compensation Act, 1923?

(a) Dependant
(b) Disablement
(c) Workman
(d) Seaman

Correct answer: (a), (c) and (d)

DISABLEMENT

The Act does not define the word Disablement. It only defines the partial and total disablement. After reading the partial or total disablement as defined under the Act one may presume that disablement is loss of earning capacity by an injury which depending upon the nature of injury and percentage of loss of earning capacity will be partial or total. The Act has classified disablement into two categories, viz. (i) Partial disablement, and (ii) Total disablement.

(i) Partial disablement

Partial disablement can be classified as temporary partial disablement and permanent partial disablement.

(a) Where the disablement is of a temporary nature: Such disablement as reduces the earning capacity of an employee in the employment in which he was engaged at the time of the accident resulting in the disablement; and

(b) Where the disablement is of a permanent nature: Such disablement as reduces for all time his earning capacity in every employment which he was capable of undertaking at the time. [Section 2(1)(g)] But every injury
specified in Part II of Schedule I shall be deemed to result in permanent partial disablement.

Schedule I contains list of injuries deemed to result in Permanent Total/Partial disablement.

In case of temporary partial disablement, the disablement results in reduction of earning capacity in respect of only that employment in which he was engaged at the time of accident. This means the employee’s earning capacity in relation to other employment is not affected. But in case of permanent partial disablement, the disablement results in reduction in his earning capacity in not only the employment in which he was engaged at the time of accident but in all other employments.

Whether the disablement is temporary or permanent and whether it results in reduction of earning capacity, the answer will depend upon the fact of each case, except when the injury is clearly included in Part II of Schedule I.

In the case of *Sukhai v. Hukam Chand Jute Mills Ltd.*, A.I.R. 1957 Cal. 601, it was observed:

“If a workman suffers as a result of an injury from a physical defect which does not in fact reduce his capacity to work but at the same time makes his labour unsaleable in any market reasonably accessible to him, there will be either total incapacity for work when no work is available to him at all or there will be a partial incapacity when such defect makes his labour saleable for less than it would otherwise fetch. The capacity of a workman may remain quite unimpaired, but at the same time his eligibility as an employee may be diminished or lost if such a result ensure by the reason of the results of an accident, although the accident has not really reduced the capacity of the workman to work. He can establish a right to compensation, provided he proves by satisfactory evidence that he has applied to a reasonable number of likely employers for employment, but had been turned away on account of the results of the accident visible on his person.”

If after the accident a worker has become disabled, and cannot do a particular job but the employer offers him another kind of job, the worker is entitled to compensation for partial disablement (*General Manager, G.I.P. Rly. v. Shankar*, A.I.R. 1950 Nag. 307).

*Deemed to be permanent partial disablement:* Part II of Schedule I contains the list of injuries which shall be deemed to result in permanent partial disablement.

Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent to the loss of that limb or member.

Note to Schedule I—On the question whether eye is a member or limb as used in the note to Schedule I it was held that considering the meaning as stated in the Oxford Dictionary as also in the Medical Dictionary, it could be said that the words limb or member include any organ of a person and in any case it includes the eye (*Lipton (India) Ltd. v. Gokul Chandran Mandal*; 1981 Lab. I.C. 1300).
Test your knowledge

State whether the following statement is “True” or “False”:

In case of permanent partial disablement, the disablement does not result in reduction in his/her earning capacity.

- True
- False

Correct Answer: False

(ii) Total disablement

Total disablement can also be classified as temporary total disablement and permanent total disablement.

“Total disablement” means, such disablement whether of a temporary or permanent nature, which incapacitates an employee for all work which he was capable of performing at the time of accident resulting in such disablement. Provided further that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or similarly total disablement shall result from any combination of injuries specified in Part II of Schedule I, where the aggregate percentage of loss of earning capacity, as specified in the said Part II against these injuries amount to one hundred per cent or more. [Section 2(1)(i)]

Some judicial interpretations on the subject are as follows:

The expression incapacitates a workman for all work does not mean capacity to work or physical incapacity. If due to any physical defect, a workman is unable to get any work which a workman of his class ordinarily performs, and has thus lost the power to earn he is entitled to compensation for total disablement (Ball v. William Hunt & Sons Ltd., 1912 A.C. 496). It is immaterial that the workman is physically fit to perform some work. Thus, where a workman, though physically capable of doing the work cannot get employment in spite of his best efforts, he becomes incapacitated for all work and hence entitled to compensation for total disablement.

Loss of physical capacity is co-extensive with loss of earning capacity but loss of earning is not so co-extensive with loss of physical capacity as he may be getting the same wages even though there may be loss of physical capacity. In a case permanent partial disability caused to a workman in accident while working on ship, e.g. getting pain in his left hand and experiencing difficulty in lifting weights, it was held that workman can be said to have lost his earning capacity even though getting same amount of wages as before Mangru Palji v. Robinsons, 1978 Lab. I.C. 1567 (Bom.). Where it is not a scheduled injury the loss of earning capacity must be proved by evidence.
Where the worker lost his vision of one eye permanently in an accident in course of his employment in colliery, the compensation should be assessed in accordance with item 26 Part II in Schedule I (Katras Jheria Coal Co. Ltd. v. Kamakhyा Paul, 1976 Lab.I.C.751).

In an injury the workman, had amputated his left arm from elbow, who was a carpenter. It was held by the Supreme Court in Pratap Narain Singh Deo v. Srinivas Sabata, 1976 I Lab.L.J.235, that it is a total disablement as the carpenter cannot carry his work with one hand and not a partial permanent disablement.

Where the workman, a driver of bus belonging to the employer was involved in an accident which resulted in an impairment of the free movement of his left hand disabling him from driving vehicles, it was held that this is not one of the injuries mentioned in the 1st Schedule which are accepted to result in permanent total disablement. In the present case the workman was also capable of performing duties and executing works other than driving vehicles. Nature of injury to be determined not on the basis of the work he was doing at the time of accident (Divisional Manager KSRTC v. Bhimaiha, 1977 II L.L.J. 521).

Test your knowledge
Which of the following types of injuries are listed in Part II of Schedule I?
(a) Permanent total disablement
(b) Temporary disablement
(c) Permanent partial disablement
(d) Temporary partial disablement

Correct answer: (a) and (c)

EMPLOYER’S LIABILITY FOR COMPENSATION

Section 3 of the Act provides for employes liability for compensation in case of occupational disease or personal injuries and prescribes the manner in which his liability can be ascertained.

(a) In cases of occupational disease

(i) Where an employee employed in any employment specified in Part A of Schedule III contracts any disease specified therein, as an occupational disease, peculiar to that employment, the contracting of disease shall be deemed to be an injury by accident arising out of and in the course of employment.

(ii) Where the employee employed in any employment specified in Part B of
Schedule III, for a continuous period of not less than six months under the same employer, and whilst in the service contracts any disease specified in the Part B of Schedule III, the contracting of disease shall be deemed to be an injury by accident arising out of and in the course of employment. The employer shall be liable even when the disease was contracted after the employee ceased to be in the service of the employer, if such disease arose out of the employment.

(iii) If an employee whilst in service of one or more employers (not necessarily the same employer) in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify, contracts any disease, even after he ceased to be in the service of any employer and disease arose out of such employment, specified in the Schedule, the contracting of disease shall be deemed to be an injury by accident arising out of and in the course of employment.

However, where the employment was under more than one employer, all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may in circumstances deem just. [Section 3(2A)]

(iv) If it is proved:

(a) that the employee whilst in the service of one or more employers in any employment specified in Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment, and

(b) that the disease has arisen out of and in the course of the employment;

the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section.

(v) The Central Government or the State Government after giving, by notification in the Official Gazette, not less than three months notice of its intention so to do, may, by a like notification, add any description of employment to the employments specified in Schedule III, and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively, and thereupon the provisions of Sub-section (2) shall apply in the case of a notification by the Central Government, within the territories to which this Act extends or, in case of a notification by the State Government, within the State as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.

(vi) Except as mentioned above no compensation shall be payable to an employee in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment.

(b) In case of personal injury

As regards personal injury, the employer becomes liable if the injury is caused to an employee by accident arising out of and in the course of his employment.
(i) Personal injury

There must be personal injury caused to an employee.

Normally, injury implies physical or bodily injury caused by an accident. However, such personal injury will also include nervous shock or break-down or mental strain. In the case of Indian News Chronicle v. Mrs. Lazarus, A.I.R. 1961, Punj. 102, an electrician who had to go frequently to a heating room from a cooling plant, contracted pneumonia which resulted in his death. It was held that the injury caused by an accident is not confined to physical injury and the injury in the instant case was due to his working and going from a heating room to a cooling plant as it was his indispensable duty.

(ii) Accident

The personal injury must be caused by an “accident”.

The term “accident” has not been defined in the Act but its meaning has been sufficiently explained in number of decided cases.

The expression accident must be construed to its popular sense. It has been defined as a mishap or an untoward event which is not expected or designed. What the Act intends to cover is what might be expressed as an accidental injury.

In the case of Smt. Sunderbai v. The General Manager, Ordnance Factory Khamaria, Jabalpur, 1976 Lac. I.C. 1163 (MP), the Madhya Pradesh High Court has clarified the difference between accident and injury. Accident means an untoward mishap which is not expected or designed by workman, ‘injury’ means physiological injury. Accident and injury are distinct in cases where accident is an event happening externally to a man, e.g., where a workman falls from the ladder and suffers injuries. But accident may be an event happening internally to a man and in such cases accident and injury coincide. Such cases are illustrated by failure of heart and the like, while the workman is doing his normal work. Physiological injury suffered by a workman mainly due to the progress of disease unconnected with employment may amount to an injury arising out of and in the course of employment if the work, that the workman was doing at the time of the occurrence of the injury contributed to its occurrence. The connection between employment must be furnished by ordinary strain of ordinary work if the strain did in fact contribute to accelerate or hasten the injury. The burden of proof is on applicant to prove the connection of employment and injury.

(iii) Arising out of employment and in the course of employment

To make the employer liable, it is necessary that the injury is caused by an accident which must be raised out of and in the course of employment.

Arising out of employment

The expression “arising out of employment” suggests some causal connection
between the employment and the accidental injury. The cause contemplated is the proximate cause and not any remote cause. Thus, where a workman suffers from heart disease and dies on account of strain of work by keeping continuously standing or working, held that the accident arose out of employment (Laxmibai Atma Ram v. Bombay Port Trust, AIR 1954 Bom.180). Generally if an employee is suffering from a particular disease and as a result of wear and tear of his employment he dies of that disease, employer is not liable. But if the employment is contributory cause or has accelerated the death that the death was due to disease coupled with the employment, then the employer would be liable as arising out of the employment.

In the case of Mackenzie v. I.M. Issak, it was observed that the words arising out of employment means that injury has resulted from risk incidental to the duties of the service which unless engaged in the duty owing to the master, it is reasonable to believe that the workman would not otherwise have suffered. There must be a casual relationship between the accident and the employment.

If the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed unless of course the workman has exposed himself to do an added peril by his own imprudence.

The Supreme Court in Mackinnon Mackenzie and Co. (P) Ltd. v. Ibrahim Mohammed Issak, AIR 1970 S.C. 1906 approving the observation of Lord Summer made in Lancashire and Yorkshire Railway Co. v. Highley, 1917 A.C. 352, observed that the test is: was it part of the injured persons employment to hazard, to suffer or to do that which caused his injury? If yes, the accident arose out of his employment, if not it did not.

Test your knowledge

Which of the following injuries come under the definition of the term 'personal injury'?

(a) Nervous shock
(b) Mental strain
(c) Loss of money
(d) Breakdown

Correct answer: (a), (b) and (d)

Arising in the course of employment

The expression “in the course of employment” suggests the period of employment and the place of work. In other words, the workman, at the time of accident must have been employed in the performance of his duties and the accident took place at or about the place where he was performing his duties.

The expression “employment” is wider than the actual work or duty which the employee has to do. It is enough if at the time of the accident the employee was in actual employment although he may not be actually turning out the work. Even when
the employee is resting, or having food, or taking his tea or coffee, proceeding from
the place of employment to his residence, and accident occurs, the accident is
regarded as arising out of and in the course of employment.

**Employment**—The word “employment” has a wider meaning than work. A
man may be in course of his employment not only when he is actually engaged
in doing something in the discharge of his duty but also when he is engaged in
acts belonging to and arising out of it (Union of India v. Mrs. Noorjahan, 1979
Lab. I.C. 652).

For the expression “accident arising out of and in the course of employment” the
basic and undispensable ingredient is unexpectedness. The second ingredient is
that the injury must be traceable within reasonable limits, to a definite time, place or
occasion or cause. The Act should be broadly and liberally constructed in order to
effectuate the real intention and purpose of the Act.

**(iv) Theory of notional extension of employment**

To make the employer liable it is necessary that the injury caused
by an accident must have arisen in the course of employment. It
means that the accident must take place at a time and place when he
was doing his master’s job.

It is well settled that the concept of “duty” is not limited to the
period of time the workman actually commenced his work and the time he downs his
tools. It extends further in point of time as well as place. But there must be nexus
between the time and place of the accident and the employment. If the
presence of the workman concerned at the particular point was so related to the
employment as to lead to the conclusion that he was acting within the scope of
employment that would be sufficient to deem the accident as having occurred in the
course of employment (Weaver v. Tradegar Iron and Coal Co. Ltd., (1940) 3 All, ER
15).

It is known as doctrine of notional extension of employment; whether employment
extends to the extent of accident depends upon each individual case.

A workman while returning home after duty was murdered within the premises of
the employer. It was held that there was casual and proximate connection between
the accident and the employment. Since the workman was on spot only for his
employment and his wife is entitled for compensation (Naima Bibi v. Lodhne Colliery
(1920) Ltd., 1977 Lab. I.C. NOC 14). If an employee in the course of his employment
has to be in a particular place by reason where he has to face a peril which causes
the accident then the casual connection is established between the accident and the

**(v) When employer is not liable**

In the following cases, the employer shall not be liable:

(i) When the injury does not result in disablement for a period
    exceeding 3 days.

(ii) When the injury not resulting in death or permanent total
disability is due to any of the following reasons:
(a) the employee was at the time of accident, under the influence of drink or drugs, or
(b) the employee wilfully disobeyed an order expressly given or a rule expressly framed for the purpose of securing safety of workers, or
(c) the employee, wilfully disregards or removes any safety guards or safety devices which he knew to have been provided for the safety of the employee.

Thus, where a employee dies due to an accident arising out of and in the course of employment, it cannot be pleaded that death was due to any of the reasons stated from (a) to (c)(R.B. Moondra & Co. v. Mst. Bhanwari, AIR, 1970 Raj. 111).

(c) Suit for damages in a Court barred

Under Section 3(5), an employee is not entitled to any compensation under the Workmen’s Compensation Act, 1923, if he has instituted, in a Civil Court, a suit for damages against the employer or any other person.

Similarly, an employee is prohibited from instituting a suit for damages in any court of law, (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or (b) if the employee and the employer have entered into an agreement for the payment of compensation in accordance with the provisions of this Act.

EMPLOYER’S LIABILITY WHEN CONTRACTOR IS ENGAGED

Section 12 of the Act envisages the employer’s liability to pay compensation to a contractor.

(i) Sometimes, employer may engage a contractor instead of employing his own employee for the purpose of doing any work in respect of his trade or business. Such a contractor then executes the work with the help of the employee engaged by him. If any injury is caused by an accident to any of these employees, the employer cannot be held liable because they are not employed by him and hence are not his employees. But now Section 12(1) makes the employer liable for compensation to such employees hired by the contractor under following circumstances:

(a) The contractor is engaged to do a work which is part of the trade or business of the employer (called principal).
(b) The employee were engaged in the course of or for the purpose of his trade or business.
(c) The accident occurred in or about the premises on which the principal employer has undertaken or undertakes to execute the work concerned.

The amount of compensation shall be calculated with reference to the wages of the employee under the employer by whom he is immediately employed.

(ii) According to Section 12(2), where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor or any other person from whom the employee could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to
indemnify a principal under this section, he shall be entitled to be indemnified by any person standing to him in relation of a contractor from whom the employee could have recovered compensation and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.

(iii) The above provision, however, does not prevent an employee from recovering compensation from the contractor instead of the employer, i.e., the Principal. [Section 12(3)]

(iv) This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken, or usually undertakes, as the case may be to execute the work or which are otherwise under his control or management. [Section 12(4)]

Following illustrative cases will further clarify the law did laid down in Section 12:

(a) A Municipal Board entrusted the electrification work of the town to State employees. An employee received injuries while performing his work. Held, it is the State and not the Board, liable to pay compensation because execution of electrical project is not the ordinary business of the Municipal Board (A.I.R. 1960 All 408).

(b) A contractor was entrusted with the repairs of a defective chimney. An employee engaged by him was injured while carrying out repairs. Held, mill was not liable for compensation as the repairing of chimney is not the part of companys trade or business, whether ordinarily or extraordinarily.

(c) A cartman was engaged by a Rice Mill to carry rice bags from mill to railway station. The cartman met with an accident on a public road while returning back from railway station and this resulted in his death. There was no evidence to show that employee was engaged through a contractor. In a suit for compensation against the mill owner, it was observed that Section 12 is not applicable where the accident arise out of and in the course of employment. Even assuming that the deceased was in the employment of contractor engaged by the employer, the liability of the owner was clear from Section 12(1) and it had not been excluded by reason of Section 12(4).

Test your knowledge

Under Section 5(5) of the employee's Compensation Act, 1923, an employee is not entitled to any compensation if he/she has instituted in a Civil Court, a suit for damages against the employer or any other person.

True
False
Correct answer: False
COMPENSATION

(i) Meaning of compensation

“Compensation” has been defined under Section 2(1)(c) of the Act to mean compensation as provided for by this Act. The meaning of the term will be more clear in the following paragraphs.

(ii) Amount of compensation

Amount of compensation is payable in the event of an employee meeting with an accident resulting into temporary or permanent disability or disease as stated in Schedule II and III in terms of Section 4 of the Act, read with Schedule IV.

Schedule II contains a list of persons engaged in different employments/operations specified therein who are covered by the definition of employee and entitled to compensation e.g. a person employed for loading/unloading of materials in a factory or ship, persons employed in work incidental or connected with manufacturing process. Schedule III contains a list of occupational diseases which if contracted while in employment entitles an employee to compensation such as disease caused by lead, mercury, etc. Schedule IV lays down the relevant factor (a certain figure) related to the age of the employee at the time of death, injury or accident by which wages are multiplied to arrive at compensation.

(iii) Compensation to be paid when due and penalty for default

Time of payment of compensation: Section 4A of the Act provides that compensation under Section 4 shall be paid as soon as it falls due. Compensation becomes due on the date of death of employee and not when Commissioner decides it (Smt. Jayamma v. Executive Engineer, P.W.D. Madhugiri Division, 1982 Lab. I.C. Noc 61).

The employer is required to deposit or to make provisional payment based on the extent of liability which he accepts with the Commissioner or hand over to the employee as the case may be even if the employer does not admit the liability for compensation to the extent claimed.

Where an employer is in default in paying compensation, he would be liable to pay interest thereon and also a further sum not exceeding fifty percent of such amount of compensation as penalty. The interest and the penalty stated above is to be paid to the employee or his dependent as the case may be.

(iv) Method of calculating wages

Monthly wages mean the amount of wages deemed to be payable for a months service and calculated as follows:

(a) Where the employee has, during a continuous period of not less than 12 months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the employee shall be 1/12th of the total wages which have fallen due for payment to him by the employer in the last 12 months of that period.
(b) Where the whole of the continuous period of service was less than one month, the monthly wages of the employee shall be the average monthly amount which during the 12 months immediately preceding the accident was being earned by an employee employed on the same work by the same employer, or, if there was no employee so employed, by an employee employed on similar work in the same locality.

(c) In other cases, including cases in which it is not possible to calculate the monthly wages under clause (b), the monthly wages shall be 30 times the total wages earned in respect of the last continuous period of service, immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of days comprising such period. (Section 5)

A period of service shall be deemed to be continuous which has not been interrupted by a period of absence from work exceeding 14 days.

(v) **Review of half-monthly payment**

Section 6 of the Act provides that any half-monthly payment payable under this Act, either under an agreement between the parties or under the order of a Commissioner may be reviewed by the Commissioner on the application either of the employer or of the employee accompanied by the certificate of a qualified medical practitioner that there has been a change in the condition of the employee or subject to rules made under this Act, an application made without such certificate.

Any half monthly payment, may on review, under the above provisions be continued, increased, decreased or ended, or if the accident is found to have resulted in permanent disablement, be converted to the lump sum to which the employee is entitled less any amount which he has already received by way of half-monthly payments.

(vi) **Commutation of half monthly payments**

Section 7 of the Act provides that any right to receive half-monthly payments may, by agreement between the parties or if the parties cannot agree and the payments have been continued for not less than 6 months on the application of either party to the Commissioner, be redeemed by the payment of a lump sum of such amount as may be agreed to by the parties or determined by the Commissioner as the case may be.

(vii) **Distribution of compensation**

No compensation has to be paid in respect of an employee whose injury has resulted in death and no payment of lump sum compensation to a woman or a person under a legal disability except by deposit with the Commissioner. The employer cannot make payment of compensation directly to the deceased legal heirs. It is the Commissioner who decides on the distribution of compensation to the legal heirs of the deceased employee. (Section 8)

Right to claim compensation passes to heirs of dependant as there is no provision under the Act to this effect (*AIR 1937 Cal. 496*). Payment of *ex-gratia* or
employment on compassionate grounds will not be employers' liability (LAB IC 1998 JK 767).

(viii) Compensation not to be assigned etc.

Save as provided by this Act, no lump sum or half-monthly payment payable under this Act can be assigned, or charged or attached or passed to any person other than the employee by operation of law nor can any claim be set-off against the same. (Section 9)

(ix) Compensation to be first charge

The compensation money shall bear the first charge on the assets transferred by the employer. It says that where an employer transfers his assets before any amount due in respect of any compensation, the liability whereof accrued before the date of transfer has been paid, such amount shall, notwithstanding any thing contained in any other law for the time being in force, be a first charge on that part of the assets so transferred as consists of immovable property. (Section 14A)

(x) Insolvency of employer and the compensation

Following provisions under Section 14 of the Act have been made in this respect:

(i) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any employee, then in the event of the employer becoming insolvent or making a composition or scheme of arrangement with his creditors or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in any law for the time being in force relating to insolvency or the winding up of companies, be transferred to and vest in the employee, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the employee than they would have been under the employer.

(ii) If the liability of the insures to the employee is less than the liability of the employer to the employee, the employee may prove for the balance in the insolvency proceedings or liquidation.

(iii) Where in any case such as is referred to in sub-section (1) the contract of the employer with the insurers is void or voidable by reason of non-compliance on the part of the employer with any terms or conditions of the contract (other than a stipulation for the payment of premia), the provisions of that sub-section shall apply as if the contract were not void or voidable, and the insurers shall be entitled to prove in the insolvency proceedings or liquidation for the amount paid to the employee.

But the employee is required to give notice of accident and resulting disablement therefrom to the insurers as soon as possible after he becomes aware of the insolvency or liquidation proceedings otherwise the above provisions shall not be applied.
(iv) There shall be deemed to be included among the debts which under Section 49 of the Presidency Towns Insolvency Act, 1909, or under Section 61 of the Provincial Insolvency Act, 1920 or under Section 530 of the Companies Act, 1956, are in the distribution of property of an insolvent or in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount due in respect of any compensation the liability wherefor accrued before the date of the order of adjudication of the insolvent or the date of the commencement of the winding up, as the case may be, and those Acts shall have effect accordingly.

(v) Where the compensation is half-monthly payment, the amount due in respect thereof shall, for the purposes of this Section, be taken to be the amount of the lump sum for which the half-monthly, payment could, if redeemable be redeemed if application were made for that purpose under Section 7, and a certificate of the Commissioner as to the amount of such sum shall be conclusive proof thereof.

(vi) The provisions of sub-section (iv) shall apply in the case of any amount for which an insurer is entitled to prove under sub-section (iii) but otherwise those provisions shall not apply where the insolvent or the company being wound up has entered into such a contract with insurers as if referred to in sub-section (i).

(vii) This Section shall not apply where a company is wound up voluntarily merely for purpose of reconstruction or of amalgamation with another company.

(xi) Contracting out of compensation

Section 17 provides that any contract or agreement whereby an employee relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment shall be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under this Act. (Section 17)

OBLIGATIONS AND RESPONSIBILITY OF AN EMPLOYER

(i) Power of Commissioner to require from employers statements regarding fatal accidents

(a) Where a Commissioner receives information from any source that an employee has died as a result of an accident arising out of and in the course of his employment, he may send by registered post a notice to the employee’s employer requiring him to submit, within thirty days of the service of the notice, a statement, in the prescribed form giving the circumstances attending the death of the employee, and indicating whether, in the opinion of the employer, he is or is not liable to deposit compensation on account of the death.

(b) If the employer is of opinion that he is liable to deposit compensation, he shall make the deposit within thirty days of the service of the notice.
(c) If the employer is of opinion that he is not liable to deposit compensation, he shall in his statement indicate the grounds on which he disclaims liability.

(d) Where the employer has so disclaimed liability, the Commissioner, after such inquiry as he may think fit, may inform any of the dependents of the deceased employee, that it is open to the dependents to prefer a claim for compensation and may give them such other further information as he may think fit. (Section 10A)

(ii) To submit reports of fatal accidents and serious bodily injuries

(i) Where by any law for the time being in force, notice is required to be given to any authority, by or on behalf of an employer, of any accident occurring in his premises which results in death or serious bodily injury, the person required to give the notice shall, within seven days of the death or serious bodily injury, send a report to the Commissioner giving the circumstances attending the death or serious bodily injury in the prescribed form (Form EE of the Workmen's Compensation Rules: Rule 17).

"Serious bodily injury" means an injury which involves, or in all probability will involve, the permanent loss of the use of, or permanent injury to, any limb, or the permanent loss of or injury to the sight or hearing, or the fracture of any limb, or the enforced absence of the injured person from work for a period exceeding twenty days. [Expl. to Section 10B(1)]

(ii) The State Government may, by notification in the Official Gazette, extend the provisions of sub-section (i) to any class of premises other than those coming within the scope of that sub-section, and may, by such notification, specify the persons who shall send the report to the Commissioner.

(iii) Nothing in this section shall apply to the factories to which the Employees’ State Insurance Act, 1948, applies. (Section 10B)

NOTICE AND CLAIM

(a) No claim for compensation shall be entertained by a Commissioner unless the notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or, in case of death, within two years from the date of death. (Section 10)

Provided that:

(i) where the accident is the contracting of a disease the accident shall be deemed to have occurred on the first of the days during which the employee was continuously absent from work in consequence of the disablement caused by the disease;

(ii) in case of partial disablement due to the contracting of any such disease and which does not force the employee to absent himself from work, the period of two years shall be counted from the day the employee gives notice of the disablement to his employer;
(iii) if an employee who, having been employed in an employment for a continuous period specified under sub-section 3(2) in respect of that employment ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected.

(iv) The want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim:

(a) if the claim is preferred in respect of the death of an employee resulting from an accident which occurred in the premises of the employer, or at any place where the employee at the time of the accident was working under the control of the employer or of any person employed by him, and the employee died on such premises, or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

(b) if the employer or any one of several employers or any persons responsible to the employer for the management of any branch of the trade or business in which the injured employee was employed had knowledge of the accident from any other source at or about the time when it occurred.

(v) The Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure to give the notice or prefer the claim, as the case may be, was due to sufficient cause.

(b) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon any one of several employers, or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured employee was employed.

(c) The State Government may require that any prescribed class of employers shall maintain at their premises at which employees are employed a notice-book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured employee employed on the premises and to any person acting bona fide on his behalf.

(d) A notice under this section may be served by delivering it at, or sending it by registered post addressed to the residence or any office or place of business of the person on whom it is to be served or, where a notice-book is maintained, by entry in the notice-book.

The Commissioner can initiate suo motu proceedings and can waive the period of limitation under this Section (1997-II-LLJ 292 All.).
Choose the correct answer:

What is the period within which an employer must make a deposit with the Commissioner if he is liable to pay compensation?

(a) Within 10 days of being served the notice
(b) Within 20 days of being served the notice
(c) Within 30 days of being served the notice
(d) Within 40 days of being served the notice

Correct answer: (c)

MEDICAL EXAMINATION

According to Section 11 of the Act:

(i) Where an employee has given notice of an accident, he shall, if the employer, before the expiry of 3 days from the time at which service of the notice has been effected, offers to have him examined free of charge by a qualified medical practitioner, submit himself for such examination, and any employee who is in receipt of half-monthly payment under this Act shall, if so required, submit himself for such examination from time to time as per the rules under the Act.

(ii) If an employee refuses to submit himself for examination by a qualified medical practitioner or in any way obstructs the same, his right to compensation shall be suspended during the continuance of such refusal, or obstruction unless, in the case of refusal, he was prevented by any sufficient cause from so submitting himself.

(iii) If an employee, voluntarily leaves without having been so examined the vicinity of the place in which he was employed, his right to compensation shall be suspended until he returns and officers himself for such examination.

(iv) Where an employee, whose right to compensation has been suspended under sub-section (ii) or sub-section (iii), dies without having submitted himself for medical examination as required by either of those sub-sections, the Commissioner may, if he thinks fit, direct the payment of compensation to the dependants of the deceased employee.

(v) Where under sub-section (ii) or sub-section (iii) a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension, and, if the period of suspension commences before the expiry of the waiting period referred to in clause (d) of sub-section (i) of Section 4, the waiting period shall be increased by the period during which the suspension continues.

(vi) Where an injured employee has refused to be attended by a qualified medical practitioner whose services have been offered to him by the employer free of charge or having accepted such offer has deliberately disregarded the instructions of such
medical practitioner, then, if it is proved that the employee has not thereafter been regularly attended by a qualified medical practitioner or having been so attended had deliberately failed to follow his instructions and that such refusal, disregard or failure was unreasonable in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting disablement shall be deemed to be of the same nature and duration as they might reasonably have been expected to be if the employee had been regularly attended by a qualified medical practitioner, whose instructions he had followed, and compensation, if any, shall be payable accordingly.

The Allahabad High Court in Burhwal Sugar Mills Ltd. v. Ramjan, observed that Section 11 confers a right and not an obligation on employer to have workmen medically examined. If he does not do so it will not debar employer from challenging medical certificate produced by employee. The court held that where the award of compensation was passed on basis of medical certificate without examination of doctor on oath, the award was liable to be quashed since there was no evidence on oath on which compensation could be awarded.

PROCEDURE IN THE PROCEEDINGS BEFORE THE COMMISSIONER

(i) Appointment of Commissioners

Section 20 as amended by the Workmen's Compensation (Amendment) Act, 2009 provides that the State Government may, by notification in the Official Gazette, appoint any person who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been for not less than five years an advocate or a pleader or is or has been a Gazetted Officer for not less than five years having educational qualifications and experience in personal management, human resource development and industrial relations to be a Commissioner for Employee’s Compensation for such area as may be specified in the notification. Where more than one Commissioner has been appointed for any area, the Government may by general or special order regulate the distribution of business between them.

Every Commissioner shall be deemed to be a public servant within the meaning of the Indian Penal Code. Section 20(3) empowers the Commissioner to appoint or choose any person, possessing special knowledge of any matter relevant to the matter under inquiry, to assist him in holding the inquiry.

(ii) Reference to Commissioner and his jurisdiction

Section 19(1) lays down jurisdiction of a Commissioner to entertain a claim in respect of payment of compensation to an employee. The Commissioner is empowered in default of an agreement to settle any question which may arise in any proceeding under this Act as to the liability of any person to pay compensation, and in particular, the Commissioner has jurisdiction over following matters:

(a) Liability of any person to pay compensation.
(b) Whether a person injured is or is not an employee?
(c) The nature and extent of disablement.
(d) The amount or duration of compensation.

If an application is made under the Employee’s Compensation Act to the
Commissioner, he has, by virtue of Section 19(1) of the Act, jurisdiction to decide any question as to the liability of any person including an insurer to pay compensation. Section 19(2) further provides that the enforcement of that liability can only be made by him. The Commissioner’s jurisdiction is wide enough to decide the tenability of the objections; the consequential direction of the Commissioner to the insurer to pay is also covered under Section 19(1). In any event in execution of the order against the insured, namely, the employer, the Commissioner can enforce his liability against the insurer under Section 31. In the light of Section 19 read along with Section 31, the order of the Commissioner can never be challenged as being without jurisdiction (United India Fire & General Insurance Co. Ltd. v. Kamalalshi, (1980) 2 LLJ 408).

(iii) Jurisdiction of Civil Court barred

No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act. [Section 19(2)] However, where the Commissioner has no jurisdiction to decide any matter and even fails to decide when raised, thereby leaving a party without any defence the Civil Court will have jurisdiction to entertain such suits (Madina Saheb v. Province of Madras, AIR1946 Mad. 113).

(iv) Venue of proceedings and transfer

Section 21 dealing with venue of proceedings and transfer of cases under the Act provides that:

(1) Where any matter under this Act is to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before the Commissioner for the area in which:

(a) the accident took place which resulted in the injury; or

(b) the employee or in case of his death, the dependent claiming the compensation ordinarily resides; or

(c) the employer has his registered office:

Provided that no matter shall be processed before or by a Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned:

Provided further that, where the employee, being the master of a ship or a seaman or the captain or a member of the crew of an aircraft or an employee in a motor vehicle or a company, meets with the accident outside India any such matter may be done by or before a Commissioner for the area in which the owner of agent of the ship, aircraft or motor vehicle resides or carries on business or the registered office of the company is situate, as the case may be.

(1A) If a Commissioner, other than the Commissioner with whom any money has been deposited under Section 8, proceeds with a matter under this Act, the former
may for the proper disposal of the matter call for transfer of any records or money remaining with the latter and on receipt of such a request, he shall comply with the same.

(2) If a Commissioner is satisfied that any matter arising out of any proceedings pending before him can be more conveniently dealt with by any other Commissioner, whether in the same State or not, he may, subject to rules made under this Act, order such matter to be transferred to such other Commissioner either for report or for disposal, and, if he does so, shall forthwith transmit to such other Commissioner all documents relevant for the decision of such matter and, where the matter is transferred for disposal, shall also transmit in the prescribed manner any money remaining in his hands or invested by him for the benefit of any party to the proceedings:

Provided that the Commissioner shall not, where any party to the proceedings has appeared before him, make any order of transfer relating to the distribution among dependants of a lump sum without giving such party an opportunity of being heard.

(3) The Commissioner to whom any matter is so transferred shall, subject to rules made under this Act, inquire thereto and, if the matter was transferred for report, return his report thereon or, if the matter was transferred for disposal, continue the proceedings as if they had originally commenced before him.

(4) On receipt of a report from a Commissioner to whom any matter has been transferred for report under Sub-section (2), the Commissioner by whom it was referred shall decide the matter referred in conformity with such report.

(5) The State Government may transfer any matter from any Commissioner appointed by it to any other Commissioner appointed by it.

The section deals with territorial jurisdiction of Commissioner under the Act. Further, for the first time the procedure for deciding case under the Act regarding accident having place outside India [second proviso to Sub-section (1) of Section 21] has been provided for. This is further clear from the fact that a Commissioner can transfer the matter to another Commissioner under Section 21(2) of the Act under specified circumstances.

**Test your knowledge**

Which of the following matters are under the jurisdiction of the Commissioner?

(a) Liability of any person to pay compensation
(b) Appointment of a substitute employee
(c) The nature and extent of disablement
(d) The amount or duration of compensation

**Correct answer: (a), (c) and (d)**
(v) Form of application

All claims for compensation subject to the provision of the Act shall be made to the Commissioner. But such applications other than the applications made by dependant or dependants can only be submitted when the parties have failed to settle the matter by agreement.

An Application to a Commissioner may be made in such form and shall be accompanied by such fee, if any, as may be prescribed and shall contain, in addition to any particulars which may be prescribed, the following particulars namely:

(a) a concise statement of the circumstances in which the application is made and the relief of order which the applicant claims;

(b) in the case of a claim for compensation against an employer, date of service of notice of the accident on the employer and, if such notice has not been served or has not been served in due time, the reason for such omission;

(c) the names and addresses of the parties; and

(d) except in the case of an application by dependents for compensation, a concise statement of the matters on which agreement has and of those on which agreement has not been come to.

If the applicant is illiterate or for any other reason is unable to furnish the required information in writing, the application shall, if the applicant so desires, be prepared under the direction of the Commissioner. (Section 22)

However, any defect in the application, e.g., when it is not in the prescribed form cannot be fatal to the claim. Any such irregularity can be rectified with the permission of the Commissioner at any stage (M.B. & G. Engineering Factory v. Bahadur Singh, AIR 1955 All 182).

(vi) Power of the Commissioner to require further deposit in case of fatal accident

Where the Commissioner is of the opinion that any sum deposited by the employer as compensation payable on the death of an employee, is insufficient, he is empowered to call upon, by a notice in writing stating his reasons, the employer to show cause why he should not make a further deposit within a stipulated period. If the employer fails to show cause to the satisfaction of the Commissioner, the Commissioner may make an award determining the total amount payable and requiring him to deposit the deficiency. (Section 22A)

(vii) Powers and procedure of Commissioners

The Commissioner shall have for the following purposes, all the powers of a Civil Court under the Code of Civil Procedure, 1908 for the purpose of:

(a) taking evidence on oath;

(b) enforcing the attendance of witnesses; and

(c) compelling the production of documents and material objects.

Further, for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973, he shall be deemed to be a Civil Court. (Section 23)
(viii) Appearance of parties

Any appearance, application or act required to be made or done by any person before or to a Commissioner other than an appearance of a party which is required for the purpose of his examination as a witness, may be made or done on behalf of such person, by a legal practitioner or by an official of an Insurance Company or registered Trade Union or by an Inspector appointed under Section 8(1) of the Factories Act, 1948, or under Section 5(1) of the Mines Act, 1952 or by any other officer specified by the State Government in this behalf, authorised in writing by such person, or, with the permission of the Commissioner by any other person so authorised. (Section 24)

(ix) Method of recording evidence

The Commissioner shall make a brief memorandum of the substance of the evidence of every witness as the examination of the witness proceeds, and such memorandum shall be written and signed by the Commissioner with his own hand and shall form a part of the record.

Provided that:

If the Commissioner is prevented from making such memorandum, he shall record the reason of his inability to do so and shall cause such memorandum to be made in writing from his dictation and shall sign the same and such memorandum shall form a part of the record.

Further, the evidence of any medical witness shall be taken down as nearly as may be word for word. (Section 25)

In the case of M.S.N. Co. Ltd. v. Mohd. Kunju, AIR 1956 Trav. Co. 935, it was held that the Commissioner should not make a medical certificate the basis of his award unless he has examined the concerned medical officer.

Time Limit for disposal of cases relating to compensation

A new Section 25A has been inserted by the Workmen’s Compensation (Amendment) Act, 2009 providing for the time Limit for disposal of cases relating to compensation. As per Section 25A, the Commissioner shall dispose of the matter relating to compensation within a period of three months from the date of reference and intimate the decision in respect thereof within the said period to the employee.

(x) Costs

All costs, incidental to any proceedings before a Commissioner, shall subject to rules made under this Act, be in the discretion of the Commissioner. (Section 26)

However, the Commissioner must use his discretion judiciously.

(xi) Power to submit cases

A Commissioner may, if he thinks fit, submit any question of law for the decision of the High Court and, if he does so, shall decide the question in conformity with such decision. (Section 27)
(xii) Registration of agreements

Section 28 makes it obligatory for the employer to send a memorandum to the Commissioner where amount of any lump sum payable as compensation has been settled by agreement:

(a) whether by way of redemption of a half-monthly payment or otherwise, or
(b) where an compensation has been settled as being payable to a woman or a person under a legal disability.

The Commissioner shall record the memorandum in a register in the prescribed manner, after he has satisfied himself as to its genuineness provided that the Commissioner has given at least 7 days notice to the parties concerned before recording such memorandum. The Commissioner may at any time rectify the register.

The Commissioner may refuse to register the memorandum on the following grounds:

(a) Inadequacy of the sum or amount settled; or
(b) Agreement obtained by fraud or undue influence or other improper means.

The Commissioner may in such a situation make such order including an order as to any sum already paid under the agreement, as he thinks just in the circumstances.

An agreement which has been registered as aforesaid shall be enforceable under this Act notwithstanding anything contained in the Indian Contract Act, 1872, or in any other law for the time being in force.

(xiii) Effect of failure to register agreement

Where a memorandum of any agreement, the registration of which is required by Section 28 is not sent to the Commissioner as required by that Section, the employer shall be liable to pay the full amount of compensation which he is liable to pay under the provisions of this Act, and notwithstanding anything contained in the proviso to sub-section (1) of Section 4, shall not unless the Commissioner otherwise directs, be entitled to deduct more than half of any amount paid to the employees by way of compensation whether under the agreement or otherwise. (Section 29)

Test your knowledge

State whether the following statement is “True” or “False”:

The Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908.

- True
- False

Correct Answer: True
APPEALS

An appeal shall lie to the High Court from the following orders of a Commissioner, namely:

(a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

(aa) an order awarding interest or penalty under Section 4A;

(b) an order refusing to allow redemption of a half-monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased employee or disallowing any claim of a person alleging himself to be such dependant;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of Sub-section (2) of Section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions.

(Section 30)

Such appeal should be filed within 60 days of order. The section empowers appellate Court to infer with findings recorded by commissioner only in case of substantial error of law (LLJ II 1998 Kar. 764). The provisions of Section 5 of Limitation Act, 1963 shall be applicable to appeals under the Section.

No appeal shall lie unless the following requirements are fulfilled:

(i) A substantial question of law is involved in the appeal.

(ii) In case of order, other than order refusing to allow redemption of a half-monthly payment, unless the amount in dispute in the appeal is not less than three hundred rupees;

(iii) The memorandum of appeal should be accompanied by a certificate by the Commissioner to the effect that the applicant has deposited with him the amount payable under the order appealed against. Deposit of compensation amount is alone contemplated: deposit of penalty or interest is not condition precedent for filing appeal (LLJ I 1999 Kar. 60).

(iv) The appeal does not relate to any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties.

Jurisdiction conferred on High Court being special any further appeal against the judgement is barred. No. leave petition was therefore held maintainable (LLJ I 1998 1122 Pat.). Finding whether the claimant was a employee arrived by commissioner on material on record is a fact hence no further appeal is allowed (LAB IC 1998 Ori. 3254).

Withholding of certain payments pending decision of appeal

Where an employer makes an appeal under clause (a) of sub-section (1) of Section 30, the Commissioner may, and if so directed by the High Court, shall,
pending the decision of the appeal, withhold payment of any sum in deposit with him. (Section 30A)

**Recovery**

The Commissioner may recover, as an arrear of land revenue, any amount payable by any person under this Act, whether under an agreement for the payment of compensation or otherwise, and the Commissioner shall be deemed to be a public officer within the meaning of Section 5 of the Revenue Recovery Act, 1890. (Section 31)

**PENALTIES**

Section 18A of the Act prescribes penalties for the contravention of the provisions of the Act which include fine up to Rs. 5,000. The following omissions attract this punishment under the Act:

(a) Whosoever fails to maintain a notice book which he is required to maintain under Section 10(3); or
(b) Whosoever fails to send to the Commissioner a statement of fatal accidents which he is required to send under Section 10A(1); or
(c) Whosoever fails to send a report of fatal accidents and serious bodily injuries which he is required to send under Section 10B; or
(d) Whosoever fails to make a return of injuries and compensation which he is required to make under Section 16.

No prosecution under Section 18A shall be instituted except by or with the previous sanction of the Commissioner and no court shall take cognizance of any offence under this section unless complaint is made within 6 months of the date on which the alleged commission of offence comes to the knowledge of the Commissioner.

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Test your knowledge

Choose the correct answer:

Within how many days should an appeal be filed to the High Court as per the Employee’s Compensation Act, 1923?

(a) Within 15 days of order being passed  
(b) Within 20 days of order being passed  
(c) Within 45 days of order being passed  
(d) Within 60 days of order being passed

Correct answer: (d)

**SPECIAL PROVISIONS RELATING TO MASTERS AND SEAMEN**

According to Section 15, the Act shall apply in the case of employees who are masters of ships or seamen subject to the following modifications, namely:

(a) The notice of the accident and the claim for compensation may, except
where the person injured is the master of the ship, be served on the master of the ship as if he were the employer, but where the accident happened and the disablement commenced on board the ship, it shall not be necessary for any seaman to give any notice of the accident.

(b) In the case of the death of a master or seaman, the claim for compensation shall be made within one year after the news of the death has been received by the claimant or, where the ship has been or is deemed to have been lost with all hands, within eighteen months of the date on which the ship was, or is deemed to have been, so lost:

Provided that the Commissioner may entertain any claim to compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(c) Where an injured seaman or master is discharged or left behind in any part of India or in any other foreign country, any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claim, be admissible in evidence:

(i) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

(ii) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness; and

(iii) if the deposition was made in the course of a criminal proceedings, on proof that the deposition was made in the presence of the person accused;

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceedings was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

(d) No half-monthly payment shall be payable in respect of the period during which the owner of the ship is, under any law in force for the time being relating to merchant shipping liable to defray the expenses of maintenance of the injured master or seaman.

(e) No compensation shall be payable under this Act in respect of any injury in respect of which provisions are made for payment of a gratuity, allowance or pension under the War Pensions and Detention Allowances (Mercantile Marine, etc.) Scheme, 1939, or the War Pensions and Detention (Navy, Army, Air Force and Mercantile Marine) Act, 1939, or under War Pensions and Detention Allowances (Indian Seamen) Scheme, 1942, made by the Central Government.

(f) Failure to give a notice to make a claim or commence proceedings within the
time required by this Act shall not be a bar to the maintenance of proceedings under this Act in respect of any personal injury, if:

(i) an application has been made for payment in respect of that injury under any of the schemes referred to in the preceding clause, and

(ii) the State Government certifies that the said application was made in the reasonable belief that the injury was one in respect of which the scheme under which the application was made makes provisions for payments, and that the application was rejected or that payments made in pursuance of the application were discontinued on the ground that the injury was not such an injury, and

(iii) the proceedings under this Act are commenced within one month from the date on which the said certificate of the State Government was furnished to the person commencing the proceedings.

SPECIAL PROVISIONS RELATING TO CAPTAINS AND OTHER MEMBERS OF CREW OF AIRCRAFTS

These provisions have been stipulated under Section 15A of the Act. As per Section 15A, this Act shall apply in the case of employees who are captains or other members of the crew of aircrafts subject to the following modifications, namely:

(1) The notice of the accident and the claim for compensation may, except where the person injured is the captain of the aircraft, be served on the captain of the aircraft as if he were the employer, but where the accident happened and the disablement commenced on board the aircraft it shall not be necessary for any member of the crew to give notice of the accident.

(2) In the case of the death of the captain or other member of the crew, the claim for compensation shall be made within one year after the news of the death has been received by the claimant or, where the aircraft has been or is deemed to have been lost with all hands, within eighteen months of the date on which the aircraft was, or is deemed to have been so lost:

Provided that the Commissioner may entertain any claim for compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(3) Where an injured captain or other member of the crew of the aircraft is discharged or left behind in any part of India or in any other country, any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims, be admissible in evidence:

(a) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

(b) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness;
(c) if the deposition was made in the course of a criminal proceeding, on proof that the deposition was made in the presence of the person accused,

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

SPECIAL PROVISIONS RELATING TO EMPLOYEES ABOARD OF COMPANIES AND MOTOR VEHICLES

This Act according to Section 15B shall apply:

(i) in the case of employee who are persons recruited by companies registered in India and working as such abroad, and

(ii) persons sent for work abroad along with motor vehicles registered under the Motor Vehicles Act, 1988 (59 of 1988) as drivers, helpers, mechanics, cleaners or other employees:

(1) The notice of the accident and the claim for compensation may be served on the local agent of the company, or the local agent of the owner of the motor vehicle, in the country of accident, as the case may be.

(2) In the case of death of the employee in respect of whom the provisions of this section shall apply, the claim for compensation shall be made within one year after the news of the death has been received by the claimant:

Provided that the Commissioner may entertain any claim for compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(3) Where an injured employee is discharged or left behind in any part of India or in any other country any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims, be admissible in evidence:

(a) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

(b) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness;

(c) if the deposition was made in the course of a criminal proceeding, or proof that the deposition was made in the presence of the person accused,
and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. There are ……. workers and contractors, employed by the establishment who are covered under the provisions of this Act.

2. The factory/establishment has submitted to the ESI Corporation returns in the prescribed form containing the particulars relating to the persons employed as per the provisions of the Act, regulation and rules made in this behalf.

3. The establishment has paid compensation to the employee for the personal injury caused to him by an accident arising out of and in the course of his employment as per the provisions contained in the Act during the financial year.

4. During the year under review, there was no dispute in respect of any bonafide claims of the employees.

5. During the year under review, every bonafide claim was duly settled by the establishment.

6. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act

SCHEDULE I

[See Section 2(1) and (4)]

PART I

List of Injuries Deemed to Result in Permanent Total Disablement

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Description of injury</th>
<th>Percentage of loss of earning capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Loss of both hands or amputation at higher sites</td>
<td>100</td>
</tr>
<tr>
<td>2.</td>
<td>Loss of a hand and foot</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>---</td>
<td>---------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>3.</td>
<td>Double amputation through leg or thigh, or amputation through leg or thigh on one side and loss of other foot</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Loss of sight to such an extent as to render the claimant unable to perform any work for which eye sight is essential</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Very severe facial disfigurement</td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td>Absolute deafness</td>
<td></td>
</tr>
</tbody>
</table>

**PART II**

**List of Injuries Deemed to Result in Permanent Partial Disablement**

*Amputation Cases — Upper limbs — Either arm*

1. Amputation through shoulder joint ............................................. 90
2. Amputation below shoulder with stump less than 20.32 cms. from tip of acromion 80
3. Amputation from 20.32 cms. from tip of acromion to less than 4” below tip of olecranon 70
4. Loss of a hand or of the thumb and four fingers of one hand or amputation from 11.43 cms. below tip of olecranon 60
5. Loss of thumb .............................................................................. 30
6. Loss of thumb and its metacarpal bone ......................................... 40
7. Loss of four fingers of one hand .................................................. 50
8. Loss of three fingers of one hand ................................................ 30
9. Loss of two fingers of one hand ................................................... 20
10. Loss of terminal phalanx of thumb ............................................... 20
10A. Guillotine amputation of tip of thump without loss of bone ........... 10

*Amputation Cases — Lower limbs*

11. Amputation of both feet resulting in end-bearing stu ....................... 90
12. Amputation through both feet proximal to the metatarso-phalangeal joint 80
13. Loss of all toes of both feet through the metatarso-phalangeal joint ........ 40
14. Loss of all toes of both feet proximal to the proximal inter-phalangeal joint 30
15. Loss of all toes of both feet distal to the proximal inter-phalangeal joint .... 20
<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>16.</td>
<td>Amputation at hip</td>
<td>90</td>
</tr>
<tr>
<td>17.</td>
<td>Amputation below hip with stump not exceeding 12.70 cms. in length measured from tip of great trenchanter</td>
<td>80</td>
</tr>
<tr>
<td>18.</td>
<td>Amputation below hip with stump exceeding 12.70 cms. in length measured from tip of great trenchanter but not beyond middle thigh</td>
<td>70</td>
</tr>
<tr>
<td>19.</td>
<td>Amputation below middle thigh to 8.89 cms. below knee</td>
<td>60</td>
</tr>
<tr>
<td>20.</td>
<td>Amputation below knee with stump exceeding 8.89 cms. but not exceeding 12.70 cms.</td>
<td>50</td>
</tr>
<tr>
<td>21.</td>
<td>Amputation below knee with stump exceeding 12.70 cms.</td>
<td>50</td>
</tr>
<tr>
<td>22.</td>
<td>Amputation of one foot resulting in end-bearing</td>
<td>50</td>
</tr>
<tr>
<td>23.</td>
<td>Amputation through one foot proximal to the metatarso-phalangeal joint</td>
<td>50</td>
</tr>
<tr>
<td>24.</td>
<td>Loss of all toes of one foot through the metatarso-phalangeal joint</td>
<td>20</td>
</tr>
</tbody>
</table>

**Other injuries**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>25.</td>
<td>Loss of one eye, without complications, the other being normal</td>
<td>40</td>
</tr>
<tr>
<td>26.</td>
<td>Loss of vision of one eye without complications or disfigurement of eye-ball, the other being normal</td>
<td>30</td>
</tr>
<tr>
<td>26A.</td>
<td>Loss of partial vision of one eye</td>
<td>10</td>
</tr>
</tbody>
</table>

* Loss of — A. Fingers of right or left hand Index finger

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<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>27.</td>
<td>Whole</td>
<td>14</td>
</tr>
<tr>
<td>28.</td>
<td>Two phalanges</td>
<td>11</td>
</tr>
<tr>
<td>29.</td>
<td>One phalanx</td>
<td>9</td>
</tr>
<tr>
<td>30.</td>
<td>Guillotine amputation of tip without loss of bone</td>
<td>5</td>
</tr>
</tbody>
</table>

* Middle finger

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>31.</td>
<td>Whole</td>
<td>12</td>
</tr>
<tr>
<td>32.</td>
<td>Two phalanges</td>
<td>9</td>
</tr>
<tr>
<td>33.</td>
<td>One phalanx</td>
<td>7</td>
</tr>
<tr>
<td>34.</td>
<td>Guillotine amputation of tip without loss of bone</td>
<td>4</td>
</tr>
</tbody>
</table>

* Ring or little finger

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>35.</td>
<td>Whole</td>
<td>7</td>
</tr>
<tr>
<td>36.</td>
<td>Two phalanges</td>
<td>6</td>
</tr>
<tr>
<td></td>
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<tr>
<td>---</td>
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</tr>
<tr>
<td>37.</td>
<td>One phalanx</td>
<td>5</td>
</tr>
<tr>
<td>38.</td>
<td>Guillotine amputation of tip without loss of bone</td>
<td>2</td>
</tr>
<tr>
<td><strong>B. Toes of right or left foot great toe</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39.</td>
<td>Through metatarso-phalangeal joint</td>
<td>14</td>
</tr>
<tr>
<td>40.</td>
<td>Part, with some loss of bone</td>
<td>3</td>
</tr>
<tr>
<td><strong>Any other toe</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>41.</td>
<td>Through metatarso-phalangeal joint</td>
<td>3</td>
</tr>
<tr>
<td>42.</td>
<td>Part, with some loss of bone</td>
<td>1</td>
</tr>
<tr>
<td><strong>Two toes of one foot, excluding great toe</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43.</td>
<td>Through metatarso-phalangeal joint</td>
<td>5</td>
</tr>
<tr>
<td>44.</td>
<td>Part, with some loss of bone</td>
<td>2</td>
</tr>
<tr>
<td><strong>Three toes of one foot, excluding great toe</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>45.</td>
<td>Through metatarso-phalangeal joint</td>
<td>6</td>
</tr>
<tr>
<td>46.</td>
<td>Part, with some loss of bone</td>
<td>6</td>
</tr>
<tr>
<td><strong>Four toes of one foot, excluding great toe</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47.</td>
<td>Through metatarso-phalangeal joint</td>
<td>9</td>
</tr>
<tr>
<td>48.</td>
<td>Part, with some loss of bone</td>
<td>3</td>
</tr>
</tbody>
</table>

*Note: Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be equivalent to the loss of that limb or member.*

**LESSON ROUND UP**

- The Employee's Compensation Act, 1923 is one of the important social security legislations. It imposes statutory liability upon an employer to discharge his moral obligation towards his employees when they suffer from physical disabilities and diseases during the course of employment in hazardous working conditions.
- The Act provides for cheaper and quicker mode of disposal of disputes relating to compensation through special proceedings than possible under the civil law.
- The Act provides for employers liability for compensation in case of occupational disease or personal injuries and prescribes the manner in which his liability can be ascertained.
Amount of compensation is payable in the event of an employee meeting with an accident resulting into temporary or permanent disability or disease as stated in Schedule II and III in terms of Section 4 of the Act, read with Schedule IV. Compensation shall be paid as soon as it falls due.

In case of death, the minimum amount of compensation fixed is Rs. 80,000 and Rs. 90,000 in case of permanent total disablement. The existing wage ceiling for computation of maximum amount of compensation is Rs. 4000.

Where an employer is in default in paying compensation, he would be liable to pay interest thereon and also a further sum not exceeding fifty percent of such amount of compensation as penalty. The interest and the penalty stated above is to be paid to the employee or his dependent as the case may be.

Under the Act, the State Governments are empowered to appoint Commissioners for Employee's Compensation for (i) settlement of disputed claims, (ii) disposal of cases of injuries involving death, and (iii) revision of periodical payments.

The Act prescribes penalties for the contravention of the provisions of the Act which include fine up to Rs. 5,000.

**SELF TEST QUESTIONS**

1. Explain the following terms under the Employees’ Compensation Act, 1923: (i) Employer; (ii) Dependent; (iii) Disablement and (iv) Wages.

2. Explain employers liability to pay compensation to an employee.

3. Define an ‘accident’. When it is said to arise out of and in the course of an employment?

4. Explain the theory of notional extension of employment.

5. State the special provisions relating to employee abroad of companies under the Act.

**Suggested Readings:**

1. The Employees’ Compensation Act, 1947—*Bare Act*

2. Industrial Law—*P.L. Malik*

3. Handbook of Industrial Law—*N.D. Kapoor*

4. Labour & Industrial Laws (Legal Manual 2007)—*Universal*
STUDY XIX

CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

LEARNING OBJECTIVE

The exploitation of workers under the contract labour system has been a matter of deep concern for the Government. The Government enacted the Contract Labour (Regulation and Abolition) Act in 1970 seeking to regulate the employment of contract labour in certain establishments and to provide for its abolition under certain circumstances. In this lesson, students will be acclimatized with the legal framework stipulated under the Contract Labour (Regulation and Abolition) Act, 1970.

At the end of the study lesson, you should be able to understand:

- Scope and application of the Act
- Important definitions
- Advisory Boards
- Registration of establishments
- Appointment of licensing officer
- Welfare and health of contact labour
- Penalties and procedure
- Inspectors

SCOPE AND APPLICATION

The Contract Labour (Regulation and Abolition) Act, 1970 regulates the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.

The Act extends to the whole of India. According to Section 1(4), it applies:

(a) to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour;

(b) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen.
The appropriate Government may, after giving not less than two months notice of its intention to do so, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification.

**ACT NOT TO APPLY TO CERTAIN ESTABLISHMENTS**

According to Section 1(5), the Act shall not apply to establishments in which work only of an intermittent or casual nature is performed.

If a question arises whether work performed in an establishment is of an intermittent or casual nature, the appropriate Government shall decide that question after consultation with the Central Board or, as the case may be, as State Board, and its decision shall be final.

---

**Test your knowledge**

State whether the following statement is “True” or “False”

The Act applies to every establishment in which 10 or more workmen are employed as contract labour or were so employed on any day of the preceding 12 months.

- True
- False

Correct answer: False

---

**IMPORTANT DEFINITIONS**

(a) **Appropriate Government**

“Appropriate Government” means

(i) in relation to an establishment in respect of which the appropriate Government under the Industrial Disputes Act, 1947 is the Central Government, the Central Government;

(ii) in relation to any other establishment, the Government of the State in which that other establishment is situated. [Section 2(1)(a)]

(b) **Contract Labour**

A workmen shall be deemed to be employed as contract labour in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer. [Section 2(1)(b)]

(c) **Contractor**

“Contractor” in relation to an establishment, means a person who undertakes to
produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor. [Section 2(1)(c)]

Test your knowledge

Choose the correct answer

Which establishments are exempt from the purview of the Contract Labour (Regulation and Abolition) Act, 1970?

(a) Establishments where work of an intermittent nature is performed
(b) Establishments where embroidery work is performed
(c) Establishments where metal work is performed
(d) Establishments where manufacturing work is performed

Correct answer: (a)

(d) Controlled Industry

"Controlled industry" means any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest. [Section 2(1)(d)]

(e) Establishment

"Establishment" means

(i) any office or department of the Government or local authority, or
(ii) any place where any industry, trade, business, manufacture or occupation is carried on. [Section 2(1)(e)]

(f) Principal Employer

"Principal Employer" means

(i) In relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in this behalf.

(ii) In a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named.

(iii) In a mine, the owner or agent of the mine and where a person has been named as the manager of the mine, the person so named.

(iv) in any other establishment, any person responsible for the supervision and control of the establishment. [Section 2(1)(g)]
Explanation: For the purpose of sub-clause (iii) of this clause, the expressions mine, owner and agent shall have the meanings respectively assigned to them in clause (j) clause (l) and clause (c) of sub-section (l) of Section 2 of the Mines Act, 1952.

(g) Workman

“Workman” means any person employed in or in connection with the work of any establishment to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, but does not include any such person-

(a) Who is employed mainly in a managerial or administrative capacity, or
(b) Who, being employed in a supervisory capacity draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature; or
(c) who is an out-worker, that is to say, a person to whom any articles or materials are given out by or on behalf of the principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of the principal employer and the process is to be carried out either in the home of the out worker or in some other premises not being premises under the control and management of the principal employer. [Section 2(1)(i)]

Test your knowledge

State whether the following statement is “True” or “False”

A workman shall be deemed to be employed as contract labour in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer.

- True
- False

Correct answer: True

THE ADVISORY BOARDS

Central Advisory Board

Section 3 requires the Central Government to constitute a Central Advisory Contract Labour Board to advise the Central Government on such matters arising out of the administration of the Act as may be referred to it and to carry out other functions assigned to it under the Act. (Section 3)

State Advisory Boards

Section 4 similarly requires the State Government to constitute the State
Advisory Contract Labour Board to advise the State Governments on such matters arising out of the administration of the Act as may be referred to it and to carry out other functions assigned to it under the Act. (Section 4)

**REGISTRATION OF ESTABLISHMENTS EMPLOYING CONTRACT LABOUR**

In order to secure its objectives and purposes the Act contains provisions for Registration of establishments employing contract labour.

**Appointment of registering officer**

Section 6 empowers the appropriate Government appoint by notification in the Official Gazette, persons being gazetted officers of Government, to be registering officers and define the limits within which a registering officer shall exercise the powers conferred on him by or under the Act. (Section 6)

**Registration of certain establishments**

Every establishment covered by the Act, if it wants to engage twenty or more persons through a contractor has to get itself registered. Section 7 of the Act lays down that every principal employer of an establishment to which the Act applies shall make an application to the registering officer in the prescribed manner for registration of the establishment within the prescribed time limit. A registration fee varying from Rs. 20 to Rs. 500 which is related to the number of workmen employed as contract labour, is payable. If the application is complete in all respects the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration in the prescribed form. (Section 7)

**Revocation of registration in certain cases**

The registration can be revoked in the following circumstances.

1. If the registering officer is satisfied, either on a reference made to him in his behalf or otherwise, that the registration has been obtained by mis-representation or suppression of any material fact, or

2. that the registration has become useless and become ineffective for any other reason and, therefore, requires to be revoked.

In both the cases, the registering officer shall give an opportunity to the principal employer of the establishment to be heard. He will also obtain previous approval of the appropriate Government in case the registration is to be revoked. (Section 8)

**EFFECT OF NON-REGISTRATION**

No principal employer of an establishment to which the Act applies can employ contract labour, if

(a) he has not obtained the certification of registration; or

(b) a certificate has been revoked after being issued. (Section 9)
Test your knowledge

State whether the following statement is “True” or “False”

In a debate whether any process or operation or other work is of perennial nature, the decision of the Commissioner thereon shall be final.

- True
- False

Correct answer: False

PROHIBITION OF EMPLOYMENT OF CONTRACT LABOUR

This is the most significant provision in the Act. It empowers the appropriate Government to prohibit employment of contract labour in any process, operation or other work in any establishment by issuing a notification in the Official Gazette. The following steps are, however, required to be taken before such a notification is issued:

1. The appropriate Government shall consult the Central Board or as the case may be, the State Board,

2. The appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors such as:

   a. Whether the process, operation or other work incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment.

   b. Whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;

   c. Whether it is done ordinarily through regular workmen in that establishment similar thereto;

   d. Whether it is sufficient to employ considerable number of wholetime workmen. (Section 10)

Explanation: If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final.

But where the government fails to disclose the basis for refusing to abolish contract labour, it amounts to non-application of mind to the requirements of Section 10(2) and the court can order abolition of contract labour (GEA v. Union of India, 1997 Lab IC 1701 Bom.).
**Test your knowledge**

**Choose the correct answer**

Whose approval does the Registering Officer require in a case of revocation of a particular establishment’s registration?

(a) Commissioner of Labour  
(b) Central Government  
(c) State Government  
(d) Appropriate Government  

**Correct answer: (d)**

**Categories of work in which employment of contract labour has been prohibited by the Central Government**

The Central Government has issued notifications in pursuance of the recommendations of the Central Advisory Contract Labour Board, prohibiting the employment of contract labour in the following categories of work from the dates indicated against each:

<table>
<thead>
<tr>
<th>Sl.No.</th>
<th>Name of Industry</th>
<th>Name of Employment</th>
<th>Date from which prohibited</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Coal mines</td>
<td>(i) Raising or raising-cum-selling of coal; (ii) Coal loading and un-loading; (iii) Over burden removal and earth catting; (iv) Soft coke manufacturing; and (v) Drawing of stone drifts and miscellaneous stone cutting underground.</td>
<td>1.2.75</td>
</tr>
<tr>
<td>2</td>
<td>Building</td>
<td>Sweeping dusting and watching.</td>
<td>1.3.77</td>
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<td>3</td>
<td>Iron Ore Mines</td>
<td>(i) Over-burden removal (ii) Drilling and blasting (iii) Float Operations (iv) Much cleaning operations in crushing plants screening plants and/or conveyor belts and (v) Wagon Levelling Operation.</td>
<td>10.6.80 28.5.82</td>
</tr>
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<td>4</td>
<td>Limestone, Dolomite and Manganese Mines</td>
<td>(i) Over-burden removal, and (ii) Drilling and blasting</td>
<td>22.6.81</td>
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| 5. | Coal Washeries | (i) Unloading or raw coal;  
(ii) Charging of magnetite, and  
(iii) Plant cleaning including removal of slippage waste muck cleaning, magnetite removal, etc. | 25.7.83 |
| 6. | Chromite Mines | (i) Over-burden excavation and removal;  
(ii) Drilling and blasting;  
(iii) Raising of Ore; and  
(iv) Transportation of overburden to dumps and ore to stocking sites. | 8.12.84 |
| 7. | Magnesites Mines | (i) Over burden removal;  
(ii) Drilling and Blasting; and  
(iii) Raising of Minerals | 8.12.84 |
| 8. | Gypsum Mines | (i) Over burden removal and  
(ii) Mining/raising of Minerals. | 8.12.84 |
| 9. | Mica Mines | (i) Raising of Mica;  
(ii) Drilling and Blasting;  
(iii) Dewatering of mines;  
(iv) Muck removal; and  
(v) Processing of Mica. | 8.12.84 |
| 10. | Fire clay mines | (i) Over burden removal  
(ii) Raising and stocking of Fire-clay  
(iii) Loading and Transportation  
(iv) De-watering of mines | 4.2.87 |
| 11. | Railways | – Work of Cleaning in Catering establishments; and  
– Pantry Cars | 28.7.87 |
| 12. | Coal Mines | – Raising or raising-cum-selling of coal;  
– Coal loading and unloading;  
– Over burden removal and earth catting;  
– Soft coke manufacturing;  
– Driving stone drifts and misc. stone  
– cutting underground. | 21.6.1988 |
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<tr>
<th></th>
<th>Description</th>
<th>Date</th>
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<tr>
<td>13</td>
<td>Food Corporation of India (FCI) Avadi, Tamil Nadu</td>
<td>28.2.1990</td>
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<tr>
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<td>Handling, loading and unloading etc. from any means of transport;</td>
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<td>Storing, stocking, etc. of foodgrains.</td>
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<td>14</td>
<td>Coal washeries</td>
<td>11.12.1990</td>
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<td>Transport of Middling Removal of slurry</td>
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<td>15</td>
<td>Railways</td>
<td>27.12.1990</td>
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<td>Painting of signal and signal posts</td>
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<td>16</td>
<td>Major ports</td>
<td>8.5.1991</td>
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<td></td>
<td>Sweeping and removal of garbage, maintenance, repair, painting and chipping of vessels of port trust, plumbing, sanitation work, etc.</td>
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<td>17</td>
<td>Food Storage Depots of Food Corporation of India (FCI) at different locations in India</td>
<td>1.11.1991</td>
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<td></td>
<td>Handling, loading and unloading from any means of transport, storing, stacking etc. of foodgrains</td>
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<td>18</td>
<td>International Airport Authority</td>
<td>2.3.1993</td>
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<td>Telephone operators job</td>
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<td>19</td>
<td>Maganese Mines</td>
<td>23.3.1993</td>
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<td></td>
<td>Raising of mineral breaking, sizing and sorting;</td>
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<td>Screening and Jigging at mine site;</td>
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<td>Loading, unloading and transporting at mine site.</td>
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<td>20</td>
<td>Limestone and Dolomite Mines</td>
<td>17.3.1993</td>
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<td></td>
<td>Raising of minerals including breaking, sizing, sorting of limestone/dolomite;</td>
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<td>Transportation of limestone and dolomite which includes loading into and unloading from mine site to factory.</td>
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<td>21</td>
<td>Oil &amp; Natural Gas Commission (ONGC)</td>
<td>8.9.94</td>
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<td></td>
<td>Fire fighting-fire supervisor fireman, fire technician</td>
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<td>Typists</td>
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<td>Clerks (including accounts clerk)</td>
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<td>Steno-typists</td>
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<td>Data operators</td>
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<td>Computer Operators</td>
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<td>Store Keepers</td>
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<td>Boiler Operators</td>
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<td>22</td>
<td>National Thermal</td>
<td>Telephone Operators</td>
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<td>Power Corporation</td>
<td>Instrumentation technicians</td>
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<td>Drivers for vehicles owned by ONGC.</td>
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<td>23</td>
<td>Indian Oil Blending</td>
<td>Operator and Instrumentation Technician</td>
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<td>24</td>
<td>Aeronautical</td>
<td>Helpers, messengers, attenders and</td>
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<td>Development</td>
<td>despatch clerks</td>
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<td>Agency, Bangalore</td>
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<td>25</td>
<td>Indian Oil</td>
<td>Electrical jobs at different locations</td>
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<td>Corporation</td>
<td>in the refinery</td>
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<td>(Mathura Refinery)</td>
<td>Operation and maintenance of centralised</td>
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<td>airconditioning plants and package units</td>
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<td>Power supply for shut down</td>
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<td>Operation of centrifugal pumps and DG</td>
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<td>Chemicals handling and solution</td>
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<td>Handling of jobs in different departments</td>
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<td>of the refinery as attenders, helpers,</td>
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<td>operators in maintenance, instrumentation,</td>
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<td>mechanical maintenance, fabrication</td>
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<td>and plant operation, including peons</td>
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<td>and clerks etc.</td>
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<td>Repair and maintenance of thermal</td>
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<td>insulation works, operation and</td>
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<td>maintenance of electrical jobs in the</td>
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<td>Routine store-keeping and store</td>
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<td>and handling other than occasional</td>
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<td>bulk handling so stores canteen services.</td>
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Jurisdiction of Industrial Tribunals to abolish contract labour

It has been held by the Supreme Court in Vegolis Private Ltd. v. The Workmen, (1971)II-LLJ p. 567, that after enforcement of the Contract Labour (Regulation and Abolition) Act, 1970, the sole jurisdiction for abolition of contract labour in any particular operation vested with the appropriate Government and thereafter the Tribunals have no jurisdiction to abolish contract labour. Supreme Court cannot under Article 32 of the Constitution order for abolition of Contract Labour System in any establishment (1985 1 SCC 630).

In Gujarat Electricity Board case, AIR 1995 SC 2942, the Supreme Court held that:

(a) all undertakings on their own discontinue the contract labour who satisfy the factors mentioned in classes (a) to (d) of Section 10(2) of the Act, and abolish as many of the labour as is feasible as their direct employees.

(b) both the Central and State Governments should appoint a committee to investigate the establishments in which the contract labour is engaged and were on the basis of criteria laid down in clauses (a) to (d) of Section 10(2) of the Act, the contract labour system can be abolished and direct employment can be given to the contract labour.

The appropriate Government on its own should take initiative to abolish the labour contracts in the establishments concerned by following the procedure laid down under the Act.

(c) the Central Government should amend the Act by incorporating a suitable provision to refer to industrial adjudicator the question of the direct employment of the contract workers of the ex-contractor in principal establishments, when the appropriate Government abolishes the contract labour.

After-effect of abolition of contract labour

At present there is no provision in the Act for absorption of contract labour in the event of prohibition of employment of contract labour in any category of work/jobs
under Section 10 of the Act. There have been complaints that contract workers are being thrown out of employment in the jobs covered by the relevant notification.

On the crucial question as to after effect of abolition of contract labour under Section 10 of the Act, the Supreme Court in Air India Statutory Corporation v. United Labour Union, AIR 1997 SC 645, held that a High Court in exercise of its jurisdiction under Article 226 of the Constitution, can direct a principal employer in an appropriate case to absorb the workman concerned after abolition of the contract labour. It overruled its earlier decision of two member bench of the Court (Dena Nath case 1991 AIR SC 3026). In this case, it was held that High Court in exercise of its power under Article 226 could not drive at the absorption of contract labour (on its abolition) as direct employees of the principal employer. The Court also overruled another important case (Gujarat Electricity Board, AIR 1995 SC 2942) wherein it was held that on abolition of contract labour their employees are free to raise their cause for reference under Section 10 of Industrial Disputes Act, 1947 seeking absorption of contract labour. After abolition of contract labour system, if the principal employer omits to abide by the law and fails to absorb the contract labour worked in the establishment on regular basis, the workmen have no option but to seek redress under Article 226 of the Constitution.

Judicial review being the basic feature of the constitution, the High Court is to have the notification enforced at the first instance. Further, the affected employees have a fundamental right to life. Meaningful right to life springs from continued work to earn their livelihood. The right to employment, therefore, is an integral facet of right to life. When they are engaged as contract labour and were continuously working in the establishment of the appellant to make their right to social and economic justice meaningful and effective, they are required to be continuously engaged as contract labour, so long as the work is available in the establishment. When the work is of perennial nature and on abolition of contract labour system, they are entitled, per force to be absorbed on regular basis.

Thus, in Air India Statutory Corporation case, the Supreme Court has held though there exists no express provision in the Act for absorption of employees in establishments where contract labour system is abolished by publication of notification under Section 10(1) of the Act, the principal employer is under obligation to absorb the contract labour. The linkage between the contractor and employee stood snapped and direct relationship stood restored between the principal employer and contract labour as its employees. Where the contract labour through a contractor engaged in keeping industrial premises clean and hygiene, but no licence was obtained by principal employer nor contractor and the contract itself stipulating number of employees to be engaged by contractor and overall control of working of contract labour including administrative control remaining with principal employer, it was held by the Court that the contract is a camouflage which could be easily pierced and the employee and the employer relationship could be directly visualised. Employees who
have put in 240 days of work is ordered to be absorbed (1999 LAB IC SC 1323 HSEB v. Suresh).

In *Steel Authority of India v. National Union of Water Front Workers and others*, AIR 2001 SC 3527, the Supreme Court overruled the judgement delivered in the *Air India Statutory Corporation* case. The Apex Court held that neither Section 10 of the Act nor any other provision in the Act whether expressly or by necessary implication provides for automatic absorption of contract labour on issuing a notification by the Appropriate Government under Section 10(1) prohibiting employment of contract labour in any process or operation or other work in any establishment. Consequently, the principal employer cannot be required to order absorption of contract labour working in the concerned establishment.

**APPOINTMENT OF LICENSING OFFICER AND LICENSING OF CONTRACTORS**

Apart from registration of establishments employing contract labour, the Act contains provisions for licensing of contractors. Section 11 empowers the appropriate Government to appoint Gazetted Officers to be licensing officers and define the limits of their jurisdiction. Orders regarding appointment of licensing officers and the limits of their jurisdiction are to be notified in the Official Gazette.

*Licensing of contractors*

Under Section 12 of the Act, no contractor to whom the Act applies can undertake or execute any work though contract labour except under and in accordance with the license issued in that behalf by the licensing officer. The license may contain such conditions including, in particular, conditions as to hours of work, fixation of wages and other essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules framed under the Act.

The license shall be issued on the payment of prescribed fee and on the deposit of security, if any, for the due performance of the conditions prescribed in the license. The licensee fee ranges from Rs. 5 to Rs. 125 depending on the number of workmen employed by the contractor. The license is not-transferable.

*Grant of license*

An application for the grant of license has to be made in the prescribed form. It should contain particulars regarding the location of establishment, nature of process, operation or work for which contract labour is to be employed and such other particulars as may be prescribed. The license is issued after necessary investigation by the licensing officer. It is valid for the period specified therein (12 months under the Central Rules) and may be renewed from time to time for such period and on payment of such fees and on such conditions as may be prescribed. (Section 13)

*Revocation, suspension and amendment of license*

If the licensing officer is satisfied, either on a reference made to him in this behalf or
otherwise, that (a) the license has been obtained by misrepresentation or suppression of any material fact or that (b) the holder of license has, without reasonable cause, failed to comply with the conditions subject to which the license has granted or has contravened any of the provisions of the Act or the rules made thereunder, the licensing officer may revoke or suspend the license. He has also the powers to forfeit the sum, if any, or any portion thereof deposited as security for the due performance of the conditions subject to which the license was granted. (Section 14)

However, before revoking or suspending the license or ordering forfeiture of the security deposit by the contractor, the licensing officer has to give the holder of the license an opportunity of showing cause. The Licensing Officer may vary or amend a license subject to the rules that be made in this behalf.

Appeals

The Act makes provision for appeals against orders relating to grant of registration to establishments, revocation of registration and revocation/suspension of licences. The aggrieved person may within 30 days from the date on which the order is communicated to him prefer an appeal to an appellate officer who shall be a person nominated in this behalf by the appropriate government. The appellant officer may entertain an appeal even after the expiry of 30 days, if he is satisfied that there was sufficient cause for the delay. The appellant officer shall after giving the appellant an opportunity of being heard dispose of the appeal as expeditiously as possible. (Section 15)

WELFARE AND HEALTH OF CONTACT LABOUR

The contractors are required to take certain specific measures for the welfare and health of contract labour. This, of course, arises in those employments in which the system of contract labour has not been abolished. The relevant provisions are as follows:

(i) Canteens: As per Section 16, the appropriate Government has powers to make rules requiring that in every establishment to which the Act applies and wherein contract labour numbering 100 or more is ordinarily employed by a contractor and the employment of the contract labour is likely to continue for such period as may be prescribed, one or more canteens shall be provided and maintained by the contractor for the use of such contract labour. The rules may provide for the date by which the canteen shall be provided, the number of canteens and the standards in respect of construction, accommodation, furniture and other equipment of the canteens, the food stuffs which may be served therein and the charges which may be made therefor.

(ii) Rest rooms: Section 17(1) makes the following provisions. In every place where contract labour is required to halt at night in connection with the work of an establishment to which the Act applies and in which work requiring employment of contract labour is likely to continue for such period as may be prescribed, there shall be provided and maintained by the contractor for the use of the contract labour such number of rest rooms or such of the suitable alternative accommodation within such time as may be prescribed. Section 17(2) says that the rest room or alternative accommodation to be provided under Sub-section (1) shall be sufficiently lighted and ventilated and shall be maintained in a clean and comfortable condition.
Other facilities: It shall be the duty of every contractor employing contract labour in connection with the work of an establishment to which the Act applies, to provide and maintain:

(a) a sufficient supply of wholesome drinking water for the contract labour at convenient places;
(b) a sufficient number of latrines and urinals of the prescribed types conveniently situated and accessible to the contract labour; and
(c) washing facilities. (Section 18)

First Aid facilities: The contractor is required to provide and maintain a first aid box equipped with the prescribed contents at every place, where contract labour is employed by him. The first aid box should be readily accessible during working hours. (Section 19)

Liability of the principal employer in certain cases: If the prescribed amenities (canteens, rest rooms and other facilities, first aid box) are not provided by the contractor within the prescribed time, then such amenities shall be provided by the principal employer within such time as may be specified. According to Section 20(2), all expenses incurred by the principal employer in providing the amenity may be recovered by him from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. (Section 20)

Responsibility for payment of wages: A common complaint against the contractors has been that some of them do not pay proper wages to the contract labourers or that payments are not made in time or that arbitrary deductions are made from wages. To take care of such malpractices, Section 21 of the Contract Labour (Regulation and Abolition) Act, 1970, lays down that the Contractor shall pay wages in the presence of the authorised representative of the Principal employer. An obligation is also cast on the principal employer to nominate a representative duly authorised by him to be present at the time of disbursement of wages. The text of Section 21 is reproduced below:

21. (1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.

(2) Every principal employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.

(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorised representative of the principal employer.

(4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by
deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor."

Test your knowledge

Choose the correct answer

Which of the following measures are to be undertaken for the welfare and health of contract labour?

(a) Canteens
(b) Rest Rooms
(c) Creche
(d) Drinking Water

Correct answer: (a), (b) and (d)

RULES FRAMED UNDER THE ACT BY THE CENTRAL GOVERNMENT ON THE QUESTION OF WAGES

Rules 63 to 73 of the Contract Labour (Regulation and Abolition) Central Rules, 1971 are reproduced below:

63. The contractor shall fix wage periods in respect of which wages shall be payable.

64. No wage period shall exceed one month.

65. The wage of every person employed as contract labour in an establishment or by a contractor where less than one thousand such persons are employed shall be paid before the expiry of tenth day after the last day of the wage period in respect of which wages are payable.

66. Where the employment of any worker is terminated by or on behalf of the contractor the wages earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated.

67. All payments of wages shall be made on a working day at the working premises and during the working time and on a date notified in advance and in case the work is completed before the expiry of the wage period, final payment shall be made within 48 hours of the last working day.

68. Wages due to every worker shall be paid to him direct or to other authorised by him in his behalf.

69. All wages shall be paid in current coin or currency or in both.

70. Wages shall be paid without any deductions of any kind except those specified by the Central Government by general or special order in this behalf or permissible under the Payment of Wages Act, 1936.

71. A notice showing the wage-period and the place and time of disbursement of wages shall be displayed at the place or work and a copy sent by the contractor to
the Principal Employer under acknowledgement.

72. The Principal Employer shall ensure the presence of his authorised representative at the place and time of disbursement of wages by the contractor to workmen and it shall be the duty of the contractor to ensure the disbursement of wages in the presence of such authorised representative.

73. The authorised representative of the principal employer shall record under his signature a certificate at the end of the entries in the Register of Wages-cum-Muster Roll, as the case may be in the following form:

“Certified that the amount shown in columns No........has been paid to the workmen concerned in my presence on......at.......”

PENDALTIES AND PROCEDURE

The Act refers to the following types of offences and provide for penalties as shown against each.

Section 22

(a) Obstructing an inspector in the discharge of his duties under the Act or refusal or wilful neglect to afford the inspector any reasonable facility for making any inspection, examination, enquiry or investigation authorised by or under the Act in relation to an establishment to which, or a contractor to whom, this Act applies [Section 22(1)].

Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 500 or both.

(b) Wilful refusal to produce on the demand of an inspector any register or other document kept in pursuance of this Act or prevention or attempted prevention or doing anything which the inspector has reason to believe is likely to prevent any person from appearing before or being examined by an Inspector acting in pursuance of his duties under the Act [Section 22(2)].

Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 500/- or both.

Section 23

Contravention of any provision of the Act or any rule made thereunder prohibiting or restricting or regulating employment of contract labour or contravention of any condition of a license granted under the Act.

Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 1,000 or both.

In case of a continuing contravention an additional fine which may extend to Rs. 100/- per day during which the contravention continues after conviction for the first such contraventions, may be imposed.

Section 24
Contravention of any of the provisions of the Act or of any rule made thereunder for which no penalty is elsewhere provided.

Imprisonment for a term which may extend to 3 months or fine which may extend to Rs. 1,000/- or both.

Offences by companies

(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against any punished accordingly:

Provided that nothing containing in this Sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section(1) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any neglect on the part of any director, manager, managing agent or any other officer of the company, such director, manager, managing agent or such other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. (Section 25)

Explanation: For the purpose of this Section

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm means a partner in the firm.

Cognizance of offence: Section 26 provides that no Court shall take cognizance of any offence under this Act except on a complaint made by, or with the previous sanction in writing of, the inspector and no Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

Limitation of prosecutions: Section 27 prescribing limitation of prosecutions stipulates that no Court shall take cognizance of an offence punishable under this Act unless the complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of an inspector:

Provided that where the offence consists of disobeying a written order made by an inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.

It has been held by the Patna High Court in Padam Prasad Jain v. State of Bihar and another, (1979) I LLJ p. 111, that executing contract labour without a licensee, constituted a fresh offence every day on which it continued and, therefore, the limitation prescribed under Section 27 for taking cognizance of an offence does not apply.
INSPECTORS

Under Section 28 of the Act, appropriate Governments have been given powers to appoint inspectors for the purposes of the Act and to define the local limits within which they shall exercise their powers. Sub-section (2) of Section 28 dealing with powers of Inspectors, read as follows:

(2) Subject to any rules made in this behalf, an inspector may, within the local limits for which he is appointed:

(a) enter, at all reasonable hours, with such assistance (if any), being in the service of the Government or any local or other public authority as he thinks fit, any premises or place where contract labour is employed, for the purpose of examining any register or record or notices required to be kept or exhibited by or under this Act or rules made thereunder, and require the production thereof for inspection;

(b) examine any person whom he finds in any such premises or place and who, he has reasonable cause to believe, is a workmen employed therein;

(c) require any person giving out work and any workmen, to give any information, which is in his powers to give with respect to the names and addresses of the persons to, for an from whom the work is given out or received, and with respect to the payments to be made for the work;

(d) seize or take copies of such register, record of wages or notices or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by the principal employer or contractor; and

(e) exercise such other powers as may be prescribed.

Sub-section (3) of Section 28 provides that any person required to produce any document or thing to give any information required by an inspector under Sub-section (2) shall be deemed to be legally bound to do so within the meaning of Section 175 and Section 176 of the Indian Penal Code.

Sub-section (4) lays down that the provisions of the Code of Criminal Procedure shall, so far as may be, apply to any search or seizure under Sub-section (2) as they apply to any search or seizure under the authority of a warrant issued under the Code.

Test your knowledge

Choose the correct answer

Which Section of the Contract Labour (Regulation and Abolition) Act, 1970, deals with cognizance of offence?

(a) Section 26
(b) Section 27
(c) Section 28
(d) Section 29

Correct answer: (a)
MAINTENANCE OF RECORDS & REGISTERS

Section 29 states that every principal employer and every contractor shall maintain such registers and records in such forms as may be prescribed.

The registers and records to be maintained, the notices to be displayed and the returns to be submitted by the contractors and the principal employer to the registering officers or/and licensing officer are explained in detail in the rules framed under the Act by the Central Government and the State Government.

The principal employers and the contractors are also required to keep exhibited in such manner as may be prescribed within the premises of the establishment where the contract labour is employed, notices in the prescribed form containing particulars about the hours of work, nature of duty and such other information as may be prescribed.

Labour Laws (Exemption from furnishing returns and maintaining Registers by certain Establishments) Act, 1988 provides for exemptions of employers in relation to establishments employing a small number of persons from furnishing returns and maintaining registers under certain labour laws including Contract Labour (Regulation and Abolition) Act, 1970 (as given in Schedule I). The Act has come into effect on 1st May, 1989.

As per this Act “small establishments” (establishments employing not less than 10 persons and not more than 19 persons) are required to furnish a core Return in Form A and maintain Registers Form B, Form C, and Form D and “very small establishments” (establishments employing not more than 9 persons) are required to furnish return in Form A and maintain Register in Form E prescribed under this Act. This requirement is in lieu of furnishing of such returns/maintaining of such registers prescribed under various labour laws mentioned in Schedule I to this Act.

COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from.....

   Or

   The factory/establishment is covered under the provisions of this Act by a notification dated ........... given by the government in the official gazette.

2. The factory/establishment has ........ number of workmen employed during the said financial year.

3. The factory/establishment has duly submitted all returns to the Commissioner/Regional Commissioner as per the provisions of the Act, regulations and rules made in this behalf.

4. The establishment has duly applied for and obtained the certificate of registration before the employment of any contract labour.
5. All the contractors engaged by the establishment to supply workmen do possess valid licence.

6. The establishment has duly complied with the provisions of the Act in respect of welfare and health of contract labour during the financial year.

7. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.

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**LESSON ROUND UP**

- The objective of the Contract Labour (Regulation and Abolition) Act, 1970 is to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.

- The Act empowers the Central or State Governments to prohibit the employment of contract labour in any process or operation.

- It applies to every establishment or contractor wherein 20 or more workmen are or were employed on any day of the preceding 12 months as contract labour.

- The appropriate government is empowered to extend the application of the Act to any establishment or contractor employing even less than 20 workers as contract labour.

- The Act is not applicable to an establishment in which work is only of an intermittent or casual nature. Work performed in an establishment for more than 120 days in the preceding 12 months or work of a seasonal nature and performed for more than 60 days in a year, shall not be deemed to be work of an intermittent nature.

- The Act provides for constitution of Contract Labour Advisory Board to advise the Government on such matters arising out of the administration of this Act as may be referred to it, and to carry out other functions assigned under the Act.

- The Act provides for grant of licence to the contractors and registration to the Principal Employers.

- The penalty provided for violation of the provisions of the Act and Rules made thereunder, is the fine, which may extend to Rs. 1000/- or imprisonment for a term which may extend to three months or with both.
SELF TEST QUESTIONS

1. To which establishments the Contract Labour (Regulation and Abolition) Act, 1970 applies, and which establishments are excluded?

2. Give the definitions of—
   (a) Contract Labour;
   (b) Contractor;
   (c) Principal Employer;
   (d) Workmen.

3. What amenities are to be provided by contractors to other workmen in terms of the Contract Labour (Regulation and Abolition) Act, 1970? What are the liabilities of the Principal Employer if the contractor fails to provide the above amenities?

4. Explain the powers of Inspectors appointed under the Act.

5. What provisions have been made under the Act regarding payment of wages of contract labour?

Suggested Readings:

(1) The Contract Labour (Regulation and Abolition) Act, 1970 — (Bare Act)
(2) Industrial Law —P.L. Malik
(3) Labour Laws —H.L. Kumar
(4) Labour & Industrial Laws (Legal Manual 2007) —Universal
LEARNING OBJECTIVE

Industrial Disputes Act, 1947 provides machinery for peaceful resolution of disputes and to promote harmonious relation between employers and workers. The Act is a benign measure which seeks to pre-empt industrial tensions, provide the mechanics of dispute resolutions and set up the necessary infrastructure so that the energies of partners in production may not be dissipated in counter productive battles and assurance of industrial may create a congenial climate. The knowledge of this legislation is a must for the students so that they develop a proper perspective about the legal frame work stipulated under the Act.

At the end of the study lesson, you should be able to understand:

- Objective and significance of the Act
- Important definitions
- Authorities under the Act
- Procedure and powers of Authorities
- Unfair labour practices
- Penalties

INTRODUCTION

The first enactment dealing with the settlement of industrial disputes was the Employers’ and Workmen’s Disputes Act, 1860. This Act weighed much against the workers and was therefore replaced by the Trade Disputes Act, 1929. The Act of 1929 contained special provisions regarding strikes in public utility services and general strikes affecting the community as a whole. The main purpose of the Act, however, was to provide a conciliation machinery to bring about peaceful settlement of industrial disputes. The Whitely Commission made in this regard the perceptive observation that the attempt to deal with unrest must begin rather with the creation of an atmosphere unfavourable to disputes than with machinery for their settlement.

The next stage in the development of industrial law in this country was taken under the stress of emergency caused by the Second World War. Rule 81-A of the Defence of India Rules was intended to provide speedy remedies for industrial disputes by referring them compulsorily to conciliation or adjudication, by making the awards legally binding on the parties and by prohibiting strikes or lock-outs during the pendency of conciliation or adjudication proceedings and for two months thereafter. This rule also put a blanket ban on strikes which did not arise out of genuine trade disputes.

With the termination of the Second World War, Rule 81-A was about to lapse on
1st October, 1946, but it was kept alive by issuing an Ordinance in the exercise of the Government’s Emergency Powers. Then followed the Industrial Disputes Act, 1947. The provisions of this Act, as amended from time to time, have furnished the basis on which industrial jurisprudence in this country is founded.

**OBJECT AND SIGNIFICANCE OF THE ACT**

The Industrial Disputes Act, 1947 makes provision for the investigation and settlement of industrial disputes and for certain other purposes. It ensures progress of industry by bringing about harmony and cordial relationship between the employers and employees. Definitions of the words ‘industrial dispute, workmen and industry’ carry specific meanings under the Act and provide the framework for the application of the Act.

In the case of Workmen of Dimakuchi Tea Estate v. Dimakuchi Tea Estate, AIR 1958 S.C. 353, the Supreme Court laid down following objectives of the Act:

(i) Promotion of measures of securing and preserving amity and good relations between the employer and workmen.

(ii) Investigation and settlement of industrial disputes between employers and employers, employers and workmen, or workmen and workmen with a right of representation by registered trade union or federation of trade unions or an association of employers or a federation of associations of employers.

(iii) Prevention of illegal strikes and lock-outs.

(iv) Relief to workmen in the matter of lay-off and retrenchment.

(v) Promotion of collective bargaining.

This Act extends to whole of India. The Act was designed to provide a self-contained code to compel the parties to resort to industrial arbitration for the resolution of existing or apprehended disputes without prescribing statutory norms for varied and variegated industrial relating norms so that the forums created for resolution of disputes may remain unhampered by any statutory control and devise rational norms keeping pace with improved industrial relations reflecting and imbibing socio-economic justice. This being the object of the Act, the Court by interpretative process must strive to reduce the field of conflict and expand the area of agreement and show its preference for upholding agreements sanctified by mutuality and consensus in larger public interest, namely, to eschew industrial strife, confrontation and consequent wastage (Workmen, Hindustan Lever Limited v. Hindustan Lever Limited, (1984) 1 SCC 728).

**Test your knowledge**

Which was the first enactment that dealt with the settlement of industrial disputes?

(a) Employers' and Workmen's Disputes Act, 1850

(b) Employers' and Workmen's Disputes Act, 1860

(c) Trade Disputes Act, 1860

(d) Trade Disputes Act, 1929

Correct answer: (b)
The Act applies to an existing and not to a dead industry. It is to ensure fair wages and to prevent disputes so that production might not be adversely affected. It applies to all industries irrespective of religion or caste of parties. It applies to the industries owned by Central and State Governments too (Hospital Employees Union v. Christian Medical College, (1987) 4 SCC 691).

IMPORTANT DEFINITIONS

(i) Industry

"Industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft, or industrial occupation or avocation of workmen. [Section 2(j)]

The Supreme Court carried out an indepth study of the definition of the term industry in a comprehensive manner in the case of Bangalore Water Supply and Sewerage Board v. A Rajappa, AIR 1978 SC 548 (hereinafter referred to as Bangalore Water Supply case), after considering various previous judicial decisions on the subject and in the process, it rejected some of them, while evolving a new concept of the term "industry".

Tests for determination of “industry”

After discussing the definition from various angles, in the above case, the Supreme Court, laid down the following tests to determine whether an activity is covered by the definition of “industry” or not. It is also referred to as the triple test.

I. (a) Where there is (i) systematic activity, (ii) organised by co-operation between employer and employee, (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g., making, on a large scale, prasad or food) prima facie, there is an “industry” in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant wherever the undertaking is whether in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organisation is a trade or business, it does not cease to be one because of philanthrophy animating the undertaking.

II. Although Section 2(i) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to over-stretch itself. Undertaking must suffer a contextual and associational shrinkage, so also, service, calling and the like. This yields the inference that all organised activity possessing the triple elements in (i) although not trade or business, may still be “industry”, provided the nature of the activity, viz., the employer - employee basis, bears resemblance to what we find in trade or business. This takes into the fold of “industry”, undertaking, callings and services, adventures analogous to the carrying on of trade or business. All features, other than
the methodology of carrying on the activity, viz., in organising the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms, there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition, nothing less, nothing more.

Hence, the Supreme Court observed that professions, clubs, educational institutions, co-operatives, research institutes, charitable projects and other kindred adventures, if they fulfil the triple tests listed in (1), cannot be exempted from the scope of Section 2(j). A restricted category of professions, clubs, co-operatives and gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

If in a pious or altruistic mission many employ themselves, free or for small honorarium or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then the institution is not an industry even if stray servants, manual or technical, are hired. Such undertakings alone are exempt - not other generosity compassion, developmental compassion or project.

Criteria for determining dominant nature of undertaking

The Supreme Court, in Bangalore Water Supply case laid down the following guidelines for deciding the dominant nature of an undertaking:

(a) Where a complex of activities, some of which qualify for exemption, others not, involves the employees on the total undertaking. Some of whom are not “workmen” or some departments are not productive of goods and services if isolated, nature of the department will be the true test. The whole undertaking will be “industry” although those who are not “workmen” definition may not be benefit by the status.

(b) Notwithstanding with previous clause, sovereign functions strictly understood alone qualify for exemption and not the welfare activities or economic adventures undertaken by Government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove an undertaking from the scope of the Act.
The above decision of the Supreme Court has a wide sweep. The triple test along with dominant nature criteria will cover almost the entire labour force in the country. The charitable or missionary institutions, hospital, educational and other research institutions, municipal corporations, firms of chartered accountants, solicitors’ firms, etc., which were not held to be “industry” earlier will now are covered by the definition of “industry”.

Now let us see whether the following activities would fall under industry or not:

1. **Sovereign functions:** Sovereign functions strictly understood alone qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies. Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable then they can be considered to come within Section 2(j). (*Bangalore Water Supply case*). If a department of a municipality discharged many functions, some pertaining to “industry” and other non-industrial activities, the predominant function of the department shall be the criterion for the purposes of the Act (*Corpn. of City of Nagpur v. Employees*, AIR 1960 SC 675).

2. **Municipalities:** Following Departments of the municipality were held, to be “industry” (i) Tax (ii) Public Conveyance (iii) Fire Brigade (iv) Lighting (v) Water Works (vi) City Engineers (vii) Enforcement (Encroachment) (viii) Sewerage (ix) Health (x) Market (xi) Public Gardens (xii) Education (xiii) Printing Press (xiv) Building and (xv) General administration. If a department of a municipality discharges many functions some pertaining to industry and others non-industrial, the predominant function of the department shall be the criterion for the purpose of the Act.

3. **Hospitals and Charitable institutions:** Exemptions to charitable institutions under Section 32(5) of Payment of Bonus Act is not relevant to the construction of Section 2(j). *FICCI v. Workmen*, (1972) 1 SCC 40, there is an industry in the enterprise, provided the nature of the activity, namely the employer-employee basis bears resemblance to what is found in trade or business. This takes into the fold of industry undertakings, callings, services and adventures ‘analogous to the carrying on of trade or business’. Absence of profit motive or gainful objective is irrelevant for “industry”, be the venture in the public, joint, private or other sector. The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

If the organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking. Charitable institutions fall into three categories: (a) those that yield profit but the profits are siphoned off for altruistic purposes; (b) those that make no profit but hire the services of employees as in any other business, but the goods and services which are the output, are made available at a low or at no cost to the indigent poor; and (c) those that are oriented on a humane mission fulfilled by men who work, not because they are paid wages, but because they share the passion for the cause and derive job satisfaction from their contribution. The first two are industries but not the third, on the assumption that they all involve co-operation between employers and employees (*Bangalore Water Supply case*). The following institutions are held to be “industry”: (1) State Hospital (*State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610); (2) Ayurvedic Pharmacy and Hospital (*Lalit Hari Ayurvedic College Pharmacy v.*
4. Clubs: A restricted category of professions, clubs, co-operatives and even Gurukulas may qualify for exemption if, in simple ventures, substantially and going by the dominant nature criterion substantively, no employees are entertained, but in minimal matters marginal employees are hired without destroying the non-employee character of the unit. But larger clubs are “industry” (as per Bangalore Water Supply case).

5. Universities, Research Institutions etc.: As regards institutions, if the triple tests of systematic activity, cooperation between employer and employee and production of goods and services were to be applied, a university, a college, a research institute or teaching institution will be “industry”. The following institutions were held to be “industry”: Ahmedabad Textile Industries Research Association, Tocklai Experimental Station. Indian Standard Institute, and Universities. However Physical Research Laboratory, Ahmedabad was held not to be an Industry by the Supreme Court (1997 Lab. IC 1912 SC). Since it is carrying on research not for the benefit of others and moreover, it is not engaged in commercial or industrial activity.

6. Professional Firms: A solicitors establishment can be an “industry” (as per Bangalore Water Supply case). Regarding liberal professions like lawyers, doctors, etc., the test of direct cooperation between capital and labour in the production of goods or in the rendering of service or that cooperation between employer and employee is essential for carrying out the work of the enterprise. The personal character of the relationship between a doctor or a lawyer with his professional assistant may be of such a kind that requires complete confidence and harmony in the productive activity in which they may be cooperating.

7. Voluntary services: If in a pious or altruistic mission, many employ themselves free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the Holiness, divinity or Central personality and the services are supplied free or at a nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then the institution is not an industry even if stray servants manual or technical are hired. Such eleemosynary or like undertakings alone are exempted. (Bangalore Water Supply case)

Following are held to be “industry”: Co-operative Societies, Federation of Indian Chamber of Commerce, Company carrying on agricultural operations, Bihar Khadi Gramodyog Sangh, Indian Navy Sailors Home, Panchayat Samiti, Public Health Department of the State Government, Forest Department of Govt., Zoo; Primary Health Centres, and Indian Institute of Petroleum. Some other instances of “Industry are: Rajasthan Co-operative Credit Institutions Cadre Authority (1985 Lab IC 1023 (Raj.), A trust for promoting religious, social and educational life but also undertaking commercial activities (1987) 1 LLJ 81, M.P. Khadi and Village Industries Board, Housing Board, Dock Labour Board, Management of a private educational institution (R.C.K. Union v. Rajkumar College, (1987) 2 LLN 573).

But the following are held to be not “Industry”: Posts and Telegraphs Department.
Section 2(j) shall stand amended by Amendment Act of 1982.

Section 2(j) under Amendment Act, 1982 [date of effect is yet to be notified]

2(j) “Industry” means any systematic activity carried on by co-operation between an employer and his workmen (Whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not:

(i) any capital has been invested for the purpose of carrying on such activity; or

(ii) such activity is carried on with a motive to make any gain or profit, and includes:

(a) any activity of the Dock Labour Board established under Section 5A of the Dock Workers (Regulations of Employment) Act, 1948, (9 of 1948);

(b) any activity relating to the promotion of sales or business or both carried on by an establishment,

but does not include:

(1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation: For the purpose of this sub-clause, “agricultural operation” does not include any activity carried on in a plantation as defined in clause (f) of Section 2 of the Plantations Labour Act, 1951; or

(2) hospitals or dispensaries; or

(3) educational, scientific, research to training institutions; or

(4) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) khadi or village industries; or

(6) any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research atomic energy and space; or

(7) any domestic service; or
(8) any activity, being a profession practised by an individual or body of individuals, if the number of persons employed by the individuals or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals in relation to such activity is less than ten.

**Test your knowledge**

Which of the following institutions are not considered “Industry”?  
(a) Posts and Telegraphs Department  
(b) Central Institute of Fisheries  
(c) Construction and maintenance of National and State Highways  
(d) Dock Labour Board

**Correct answer: (a), (b) and (c)**

(ii) **Industrial Dispute**

“Industrial Dispute” means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. [Section 2(k)]

The above definition can be analysed and discussed under the following heads:

(i) There should exist a dispute or difference;

(ii) The dispute or difference should be between:
   (a) employer and employer;  
   (b) employer and workmen; or  
   (c) workmen and workmen.

(iii) The dispute or difference should be connected with (a) the employment or non-employment, or (b) terms of employment, or (c) the conditions of labour of any person;

(iv) The dispute should relate to an industry as defined in Section 2(j).

(i) **Existence of a dispute or difference**

The existence of a dispute or difference between the parties is central to the definition of industrial dispute. Ordinarily a dispute or difference exists when workmen make demand and the same is rejected by the employer. However, the demand should be such which the employer is in a position to fulfil. The dispute or difference should be fairly defined and of real substance and not a mere personal

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1. It may be noted that the amendment has not been enforced so far.
quarrel or a grumbling or an agitation. The term “industrial dispute” connotes a real and substantial difference having some element of persistency, and likely, and if not adjusted, to endanger the industrial peace of the community. An industrial dispute exists only when the same has been raised by the workmen with the employer. A mere demand to the appropriate Government without a dispute being raised by the workmen with their employer regarding such demand, cannot become an industrial dispute (Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal 1968-I L.L.J. 834 S.C.). However, in Bombay Union of Journalists v. The Hindu, AIR, 1964 S.C. 1617, the Supreme Court observed that for making reference under Section 10, it is enough if industrial dispute exists or is apprehended on the date of reference. Therefore, even when no formal demands have been made by the employer, industrial dispute exists if the demands were raised during the conciliation proceedings. When an industrial dispute is referred for adjudication the presumption is that, there is an industrial dispute (Workmen v. Hindustan Lever Ltd., (1984) 4 SCC 392).

Unless there is a demand by the workmen and that demand is not complied with by the management, there cannot be any industrial dispute within the meaning of Section 2(k). Mere participation by the employer in the conciliation proceedings will not be sufficient (W.S. Insulators of India Ltd. v. Industrial Tribunal, Madras 1977-II Labour Law Journal 225).

(ii) Parties to the dispute

Most of the industrial disputes exist between the employer and the workmen and the remaining combination of persons who can raise the dispute, has been added to widen the scope of the term “industrial dispute”. So the question is who can raise the dispute? The term “industrial dispute” conveys the meaning that the dispute must be such as would affect large groups of workmen and employers ranged on opposite sides. The disputes can be raised by workmen themselves or their union or federation on their behalf. This is based on the fact that workmen have right of collective bargaining. Thus, there should be community of interest in the dispute.

It is not mandatory that the dispute should be raised by a registered Trade Union. Once it is shown that a body of workmen either acting through their union or otherwise had sponsored a workmen’s case, it becomes an industrial dispute (Newspaper Ltd., Allahabad v. Industrial Tribunal, A.I.R. 1960 S.C. 1328). The dispute can be raised by minority union also. Even a sectional union or a substantial number of members of the union can raise an industrial dispute. However, the members of a union who are not workmen of the employer against whom the dispute is sought to be raised, cannot by their support convert an individual dispute into an industrial dispute. In other words, persons who seek to support the cause must themselves be directly and substantially interested in the dispute and persons who are not the employees of the same employer cannot be regarded as so interested. But industrial dispute can be raised in respect of non-workmen (Workmen v. Cotton Greaves & Co. Ltd. 1971 2 SCC 658). Industrial dispute can be initiated and continued by legal heirs even after the death of a workman (LAB 1C 1999 Kar. 286).

Individual dispute whether industrial dispute?

Till the provisions of Section 2-A were inserted in the Act, it has been held by the Supreme Court that an individual dispute per se is not industrial dispute. But it can develop into an industrial dispute when it is taken up by the union or substantial
number of workmen (Central Province Transport Service v. Raghunath Gopal Patwardhan, AIR 1957 S.C. 104). This ruling was confirmed later on in the case of Newspaper Ltd. v. Industrial Tribunal. In the case of Workmen of Dimakuchi Tea Estate v. Dimakuchi Tea Estate (1958) I. L.L.J. 500, the Supreme Court held that it is not that dispute relating to “any person” can become an industrial dispute. There should be community of interest. A dispute may initially be an individual dispute, but the workmen may make that dispute as their own, they may espouse it on the ground that they have a community of interest and are directly and substantially interested in the employment, non-employment, or conditions of work of the concerned workmen. All workmen need not to join the dispute. Any dispute which affects workmen as a class is an industrial dispute, even though, it might have been raised by a minority group. It may be that at the date of dismissal of the workman there was no union. But that does not mean that the dispute cannot become an industrial dispute because there was no such union in existence on that date. If it is insisted that the concerned workman must be a member of the union on the date of his dismissal, or there was no union in that particular industry, then the dismissal of such a workman can never be an industrial dispute although the other workmen have a community of interest in the matter of his dismissal and the cause for which on the manner in which his dismissal was brought about directly and substantially affects the other workmen. The only condition for an individual dispute turning into an industrial dispute, as laid down in the case of Dimakuchi Tea Estate is the necessity of a community of interest and not whether the concerned workman was or was not a member of the union at the time of his dismissal. Further, the community of interest does not depend on whether the concerned workman was a member or not at the date when the cause occurred, for, without his being a member the dispute may be such that other workmen by having a common interest therein would be justified in taking up the dispute as their own and espousing it. Whether the individual dispute has been espoused by a substantial number of workmen depends upon the facts of each case.

If after supporting the individual dispute by a trade union or substantial number of workmen, the support is withdrawn subsequently, the jurisdiction of the adjudicating authority is not affected. However, at the time of making reference for adjudication, individual dispute must have been espoused, otherwise it will not become an industrial dispute and reference of such dispute will be invalid.

Test your knowledge

State whether the following statement is “True” or “False”

Payment of pension cannot be a matter of an industrial dispute.

- True
- False

Correct answer: False

(iii) Subject matter of dispute

The dispute should relate to employment or non-employment or terms of employment or conditions of labour of any person.
The meaning of the term “employment or non-employment” was explained by Federal Court in the case of *Western India Automobile Association v. Industrial Tribunal*. If an employer refuses to employ a workman dismissed by him, the dispute relates to non-employment of workman. But the union insists that a particular person should not be employed by the employer, the dispute relates to employment of workman. Thus, the “employment or non-employment” is concerned with the employers failure or refusal to employ a workman. The expression “terms of employment” refers to all terms and conditions stated in the contract of employment. The expression terms of employment would also include those terms which are understood and applied by parties in practice or, habitually or by common consent without ever being incorporated in the Contract (*Workmen v. Hindustan Lever Ltd.*, 1984 1 SCC 392).

The expression “condition of labour” is much wider in its scope and usually it was reference to the amenities to be provided to the workmen and the conditions under which they will be required to work. The matters like safety, health and welfare of workers are also included within this expression.

It was held that the definition of industrial dispute in Section 2(k) is wide enough to embrace within its sweep any dispute or difference between an employer and his workmen connected with the terms of their employment. A settlement between the employer and his workmen affects the terms of their employment. Therefore *prima facie*, the definition of Industrial dispute in Section 2(k) will embrace within its sweep any fraudulent and involuntary character of settlement. Even a demand can be made through the President of Trade Union (1988 1 LLN 202). Dispute between workmen and employer regarding confirmation of workman officiating in a higher grade is an industrial dispute (1984 4 SCC 392).

Employer’s failure to keep his verbal assurance, claim for compensation for loss of business; dispute of workmen who are not employees of the Purchaser who purchased the estate and who were not yet the workmen of the Purchaser’s Estate, although directly interested in their employment, etc. were held to be not the industrial disputes. Payment of pension can be a subject matter of an industrial dispute (*ICI India Ltd. v. Presiding Officer L.C.*, 1993 LLJ II 568).

(iv) Dispute in an “Industry”

Lastly, to be an “industrial dispute”, the dispute or difference must relate to an industry. Thus, the existence of an “industry” is a condition precedent to an industrial dispute. No industrial dispute can exist without an industry. The word “industry” has been fully discussed elsewhere. However, in *Pipraich Sugar Mills Ltd. v. P.S.M. Mazdoor Union*, A.I.R. 1957 S.C. 95, it was held that an “industrial dispute” can arise only in an “existing industry” and not in one which is closed altogether.

The mere fact that the dispute comes under the definition of Section 2(k) does not automatically mean that the right sought to be enforced is one created or recognised and enforceable only under the Act (*National and Grindlays Bank Employees’ Union, Madras v. I. Kannan* (Madras), 1978 Lab. I.C. 648). Where the right of the employees is not one which is recognised and enforceable under the Industrial Disputes Act, the jurisdiction of the Civil Court is not ousted.
(iii) Workman

"Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be expressed or implied and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes:

(a) any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or

(b) any person whose dismissal, discharge or retrenchment has led to that dispute,

but does not include any such person:

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950 or the Navy Act, 1957; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who is employed in a supervisory capacity drawing more than Rs. 1,600 per month as wages; or

(v) who is exercising either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature. [Section 2(s)]

Some of the expressions used in the definition of "workman" have been the subject of judicial interpretation and hence they have been discussed below:

(a) Employed in "any industry"

To be a workman, a person must have been employed in an activity which is an "industry" as per Section 2(j). Even those employed in operation incidental to such industry are also covered under the definition of workman.

In the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. L.A.T., AIR 1964 S.C. 737, the Supreme Court held that 'malis' looking after the garden attached to bungalows provided by the company to its officers and directors, are engaged in operations incidentally connected with the main industry carried on by the employer. It observed that in this connection it is hardly necessary to emphasise that in the modern world, industrial operations have become complex and complicated and for the efficient and successful functioning of any industry, several incidental operations are called in aid and it is the totality of all these operations that ultimately constitutes the industry as a whole. Wherever it is shown that the industry has employed an employee to assist one or the other operation incidental to the main industrial operation, it would be unreasonable to deny such an employee the status of a workman on the ground that his work is not directly concerned with the main work or operation of the industry.
(b) Person employed

A person cannot be a workman unless he is employed by the employer in any industry. The relationship of employer and workman is usually supported by a contract of employment which may be expressed or implied. This is also a must for regarding an apprentice as a worker (Achutan v. Babar, 1996-LLR-824 Ker.). But such a question cannot be derived merely on the basis of apprenticeship contract (R.D. Paswan v. L.C., 1999 LAB 1C Pat 1026). The employee agrees to work under the supervision and control of his employer. Here one must distinguish between contract for employment or service and contract of employment or service. In the former, the employer can require what is to be done but in the latter, he can not only order what is to be done, but also how it shall be done. In the case of contract for employment, the person will not be held as a 'workman' but only an 'independent contractor'. There should be due control and supervision by the employer for a master and servant relationship (Dharangadhara Chemical Works Ltd. v. State of Saurashtra, AIR 1957 SC 264). Payment on piece rate by itself does not disprove the relationship of master and servant (1983 4 SCC 464). Even a part time employee is a worker (P.N. Gulati v. Labour Commissioner 1977 (35) FLR 35). Since he is under an obligation to work for fixed hours every day, jural relationship of master and servant would exist. A casual worker is nonetheless a workman (G.Yeddi Reddi v. Brooke Bond India Ltd., 1994 Lab 1C 186).

(c) Employed to do skilled or unskilled etc.

Only those persons who are engaged in the following types of work are covered by the definition of "workman":

(i) Skilled or unskilled manual work;
(ii) Supervisory work;
(iii) Technical work;
(iv) Clerical work.

Where a person is doing more than one work, he must be held to be employed to do the work which is the main work he is required to do (Burma Shell Oil Storage & Distributing Co. of India v. Burma Shell Management Staff Association, AIR 1971 SC 922). Manual work referred in the definition includes work which involves physical exertion as distinguished from mental or intellectual exertion.

A person engaged in supervisory work will be a workman only if he is drawing more than Rs. 1,600 per month as wages. The designation of a person is not of great importance, it is the nature of his duties which is the essence of the issue. If a person is mainly doing supervisory work, but incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and conversely, if the main work done is of clerical nature, the mere fact that some supervisory duties are also carried out incidentally, will not convert his employment as a clerk into one in supervisory capacity (Anand Bazar Patrika (P) Ltd. v. Its Workmen, (1969) II L.L.J. 670). In other words, the dominant purpose of employment must be taken into account at first and the gloss of additional duties to be rejected, while determining status and character of the job (AGR Rao v. Ciba Geigy AIR 1985 SC 985). The work of labour officer in jute mill involving exercise of initiative, tact and independence is a supervisory work. But the work of a teller in a bank does not show any element of supervisory character.
Whether teachers are workmen or not

After amendment of Section 2(s) of the Act, the issue whether “teachers are workmen or not” was decided in many cases but all the cases were decided on the basis of definition of workman prior to amendment. The Supreme Court in Sunderambai v. Government of Goa [AIR (1988) SC 1700. (1989) LAB 1C 1317] held that the teachers employed by the educational institution cannot be considered as workmen within the meaning of Section 2(s) of the Act, as imparting of education which is the main function of the teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. The Court in this case also said that manual work comprises of work involving physical exertion as distinct from mental and intellectual exertion. The teacher necessarily performs intellectual duties and the work is mental and intellectual as distinct from manual.

A person doing technical work is also held as a workman. A work which depends upon the special training or scientific or technical knowledge of a person is a technical work. Once a person is employed for his technical qualifications, he will be held to be employed in technical work irrespective of the fact that he does not devote his entire time for technical work. Thus, the person doing technical work such as engineers, foreman, technologist, medical officer, draughtsman, etc., will fall within the definition of “workman”. A medical representative whose main and substantial work is to do canvassing for promotion of sales is not a workman within the meaning of this Section (1990 Lab IC 24 Bom. DB). However, a salesman, whose duties included manual as well as clerical work such as to attend to the customer, prepare cash memos, to assist manager in daily routine is a workman (Carona Sahu Co. Ltd. v. Labour Court 1993 I LLN 300). A temple priest is not a workman (1990 1 LLJ 192 Ker.).

Test your knowledge

State whether the following statement is “True” or “False”

A medical representative whose main and substantial work is to do canvassing for promotion of sales is a workman.

Correct answer: False

Person employed mainly in managerial and administrative capacity

Persons employed mainly in the managerial or administrative capacity have been excluded from the definition of “workman”. Development officer in LIC is a workman (1983 4 SCC 214). In Standard Vacuum Oil Co. v. Commissioner of Labour, it was observed that if an individual has officers subordinate to him whose work he is required to oversee, if he has to take decision and also he is responsible for ensuring that the matters entrusted to his charge are efficiently conducted, and an ascertainable area or section of work is assigned to him, an inference of a position of management would be justifiable. Occasional entrustment of supervisory, managerial or administrative work, will not take a person mainly discharging clerical duties, out of purview of Section 2(s).

(iv) Strike

“Strike” means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment. [Section 2(q)]
Strike is a weapon of collective bargaining in the armour of workers. The following points may be noted regarding the definition of strike:

(i) Strike can take place only when there is a cessation of work or refusal to work by the workmen acting in combination or in a concerted manner. Time factor or duration of the strike is immaterial. The purpose behind the cessation of work is irrelevant in determining whether there is a strike or not. It is enough if the cessation of work is in defiance of the employers authority.

Proof of formal consultations is not required. However, mere presence in the striking crowd would not amount to strike unless it can be shown that there was cessation of work.

(ii) A concerted refusal or a refusal under a common understanding of any number of persons to continue to work or to accept employment will amount to a strike. A general strike is one when there is a concert of combination of workers stopping or refusing to resume work. Going on mass casual leave under a common understanding amounts to a strike. However, the refusal by workmen should be in respect of normal lawful work which the workmen are under an obligation to do. But refusal to do work which the employer has no right to ask for performance, such a refusal does not constitute a strike (Northbrooke Jute Co. Ltd. v. Their Workmen, AIR 1960 SC 879). If on the sudden death of a fellow-worker, the workmen acting in concert refuse to resume work, it amounts to a strike (National Textile Workers' Union v. Shree Meenakshi Mills, (1951) II L.L.J. 516).

(iii) The striking workman, must be employed in an “industry” which has not been closed down.

(iv) Even when workmen cease to work, the relationship of employer and employee is deemed to continue albeit in a state of belligerent suspension. In Express Newspaper (P) Ltd. v. Michael Mark, 1962-II, L.L.J. 220 S.C., the Supreme Court observed that if there is a strike by workmen, it does not indicate, even when strike is illegal, that they have abandoned their employment. However, for illegal strike, the employer can take disciplinary action and dismiss the striking workmen.

TYPES OF STRIKE AND THEIR LEGALITY

(i) Stay-in, sit-down, pen-down or tool-down strike

In all such cases, the workmen after taking their seats, refuse to do work. Even when asked to leave the premises, they refuse to do so. All such acts on the part of the workmen acting in combination, amount to a strike. Since such strikes are directed against the employer, they are also called primary strikes. In the case of Punjab National Bank Ltd. v. All India Punjab National Bank Employees' Federation, AIR 1960 SC 160, the Supreme Court observed that on a plain and grammatical construction of this definition it would be difficult to exclude a strike where workmen enter the premises of their employment and refuse to take their tools in hand and start their usual work. Refusal under common understanding not to work is a strike. If in pursuance of such common understanding the employees enter the premises of the Bank and refuse to take their pens in their hands that would no doubt be a strike under Section 2(q).

(ii) Go-slow
Go-slow does not amount to strike, but it is a serious case of misconduct.

In the case of Bharat Sugar Mills Ltd. v. Jai Singh, (1961) II LLJ 644 (647) SC, the Supreme Court explained the legality of go-slow in the following words: “Go-slow which is a picturesque description of deliberate delaying of production by workmen pretending to be engaged in the factory, is one of the most prenicious practices that discontented and disgruntled workmen sometimes resort to. Thus, while delaying production and thereby reducing the output, the workmen claim to have remained employed and entitled to full wages. Apart from this, ‘go-slow’ is likely to be much more harmful than total cessation of work by strike. During a go-slow much of the machinery is kept going on at a reduced speed which is often extremely damaging to the machinery parts. For all these reasons, ‘go-slow’ has always been considered a serious type of misconduct.”

In another case, it was observed that slow-down is an insidious method of undermining the stability of a concern and Tribunals certainly will not countenance it. It was held that ‘go slow’ is a serious misconduct being a covert and a more damaging breach of the contract of employment (SU Motors v. Workman 1990-II LLJ 39). It is not a legitimate weapon in the armoury of labour. It has been regarded as a misconduct.

(iii) Sympathetic strike

Cessation of work in the support of the demands of workmen belonging to other employer is called a sympathetic strike. This is an unjustifiable invasion of the right of employer who is not at all involved in the dispute. The management can take disciplinary action for the absence of workmen. However, in Ramalingam v. Indian Metallurgical Corporation, Madras, 1964-I L.L.J. 81, it was held that such cessation of work will not amount to a strike since there is no intention to use the strike against the management.

(iv) Hunger strike

Some workers may resort to fast on or near the place of work or residence of the employer. If it is peaceful and does not result in cessation of work, it will not constitute a strike. But if due to such an act, even those present for work, could not be given work, it will amount to strike (Pepariach Sugar Mills Ltd v. Their Workmen).

(v) Work-to-rule

Since there is no cessation of work, it does not constitute a strike.

Test your knowledge

Which of the following types of strikes are called ‘primary strikes’?

(a) Stay-in  
(b) Tool-down  
(c) Pen-down  
(d) Go-slow

Correct answer: (a), (b) and (c)
LEGALITY OF STRIKE

The legality of strike is determined with reference to the legal provisions enumerated in the Act and the purpose for which the strike was declared is not relevant in directing the legality. Section 10(3), 10A(4A), 22 and 23 of the Act deals with strike. Sections 22 and 23 impose restrictions on the commencement of strike while Sections 10(3) and 10A(4A) prohibit its continuance.

The justifiability of strike has no direct relation to the question of its legality and illegality. The justification of strike as held by the Punjab & Haryana High Court in the case of Matchwell Electricals of India v. Chief Commissioner, (1962) 2 LLJ 289, is entirely unrelated to its legality or illegality. The justification of strikes has to be viewed from the standpoint of fairness and reasonableness of demands made by workmen and not merely from the standpoint of their exhausting all other legitimate means open to them for getting their demands fulfilled.

The Supreme Court in Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Majdoor Sabha, AIR 1980 SC 1896 held that justifiability of a strike is purely a question of fact. Therefore, if the strike was resorted to by the workers in support of their reasonable, fair and bona fide demands in peaceful manner, then the strike will be justified. Where it was resorted to by using violence or acts of sabotage or for any ulterior purpose, then the strike will be unjustified.

As regards the wages to the workers strike period are concerned, the Supreme Court in Charakulam Tea Estate v. Their Workmen, AIR 1969 SC 998 held that in case of strike which is legal and justified, the workmen will be entitled to full wages for the strike period. Similar view was taken by the Supreme Court in Crompton Greaves Ltd. case 1978 Lab 1C 1379 (SC).

The Supreme Court in Statesman Ltd. v. Their Workman, AIR 1976 SC 758 held that if the strike is illegal or unjustified, strikers will not be entitled to the wages for the strike period unless considerate circumstances constraint a different cause. Similar view was taken by the Supreme Court in Madura Coats Ltd. v. The Inspector of Factories, Madurai, AIR 1981 SC 340.

The Supreme Court has also considered the situation if the strike is followed by lockout and vice versa, and both are unjustified, in India Marine Service Pvt. Ltd. v. Their Workman, AIR 1963 SC 528. In this case, the Court evolved the doctrine of “apportionment of blame” to solve the problem. According to this doctrine, when the workmen and the management are equally to be blamed, the Court normally awards half of the wages. This doctrine was followed by the Supreme Court in several cases. Thus, the examination of the above cases reveal that when the blame for situation is apportioned roughly half and half between the management and workmen, the workmen are given half of the wages for the period involved.

A division bench of the Supreme Court in the case of Bank of India v. TS Kelawala, (1990) 2 Lab 1C 39 held that the workers are not entitled to wages for the strike period. The Court observed that “the legality of strike does not always exempt the employees from the deduction of their salaries for the period of strike”. The
Court, further observed, “whether the strike is legal or illegal, the workers are liable to lose wages does not either make the strike illegal as a weapon or deprive the workers of it”.

(v) Lock-out

“Lock-out” means the temporary closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him. [Section 2(l)]

In lock out, the employer refuses to continue to employ the workman employed by him even though there is no intention to close down the unit. The essence of lock out is the refusal of the employer to continue to employ workman. Even if suspension of work is ordered, it would constitute lock out. But mere suspension of work, unless it is accompanied by an intention on the part of employer as a retaliation, will not amount to lock out.

Locking out workmen does not contemplate severance of the relationship of employer and the workmen. In the case Lord Krishna Sugar Mills Ltd. v. State of U.P., (1964) II LLJ 76 (All), a closure of a place of business for a short duration of 30 days in retaliation to certain acts of workmen (i.e. to teach them a lesson) was held to be a lock out. But closure is not a lock out.

(vi) Lay-off

“Lay-off” (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer to give employment due to following reasons, to a workman whose name appears on the muster-rools of his industrial establishment and who has not been retrenched:

(a) shortage of coal, power or raw materials, or
(b) accumulation of stocks, or
(c) break-down of machinery, or
(d) natural calamity, or
(e) for any other connected reason. [Section 2(kk)]

Explanation: Every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause.

Provided that if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose
during this second half of the shift for the day and is given employment, then, he shall be deemed to have been laid-off only for one-half of that day.

Provided further that if he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day.

From the above provisions, it is clear that lay-off is a temporary stoppage and within a reasonable period of time, the employer expects that his business would continue and his employees who have been laid-off, the contract of employment is not broken but is suspended for the time being. But in the case of M.A. Veirya v. C.P. Fernandez, 1956-I, L.L.J. 547 Bomb., it was observed that it is not open to the employer, under the cloak of “lay-off”, to keep his employees in a state of suspended animation and not to make up his mind whether the industry or business would ultimately continue or there would be a permanent stoppage and thereby deprive his employees of full wages. In other words, the lay-off should not be mala fide in which case it will not be lay-off. Tribunal can adjudicate upon it and find out whether the employer has deliberately and maliciously brought about a situation where lay-off becomes necessary. But, apart from the question of mala fide, the Tribunal cannot sit in judgement over the acts of management and investigate whether a more prudent management could have avoided the situation which led to lay-off (Tatanagar Foundry v. Their Workmen, A.I.R. 1962 S.C. 1533).

Further, refusal or inability to give employment must be due to (i) shortage of coal, power or raw materials, or (ii) accumulation of stock, or (iii) break-down of machinery, (iv) natural calamity, or (v) for any other connected reason. Financial stringency cannot constitute a ground for lay-off (Hope Textiles Ltd. v. State of MP, 1993 I LLJ 603).

Lastly, the right to lay-off cannot be claimed as an inherent right of the employer. This right must be specifically provided for either by the contract of employment or by the statute (Workmen of Dewan Tea Estate v. Their Management). In fact ‘lay-off’ is an obligation on the part of the employer, i.e., in case of temporary stoppage of work, not to discharge the workmen but to lay-off the workmen till the situation improves. Power to lay-off must be found out from the terms of contract of service or the standing orders governing the establishment (Workmen v. Firestone Tyre and Rubber Co., 1976 3 SCC 819).

There cannot be lay-off in an industrial undertaking which has been closed down. Lay-off and closure cannot stand together.

Test your knowledge

Which of the following are valid reasons for an employer declaring ‘Lay-off’?

(a) Shortage of coal, power or raw materials
(b) Accumulation of stocks
(c) Break-down of machinery
(d) Financial stringency

Correct answer: (a), (b) and (c)
**Difference between lay-off and lock-out**

1. In lay-off, the employer refuses to give employment due to certain specified reasons, but in lock-out, there is deliberate closure of the business and employer locks out the workers not due to any such reasons.

2. In lay-off, the business continues, but in lock-out, the place of business is closed down for the time being.

3. In a lock-out, there is no question of any wages or compensation being paid unless the lock-out is held to be unjustified.

4. Lay-off is the result of trade reasons but lock-out is a weapon of collective bargaining.

5. Lock-out is subject to certain restrictions and penalties but it is not so in case of lay-off.

However, both are of temporary nature and in both cases the contract of employment is not terminated but remains in suspended animation.

**(vii) Retrenchment**

"Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include:

(a) voluntary retirement of the workman; or

(b) retirement of the workman or reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.

(c) termination of the service of workman on the ground of continued ill-health.

Thus, the definition contemplates following requirements for retrenchment:

(i) There should be termination of the service of the workman.

(ii) The termination should be by the employer.

(iii) The termination is not the result of punishment inflicted by way of disciplinary action.

(iv) The definition excludes termination of service on the specified grounds or instances mentioned in it. [Section 2(oo)]

The scope and ambit of Section 2(oo) is explained in the case of Santosh Gupta v. State Bank of Patiala, (1980) Lab.I.C.687 SC, wherein it was held that if the definition of retrenchment is looked at unaided and unhampered by precedent, one is at once struck by the remarkably wide language employed and particularly the use of
the word ‘termination for any reason whatsoever’. If due weight is given to these words, i.e. they are to be understood as to mean what they plainly say, it is difficult to escape the conclusion that retrenchment must include every termination of service of a workman by an act of the employer. In the case of Punjab Land Development Corporation Ltd. v. Labour Court, Chandigarh, (1990) II LLJ 70 SC, the Supreme Court held that expression “retrenchment” means termination by employer of services of workman for any reason whatsoever except those expressly excluded in the Section itself.

The expression “for any reason whatsoever” in Section 2(oo) could not be safely interpreted to include the case of discharge of all workmen on account of bona fide closure of business, because for the application of definition, industry should be a working or a continuing or an existing industry, not one which is altogether a closed one. So the underlying assumption would be of course, that the undertaking is running as an undertaking and the employer continues to be an employer (Hariprasad Shivshankar Shukla v. A.D.Divakar, (1957) SCR 121), hereinafter referred to as Hariprasad case.

The Hariprasad case and some other decisions, lead to the unintended meaning of the term “retrenchment” that it operates only when there is surplus of workman in the industry which should be an existing one. Thus, in effect either on account of transfer of undertaking or on account of the closure of the undertaking, there can be no question of retrenchment within the meaning of the definition contained in Section 2(oo). To overcome this view, the Government introduced new Sections 25FF and 25FFF, providing that compensation shall be payable to workmen in case of transfer of an undertaking or closure of an undertaking to protect the interests of the workmen. Thus, the termination of service of a workman on transfer or closure of an undertaking was treated as ‘deemed retrenchment’, in result enlarging the general scope and ambit of the expression (retrenchment) under the Act.

The Supreme Court, clearing the misunderstanding created by earlier decisions stated in Punjab Land Development Corporation Ltd. case (1990 II LLJ SC 70), that the sole reason for the decision of the Constitution Bench in Hariprasad case was that the Act postulated the existence and continuance of an Industry and wherein the industry, the undertaking itself was closed down or transferred, the very substratum disappeared and the Act could not regulate industrial employment in the absence of an industry. The true position in that case was that Section 2(oo) and Section 25F could not be invoked since the undertaking itself ceased to exist. In fact, the Constitution Bench in that case was neither called upon to decide, nor did it decide, whether in a continuing business, retrenchment was confined only to discharge of surplus staff and the reference to discharge the surplusage was for the purpose of contrasting the situation in that case (i.e.) workmen were being retrenched because of cessation of business and those observations did not constitute reasons for the decision. What was decided was that if there was no continuing industry, the provision could not apply. In fact, the question whether retrenchment did or did not include other terminations was never required to be decided in Hariprasad case and could not therefore have been or be taken to have been decided in that case.
The Supreme Court in the *Punjab Land Development Corporation Ltd.* case clarified that the expression “retrenchment” does not mean only termination by the employer of service of surplus labour for any reason whatsoever. The expression “retrenchment” is not to be understood in the narrow, natural and contextual meaning but is to be understood in its wider literal meaning to mean termination of service of workman for any reason whatsoever.

The expression “for any reason whatsoever” in Section 2(oo), must necessarily draw within its ambit, the termination of the workers services due to reasons such as economy, rationalisation in industry, installation or improvement of plant or technique and the like. It is in conjunction with such reasons that the words “any reason whatsoever” must be read and construed (*Kamleshkumari Rajanikant Mehta v. Presiding Officer, Central Government, Industrial Tribunal No.1*, (1980) Lab I.C.1116).

A casual labourer is a workman and as such his termination would amount to retrenchment within Section 2(oo); 1981-II Labour Law Journal 82 (DB) (Cal.). Where persons are employed for working on daily wages their disengagement from service or refusal to employ for a particular work cannot be construed to be a retrenchment and that concept of retrenchment cannot be stretched to such an extent as to cover such employees (*U.P. v. Labour Court, Haldwani*, 1999 (81) FLR 319 All.). The Supreme Court observed that if the termination of an employee’s services is a punishment inflicted by way of disciplinary action, such termination would amount to retrenchment (*SBI v. Employees of SBI*, AIR 1990 SC 2034). But where the workmen were engaged on casual basis for doing only a particular urgent work, the termination of their service after the particular work is over, is not a retrenchment (*Tapan Kumar Jana v. The General Manager, Calcutta Telephones*, (1980) Lab.I.C.508).

In *Parry & Co. Ltd. v. P.C. Pal*, (1970) II L.L.J. 429, the Supreme Court observed that the management has a right to determine the volume of its labour force consistent with its business or anticipated business and its organisation. If for instance a scheme of reorganisation of the business of the employer results in surpluses of employees, no employer is expected to carry the burden of such economic dead weight and retrenchment has to be accepted as inevitable, however, unfortunate it be.

The fact that the implementation of a reorganisation scheme adopted by an employer for reasons of economy and convenience would lead to the discharge of some of the employees, will have no material bearing on the question as to whether the reorganisation has been adopted by the employer *bona fide* or not. The retrenchment should be *bona fide* and there should be no victimisation or unfair labour practice on the part of the employer. The Supreme Court in the case of *Workmen of Subong Tea Estate v. Subong Tea Estate*, (1964) 1 L.L.J. 333, laid down following principles with regard to retrenchment:

1. The management can retrench its employees only for proper reasons, which means that it must not be actuated by any motive of victimisation or any unfair labour practice.
2. It is for the management to decide the strength of its labour force, and the number of workmen required to carry out efficiently the work in his industrial undertaking must always be left to be determined by the management in its discretion.

3. If the number of employees exceeds the reasonable and legitimate needs of the undertaking, it is open to the management to retrench them.

4. Workmen may become surplus on the ground of rationalisation or on the group of economy reasonably and bona fide adopted by the management or of other industrial or trade reasons.

5. The right of the employer to effect retrenchment cannot normally be challenged but when there is a dispute in regard to the validity of the retrenchment, it would be necessary for the tribunal to consider whether the impugned retrenchment was justified for proper reasons and it would not be open to the employer either capriciously or without any reason at all to say that it proposes to reduce its labour for no rhyme or reason.

The Section does not make any difference between regular and temporary appointment or an appointment on daily wage basis or appointment of a person not possessing requisite qualification (L.L.J.-II-1996 Mad. 216) or whether the appointment was held to be in accordance with law or not. In Prabhudayal Jat v. Alwar Sehkar Bhumi Vikas Bank Ltd., (1997) Lab IC Raj. 944, where the services of an employee irregularly appointed was terminated, the Court held, it was a fit case of retrenchment.

In Anand Behari v. RSRTC, AIR 1991 SC 1003, the services of bus conductors, were terminated on the ground of weak eye sight which was below the standard requirement. Supreme Court held that the termination is due to continued ill-health which has to be construed relatively in its context, and that must have a bearing on the normal discharge of their duties. Ill-health means disease, physical defect, infirmity or unsoundness of mind. Termination on account of lack of confidence is stigmatic and does not amount to retrenchment (Chandulal v. Pan American Airways, (1985) 2 SCC 727). Striking of the name of a worker from the rolls on the ground of absence for a specific period, provided under Standing Orders amounts to retrenchment (1993 II LLJ 696). Disengagement of workers of seasonal factories after season is not a retrenchment (LLJ I 98 SC 343).

(viii) Award

“Award” means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under Section 10-A. [Section 2(b)]

This definition was analysed in the case of Cox & Kings (Agents) Ltd. v. Their Workmen, AIR 1977 S.C. 1666 as follows: The definition of “award” is in two parts. The first part covers a determination, final or interim, of any industrial dispute. The second part takes in a determination of any question relating to an industrial dispute. However, basic thing to both the parts is the existence of an industrial dispute, actual or apprehended. The ‘determination contemplated is of the industrial dispute or a question relating thereto on merits.
The word ‘determination’ implies that the Labour Court or the Tribunal should adjudicate the dispute upon relevant materials and exercise its own judgement. The definition of ‘award’ also includes the ‘interim award’, but it should be distinguished from ‘interim relief’ granted by Tribunal under Section 10(4). (Hotel Imperial v. Hotel Workers Union). However, in Management of Bihar State Electricity Board v. Their Workmen, it was held that since there is no provision for interim relief in the Act, it will take the form of interim award. It may be noted that if the ‘interim relief’ does not take the form of ‘interim award’, the violation of it, will not attract any penalty under the Act.

Further, if an industrial dispute has been permitted to be withdrawn by an order of the adjudication authority, it will not amount to an award because there is no determination of the dispute on merit. However, position would be different if the dispute has been settled by a private agreement and the Tribunal has been asked to make award in terms of the agreement. The Delhi High Court in Hindustan Housing Factory Employees Union v. Hindustan Housing Factory, has held that such an award is binding on the parties provided it is not tainted with fraud, coercion, etc. However, it is necessary that the Tribunal brings its own judicial mind with regard to such a compromise so that there is determination of the dispute.

Lastly, if any party to the dispute does not appear before the adjudication authority, the Tribunal can proceed ex-parte but cannot make award unless it has exercised its mind. Thus, the order of dismissal of the reference, for default, does not amount to award.

(ix) Appropriate Government

“Appropriate Government” means:

(i) in relation to any industrial disputes concerning any industry carried on by or under the authority of the Central Government or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government or in relation to an industrial dispute concerning a Dock Labour Board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 or the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956, or the Employees’ State Insurance Corporation established under Section 3 of the Employees’ State Insurance Act, 1948 or the Board of Trustees constituted under Section 3-A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 or the Central Board of Trustees and the State Boards of Trustees constituted under Section 5-A and Section 5-B, respectively, of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 or the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956 or the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956, or the Deposit Insurance and Credit Guarantee Corporation established under Section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961, or the Central Warehousing Corporation established under Section 3 of the Warehousing Corporation Act, 1962, or the Unit Trust of India established under Section 3 of the Unit Trust of India Act, 1963, or the Food Corporation of India established under Section 3, or a Board of Management established for two or more contiguous States under Section
16 of the Food Corporations Act, 1964, or the Airports Authority of India constituted under Section 3 of the Airports Authority of India Act, 1994, or a Regional Rural Bank established under Section 3 of the Regional Rural Banks Act, 1976 or the Export Credit and Guarantee Corporation Limited or the Industrial Reconstruction Corporation of India Limited, the National Housing Bank establishment under Section 3 of the National Housing Bank Act, 1987 or the Banking Service Commission established under Section 3 of the Banking Service Commission Act, 1975, or an air transport service, or a banking or an insurance company, a mine, an oil-field, a Cantonment Board or a major port, the Central Government, and

(ii) in relation to any other Industrial Dispute, the State Government. [Section 2(a)]

(x) Arbitrator

An “Arbitrator” includes an umpire. [Section 2(aa)]

(xi) Average Pay

“Average pay” means the average of the wages payable to a workman:

(i) in the case of monthly paid workman, in the three complete calendar months;

(ii) in the case of weekly paid workman, in the four complete weeks;

(iii) in the case of daily paid workman, in the twelve full working days preceding the date on which the average pay becomes payable if the workman had worked for three complete calendar months or four complete weeks or twelve full working days as the case may be, and where such calculation cannot be made, the average pay shall be calculated as the average of the wages payable to a workman during the period he actually worked. [Section 2(aaa)]

(xii) Closure

“Closure” means the permanent closing down of a place of employment or a part thereof. [Section 2(cc)]

(xiii) Controlled Industry

“Controlled Industry” means any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest. [Section 2(eee)]

(xiv) Employer

“Employer” means:

(i) in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department;

(ii) in relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority. [Section 2(g)]
"Employer includes among others an agent of an employer, general manager, director, occupier of factory etc.

(xv) Executive

"Executive" in relation to a Trade Union, means the body, by whatever name called, to which the management of the affairs of the trade union is entrusted. [Section 2(gg)]

(xvi) Independent

A person shall be deemed to be "independent" for the purpose of his appointment as the chairman or other member of a Board, Court or Tribunal if he is unconnected with the industrial dispute referred to such Board, Court or Tribunal, or with any industry directly affected by such dispute.

Provided that no person shall cease to be independent by reason only of the fact that he is a shareholder of an incorporated company which is connected with, or likely to be affected by, such industrial dispute; but in such a case, he shall disclose to the appropriate Government, the nature and extent of the shares held by him in such company. [Section 2(i)]

(xvii) Office Bearer

"Office Bearer", in relation to a trade union, includes any member of the executive thereof, but does not include an auditor. [Section 2(III)]

(xviii) Public Utility Service

"Public Utility Service" means:

(i) any railway service or any transport service for the carriage of passengers or goods by air;

(ia) any service in, or in connection with the working of, any major port or dock;

(ii) any section of an industrial establishment, on the working of which the safety of the establishment or the workman employed therein depends;

(iii) any postal, telegraph or telephone service;

(iv) any industry which supplies power, light or water to the public;

(v) any system of public conservancy or sanitation;

(vi) any industry specified in the First Schedule to which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification:

Provided that the period so specified shall not, in the first instance, exceed six months but may, by a like notification, be extended from time to time, by any period not exceeding six months at any one time, if in the opinion of the appropriate Government public emergency or public interest requires such extension. [Section 2(n)]
Public utility services may be carried out by private companies or business corporations (D.N. Banerji v. P.R. Mukharjee (Budge Budge Municipality), AIR 1953 SC 58).

(xix) Settlement

“Settlement” means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer. [Section 2(p)]

An analysis of Section 2(p) would show that it envisages two categories of settlements (i) a settlement arrived at in the course of conciliation proceedings, and (ii) a written agreement between employer arrived at otherwise in the course of conciliation proceedings. For the validity of the second category of settlement, it is essential that parties thereto should have subscribed to it in the prescribed manner and a copy thereof sent to authorised officer and the conciliation officer (Tata Chemicals Ltd. v. Workmen, 1978 Lab. I.C. 637). Moreover, settlement contemplates only written settlement, and no oral agreement can be pleaded to vary or modify or supercede a written settlement (AIR 1997 SC 954).

A settlement cannot be weighed in any golden scale and the question whether it is just and fair has to be answered on the basis of principles different from those which came into play where an industrial dispute is under adjudication. If the settlement has been arrived at by a vast majority of workmen with their eyes open and was also accepted by them in its totality, it must be presumed to be fair and just and not liable to be ignored merely because a small number of workers were not parties to it or refused to accept it (Tata Engineering and Locomotive Co. Ltd. v. Workmen, 1981-II Labour Law Journal 429 SC). A memorandum of settlement signed by office bearers of union without being authorised either by constitution of union or by executive committee of the union or by the workmen to enter into agreement with the management does not amount to settlement (Brooke Bond India Pvt. Ltd. v. Workman, (1981) 3 SCC 493).

(xx) Trade Union

“Trade Union” means a trade union registered under the Trade Unions Act, 1926. [Section 2(qq)]
(xxi) Unfair Labour Practice

It means any of the practices specified in the Fifth Schedule. [Section 2(ra)]

(xxii) Wages

“Wages” means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to workman in respect of his employment or of work done in such employment, and includes:

(i) such allowance (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

(iii) any travelling concession,

but does not include:

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service.

(d) any commission payable on the promotion of sales or business or both.  

[Section 2(rr)]

DISMISSAL ETC. OF AN INDIVIDUAL WORKMAN TO BE DEEMED TO BE AN INDUSTRIAL DISPUTE

According to Section 2A, where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between the workman and his employer connected with or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

The ambit of Section 2A is not limited to bare discharge, dismissal, retrenchment or termination of service of an individual workman, but any dispute or difference between the workman and the employer connected with or arising out of discharge, dismissal, retrenchment or termination is to be deemed industrial dispute. It has to be considered whether the claim for gratuity is connected with or arises out of discharge, dismissial, retrenchment or termination of service. The meaning of the phrase “arising out” of is explained in Mackinnon Mackenzie & Co. Ltd. v. I.M. Isaak, (1970) I LLJ 16. A thing is said to arise out of another when there is a close nexus between the two and one thing flows out of another as a consequence. The workman had claimed gratuity and that right flowed out of the termination of the services. Whether he is entitled to gratuity is a matter for the Tribunal to decide. It cannot be accepted that the claim of gratuity does not arise out of termination (Joseph Niranjan Kumar Pradhan v. Presiding Officer, Industrial Tribunal, Orissa, 1976 Lab. I.C. 1396).
AUTHORITIES UNDER THE ACT AND THEIR DUTIES

The Act provides for following Authorities for Investigation and settlement of industrial disputes:

(i) Works Committee.
(ii) Conciliation Officers.
(iii) Boards of Conciliation.
(iv) Court of Inquiry.
(v) Labour Tribunals.
(vi) Industrial Tribunals.
(vii) National

(i) Works Committee

Section 3 of the Act provides that the appropriate Government may by general or special order require the employer to constitute in the prescribed manner a Works Committee in industrial establishments, where 100 or more workmen are employed or have been employed on any working day in the preceding 12 months. The Works Committee will be comprised of the representatives of employers and workmen engaged in the establishment.

It shall be the duty of the Works Committee to promote measures for securing and preserving amity and good relations between the employer and workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters [Section 3(2)].

(ii) Conciliation Officers

With the duty of mediating in and promoting the settlement of industrial disputes, the appropriate Government may, by notification in the Official Gazette, appoint such number of Conciliation Officers as it thinks fit. The Conciliation Officer may be appointed for a specified area or for specified industries in a specified area or for one or more specified industries and either permanently or for a limited period. The main objective of appointing the Conciliation Officers, by the appropriate Government, is to create congenial atmosphere within the establishment where workers and employers can reconcile on their disputes through the mediation of the Conciliation Officers. Thus, they help in promoting the settlement of the disputes. (Section 4)

(iii) Boards of Conciliation

For promoting the settlement of an industrial dispute, the appropriate Government may, as occasion arises, constitute by a notification in the Official Gazette, a Board of Conciliation. A Board shall consist of a Chairman and two or four other members as the appropriate Government thinks fit.

It shall be the duty of Board to endeavour to bring about a settlement of the dispute and for such purpose it shall, without delay, investigate into the dispute and all matters affecting the merits and the right settlement. The Board may also do all such things which may be considered fit by it, for including the parties to come for a
fair and amicable settlement of the dispute. In case of settlement of the dispute, the Board shall send a report thereof to the appropriate Government together with a memorandum of settlement signed by all the parties to the dispute. In case no settlement is arrived at, the Board shall forward a report to appropriate Government enlisting therein the steps taken by the Board for ascertaining the facts and circumstances related to the dispute and for bringing about a settlement thereof. The Board will also enlist the reasons on account of which in its opinion a settlement could not be arrived at and its recommendations for determining the disputes. (Section 5)

(iv) Courts of Inquiry

According to Section 6 of the Act, the appropriate Government may as occasion arises, by notification in the Official Gazette constitute a Court of Inquiry into any matter appearing to be connected with or relevant to an industrial dispute. A Court may consist of one independent person or of such number of independent persons as the appropriate Government may think fit and where a Court consists of two or more members, one of them shall be appointed as the Chairman. It is the duty of such a Court to inquire into matters referred to it and submit its report to the appropriate Government ordinarily within a period of six months from the commencement of the inquiry. The period within which the report is to be submitted is not mandatory and the report may be submitted even beyond the period of six months without affecting the legality of the inquiry.

Test your knowledge

Choose the correct answer

Which of the following is not a designated authority for investigation and settlement of industrial disputes?

(a) Works Committee  
(b) Conciliation Officers  
(c) Labour Courts  
(d) Dispute Tribunal

Correct answer: (d)

(v) Labour Courts

Under Section 7, the appropriate Government is empowered to constitute one or more Labour Courts for adjudication of industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under the Act.

A Labour Court shall consist of one person only to be appointed by the appropriate Government.

A person shall not be qualified for appointment as the presiding officer of a Labour Court unless—

(a) he is, or has been, a judge of a High Court: or
(b) he has, for a period not less than three years, been a district Judge or an Additional District Judge; or

(c) he has held any judicial office in India for not less than seven years; or

(d) he has been the presiding officer of a Labour Court constituted under any provincial Act or State Act for not less than five years.

When an industrial dispute has been referred to a Labour Court for adjudication, it is the duty of the Labour Court to (i) hold its proceedings expeditiously, and (ii) submit its award to the appropriate Government soon after the conclusion of the proceedings. No time period has been laid down for the completion of proceedings but it is expected that such Courts will hold their proceedings without going into the technicalities of a Civil Court. Labour Court has no power to permit suo motu the management to avail the opportunity of adducing fresh evidence in support of charges (1998 Lab 1C 540 AP).

Provisions of Article 137 of the Limitation Act do not apply to reference of dispute to the Labour Court. In case of delays, Court can mould relief by refusing back wages or directing payment of past wages (1999 LAB 1C SC 1435).

(vi) Tribunals

(1) The appropriate Government may by notification in the Official Gazette, constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter whether specified in the Second Schedule or the Third Schedule and for performing such other functions as may be assigned to them under this Act.

(2) A Tribunal shall consist of one person only to be appointed by the appropriate Government.

(3) A person shall not be qualified for appointment as the presiding officer of a Tribunal unless:

(a) he is, or has been, a Judge of High Court; or

(b) he has, for a period of not less than three years, been a District Judges or an Additional District Judge.

(4) The appropriate Government may, if it so thinks fit, appoint two persons as assessors to advise the Tribunal in the proceedings before it.

Further, the person appointed as a Presiding Officer should be an independent person and must not have attained the age of 65 years. (Section 7-A)

The Industrial Tribunal gets its jurisdiction on a reference by the appropriate Government under Section 10. The Government can nominate a person to constitute a Tribunal for adjudication of industrial disputes as and when they arise and refer them to it. The Tribunal may be constituted for any limited or for a particular case or area. If appointed for a limited period, it ceases to function after the expiry of the term even when some matters are still pending (J.B. Mangharam & Co. v. Kher, A.I.R. 1956 M.B.113).

Further, when a Tribunal concludes its work and submits its award to the
appropriate Government, it does not extinguish the authority of the Tribunal nor does it render the Tribunal functus officio. The Government can refer to it for clarification on any matter related to a prior award (G. Claridge & Co. Ltd. v. Industrial Tribunal, A.I.R. 1950 Bom.100).

The duties of Industrial Tribunal are identical with the duties of Labour Court, i.e., on a reference of any industrial dispute, the Tribunal shall hold its proceedings expeditiously and submit its award to the appropriate Government.

(vii) National Tribunals

(1) Under Section 7-B, the Central Government alone has been empowered to constitute one or more National Tribunals for the adjudication of industrial disputes which (a) involve questions of national importance or (b) are of such a nature that industrial establishments situated in more than one State are likely to be interested in or affected by such disputes.

(2) A National Tribunal shall consist of one person only to be appointed by the Central Government.

(3) A person shall not be qualified for appointment as the Presiding Officer of a National Tribunal unless: he is, or has been, a Judge of a High Court; or

(4) The Central Government may, if it so thinks fit, appoint two persons as assessors to advise the National Tribunal in the proceeding before it.

Section 7-C further provides that such a presiding officer should be an independent person and must not have attained the age of 65 years.

Duties

When a matter has been referred to a National Tribunal, it must adjudicate the dispute expeditiously and submit its award to the Central Government. (Section 15)

REFERENCE OF DISPUTES

The adjudication of industrial disputes by Conciliation Board, Labour Court, Court of Inquiry, Industrial Tribunal or National Tribunal can take place when a reference to this effect has been made by the appropriate Government under Section 10. The various provisions contained in this lengthy Section are summed up below:

(A) Reference of disputes to various Authorities

Where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing make a reference to various authorities in the following ways:

(a) It may refer the dispute to a Conciliation Board for promoting the settlement of the dispute. As noted earlier, duty of the Board is to promote settlement and not to adjudicate the dispute. A failure report of the Board will help the Government to make up its mind as to whether the dispute can be referred for compulsory adjudication. Further, any matter appearing to be connected with or relevant to the dispute cannot be referred to a Conciliation Board (Nirma Textile Finishing Mills Ltd. v. Second Tribunal, Punjab 1957 I L.L.J. 460 S.C.).
(b) It may refer any matter appearing to be connected with or relevant to the dispute to a Court of Inquiry. The purpose of making such a reference is not conciliatory or adjudicatory but only investigatory.

(c) It may refer the dispute, or any matter appearing to be connected with, or relevant to, the dispute if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication. However, disputes relating to any matter falling in the Third Schedule can also be referred to a Labour Court, if the appropriate Government so thinks fit provided the dispute is not likely to affect more than 100 workmen.

(d) It may refer the dispute or any matter appearing to be connected with, or relevant to the dispute specified in the Second or Third Schedule, to an Industrial Tribunal for adjudication. [Section 10(1)]

Under the second proviso to Section 10(1), where the dispute relates to a public utility service and a notice of strike or lock-out under Section 22 has been given, it is mandatory for the appropriate Government or the Central Government as the case may be, to make a reference even when some proceedings under the Act are pending in respect of the dispute. But the Government may refuse to make the reference if it considers that (i) notice of strike/lock-out has been frivolously or vexatiously given, or (ii) it would be inexpedient to make the reference. If the Government comes to a conclusion and forms an opinion which is vitiated by mala fide or biased or irrelevant or extraneous considerations, then the decision of the Government will be open to judicial review.

Where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court (Labour Court, Tribunal or National Tribunal), the appropriate Government, if satisfied that the person applying represent the majority of each party, shall make the reference accordingly.

The Industrial Disputes Act provides for no appeal or revision as against the awards so made nor any such remedy is specifically provided for by any other statute or statutory provision though no doubt the Supreme Court in its discretion may under Article 136 of the Constitution of India, grant special leave to a party aggrieved by such an award to appeal to the Supreme Court against an award so made (1978-II Labour Law Journal, Cal.).

Section 10(1) providing for the powers of appropriate Government to make a reference, has been the favoured subject of judicial interpretation. The various observations made in the course of judicial interpretation of Section 10(1) are summarised below:

(i) The order making a reference is an administrative act and it is not a judicial or quasi-judicial act (State of Madras v. C.P. Sarathy, (1953) I L.L.J. 174 SC). It is because the Government cannot go into the merits of the dispute. Its duty is only to refer the dispute for the adjudication of the authority so that the dispute is settled at an early date.

(ii) The powers of the appropriate Government to make a reference is discretionary but within narrow limits it is open to judicial review.

(iii) Ordinarily the Government cannot be compelled to make a reference. But in
such a situation the Government must give reasons under Section 12(5) of the Act. If the Court is satisfied that the reasons given by the Government for refusing to the issue, the Government can be compelled to reconsider its decision by a writ of Mandamus (State of Bombay v. K.P. Krishnan, A.I.R. 1960 S.C. 1223). The appropriate government is not bound to refer belated claims (1994 I LLN 538 P&H DB).

(iv) In the case of Western India Match Co. Ltd. v. Workmen, it was held that it is not mandatory for the appropriate Government to wait for the outcome of the conciliation proceedings before making an order of reference. The expression “the appropriate Government at any time may refer” takes effect in such cases where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed.

(v) Refusal of the Government to refer the dispute for adjudication does not debar it from making subsequent reference. It at one stage the appropriate Government had come to the conclusion that no reference was called for in the interest of industrial peace, there is nothing in the Act, which bars it from re-examining the matter, whether in the light of fresh material or otherwise, and from making a reference if it comes to the conclusion that a reference is justified and it is expedient in the interest of industrial peace to make such reference (Western India Match Co. Ltd. v. Workers Union).

(vi) The appropriate Government has no power either expressly or impliedly to cancel, withdraw or supersede any matter referred for adjudication. However, it is empowered to add to or amplify a matter already referred for adjudication (State of Bihar v. D.N. Ganguli, 1958-II L.L.J. 634 S.C.). The Government is competent to correct clerical error (Dabur Ltd. v. Workmen, A.I.R. 1968 S.C. 17). Even the Government can refer a dispute already pending before a Tribunal, afresh to another Tribunal, if the former Tribunal has ceased to exist. Now under Section 33-B the Government is empowered to transfer any dispute from one Tribunal to another Tribunal.

(vii) If reference to dispute is made in general terms and disputes are not particularised, the reference will not become bad provided the dispute in question can be gathered by Tribunal from reference and surrounding facts (State of Madras v. C.P. Sarthy. Also see Hotel Imperial, New Delhi v. The Chief Commissioner, Delhi).

(viii) The appropriate Government can decide, before making a reference, the prima facie case, but it cannot decide the issue on merits (Bombay Union of Journalists v. State of Bombay, (1964) 1 L.L.J., 351 SC).

(B) Reference of dispute to National Tribunal involving question of importance, etc.

According to Section 10(1-A), where the Central Government is of opinion that any industrial dispute exists or is apprehended and the dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by such dispute and that the dispute should be adjudicated by a National Tribunal, then, the Central Government may, whether or not it is the appropriate Government in relation to that dispute, at any time, by order in writing, refer the dispute or any matter appearing to
be connected with, or relevant to the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a National Tribunal, and accordingly.

(a) If the matter under adjudication before the National Tribunal is pending in a proceeding before a Labour Court or Tribunal, the proceeding before the Labour Court or the Tribunal, as the case may be in so far as it relates to such matter, shall be deemed to have been quashed on such reference to the National Tribunal; and

(b) It shall not be lawful for the appropriate Government to refer the matter under adjudication before the National Tribunal to any Labour Court or Tribunal for adjudication during the pendency of the proceeding in relation to such matter before the National Tribunal. [Section 10(1-A) and 10(5)]

In this sub-section, “Labour Court” or “Tribunal” includes any Court or other authority constituted under any law relating to investigation and settlement of industrial disputes in force in any State.

(C) Reference on application of parties

According to Section 10(2), where the parties to an industrial disputes apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court, Labour Court, Tribunal or National Tribunal, the appropriate Government, if satisfied that the persons applying represent the majority of each party, shall make the reference accordingly and shall specify the time limit (not exceeding three months) to submit the award, such time limit may be extended if required.

Thus, it is mandatory for the Government to make a reference if (i) application to this effect has been made by the parties to the dispute, and (ii) the applicants represent the majority of each party to the satisfaction of the appropriate Government. (Poona Labour Union v. State of Maharashtra, (1969) II L.L.J.291 Bombay). The Government cannot, before making reference, go into the question of whether any industrial dispute exists or is apprehended.

(D) Time limit for submission of awards

According to Section 10(2A) an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal shall specify the period within which its award shall be submitted to the appropriate Government. The idea is to expedite the proceedings. Sub-section (2A) reads as follows:

"An order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this Section shall specify the period within which such Labour Court, Tribunal or National Tribunal shall submit its award on such dispute to the appropriate Government.

Provided that where such dispute is connected with an individual workman, no such period shall exceed three months:

Provided further that where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, to the Labour Court, Tribunal or
National Tribunal for extension of such period or for any other reason, and the
presiding officer of such Labour Court, Tribunal or National Tribunal considers it
necessary or expedient to extend such period, he may for reasons to be recorded in
writing, extend such period by such further period as he may think fit:

Provided also that in computing any period specified in this sub-section, the
period, if any, for which the proceedings before the Labour Court, Tribunal or National
Tribunal had been stayed by any injunction or order of a Civil Court shall be
excluded:

Provided also that no proceedings before a Labour Court, Tribunal or National
Tribunal shall lapse merely on the ground that any period specified under this sub-
section has expired without such proceedings being completed".

(E) Prohibition of strike or lock-out

Where an industrial dispute has been referred to a Board, Labour Court, Tribunal
or National Tribunal under this Section, the appropriate Government may by order
prohibit the continuance of any strike or lock-out in connection with such dispute
which may be in existence on the date of the reference. [Section 10(3)]

It is necessary that the Government makes an order prohibiting strike or lock out.
If no order is made, continuance of strike or lock-out is not illegal. Further, once the
order prohibiting strike or lock-out is made, the mere fact that strike was on a matter
not covered by the reference, is immaterial (Keventers Karamchari Sangh v. Lt.
Governor, Delhi, (1971) II L.L.J. 525 Delhi).

The only requirement for taking action under Section 10(1) is that there must be
some material before the Government which will enable the appropriate Government
to form an opinion that an industrial dispute exists or is apprehended. This is an
administrative function of the Government as the expression is understood in
contradiction to judicial or quasi-judicial function. Merely because the Government
rejects a request for a reference or declines to make a reference, it cannot be said
that the industrial dispute has ceased to exist, nor could it be said to be a review of
any judicial or quasi-judicial order or determination. The industrial dispute may
nevertheless continue to remain in existence and if at a subsequent stage the
appropriate Government is satisfied that in the interest of industrial peace and for
promoting industrial harmony it is desirable to make a reference, the appropriate
Government does not lack power to do so under Section 10(1) nor is it precluded
from making a reference on the only ground that on an earlier occasion, it had
declined to make the reference.

(F) Subject-matter of adjudication

Where in an order referring an industrial dispute to a Labour Court, Tribunal or
National Tribunal under this Section or in a subsequent order, the appropriate
Government has specified the points of dispute for adjudication, the Labour Court or
the Tribunal or the National Tribunal, as the case may be, shall confine its
adjudication to those points and matters incidental thereto. [Section 10(4)]

(G) Powers of the Government to add parties

Where a dispute concerning any establishment of establishments has been, or is
to be, referred to a Labour Court, Tribunal or National Tribunal under this Section and the appropriate Government is of opinion, whether on an application made to it in this behalf or otherwise, that the dispute is of such a nature that any other establishment, group or class of establishments of a similar nature is likely to be interested in, or affected by, such dispute, the appropriate Government may, at the time of making the reference or at any time thereafter but before the submission of the award, include in that reference such establishment, group or class of establishments, whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishments. [Section 10(5)]

VOLUNTARY REFERENCE OF DISPUTES TO ARBITRATION

Section 10-A provides for the settlement of industrial disputes by voluntary reference of such dispute to arbitrators. To achieve this purpose, Section 10-A makes the following provisions:

(i) Where any industrial dispute exists or is apprehended and the same has not yet been referred for adjudication to a Labour Court, Tribunal or National Tribunal, the employer and the workmen may refer the dispute, by a written agreement, to arbitration specifying the arbitrator or arbitrators. The presiding officer of a Labour Court or Tribunal or National Tribunal can also be named by the parties as arbitrator.

Where an arbitration agreement provides for a reference of the dispute to an even number of arbitrators, the agreement shall provide for the appointment of another person as umpire who shall enter upon the reference, if the arbitrators are equally divided in their opinion, and the award of the umpire shall prevail and shall be deemed to be the arbitration award for the purposes of this Act.

(ii) An arbitration agreement referred to in sub-section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed.

(iii) A copy of the arbitration agreement shall be forwarded to appropriate Government and the Conciliation Officer and the appropriate Government shall within one month from the date of the receipt of such copy, publish the same in the Official Gazette.

According to Section 10-A(3A), where an industrial dispute has been referred to arbitration and the appropriate Government is satisfied that the persons making the reference represent the majority of each party, the appropriate Government may, within the time referred above, issue a notification in such manner as may be prescribed; and when any such notification is issued, the employer and workmen who are not parties to the arbitration agreement but are concerned in the dispute, shall be given an opportunity of presenting their case before the arbitrator or arbitrators.

(iv) The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all arbitrators, as the case may be.

(v) Where an industrial dispute has been referred to arbitration and a
notification has been issued, the appropriate Government may, by order, prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference.

(vi) Nothing in the Arbitration Act, 1940 shall apply to arbitrations under this Section.

PROCEDURE AND POWERS OF AUTHORITIES

Section 11 provides that

(1) Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit.

(2) A Conciliation Officer or a member of a Board or Court or the Presiding Officer of a Labour Court, Tribunal or National Tribunal may for the purpose of inquiry into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates.

(3) Every Board, Court, Labour Court, Tribunal and National Tribunal shall have the same powers as are vested in Civil Court under the Code of Civil Procedure, 1908 when trying a suit, in respect of the following matters, namely:

(a) enforcing the attendance of any person and examining him on oath;
(b) compelling the production of documents and material objects;
(c) issuing commissions for the examination of witnesses;
(d) in respect of such other matters as may be prescribed.

Further, every inquiry or investigation by such an authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code.

(4) A Conciliation Officer may enforce the attendance of any person for the purpose of examination of such person or call for and inspect any document which he has ground for considering to be relevant to the industrial dispute or to be necessary for the purpose of verifying the implementation of any award or carrying out any other duty imposed on him under this Act, and for the aforesaid purposes, the Conciliation Officer shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, in respect of enforcing the attendance or compelling the production of documents.

(5) A Court, Labour Court, Tribunal or National Tribunal may, if it so thinks fit, appoint one or more persons having special knowledge of the matter under consideration, as assessor or assessors to advise it in the proceeding before it.

(6) All Conciliation Officers, members of a Board or Court and the Presiding Officers of a Labour Court, Tribunal or National Tribunal shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.

(7) Subject to any rules made under this Act, the costs of, and incidental to, any proceeding before a Labour Court, Tribunal or National Tribunal shall be in the discretion of that Labour Court, Tribunal or National Tribunal and the Labour Court Tribunal or National Tribunal, as the case may be, shall have full power to determine
by and to whom and to what extent and subject to what conditions, if any, such costs are to be paid, and to give all necessary directions for the purposes aforesaid and such costs may, on application made to the appropriate Government by the person entitled, be recovered by that Government in the same manner as an arrear of land revenue.

(8) Every Labour Court, Tribunal or National Tribunal shall be deemed to be Civil Court for the purposes of Section 345, 316 and 348 of the Code of Criminal Procedure, 1973.

Thus, we see that Section 11(1) gives wide powers to various authorities. However, power to lay-down its own procedure is subject to rules made by the appropriate Government. The Industrial Disputes (Central) Rules, 1957 has prescribed a detailed procedure which these authorities are required to follow. (See Rules 9 to 30). The authorities are not bound to follow the rules laid down in Civil Procedure Code, 1908 or the Indian Evidence Act. However, being quasi-judicial bodies, they should use their discretion in a judicial manner without caprice and act according to the general principles of law and rules of natural justice.

Powers to give appropriate relief in case of discharge or dismissal

According to Section 11-A, where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

According to the proviso to Section 11-A, in any proceeding under this Section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take fresh evidence in relation to the matter.

Before the enactment of Section 11-A, there was no provision circumscribing the perimeter of the jurisdiction of the Tribunal to interfere with the disciplinary action of discharge or dismissal for misconduct taken by an employer against an industrial workman.

In Indian Iron and Steel Co. Ltd. v. Their Workmen, (1958) I LLJ. 260, the Supreme Court, while considering the Tribunal's power to interfere with the management's decision to dismiss, discharge or terminate the service of a workman, has observed that in cases of dismissal for misconduct the Tribunal does not act as a Court of appeal and substitute its own judgement for that of the management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, etc., on the part of the management.

The above Section has no relevance to punishments other than dismissal or discharge (Rajasthan SRTC v. Labour Court, (1994)1LLJ 542).
STRIKES AND LOCK-OUTS

Strikes and lock-outs are the two weapons in the hands of workers and employers respectively, which they can use to press their viewpoints in the process of collective bargaining. The Industrial Disputes Act, 1947 does not grant an unrestricted right of strike or lock-out. Under Section 10(3) and Section 10A(4A), the Government is empowered to issue order for prohibiting continuance of strike or lock-out. Sections 22 and 23 make further provisions restricting the commencement of strikes and lock-outs.

(i) General prohibition of strikes and lock-outs

No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out:

(a) during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings;

(b) during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal and two months after the conclusion of such proceedings;

(bb) during the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings, where a notification has been issued under sub-section (3A) of Section 10A; or

(c) during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award. (Section 23)

The purpose of above provisions is to ensure peaceful atmosphere during the pendency of any proceeding before a Conciliation Officer, Labour Court, Tribunal or National Tribunal or Arbitrator under Section 10A.

(ii) Prohibition of strikes and lock-outs in public utility service

The abovementioned restrictions on strikes and lock-outs are applicable to both utility services and non-utility services. Section 22 provides for following additional safeguards for the smooth and uninterrupted running of public utility services and to obviate the possibility of inconvenience to the general public and society (State of Bihar v. Deodar Jha, AIR 1958 Pat. 51).

1. No person employed in a public utility service shall go on strike in breach of contract.

   (a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking, i.e., from the date of the notice to the date of strike a period of six weeks should not have elapsed; or

   (b) within 14 days of giving of such notice, i.e., a period of 14 days must have elapsed from the date of notice to the date of strike; or

   (c) before the expiry of the date of strike specified in any such notice as aforesaid, i.e., the date specified in the notice must have expired on the day of striking; or

   (d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conciliation of such proceedings.
(2) No employer carrying on any public utility service shall lock-out any of his workmen:
   (a) without giving them notice of lock-out as hereinafter provided within six weeks before locking-out; or
   (b) within 14 days of giving such notice; or
   (c) before the expiry of the date of lock-out specified in any such notice as aforesaid; or
   (d) during the pendency of any conciliation proceedings before a Conciliation Officer and 7 days after the conciliation of such proceedings.

Right to Strike is to be exercised after complying with certain conditions regarding service of notice and also after exhausting intermediate and salutary remedy of conciliation proceedings (Dharam Singh Rajput v. Bank of India, Bombay, 1979 Lab. I.C. 1079).

The Act nowhere contemplates that a dispute would come into existence in any particular or specified manner. For coming into existence of an industrial dispute, a written demand is not a *sine qua non* unless of course in the case of public utility service because Section 22 forbids going on strike without giving a strike notice (1978-I Labour Law Journal 484 SC).

(3) The notice of lock-out or strike under this Section shall not be necessary where there is already in existence a strike or, as the case may be, lock-out in the public utility service, but the employer shall send intimation of such lock-out or strike on the day on which it is declared, to such authority as may be specified by the appropriate Government either generally or for a particular area or for a particular class of public utility services.

(4) The notice of strike referred to in Section 22(1) shall be given by such number of persons to such person or persons and in such manner as may be prescribed.

(5) The notice of lock-out referred to in Section 22(2) shall be given in such manner as may be prescribed.

(6) If on any day an employer receives from any persons employed by him any such notices as are referred to in sub-section (1) or gives to any persons employed by him any such notices as are referred to in sub-section (2), he shall within five days thereof report to the appropriate Government or to such authority as that Government may prescribe the number of such notices received or given on that day. (Section 22)

Test your knowledge

State whether the following statement is “True” or “False”

No person employed in a public utility service shall go on strike without giving to the employer a notice of strike, within five weeks before striking.

- True
- False

Correct Answer: False
(iii) Illegal strikes and lock-outs

(1) A strike or lock-out shall be illegal if:
   (i) it is commenced or declared in contravention of Section 22 or Section 23; or
   (ii) it is continued in contravention of an order made under Section 10(3) or Section 10A(4A).

(2) Where a strike or lock-out in pursuance of an industrial dispute has already commenced and is in existence at the time of reference of the dispute to a Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, the continuance of such strike or lock-out shall not be deemed to be illegal, provided that such strike or lock-out was not at its commencement in contravention of the provisions of this Act or the continuance thereof was not prohibited under Section 10(3) or Section 10A(4A).

(3) A lock-out declared in consequence of an illegal strike or strike declared in consequence of an illegal lock-out shall not be deemed to be illegal. (Section 24)

No person shall knowingly expend or apply any money in direct furtherance or support of any illegal strike or lock-out (Section 25).

JUSTIFIED AND UNJUSTIFIED STRIKES

If a strike is in contravention of the above provisions, it is an illegal strike. Since strike is the essence of collective bargaining, if workers resort to strike to press for their legitimate rights, then it is justified. Whether strike is justified or unjustified will depend upon the fairness and reasonableness of the demands of workers.

In the case of Chandramalai Estate v. Its Workmen, (1960) II L.L.J. 243 (S.C.), the Supreme Court observed: "While on the one hand it be remembered that strike is a legitimate and sometimes unavoidable weapon in the hands of labour, it is equally important to remember that indiscriminate and hasty use of this weapon should not be encouraged. It will not be right for labour to think that for any kind of demand a strike can be commenced with impunity without exhausting reasonable avenues for peaceful achievement of their objects. There may be cases where the demand is of such an urgent and serious nature that it would not be reasonable to expect labour to wait till after asking the Government to make a reference. In such cases, strike even before such a request has been made, will be justified".

Thus, if workmen go on strike without contravening statutory requirements, in support of their demands, the strike will be justified. In the beginning strike was justified but later on workmen indulged in violence, it will become unjustified.

In the case of Indian General Navigation and Rly. Co. Ltd. v. Their Workmen, (1960) I L.L.J. 13, the Supreme Court held that the law has made a distinction between a strike which is illegal and one which is not, but it has not made distinction between an illegal strike which may be said to be justifiable and one which is not justifiable. This distinction is not warranted by the Act and is wholly misconceived, specially in the case of employees in a public utility service. Therefore, an illegal strike is always unjustified.
It is well settled that in order to entitle the workmen to wages for the period of strike, strike should be legal as well as justified. A strike is legal if it does not violate any provision of the statute. Again a strike cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. Whether a particular strike is justified or not is a question of fact which has to be judged in the light of the facts and circumstances of each case. It is also well settled that the use of force or violence or acts of sabotage resorted to by the workmen during a strike disentitled them to wages for the strike period (Crompton Greaves Limited v. Workmen, 1978 Lab. I.C. 1379).

Where pending an industrial dispute the workers went on strike the strike thus being illegal, the lock-out that followed becomes legal, a defensive measure (1976-I Labour Law Journal, 484 SC).

Test your knowledge

State whether the following statement is “True” or “False”

A lock-out declared in consequence of an illegal strike or strike declared in consequence of an illegal lock-out shall not be deemed to be illegal.

- True
- False

Correct answer: True

WAGES FOR STRIKE PERIOD

The payment of wages for the strike period will depend upon whether the strike is justified or unjustified. This also depends upon several factors such as service conditions of workman, the cause which led to strike, the urgency of cause or demand of workman, the reason for not resorting to dispute settlement machinery under the Act or service rules/regulations etc. (1994-SCC-1197). No wages are payable if the strike is illegal or it is unjustified. Further, if the workers indulge in violence, no wages will be paid even when their strike was legal and justified (Dum Dum Aluminium Workers Union v. Aluminium Mfg. Co.). The workmen must not take any hasty steps in resorting to strike. They must, first take steps to settle the dispute through conciliation or adjudication except when the matter is urgent and of serious nature. Thus, in Chandramalai Estate v. Workmen, it was observed that when workmen might well have waited for some time, after conciliation efforts had failed, before starting a strike, and in the mean time could have asked the Government to make a reference, the strike would be unjustified and the workmen would not be entitled to wages for the strike period.

In the case of Crompton Greaves Ltd. v. The Workmen, AIR 1978 S.C. 1489, it was observed that for entitlement of wages for the strike period, the strike should be legal and justified. Reiterating this position, the Court held in Syndicate Bank v. Umesh Nayak (1994 SCC 1197) that where the strike is legal but at the same time unjustified, the workers are not entitled for wages for the strike period. It cannot be unjustified unless reasons for it are entirely preverse or unreasonable. The use of force, violence or acts of sabotage by workmen during the strike period will not entitle them for wages for the strike period.
Supreme Court in *Bank of India v. T.S. Kelawala* (1990 II LLJ S.C. 39) decided, that where employees are going on a strike for a portion of the day or for whole day and there was no provision in the contract of employment or service rules or regulations for deducting wages for the period for which the employees refused to work although work was offered to them, and such deduction is not covered by any other provision, employer is entitled to deduct wages proportionately for the period of absence or for the whole day depending upon the circumstances.

**DISMISSAL OF WORKMEN AND ILLEGAL STRIKE**

If workers participate in an illegal strike, the employer is within his right to dismiss the striking workmen on ground of misconduct. For this it is necessary that a proper and regular domestic enquiry is held. In the case of *Indian General Navigation and Rly. Co. v. Their Workmen*, the Supreme Court laid down the general rule that mere taking part in an illegal strike without anything further would not necessarily justify the dismissal of all workmen taking part in the strike and that it was necessary to hold a regular inquiry after furnishing charge-sheet to each of the workman sought to be dealt with for his participation in the strike. It was further observed, that because workmen go on strike, it does not justify the management in terminating their services. In any case if allegations of misconduct have been made against them, those allegations have to be enquired into by charging them with specific acts of misconduct and giving them an opportunity to defend themselves at the enquiry. In the case of *Express Newspaper (P) Ltd. v. Michael Mark*, (1962) II L.L.J. 220 (S.C.), the Supreme Court held that where the workmen who had participated in an illegal strike, did not join their duties which resulted in their dismissal under the Standing Orders, participation in strike means that they have abandoned their employment. However, the employer can take disciplinary action against the employees under the Standing Orders and dismiss them.

Further, the quantum of punishment should depend upon the extent of involvement in the strike. Those who are guilty of violence, encourage other workers to join an illegal strike and physically obstruct the loyal workers from joining their duties, they can be dismissed from their service. But dismissal of peaceful strikers who merely acted as dumb-driven cattle cannot be justified. The question of punishment has to be considered by the industrial adjudication keeping in view the overriding consideration of the full and efficient working of the industry as a whole.

However, the Supreme Court in an unprecedented judgement in *T.K. Rangarajan v. Government of Tamil Nadu and Others*, (2003) 6 SCC 581: 2003-III-LLJ-275 held that the government employees have no fundamental right, statutory or equitable or moral to resort to strike and they can not take the society at ransom by going on strike, even if there is injustice to some extent.

The Apex Court went to observe that strike as a weapon is mostly used which results in chaos and total mal administration. The judgement has evoked a lively debate for and against the proposition.
The Supreme Court has agreed to hear a petition seeking review of its judgement banning strike by all government employees and it is expected that the inconsistencies in the judgement are likely to be resolved.

**Test your knowledge**

State whether the following statement is “True” or “False”

The payment of wages for the strike period will not depend upon whether the strike is justified or unjustified

- True
- False

Correct answer: False

**JUSTIFICATION OF LOCK-OUT AND WAGES FOR LOCK-OUT PERIOD**

A lock-out in violation of the statutory requirements is illegal and unjustified and workers are entitled to wages for the lock-out period. For legal lock-out, no wages are payable to workmen. But where the lock-out, though legal is declared with the ulterior motive of victimisation of workmen or has been continued for unreasonable period of time, it is unjustified and the workmen are entitled to wages. In *Lord Krishna Sugar Mills Ltd. v. State of U.P.* (1964) II L.L.J. 76 (All), it was observed that locking-out the workmen without any prior notice to them and as a retaliatory measure to terrorise them, is illegal or unjustified. Where illegal or unjustified strike is followed by an unjustified lock out, the wages for lock-out period will depend upon the extent of blame for each others act (*India Marine Services (P) Ltd. v. Their Workmen*, (1963) I L.L.J. 122 S.C.).

**CHANGE IN CONDITIONS OF SERVICE**

(1) Change in service conditions when no proceedings are pending before Labour Court/Tribunal etc.

Notice of change: Section 9A of the Industrial Disputes Act, 1947 lays down that any employer who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in Schedule IV (given in the end of this study) is required to follow the procedure laid down in Section 9A of the Act.

According to Section 9A, the workmen likely to be affected by the proposed changes are to be given a notice in the prescribed manner. No change can be made within 21 days of giving such notice. However, no notice is required for effecting any such change when it is in pursuance of any settlement or award. These provisions are wholly inapplicable to any alleged right to work relief for office bearers of trade unions. No such right is recognised under provisions of the Act (LLJ II 1998 Mad. 26).

According to Section 9B, where the appropriate Government is of opinion that the application of the provisions of Section 9A to any class of industrial establishments or to any class of workmen employed in any industrial establishment affect the employers in relation thereto so prejudicially that such application may cause serious
repercussion on the industry concerned and that public interest so requires, the appropriate Government may, by notification in the Official Gazette, direct that the provisions of the said Section shall not apply or shall apply, subject to such conditions as may be specified in the notification, to that class of industrial establishments or to that class of the workmen employed in any industrial establishment.

(2) Change in conditions of service during pendency of proceedings

Section 33 prohibits the employer from bringing any change, to the prejudice of any workman, in the conditions of service in respect of any matter connected with the dispute which is pending before a Conciliation Officer, or Conciliation Board or an Arbitrator or Labour Court or Tribunal or National Tribunal. The purpose of such a prohibition is to protect the workmen concerned, during the pendency of proceedings against employers harassment and victimisation on account of their having raised the industrial dispute of their continuing the pending proceedings. This Section also seeks to maintain status quo by prescribing management conduct which may give rise to fresh dispute which further exacerbate the already strained relations between the employer and the workmen (Automobile Products of India Ltd. v. Rukmaji Bala AIR 1955 SC 258). Thus ordinary right of the employer to alter the terms of his employees service to their prejudice or to terminate their services under the general law governing the contract of employment, has been banned subject to certain conditions. However, under Section 3, employer is free of deal with employees when the action against the concerned workman is not punitive or malafide or does not amount to victimisation or unfair labour practice (Air India Corporation v. A. Rebello, 1972-I L.L.J. 501 S.C.). A detailed study of Section 33 will further clarify that aspect.

According to Section 33(1), during the pendency of any proceedings before Conciliation Officer or a Board, or an Arbitrator, or a Labour Court or Tribunal or National Tribunal, in respect of an industrial dispute, the employer is prohibited from taking following actions against the workmen, except with the express permission in writing of the authority before which the proceedings are pending.

(a) to alter in regard to any matter connected with the dispute to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings.

(b) to discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute for any misconduct connected with the dispute”.

From the above provisions, it is clear that prohibition on the employer is not absolute. He can make changes in the conditions of service provided he has obtained, before effecting any change, permission in writing of the authority before which the proceedings are pending. Further, alterations in the conditions of services should be to the prejudice of a workman. Transfer of a workman from one department is an ordinary incidence of service and therefore, does not amount to alteration or the prejudice of a workman, even when transfer amounts to reduction in earning due to reduced over-time wages.

In the case of Bhavanagar Municipality v. Alibhai Karimbhai, AIR 1977 S.C. 1229, the Supreme Court laid down the following essential features of Section 33(1)(a):

(i) the proceedings in respect of industrial dispute should be
pending before the Tribunal;
(ii) conditions of service immediately before the commencement of Tribunal proceedings should have been altered;
(iii) alteration is in regard to a matter connected with the pending industrial dispute;
(iv) workmen whose conditions of service have been altered are concerned in the industrial dispute;
(v) alteration is to the prejudice of the workmen.

Change in condition of service—When permissible

Section 33(1) prohibits the employer from changing, during the pendency of proceedings, the conditions of service relating to matter connected with the dispute. Employers were prevented from taking action even in obvious cases of misconduct and indiscipline unconnected with the dispute. To overcome this difficulty, Section 33(2) makes the following provisions:

(i) During the pendency of any such proceedings in respect of an industrial dispute, the employer is permitted to take following actions, in accordance with the standing orders applicable to workmen concerned in such disputes or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman:

(a) to alter, in regard to 'any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceedings.

(b) to discharge or punish, whether by dismissal or otherwise, that workman for any misconduct not connected with the dispute.

(ii) According to proviso to Section 33(2), no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceedings are pending for approval of the action taken by the employer.

According to Section 33(5), where an employer makes an application to a Conciliation Officer, Board, an Arbitrator, a Labour Court, Tribunal or National Tribunal under the above proviso for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass within a period of three months from the date of receipt of such application, such order in relation thereto as it deems fit (unless extended on reasonable grounds).

Thus, the stringency of the previous provision is ought to be softened by permitting the employer to take action against the workmen in accordance with the standing orders applicable to them during the pendency of proceedings in regard to any matter unconnected with the dispute by the present Section 33(2).

In cases falling under sub-section (2), the employer is required to satisfy the specified conditions, but he need not necessarily obtain the previous consent in writing before he takes any action. The ban imposed by Section 33(2) is not as rigid or rigorous as that imposed by Section 3(1). The jurisdiction to give or withhold
permission is *prima facie* wider than the jurisdiction to give or withhold approval. In dealing with cases falling under Section 32(2) the industrial authority will be entitled to enquire whether the proposed action is in accordance with the standing orders, whether the employer concerned has been paid wages for one month, and whether an application has been made for approval as prescribed by the said sub-section. It is obvious that in case of alteration of conditions of service falling under Section 33(2)(b), no such approval is required and the right of the employer remains unaffected by any ban. Therefore, putting in negatively, the jurisdiction of the appropriate industrial authority in holding enquiry under Section 33(2)(b) cannot be wider and is, if at all, more limited, than that permitted under Section 33(1), and in exercising its powers under Section 33(2) the appropriate authority must bear in mind the departure deliberately made by the legislature in separating the two classes falling under the two sub-sections, and in providing for express permission in one case and only approval in the other”. The crucial date for seeking permission of authorities to dismiss an employee is the date of dismissal and not the date of initial action (LAB IC 1998 Mad. 3422).

(3) Protected workmen and change in conditions of service, etc.

A protected workman in relation to an establishment, means a workman who, being a member of the executive or other officer bearer of a registered Trade Union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

According to Section 33(3), notwithstanding anything contained in Section 33(2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute:

(a) by altering, to the prejudice of such protected workman, the condition of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which the proceeding is pending.

In every establishment the number of workmen to be recognised as protected workmen for the purposes of above-stated provisions, shall be one per cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various Trade Unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen [Section 33(4)]. Bombay High Court in *Blue Star Ltd. v. Workmen*, held that a Trade Union-worker cannot enjoy the luxury of getting salary, for not doing the assigned task in the company and spending away his time in Trade Union activities exclusively. The Trade Union office bearers cannot claim any special privilege over and above ordinary workers. [Section 33(3) and (4)]
Principles governing domestic enquiry

Some important principles governing a domestic enquiry are summarised below:

(1) The enquiry should be conducted by an unbiased person, i.e., who is neither against nor in favour of a particular party. The person should not be an interested party. He should not import his own knowledge (Associated Cement Co. Ltd. v. Their Workmen). If he has himself witnessed anything, the enquiry should be held by somebody else. Thus, it should be ensured that justice is not only rendered but appears to be rendered. However, a person holding enquiry will not be held as biased merely on the ground that he receives remuneration from the employer.

(2) The enquiry officer should conduct the enquiry honestly. It should be seen that enquiry is not mere empty formalities (Kharah & Co. v. Its Workmen, AIR 1964 SC 719).

(3) The employee should be given a fair opportunity to defend himself. He should be clearly informed of the charges levelled against him. Evidence must be examined in the presence of the workman, and he should be given an opportunity to cross-examine the witnesses (Meenaglass Tea Estate v. Its Workmen, AIR 1963 SC 1719). However, the enquiry officer can proceed with the enquiry if the worker refuses to participate without reasons.

(4) If any criminal proceedings, e.g., the theft, etc., are pending against any workman, the enquiry officer need not wait for the completion of those proceedings. However, he may wait for the outcome of such proceedings if the case is of grave or serious nature (D.C.M. v. Kushal Bhum, AIR 1960 SC 806).

(5) Holding out of preliminary enquiry is not mandatory or necessary. But it is desirable to find out prima facie reasons for the domestic enquiry.

(6) A proper procedure should be followed in conducting the enquiry. If procedure is prescribed by Standing Orders, it must be followed. Normally, a worker should be informed by a notice so that he can prepare his defence. The proceedings may be adjourned at the discretion of the enquiry officer. The pleadings and other rules should not be rigid and technical. Strict rules of the Evidence Act need not be followed.

(7) The enquiry officer should clearly and precisely record his conclusions giving briefly reasons for reaching the said conclusion.

(4) Recovery of money due from an employer

Following provisions have been made in this respect:

(1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or Chapter V-B, the workman himself or any other person authorised by him in writing in this behalf, or, in the case of death of the workman his assignee or heirs may, without prejudice to any other mode of recovery make an
application to the appropriate Government for the recovery of money due to him and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue.

(2) Every such application shall be made within one year from the date on which the money become due to the workman from the employer. However, any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period. However stale claim cannot be entertained unless delay is satisfactorily explained.

(3) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within three months unless extended by the Presiding Officer of a Labour Court.

(4) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case.

(5) The decision of the Labour Court shall be forwarded by it to the appropriate Government and any amount found due by the Labour Court may be recovered in the manner provided for in point (1) above.

(6) Where workmen employed under the same employer are entitled to receive from him any money or any benefit capable of being computed in terms of money then, subject to such rules as may be made in this behalf, a single application for the recovery of the amount due may be made on behalf of or in respect of any number of such workmen. (Section 33-C)

UNFAIR LABOUR PRACTICES

A new Chapter VC relating to unfair labour practices has been inserted. Section 25T under this Chapter lays down that no employer or workman or a Trade Union, whether registered under the Trade Unions Act, 1926 or not, shall commit any unfair labour practice. Section 25U provides that any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

The unfair labour practices have been listed in Schedule V which is reproduced at the end of the topic of this study lesson.
PENALTIES

1. Penalty for illegal strikes

Any workman who commences, continues or otherwise acts in furtherance of a strike which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees or with both. [Section 26(1)]

In the case of Vijay Kumar Oil Mills v. Their Workmen, it was held that the act of a workman to participate in an illegal strike gives the employer certain rights against the workman, which are not the creation of the Statute but are based on policy, and the employer has every right to waive such rights. In a dispute before the Tribunal, waiver can be a valid defence by the workman. However, waiver by the employer cannot be a defence against prosecution under Section 26 and something which is illegal by Statute cannot be made legal by waiver (Punjab National Bank v. Their Workmen).

2. Penalty for illegal lock-outs

Any employer who commences, continues, or otherwise, acts in furtherance of a lock-out which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both. [Section 26(2)]

3. Penalty for instigation etc.

Any person who instigates or incites others to take part in, or otherwise acts in furtherance of, a strike or lock-out which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (Section 27)

4. Penalty for giving financial aid to illegal strikes and lock-outs

Any person who knowingly expends or applies any money in direct furtherance or support of any illegal strike or lock-out shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (Section 28)

5. Penalty for breach of settlement or award

Any person who commits a breach of any term of any settlement or award which is binding on him under this Act, should be punishable with imprisonment for a term which may extend to six months, or with fine or with both, and where the breach is a continuing one with a further fine which may extend to two hundred rupees for everyday during which the breach continues after the conviction for the first, and the Court trying the offence, if it fines the offender, may direct that the whole or any part of the fine realised from him shall be paid, by way of compensation to any person who, in its opinion has been injured by such breach. (Section 29)

6. Penalty for disclosing confidential information

Any person who wilfully discloses any such information as is referred to in Section 21 in contravention of the provisions of that section shall, on complaints made by or on behalf of the trade union or individual business affected, be
punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both. (Section 30)

7. Penalty for closure without notice

Any employer who closes down any undertaking without complying with the provisions of Section 25-FFA shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five thousand rupees, or with both. (Section 30-A)

8. Penalty for other offences

Any employer who contravenes the provisions of Section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Further, whoever contravenes any of the provisions of this Act or any rules made thereunder shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with fine which may extend to one hundred rupees. (Section 31)

9. Offence by companies, etc.

Where a person committing an offence under this Act is a company, or other body corporate, or an association of persons (whether incorporated or not) every director, manager, secretary, agent or other officer or person concerned with management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence. (Section 32)

<table>
<thead>
<tr>
<th>Test your knowledge</th>
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<tbody>
<tr>
<td>What is the penalty on any employer who continues a lock-out even if it is illegal?</td>
</tr>
<tr>
<td>(a) Imprisonment for a term which may extend to one month, or</td>
</tr>
<tr>
<td>(b) A fine of Rs. 1,000, or</td>
</tr>
<tr>
<td>(c) Both (a &amp; b)</td>
</tr>
<tr>
<td>(d) No penalty</td>
</tr>
</tbody>
</table>

Correct answer: (a), (b) and (c)

SCHEDULES

THE FIRST SCHEDULE

[See Section 2(n)(vi)]

Industries which may be Declared to be Public Utility Services under sub-clause (vi) of Clause (n) of Section 2

1. Transport (other than railways) for the carriage of passengers of goods [by land or water];
2. Banking;
3. Cement;
4. Coal;
5. Cotton textiles;
6. Foodstuffs;
7. Iron and steel;
8. Defence establishments;
9. Service in hospitals and dispensaries;
10. Fire brigade service;
11. India Government Mints;
12. India Security Press;
13. Copper Mining;
14. Lead Mining;
15. Zinc Mining;
16. Iron Ore Mining;
17. Service in any oil field;
18. *(deleted)*
19. Service in uranium industry;
20. Pyrites mining industry;
22. Services in Bank Note Press, Dewas;
23. Phosphorite Mining;
24. Magnesite Mining;
25. Currency Note Press;
26. Manufacture or production of mineral (crude oil), motor and aviation spirit, diesel oil, kerosine oil, fuel oil, hydrocarbon oils and their blend-including synthetic fuels, lubricating oils and the like.
27. Service in the International Airports Authority of India.
28. Industrial establishments manufacturing or producing nuclear fuel and components, heavy water and allied chemicals and atomic energy.

**THE SECOND SCHEDULE**
(See Section 7)

**Matters within the Jurisdiction of Labour Court**

1. The propriety or legality of an order passed by an employer under standing orders;
2. The application and interpretation of standing orders;
3. Discharge of dismissal of workmen including reinstatement of or grant of relief to, workmen wrongfully dismissed;
4. Withdrawal of any customary concession or privilege;
5. Illegality or otherwise of a strike or lock-out; and
6. All matters other than those specified in the Third Schedule.
THE THIRD SCHEDULE
[See Section 7-A]

Matters within the Jurisdiction of Industrial Tribunals

1. Wages, including the period and mode of payment;
2. Compensatory and other allowances;
3. Hours of work and rest intervals;
4. Leave with wages and holidays;
5. Bonus, profit sharing, provident fund and gratuity;
6. Shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Rules of discipline;
9. Rationalisation;
10. Retrenchment of workmen and closure of establishment; and
11. Any other matter that may be prescribed.

THE FOURTH SCHEDULE
[See Section 9-A]

Conditions of Service for Change of which Notice is to be Given

1. Wages, including the period and mode of payment.
2. Contribution paid, or payable, by the employer to any provident fund or pension fund or for the benefit of the workmen under any law for the time being in force.
3. Compensatory and other allowances;
4. Hours of work and rest intervals;
5. Leave with wages and holidays;
6. Starting, alternating or discontinuance of shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Withdrawal of any customary concession or privilege or change in usage;
9. Introduction of new rules of discipline, or alteration of existing rules except insofar as they are provided in standing orders;
10. Rationalisation, standardisation or improvement of plant or technique which is likely to lead to retrenchment of workmen;
11. Any increase or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department of shift (not occasioned by circumstances over which the employer has no control).
THE FIFTH SCHEDULE

[See Section 2(ra)]

Unfair Labour Practices

I. On the part of employers and trade unions of employers

1. To interfere with, restrain from, or coerce, workmen in the exercise of their right to organise, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection that is to say:
   (a) threatening workmen with discharge or dismissal, if they join a trade union.
   (b) threatening a lock-out or closure, if a trade union is organised;
   (c) granting wage increase to workmen at crucial periods of trade union organisation, with a view to undermining the efforts of the trade union at organisation.

2. To dominate, interfere with or contribute support, financial or otherwise to any trade union, that is to say:
   (a) an employer taking an active interest in organising a trade union of workmen; and
   (b) an employer showing partiality or granting favour to one of several trade unions attempting to organise his workmen or to its members, where such a trade union is not a recognised trade union.

3. To establish employer sponsored trade unions of workmen.

4. To encourage or discourage membership in any trade union by discriminating against any workmen, that is to say:
   (a) discharging or punishing a workman, because he urged other workmen to join or organise a trade union;
   (b) discharging or dismissing a workman for taking part in any strike (not being a strike which is deemed to be an illegal strike under this Act);
   (c) changing seniority rating of workmen because of trade union activities;
   (d) refusing to promote workmen to higher posts on account of their trade union activities;
   (e) giving unmerited promotions to certain workmen with a view to creating discord amongst other workmen, or to undermine the strength of their trade union;
   (f) discharging office-bearers or active members of the trade union on account of their trade union activities.

5. To discharge or dismiss workmen:
   (a) by way of victimisation;
   (b) not in good faith, but in the colourable exercise of the employers rights;
(c) by falsely implicating a workman in a criminal case on false evidence or on concocted evidence;
(d) for patently false reasons;
(e) on untrue or trumped up allegations of absence without leave;
(f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
(g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the workman, thereby leading to a disproportionate punishment.

6. To abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike.
7. To transfer a workman *mala fide* from one place to another under the guise of following management policy.
8. To insist upon individual workmen, who are on a legal strike to sign a good conduct bond, as a pre-condition to allowing them to resume work.
9. To show favouritism or partiality to one set of workers regardless of merit.
10. To employ workmen as “badlis”, casuals or temporaries and to continue them as such for years, with the object of depriving them to the status and privileges of permanent workmen.
11. To discharge or discriminate against any workman for filling charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute.
12. To recruit workmen during a strike which is not an illegal strike.
13. Failure to implement award, settlement or agreement.
14. To indulge in acts of force or violence.
15. To refuse to bargain collectively, in good faith with the recognised trade unions.
16. Proposing or continuing a lock-out deemed to be illegal under this Act.

II. On the part of workmen and trade unions of workmen

1. To advise or actively support or instigate any strike deemed to be illegal under this Act.
2. To coerce workmen in the exercise of their right to self-organisation or to join a trade union or refrain from joining any trade union, that is to say:
   (a) for a trade union or its members to picketing in such a manner that non-striking workmen are physically debarred from entering the work places;
   (b) to indulge in acts of force or violence or to hold out threats of intimidation in connection with a strike against non-striking workmen or
against managerial staff.

3. For a recognised union to refuse to bargain collectively in good faith with the employer.

4. To indulge in coercive activities against certification of bargaining representative.

5. To stage, encourage or instigate such forms of coercive actions as wilful go slow, squatting on the work premises after working hours or gherao of any of the members of the managerial or other staff.

6. To stage demonstrations at the residences of the employers or the managerial staff members.

7. To incite or indulge in wilful damage to employers property connected with the industry.

8. To indulge in acts of force of violence to hold out threats of intimidation against any workman with a view to prevent him from attending work.

LESSON ROUND UP

- The Industrial Disputes Act, 1947 is an Act to make provision for the investigation and settlement of industrial disputes and for certain other purposes.

- The Industrial Disputes Act applies to all industries. “Industry” for the purpose of Industrial Disputes Act is defined under the Act.

- The industrial dispute connotes a real and substantial difference between employers and employers or between employers and workmen or between workmen and workmen, having some elements of persistency and continuity till resolved and likely to endanger industrial peace of the undertaking or the community.

- An individual dispute espoused by the union becomes an industrial dispute. The disputes regarding modification of standing orders, contract labour, lock out in disguise of closure have been held to be industrial disputes.

- The Act provides for a special machinery of Conciliation Officers, Work Committees, Courts of Inquiry, Labour Courts, Industrial Tribunals and National Tribunals, defining their powers, functions and duties and also the procedure to be followed by them.

- It also enumerates the contingencies when a strike or lock-out can be lawfully resorted to, when they can be declared illegal or unlawful, conditions for laying off, retrenching, discharging or dismissing a workman, circumstances under which an industrial establishment can be closed down and several other matters related to industrial employees and employers.
SELF TEST QUESTIONS

1. What is the object and scope of the Industrial Disputes Act, 1947?
2. Define: (a) Industrial Dispute; (b) Workman; (c) Lay off; (d) Retrenchment; (e) Strike; (f) Lock-out;
3. Describe the various steps in settlement of an industrial dispute. Is it incumbent on the appropriate Government to refer every industrial dispute to adjudication?
4. Describe briefly the authorities provided in the Act for adjudication of industrial disputes.
5. Mention a few unfair labour practices on the part of employers and on the part of workmen.
6. Briefly discuss the provisions relating to illegal strikes and lock-outs.
7. Write short notes on:
   1. Workman.
   2. Industrial dispute.
   3. Protected workmen.
   4. Layoff and retrenchment.

Suggested Readings:
(1) The Industrial Disputes Act, 1947—(Bare Act)
(2) The Law of Industrial Disputes—O.P. Malhotra
(3) Industrial Law—P.L. Malik
(4) Commentaries on Industrial Disputes Act, 1947—K.D. Srivastava
STUDY XXI

THE INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

LEARNING OBJECTIVE

The Industrial Employment (Standing Orders) Act requires employers in industrial establishments to clearly define the conditions of employment by issuing standing orders duly certified. Model standing orders issued under the Act deal with classification of workmen, holidays, shifts, payment of wages, leaves, termination etc. Students must be conversant with the terms and conditions of the industrial employment which the employees must know before they accept the employment.

At the end of the study lesson, you should be able to understand:

- Object and scope of the Act
- Important definitions
- Certifications of draft standing orders.
- Appeals
- Date of operation of standing orders
- Posting of standing orders
- Duration and modification of standing orders.
- Payment of subsistence allowance
- Compliances under the Act

OBJECT AND SCOPE OF THE ACT

The Act requires the employers in industrial establishment to define with sufficient precision the conditions of employment under them and make the said conditions known to workmen employed by them. The objects of the Act are: Firstly, to enforce uniformity in the conditions of services under different employers in different industrial establishments. Secondly, the employer, once having made the conditions of employment known to his employed workmen cannot change them to their detriment or to the prejudice of their rights and interests. Thirdly, with the express or written conditions of employment, it is open for the prospective worker to accept them and join the industrial establishment. Fourthly, for maintaining industrial peace and continued productivity, the significance of the express written conditions of employment cannot be minimised or exaggerated.
The object of the Act is to have uniform standing orders in respect of matters enumerated in the Schedule to the Act, applicable to all workers irrespective of their time of appointment (Barauni Refinery Pragati Sheel Parishad v. Indian Oil Corporation Ltd. (1991) 1 SCC 4).

The Act extends to the whole of India and applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding twelve months. Further, the appropriate Government may, after giving not less than 2 months notice of its intention to do so, by notification in the Official Gazette, extend the provisions of this Act to any industrial establishment employing such number of persons less than 100 as may be specified in the notification.

However, the Act does not apply to (1) any industry to which provisions of Chapter VII of the Bombay Industrial Relations Act, 1946, apply; or (2) any industrial establishment to which provisions of Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 apply. Notwithstanding anything contained in the said Act, the provisions of this Act shall apply to all industrial establishments under the control of the Central Government.

Certified standing orders become part of the statutory and not contractual terms and conditions of service and are binding on both the employer and the employees (Derby Textiles Ltd. v. Karamchari and Shramik Union (1991) 2 LLN 774).

Apart from the above stated provisions of Section 1 of the Act limiting the scope, extent and application of the Act, the following Sections further limit its application:

Section 13-B of the Act specifically exempt certain industrial establishments from the purview of the Act, viz., the industrial establishment in so far as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Service (Temporary Services) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Service (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette apply.

Further, Section 14 provides that the appropriate Government may by notification in the Official Gazette exempt conditionally or unconditionally any industrial establishment or class of industrial establishments from all or any of the provisions of this Act.

Test your knowledge
Choose the correct answer
What is the minimum number of employees required in an establishment which comes under the purview of the Industrial Employment (Standing Orders) Act, 1946?

(a) 50  
(b) 100 
(c) 150 
(d) 200

Correct answer: (b)
IMPORTANT DEFINITIONS

Appellate Authority

It means an authority appointed by the appropriate Government by notification in the Official Gazette, to exercise in such area, as may be specified in the notification the functions of an appellate authority under this Act. [Section 2(a)]

Appropriate Government

“Appropriate Government” means in respect of industrial establishments under the control of the Central Government or a Railway administration or in a major port, mine or oilfield, the Central Government, and in all other cases the State Government:

Provided that where any question arises as to whether any industrial establishment is under the control of the Central Government, that Government may, either on a reference made to it by the employer or the workman or a trade union or other representative body of the workmen or on its own motion and after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties. [Section 2(b)]

Certifying Officer

“Certifying Officer” means a Labour Commissioner or a Regional Labour Commissioner, and includes any other officer appointed by the appropriate Government by notification in the Official Gazette, to perform all or any of the functions of a Certifying Officer under this Act. [Section 2(c)]

Employer

“Employer” means the owner of an industrial establishment to which this Act applies and also includes the following persons:

(i) A manager so named under Section 7(1)(f) of the Factories Act, 1948.
(ii) The head of the department or any authority appointed by the Government in any industrial establishment under its control.
(iii) Any person responsible to the owner for the supervision and control of any other industrial establishment which is not under the control of Government. [Section 2(d)]

Industrial Establishment

It means

(i) an industrial establishment defined by Section 2(ii) of the Payment of Wages Act, 1936, or
(ii) a factory as defined by Section 2(m) of the Factories Act, 1948, or
(iii) a railway as defined by Section 2(4) of the Indian Railways Act, 1890, or
(iv) the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen. [Section 2(e)]
Standing Orders

“Standing Orders” means rules relating to matters set out in the Schedule to the Act. [Section 2(g)]

Wages and Workmen

The terms “Wages” and “Workmen” have the meanings respectively assigned to them in clauses (rr) and (s) of Section 2 of the Industrial Disputes Act, 1947. [Section 2(i)]

CERTIFICATION OF DRAFT STANDING ORDERS

Submission of draft Standing Orders by employers to the certifying officer

Section 3 provides that within six months from the date on which this Act becomes applicable to an industrial establishment, the employer of that establishment shall submit to the Certifying Officer five copies of the draft Standing Orders proposed by him for adoption in that establishment.

Such draft Standing Orders shall be in conformity with the Model Standing Orders if any, and, shall contain every matter set out in the Schedule which may be applicable to the industrial establishment.

The draft Standing Orders shall be accompanied by a statement containing prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.

If the industrial establishment are of similar nature, a group of employers owning those industrial establishment may submit a joint draft of Standing Orders subject to such conditions as may be prescribed.

Conditions for certification of Standing Orders

According to Section 4 of the Act, Standing Orders shall be certifiable if

(a) provision is made therein for every matter stated in the Schedule to the Act which is applicable to industrial establishment; and

(b) the Standing Orders are otherwise in conformity with the provisions of the Act.

**Test your knowledge**

Choose the correct answer

Which of the following documents must a Standing Order be in conformity with?

(a) Standard Standing Orders
(b) Model Standing Orders
(c) Uniform Standing Orders
(d) Form Standing Orders

Correct answer: (b)
Fairness or reasonableness of Standing Orders

It is further provided in Section 4 that it shall be the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders.

The Act, has imposed a duty on the Certifying Officer, to consider the reasonableness and fairness of the Standing Orders before certifying the same. The Certifying Officer is under a legal duty to consider that the Standing Orders are in conformity with the Act. If the Certifying Officer finds that some provisions, as proposed by the employer relate to matters which are not included in the Schedule, or if he finds some provisions are unreasonable he must refuse to certify the same. Certification of any such Standing Order would be without jurisdiction. The Certifying Officer has a mandatory duty to discharge and he acts in a quasi-judicial manner. Where a matter is not included in the Schedule and the concerned appropriate Government has not added any such item to the Schedule, neither the employer has a right to frame a Standing Order enabling him to transfer his employees nor the Certifying Officer has jurisdiction to certify the same. The consent of the employees to such standing orders would not make any difference (Air Gases Mazdoor Sangh, Varanasi v. Indian Air Gases Ltd., 1977 Lab. I.C. 575).

Certification of Standing Orders —Procedure to be followed by the Certifying Officer

Section 5 of the Act lays down the procedure to be followed by Certifying Officer. On receipt of the draft Standing Order from the employer, the Certifying Officer shall forward a copy thereof to the trade union of the workmen or where there is no trade union, then to the workmen in such manner as may be prescribed, together with a notice requiring objections, if any, which the workmen may desire to make in the draft Standing Orders. These objections are required to be submitted to him within 15 days from the receipt of the notice. On receipt of such objections he shall provide an opportunity of being heard to the workmen or the employer and will make amendments, if any, required to be made therein and this will render the draft Standing Orders certifiable under the Act and he will certify the same. A copy of the certified Standing Orders will be sent by him to both the employer and the employees association within seven days of the certification.

Effect of certification: The Act is a special law in regard to matters enumerated in the Schedule and the regulations made by the employer with respect to any of those matters. These are of no effect unless such regulations are notified by the Government under Section 13B or certified by the Certifying Officer under Section 5 of the Act.

Register of Standing Orders: Section 8 empowers the Certifying Officer to file a copy of all the Standing Orders as certified by him in a register maintained for the purpose in the prescribed form. He shall furnish a copy of the same to any person applying therefor on payment of the prescribed fee.
Test your knowledge

State whether the following statement is “True” or “False”

Workmen are not entitled to apply for modification of the Standing Orders.

- True
- False

Correct answer: False

APPEALS

According to Section 6 of the Act, the order of the Certifying Officer can be challenged by any employer, workman, trade union or any other prescribed representatives of the workmen, who can file an appeal before the appellate authority within 30 days from the date on which copies are sent to employer and the workers representatives. The appellate authority, whose decision shall be final, has the power to confirm the Standing Orders as certified by the Certifying Officer or to amend them. The appellate authority is required to send copies of the Standing Orders as confirmed or modified by it, to the employer or workers representatives within 7 days of its order.

The appellate authority has no power to set aside the order of Certifying Officer. It can confirm or amend the Standing Orders (Khadi Gram Udyog Sangh v. Jit Ram, 1975-2 L.L. J. 413). The appellate authority can not remand the matter for fresh consideration. [Kerala Agro Machinery Corporation, (1998) 1 LLN 229 (Ker)]

DATE OF OPERATION OF STANDING ORDERS

Standing Orders shall come into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where an appeal has been preferred, they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives. (Section 7)

POSTING OF STANDING ORDERS

The text of the Standing Orders as finally certified under this Act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed. (Section 9)

DURATION AND MODIFICATION OF STANDING ORDERS

Section 10 prohibits an employer to modify the Standing Orders once they are certified under this Act except on agreement between the employer and the workmen or a trade union or other representative body of the workmen. Such modification will not be affected until the expiry of 6 months from the date on which the Standing Orders were last modified or
certified as the case may be. This Section further empowers an employer or the workmen or a trade union or other representative body of the workmen to apply to the Certifying Officer to have the Standing Orders modified by making an application to the Certifying Officer. Such application should be accompanied by 5 copies of the proposed modifications and where such modifications are proposed to be made by agreement between the employer and the workmen or a trade union or other representative body of the workmen, a certified copy of such agreement should be filed along with the application.

Workmen are entitled to apply for modification of the Standing Orders. (1977-II Labour Law Journal 503). Section 10(2) does not contain any time limit for making modification application. It can be made at any time. [Indian Express Employees Union v. Indian Express (Madurai) Ltd. (1998) 1 Cur LR 1161 (Ker)]

Test your knowledge

Choose the correct answer

What is the period within which any employer or workman can challenge an order given by the Certifying Officer and thus file an appeal before the Appellate Authority?

(a) Within 10 days from the date on which copies are sent to the employer and workers representatives
(b) Within 15 days from the date on which copies are sent to the employer and workers' representatives
(c) Within 20 days from the date on which copies are sent to the employer and workers' representatives
(d) Within 30 days from the date on which copies are sent to the employer and workers representatives

Correct answer: (d)

PAYMENT OF SUBSISTENCE ALLOWANCE

Statutory provision for payment of subsistence allowance has been made under Section 10A of the Act which was inserted by the amending Act (No. 18) of 1982. Section 10A provides as follows:

Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such a workman the subsistence allowance

(a) at the rate of fifty per cent of the wages which the workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension: and

(b) at the rate of seventy five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings
against such workman is not directly attributable to the conduct of such workman.

Any dispute regarding subsistence allowance may be referred by the workman or the employer, to the Labour Court constituted under the Industrial Disputes Act, 1947.

However, if the provisions relating to payment of subsistence allowance under any other law for the time being in force are more beneficial, then the provisions of such other law shall be applicable.

INTERPRETATION OF STANDING ORDERS

Section 13-A of the Act provides that the question relating to application or interpretation of a Standing Order certified under this Act, can be referred to any Labour Court constituted under the Industrial Disputes Act, 1947 by any employer or workman or a trade union or other representative body of the workmen. The Labour Court to which the question is so referred, shall decide it after giving the parties an opportunity of being heard. Such decision shall be final and binding on the parties.

Test your knowledge

Choose the correct answer

What is the subsistence allowance payable to a workman for the first 90 days when he has been suspended pending an inquiry against him?

(a) 25% of the wages
(b) 50% of the wages
(c) 75% of the wages
(d) No wages

Correct answer: (b)

TEMPORARY APPLICATION OF MODEL STANDING ORDERS

Section 12-A provides that for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the Standing Orders as finally certified under this Act come into operation in that establishment, the prescribed model Standing Orders shall be deemed to be adopted in that establishment and the provisions of Sections 9, 13(2) and 13-A shall apply.

Where there are two categories of workers, daily rated and monthly rated but the certified Standing Orders are in respect of daily rated workmen only, then Model Standing Orders can be applied to monthly rated workmen (Indian Iron and Steel Co. Ltd. v. Ninth Industrial Tribunal, 1977 Lab. I.C. 607).

In case where there are no certified Standing Orders applicable to an industrial establishment, the prescribed Model Standing Orders shall be deemed to be adopted and applicable (1981-II Labour Law Journal 25).
COMPLIANCES UNDER THE ACT

THE SCHEDULE

[See Sections 2(g) and 3(2)]

Matters to be provided in Standing Orders under this Act

1. Classification of workmen, e.g., whether permanent, temporary, apprentices, probationers or badlis.
2. Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.
3. Shift working.
4. Attendance and late coming.
5. Conditions of, procedure in applying for, and the authority which may grant leave and holidays.
6. Requirement to enter premises by certain gates, and liability to search.
7. Closing and reopening of sections of the industrial establishment, and temporary stoppage of work and the rights and liabilities of the employer and workmen arising therefrom.
8. Termination of employment, and the notice thereof to be given by employer and workmen.
9. Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
10. Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants.

10A. Additional matters to be provided in Standing Orders in coal mines.

1. Medical aid in case of accident.
2. Railway travel facilities.
4. Transfers.
5. Liability of manager of the establishment or mine.
7. Exhibition and supply of Standing Orders.

10B. Additional matters to be provided in Standing Orders relating to all industrial establishments.

1. Service record-matters relating to service card, token tickets, certification of services, change of residential address of workers and record of age.
2. Confirmation.
3. Age of retirement.
4. Transfer.
5. Medical aid in case of accidents.
6. Medical examination.
7. Secrecy.
8. Exclusive services.
9. Any other matter which may be prescribed.

In a significant judgement on gender justice, the Supreme Court has ordered that employers should include strict prohibitions on sexual harassment of employees and appropriate penalties against the offending employees in Standing Orders.

LESSON ROUND UP

- The Act requires the employers in industrial establishment to define with sufficient precision the conditions of employment under them and make the said conditions known to workmen employed by them.

- It applies to every industrial establishment wherein 100 or more workmen are employed or were employed on any day during the preceding twelve months.

- The appropriate Government may, after giving not less than 2 months notice of its intention to do so, by notification in the Official Gazette, extend the provisions of this Act to any industrial establishment employing such number of persons less than 100 as may be specified in the notification.

- Within six months from the date on which this Act becomes applicable to an industrial establishment, the employer of that establishment shall submit to the Certifying Officer five copies of the draft Standing Orders proposed by him for adoption in that establishment.

- Such draft Standing Orders shall be in conformity with the Model Standing Orders if any, and, shall contain every matter set out in the Schedule which may be applicable to the industrial establishment.

- On receipt of the draft Standing Order from the employer, the Certifying Officer shall forward a copy thereof to the trade union of the workmen or where there is no trade union, then to the workmen in the prescribed manner together with a notice requiring objections, if any, which the workmen may desire to make in the draft Standing Orders.

- These objections are required to be submitted to him within 15 days from the receipt of the notice.

- On receipt of such objections, he shall provide an opportunity of being heard to the workmen or the employer and will make amendments, if any, required to be made therein and this will render the draft Standing Orders certifiable under the Act and he will certify the same.
A copy of the certified Standing Orders will be sent by him to both the employer and the employees association within seven days of the certification.

The Certifying Officer has been empowered to file a copy of all the Standing Orders as certified by him in a register maintained for the purpose in the prescribed form. He shall furnish a copy of the same to any person applying therefor on payment of the prescribed fee.

Standing Orders shall come into operation on the expiry of 30 days from the date on which the authenticated copies are sent to employer and workers representatives or where an appeal has been preferred, they will become effective on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent to employer and workers representatives.

SELF TEST QUESTIONS

1. Define the term Standing Orders and explain their importance in the light of decided cases.

2. Explain the Object and Scope of the Industrial Employment (Standing Orders) Act, 1946.

3. Explain the procedure for certification of Standing Orders.

4. Whether the certified Standing Orders could be modified? Explain.

Suggested Readings:

2. Industrial Relations in India (ed) —V.B. Singh
4. Industrial Law—P.L. Malik
5. The Employment Exchange (Compulsory Notification of Vacancies) Act, 1959—Bare Act
6. The Apprentice Act, 1961—Bare Act
7. Industrial Employment (Standing Orders) Act, 1946—Bare Act
The Factories Act has been enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. For that purpose, it seeks to impose upon the owner or the occupier certain obligations to protect the workers and to secure for them employment in conditions conductive to their health and safety. The object of the lesson is to familiarize the students with the legal requirements stipulated under the Act.

At the end of the study lesson, you should be able to understand:

- Object, scope and application of the Act
- Important definitions
- Statutory agencies and their powers
- Approval licensing and registration of factories
- General duties of the occupier and manufacturers
- Health, safety and welfare measures
- Working hours of adults
- Employment of young persons and children
- Penalties
- Compliances under the Act

**OBJECT AND SCOPE OF THE ACT**

The main object of the Factories Act, 1948 is to ensure adequate safety measures and to promote the health and welfare of the workers employed in factories. The Act also makes provisions regarding employment of women and young persons (including children and adolescents), annual leave with wages etc.

The Act extends to whole of India including Jammu & Kashmir and covers all manufacturing processes and establishments falling within the definition of ‘factory’ as defined under Section 2(m) of the Act. Unless otherwise provided it is also applicable to factories belonging to Central/State Governments. (Section 116)
IMPORTANT DEFINITIONS

Adult

“Adult” means a person who has completed his eighteenth year of age. [Section 2(a)]

Adolescent

“Adolescent” means a person who has completed his fifteenth year of age but has not completed his eighteenth year. [Section 2(b)]

Calendar Year

“Calendar Year” means the period of twelve months beginning with the first day of January in any year. [Section 2(bb)]

Child

“Child” means a person who has not completed his fifteenth year of age. [Section 2(c)]

Competent Person

“Competent Person” in relation to any provision of this Act, means a person or an institution recognised as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to

(i) the qualifications and experience of the person and facilities available at his disposal; or

(ii) the qualifications and experience of the persons employed in such institution and facilities available therein.

With regard to the conduct of such tests, examinations and inspections and more than one person or institution can be recognised as a competent person in relation to a factory. [Section 2(ca)]

Test your knowledge

State whether the following statement is “True” or “False”

As per the Factories Act, 1948, “Adolescent” means a person who has completed his 15th year of age but has not completed his 21st year.

- True
- False

Correct answer: False

Hazardous Process

“Hazardous Process” means any process or activity in relation to an industry specified in the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye products, wastes or effluents thereof would

(i) cause material impairment to the health of the persons engaged in or
connected therewith, or
(ii) result in the pollution of the general environment;

Provided that the State Government may, by notification in the Official Gazette amend the First Schedule by way of addition, omission or variation of any industry specified in the said Schedule. [Section 2(cb)]

Young Person

“Young Person” means a person who is either a child or an adolescent. [Section 2(d)]

Day

“Day” means under Section 2(e), a period of twenty-four hours beginning at midnight. [Section 2(e)]

Week

“Week” means a period of seven days beginning at mid-night on Saturday night or such other night as may be approved in writing for a particular area by the Chief Inspector of Factories. [Section 2(f)]

Power

“Power” means electrical energy or any other form of energy which is mechanically transmitted and is not generated by human or animal agency. [Section 2(g)]

Prime Mover

“Prime” Mover means any engine, motor or other appliance which generates or otherwise provides power. [Section 2(h)]

Transmission Machinery

“Transmission” Machinery means any shaft, wheel, drum, pulley, system of pulleys, coupling, clutch, driving belt or other appliance or device by which the motion of a prime-mover is transmitted to or received by any machinery or appliance. [Section 2(i)]

Machinery

The term includes prime-movers, transmission machinery and all other appliances whereby power is generated, transformed, transmitted or applied. [Section 2(j)]

Factory

“Factory” includes any premises including the precincts thereof

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on; or

(ii) whereon twenty or more workers are working, or were working on a day of
the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on.

But does not include a mine subject to the operation of the Mines Act, 1952 or a mobile unit belonging to the armed forces of the Union or a railway running shed, or a hotel, restaurant or eating place. [Section 2(m)]

Explanation I: For computing the number of workers for the purposes of this clause, all the workers in different groups and relays in a day shall be taken into account.

Explanation II: For the purposes of this clause the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof.

(i) Essential elements of a factory:
   (1) There must be a premises.
   (2) There must be a manufacturing process which is being carried on or is so ordinarily carried on in any part of such a premises.
   (3) There must be ten or more workers who are/were working in such a premises on any day of the last 12 months where the said manufacturing process is carried on with the aid of power. But where the manufacturing process is carried on without the aid of power, the required number of workers working should be twenty or more.

The following are not covered by the definition of factory:
   (i) Railway running sheds, (ii) mines, (iii) mobile units of armed forces, (iv) hotels, eating places or restaurants.

(ii) Meaning of words “premises and precincts”

The word “premises” is a generic term meaning open land or land with building or building alone. The term ‘precincts’ is usually understood as a space enclosed by walls. Expression ‘premises’ including precincts does not necessarily mean that the premises must always have precincts. It merely shows that there may be some premises with precincts and some premises without precincts. The word ‘including is not a term’ restricting the meaning of the word ‘premises’, but is a term which enlarges its scope. All the length of railway line would be phase wise factories (LAB IC 1999 SC 407). Company engaged in construction of railway line is factory. (LAB IC 1999 SC 407).

The Supreme Court in Ardeshir H. Bhiwandiwala v. State of Bombay, AIR 1962 S.C. 29, observed that the legislature had no intention to discriminate between workers engaged in a manufacturing process in a building and those engaged in such a process on an open land and held that the salt works, in which the work done is of conversion of sea water into crystals of salt, come within the meaning of the word ‘premises’.

(iii) Manufacturing process is being carried on or ordinarily so carried on

The word ordinarily came up for interpretation in the case of Employers
Association of Northern India v. Secretary for Labour U.P. Govt. The question was whether a sugar factory ceases to be a factory when no manufacturing process is carried on during the off-season. It was observed that the word ‘ordinarily’ used in the definition of factory cannot be interpreted in the sense in which it is used in common parlance. It must be interpreted with reference to the intention and purposes of the Act. Therefore, seasonal factories or factories carrying on intermittent manufacturing process, do not cease to be factories within the meaning of the Act.

(iv) Ten or twenty workers

The third essential content of ‘factory’ is that ten or more workers are employed in the premises using power and twenty or more workers are employed in the premises not using power.

Where seven workers were employed in a premises where the process of converting paddy into rice by mechanical power was carried on and in the same premises, three persons were temporarily employed for repairs of part of the machinery which had gone out of order but the manufacturing was going on, it was held that since three temporary persons were workers, consequently there were ten workers working in the ‘premises’ and the premises is a factory (AIR 1959, All. 794).

According to explanation to Section 2(m), all the workers in different relays in a day shall be taken into account while computing the number of workers.

Bombay High Court held that the fact that manufacturing activity is carried on in one part of the premises and the rest of the work is carried on in the other part of the premises cannot take the case out of the definition of the word ‘factory’ which says that manufacturing process can be carried on in any part. The cutting of the woods or converting the wood into planks is essentially a part of the manufacturing activity (Bharati Udyog v. Regional Director ESI Corpn., 1982 Lab. I.C. 1644).

A workshop of Polytechnic Institution registered under the Factories Act imparting technical education and having power generating machines, was carrying on a trade in a systematic and organised manner Held, it will come under the definition of factory as defined under Section 2(m) read with Section 2(k) (1981 Lab. I.C. NOC 117).

**Test your knowledge**

Which of the following are essential elements of a factory?

(a) There must be premises

(b) There must be a manufacturing process being carried on at the premises

(c) There must be ten or more workers where the manufacturing process is being carried on with the aid of power

(d) There electronic data processing units are installed

Correct answer: (a), (b) and (c)
Manufacturing Process

It means any process for

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise, treating or adopting any article or substance with a view to its use, sale, transport, delivery or disposal; or

(ii) pumping oil, water or sewage or any other substance; or

(iii) generating, transmitting, transmitting power; or

(iv) composing types for printing, printing by letter-press, lithography, photogravure or other similar process, or book-binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or

(vi) preserving or storing any article in cold storage. [Section 2(k)]

The definition is quite important and it has been the subject of judicial interpretation in large number of cases:

(i) What is manufacturing process

The definition of manufacturing process is exhaustive. Under the present definition even transporting, washing, cleaning, oiling and packing which do not involve any transformation as such which is necessary to constitute manufacturing process in its generic sense, are nonetheless treated as manufacturing process. The definition is artificially projected beyond the scope of natural meaning of what the words might convey thus covering very vide range of activities. Madras High Court in the case of In re. Seshadrinatha Sarma, 1966 (2) LLJ 235, held that to constitute a manufacture there should not be essentially some kind of transformation of substance and the article need not become commercially as another and different article from that at which it begins its existence so long as there has been an indisputable transformation of substance by the use of machinery and transformed substance is commercially marketable.

Division Bench of A.P. High Court held that to determine where certain premises is factory, it is necessary that it should carry on manufacturing process and it does not require that the process should end in a substance being manufactured (Alkali Metals (P) Ltd. v. ESI Corpn., 1976 Lab.I.C.186). In another case it was observed that manufacturing process merely refers to particular business carried on and does not necessarily refer to the production of some article. The works of laundry and carpet beating were held to involve manufacturing process. A process employed for purpose of pumping water is manufacturing process. Each of the words in the definition has got independent meaning which itself constitutes manufacturing process.

Following processes have been held to be manufacturing processes:

(1) Sun-cured tobacco leaves subjected to processes of moistening, stripping, breaking up, adaption, packing, with a view to transport to companys main factory for their use in manufacturing cigarette (V.P. Gopala Rao v. Public Prosecutor, AIR 1970 S.C. 66).
The operation of peeling, washing etc., of prawns for putting them in cold storage is a process with a view to the sale or use or disposal of the prawns (R.E.DSouza v. Krishnan Nair, 1968 F.J.R. 469).

(3) Stitching old gunny bags and making them fit for use.

(4) In paper factory, bankas grass packed into bundles manually and despatched to the factory.

(5) Work of garbling of pepper or curing ginger.

(6) Process carried out in salt works in converting sea water into salt.

(7) Conversion of latex into sheet rubber.

(8) A process employed for the purpose of pumping water.

(9) The work done on the bangles of cutting grooves in them which later would be filled with colouring, is clearly a stage in ornamentation of the bangle with view to its subsequent use for sale.

(10) Preparation of soap in soap works.

(11) The making of bidies.

(12) The raw film used in the preparation of movies is an article or a substance and when by the process of tracing or adapting, after the sound are absorbed and the photos imprinted, it is rendered fit to be screened in a cinema theatre, then such a change would come within the meaning of the term treating or adapting any article or substance with a view to its use.

(13) Composing is a necessary part of printing process and hence it is a manufacturing process. It cannot be said that the definition should be confined to the process by which impression is created on the paper and to no other process preceding or succeeding the marking of the impression on the paper to be printed. Everything that is necessary before or after complete process, would be included within the definition of the word ‘manufacturing process’. The definition takes in all acts which bring in not only some change in the article or substance but also the act done for the protection and maintenance of such article by packing, oiling, washing, cleaning, etc. (P.Natrajan v. E.S.I. Corporation (1973) 26 FLR 19).

(14) Preparation of food and beverages and its sale to members of a club (CCI v. ESIC, 1992 LAB IC 2029 Bom.).

(15) Receiving products in bulk, in packing and packing as per clients requirements (LLJ I 1998 Mad. 406).

(16) Construction of railway - use of raw materials like sleepers, bolts, loose rails etc. to adaptation of their use for ultimately for laying down railway line (LAB IC 1999 SC 407; Lal Mohmd. v. Indian Railway Construction Co. Ltd.).

(ii) What is not a manufacturing process

No definite or precise test can be prescribed for determining the question whether a particular process is a manufacturing process. Each case must be judged on its own facts regard being had to the nature of the process employed, the eventual result achieved and the prevailing business and commercial notions of the people. In
deciding whether a particular business is a manufacturing process or not, regard must be had to the circumstances of each particular case. To constitute a manufacturing process, there must be some transformation i.e. article must become commercially known as something different from which it acquired its existence.

Following processes are not manufacturing processes:

1. Exhibition of films process.
2. Industrial school or Institute imparting training, producing cloth, not with a view to its sale.
3. Receiving of news from various sources on a reel in a teleprinter of a newspaper office, is not a manufacturing process in as much as news is not the article or substance to which Section 2(k)(i) has referred.
4. Any preliminary packing of raw material for delivering it to the factory (AIR 1969 Mad. 155).

_test your knowledge_

State whether the following statement is “True” or “False”

Conversion of latex into sheet rubber is not a manufacturing process

Correct answer: False

Worker

“Worker” means a person employed directly or by or through any agency (including a contractor) with or without knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in any other kind or work incidental to, or connected with, the manufacturing process or the subject of the manufacturing process but does not include any member of the armed forces of the Union. [Section 2(1)]

The definition contains following ingredients:

(i) There should be an ‘employed person’

(a) Meaning of the word “employed”: The concept of “employment” involves three ingredients, viz. employer, employee, and contract of employment. The ‘employer’ is
one who employs, i.e., one who engages the services of other persons. The ‘employee’ is one who works for another for hire.

The employment is the contract of service between employer and employee whereunder the employee agrees to serve the employer subject to his control and supervision. The prima facie test for determination of the relationship between the employer and employee is the existence of the right of the employer to supervise and control the work done by the employee not only in the matter of directing what work the employee is to do but also the manner in which he shall do his work (Chintaman Rao v. State of M.P. AIR 1958 S.C. 388).

Therefore, ‘supervision and control’ is the natural outcome when a person is employed by another person. Moreover, the ‘employment’ referred to in the section is in connection with a manufacturing process that is carried on in the factory which process normally calls for a large measure of coordination between various sections inside a factory and between various individuals even within a section. The persons will have to be guided by those placed in supervisory capacity. A certain amount of control is thus necessarily present in such a case.

In Shankar Balaji Waje v. State of Maharashtra, AIR 1963 Bom. 236, the question arose whether bidi roller is a worker or not. The management simply says that the labourer is to produce bidies rolled in a certain form. How the labourer carried out the work is his own concern and is not controlled by the management, which is concerned only with getting bidies rolled in a particular style with certain contents. The Supreme Court held that the bidi roller is not a worker. The whole conception of service does not fit in well with a servant who has full liberty to attend to his work according to his pleasure and not according to the orders of his master. Where the employer did retain direction and control over the workers both in manner of the nature of the work as ‘also its details they will be held as workers.

A day labourer, where there was no evidence to show that he was free to work for such period as he likes, free to come and go whenever he chose and free to absent himself at his own sweet will, was held to be a worker. Similarly, women and girls employed in peeling, washing etc., of consignment of prawns brought on the premises at any time of the day or night, without any specified hours of work and without any control over their attendance or the nature, manner or quantum of their work and who after finishing the work go to other premises in the locality where similar consignment of prawns are received, are not Workers (State of Kerala v. R.E.DSouza).

(b) Whether relationship of master and servant necessary: The expression “employed” does not necessarily involve the relationship of master and servant. There are conceivable cases in which where no such relationship exists and yet such persons would be workers. The expression a person employed, according to Justice Vyas, means a person who is actually engaged or occupied in a manufacturing process, a person whose work is actually utilised in that process. The definition of worker is clearly enacted in terms of a person who is employed in and not in terms of person who is employed by. It is immaterial how or by whom he is employed so long as he is actually employed in a manufacturing process.
(c) **Piece-rate workers**—Whether workers: **Piece-rate workers can be workers within the definition of ‘worker in the Act, but they must be regular workers and not workers who come and work according to their sweet will** (Shankar Balaji Waje v. State of Maharashtra, AIR 1967 S.C. 517). In another case workmen had to work at bidi factory when they liked. The payment was made on piece-rate according to the amount of work done. Within the factory, they were free to work. But the control of the manner in which bidies were ready, by the method of rejecting those which did not come up to the proper standards. In such a case it was exercised which was important (Birdhi Chand Sharma v. First Civil Judge, Nagpur, AIR 1961 SC 644). Therefore, whatever method may be adopted for the payment of wages, the important thing to see is whether the workers work under supervision and control of the employer. It makes no difference whether the worker employed in the manufacturing process is paid time rate wages or piece rate wages.

(d) The partners of a concern, even though they work on premises in the factory cannot be considered to be workers within Section 2(1): (1958 (2) LLJ 252 SC).

(e) **An independent contractor**: He is a person who is charged with work and has to produce a particular result but the manner in which the result is to achieved is left to him and as there is no control or supervision as to the manner in which he has to achieve the work, he is not a worker.

(ii) **Employment should be direct or through some agency**

The words directly or by or through any agency in the definition indicate that the employment is by the management or by or through some kind of employment agency. In either case there is a contract of employment between the management and the person employed. There should be a privity of contract between them and the management. Only such person can be classified as worker who works either directly or indirectly or through some agency employed for doing his works of any manufacturing process or cleaning, etc., with which the factory is concerned. It does not contemplate the case of a person who comes and that too without his intervention either directly, or indirectly, and does some work on the premises of factory.

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**Test your knowledge**

State whether the following statement is “True” or “False”

Piece-rate workers are considered workers as per the definition of ‘Worker’ in the Factories Act, 1948.

- True
- False

Correct answer: True

(iii) **Employment should be in any manufacturing process etc.**

The definition of “worker” is fairly wide. It takes within its sweep not only persons employed in manufacturing process but also in cleaning any part of the machinery.
and premises used for manufacturing process. It goes far beyond the direct connection with the manufacturing process by extending it to other kinds of work which may either be incidental to or connected with not only the manufacturing process itself but also the subject of the manufacturing process (Works Manager, Central Rly. Workshop Jhansi v. Vishwanath and others), the concept of manufacturing process has already been discussed. The meaning of the expression employed in cleaning any part of machinery, etc.” and employed in work incidental to... process, are discussed below:

(a) Employed in cleaning any part of machinery etc.: If a person is employed in cleaning any part of the machinery premises which is used for manufacturing process, he will be held as worker.

(b) Employed in work incidental to process: This clause is very important because it enlarges the scope of the term, manufacturing process. Following illustrative cases will clarify the meaning of this clause:

1. In Shinde v. Bombay Telephones, 1968 (11) LLJ 74, it was held that whether the workman stands outside the factory premises or inside it, if his duties are connected with the business of the factory or connected with the factory, he is really employed in the factory and in connection with the factory.

2. In Works Manager, Central Rly. Workshop Jhansi v. Vishwanath and others, it was held that the definition of worker does not exclude those employees who are entrusted solely with clerical duties, if they otherwise fall within the definition of ‘worker. Timekeepers employed to maintain attendance of the staff, job cards particularly of the various jobs under operation, and time-sheets of the staff engaged in production of spare parts, repairs, etc.; and head time-keeper who supervise the work of the time-keepers, perform work which is incidental to or connected with the manufacturing process carried on in the factory and would therefore, fall within the definition of the worker in the Act.

3. Munim in a factory is a worker.

4. Workmen in canteen attached to a factory are employees.

5. A person employed by a gas manufacturing works as a coolie for excavating and digging trenches outside the factory for laying pipes for transporting gas to consumers, cannot be held to be a worker (AIR 1961 Bomb. 184).

6. Person employed to supply material to a mason engaged in construction of furnace will be deemed to be employed by the factory to a work incidental to or connected with manufacturing process.

7. In a soap-works, a carpenter preparing the packing cases is a worker because he might legitimately be considered to be engaged in a kind of work incidental to or connected with the subject of the manufacturing process, viz., packaging of soap for being sent out for sale.

8. In the case of Rohtas Industries Ltd. v. Ramlakhan Singh and others, A.I.R. 1971 SC 849, a person was employed in a paper factory. He was engaged
in supervising and checking quality and weighment of waste papers and
rags which are the basic raw material for the manufacture of paper. He used
to deal with receipts and maintain records of stock and pass the bill of the
supplier of waste paper and rags. He used to work in the precincts of the
factory and in case of necessities had to work inside the factory. The
Supreme Court held that he was working in the factory premises or its
precincts in connection with the work of the subject of the manufacturing
process, namely the raw material.

(iv) Employment may be for remuneration or not

A person who receives wages as remuneration for his services, a person who
receives remuneration on piece-work basis, a person may be working as an
apprentice, and a person who is a honorary worker, all come within the definition of a
worker. Therefore to be a worker, it is immaterial whether a person is employed for
wages or for no wages.

(v) Any member of the armed forces of the Union is excluded from the definition of
worker

(vi) Whether all employees are workers?

Since the word employee has not been defined in the Act it follows that all the
workers within the ambit of the definition under the Act would be employees, while all
employees would not be workers (Harbanslal v. State of Karnataka, (1976)1
Karnt.J.111). All persons employed in or in connection with a factory whether or
not employed as workers are entitled to the benefits of the Act (Union of India

Once it is established prima facie that premises in question is a factory within the
meaning of the Act, the provisions of Section 103 as to the presumption of
employment are immediately attracted and onus to prove the contrary shifts to the

Occupier

Section 2(n) of the Act defines the term “occupier” as a person who
has ultimate control over the affairs of the factory:

Provided that

(i) in the case of a firm or other association of individuals, any
one of the individual partners or members thereof shall be deemed to be the
occupier;

(ii) in the case of a company, any one of the directors, shall be deemed to be
the occupier;

(iii) in the case of a factory owned or controlled by the Central Government or
any State Government, or any local authority, the person or persons
appointed to manage the affairs of the factory by the Central Government,
the State Government or the local authority, as the case may be, shall be
deemed to be the occupier.
Provided further that in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire

(1) the owner of the dock shall be deemed to be the occupier for the purposes of any matter provided for by or under (a) Sections 6, 7, 7A, 7B, 11 or 12; (b) Section 17 in so far as it relates to the providing the maintenance of sufficient and suitable lighting in or around the dock; (c) Sections 18, 19, 42, 46, 47 or 49 in relation to the workers employed on such repair or maintenance;

(2) the owner of the ship or his agent or master or other officer-in-charge of the ship or any person who contracts with such owner, agent or master or other officer-in-charge to carry out the repair or maintenance work shall be deemed to be occupier for the purposes of any matter provided for by or under Sections 13, 14, 16 or 17 (save as otherwise provided in this proviso) or Chapter IV (except Section 27) or Sections 43, 44, or 45, Chapter VI, VII, VIII or IX or Sections 108, 109 or 110, in relation to (a) the workers employed directly by him, or by or through any agency, and (b) the machinery, plant or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in-charge or person.

The important test whether a person is an occupier or not is the possession or vesting in of the ultimate control of the factory. The control should be an ultimate one, though it may be remote. There was a lot of controversy regarding 'Occupier in case of a company, as the Section 2(n)(ii), provides that any one of the directors of the company shall be deemed to be occupier of the factory. However, the Supreme Court in the case of J.K. Industries Ltd. v. Chief Inspector of Factories (1997) I-L.L.J. SC722, has held that only a member of Board of Directors of the Company can be occupier of the factory of the Company. The ultimate control of factory owned by company vests in Board of Directors. Ultimate control which vests in Board of Directors cannot be vested in any one else. Company owning factory cannot nominate its employees or officers except Director of the company as occupier of its factory.

Therefore an employee of company or factory cannot be occupier. Proviso (ii) to Section 2(n) does not travel beyond scope of main provision and is not violative of Article 14 of Constitution of India. Proviso (ii) is not ultra vires main provisions of Section 2(n). No conflict exists between main provisions of Section 2(n) and proviso (ii). Further, proviso (ii) to Section 2(n) read with Section 92, does not offend Article 21.

Under Section 2(n)(iii), for the purpose of deciding who is an occupier of the factory, the test to be applied is who has ultimate control over its affairs in a government company, in fact the ultimate control lies with government though the company is a separate legal entity by having right to manage its affairs. Persons appointed by central government to manage its affairs of factories (of government companies) were therefore deemed to be appointed as occupiers under the Act (IOC v. CIF, LLJ II SC 1998 604).
Exemption of occupier or manager from liability in certain cases

Section 101 provides exemptions from liability of occupier or manager. It permits an occupier or manager of a factory who is charged with an offence punishable under the Act to bring into the Court any other person whom he charges actual offender and also proves to the satisfaction of the Court that:

(a) he has used due diligence to enforce the execution of this Act; and
(b) that the offence in question was committed without his knowledge, consent or connivance, by the said other person.

The other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory. In such a case occupier or manager of the factory is discharged from liability. The Section is an exception to principles of strict liability, but benefit of this would be available only when the requirements of this section are fully complied with and the court is fully satisfied about the proof of facts contemplated in (a) and (b) above.

STATUTORY AGENCIES AND THEIR POWERS FOR ENFORCEMENT OF THE ACT

The State Governments assume the main responsibility for administration of the Act and its various provisions by utilising the powers vested in them. Section 3 empowers the State Government to make rules for references to time of day where Indian Standard Time, being 5-1/2 hours ahead of Greenwich Mean-Time is not ordinarily observed. These rules may specify the area, define the local mean time ordinarily observed therein, and permit such time to be observed in all or any of the factories situated in the area.

The State Government assumes power under Section 4 of the Act to declare different departments to be separate factories or two or more factories to be single factory for the purposes of this Act. This power will be utilised by the State Government either on its own or on an application made to it by the occupier. But no order could be made on its own motion unless occupier is heard in this regard.

In case of public emergency, Section 5 further empowers the State Government to exempt by notification any factory or class or description of factories from all or any of the provisions of this Act except Section 67 for such period and subject to such conditions as it may think fit, however no such notification shall be made exceeding a period of three months at a time. Explanation to Section 5 defines public emergency as a situation whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or internal disturbance.

The State Governments carry out the administration of the Act through:

(i) Inspecting Staff
(ii) Certifying Surgeons
(iii) Welfare Officers
(iv) Safety Officers.

The Inspecting Staff

Appointment: Section 8 empowers the State Government to appoint Inspectors, Additional Inspectors and Chief Inspectors, such persons who possess prescribed qualifications.
Section 8(2) empowers the State Government to appoint any person to be a Chief Inspector. To assist him, the government may appoint Additional, Joint or Deputy Chief Inspectors and such other officers as it thinks fit [Section 8(2A)].

Every District Magistrate shall be an Inspector for his district.

The State Government may appoint certain public officers, to be the Additional Inspectors for certain areas assigned to them [Section 8(5)].

The appointment of Inspectors, Additional Inspectors and Chief Inspector can be made only by issuing a notification in the *Official Gazette*.

When in any area, there are more inspectors than one, the State Government may by notification in the *Official Gazette*, declare the powers which such Inspectors shall respectively exercise and the Inspector to whom the prescribed notices are to be sent.

Inspector appointed under the Act is an Inspector for all purposes of this Act. Assignment of local area to an inspector is within the discretion of the State Government.

A Chief Inspector is appointed for the whole State. He shall in addition to the powers conferred on a Chief Inspector under this Act, exercise the powers of an Inspector throughout the State. Therefore, if a Chief Inspector files a complaint, the court can legally take congnizance of an offence. Even assignment of areas under Section 8(6) does not militate in any way against the view that the Chief Inspector can file a complaint enabling the court to take congnizance. The Additional, Joint or Deputy Chief Inspectors or any other officer so appointed shall in addition to the powers of a Chief Inspector, exercise the powers of an Inspector throughout the State.

### Test your knowledge

Which authorities carry out the administration of the Factories Act, 1948, under the supervision of the State Government?

(a) Inspecting Staff  
(b) Certifying Surgeons  
(c) Labour Officers  
(d) Safety Officers

**Correct answer: (a), (b) and (d)**

**Powers of Inspectors**

Section 9 describes the powers of the Inspectors subject to any rules made in this behalf for the purpose of the Act. An Inspector may exercise any of the following powers within the local limits for which he is appointed:

1. He can enter any place which is used or which, he has reasons to believe, is used as a factory.

2. He can make examination of the premises, plant, machinery, article or
substance. Inquire into any accident or dangerous occurrence whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry.

3. Require the production of any prescribed register or any other document relating to the factory. Seize, or take copies of any register, record of other document or any portion thereof.

4. Take measurement and photographs and make such recordings as he considers necessary for the purpose of any examination.

5. In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is in the circumstances necessary, for carrying out the purposes of this Act) and take possession of any such article or substance or a part thereof, and detain it for so long as is necessary for such examination.

Production of documents

The Factories Act requires the maintenance of certain registers and records. Inspectors have been empowered to ask for the production of any such documents maintained under law, and the non-compliance of this has been made an offence.

(ii) Certifying Surgeons

Section 10 provides for the appointment of the Certifying Surgeons by the State Government for the purpose of this Act to perform such duties as given below within such local limits or for such factory or class or description of factories as may be assigned to Certifying Surgeon:

(a) the examination and certification of young persons under this Act;

(b) the examination of persons engaged in factories in such dangerous occupations or processes as may be prescribed;

(c) the exercising of such medical supervision as may be prescribed for any factory or class or description of factories.

(iii) Welfare Officer

Section 49 of the Act imposes statutory obligation upon the occupier of the factory of the appointment of Welfare Officer/s wherein 500 or more workers are ordinarily employed. Duties, qualifications and conditions of service may be prescribed by the State Government.

(iv) Safety Officer

Section 40-B empowers the State Government for directing a occupier of factory to employ such number of Safety Officers as specified by it where more than 1,000 workers are employed or where manufacturing process involves risk of bodily injury, poisoning or disease or any other hazard to health of the persons employed therein. The duties, qualifications and working conditions may be prescribed by the State Government.
APPROVAL, LICENSING AND REGISTRATION OF FACTORIES

Section 6 empowers the State Government to make rules with regard to licensing and registration of factories under the Act on following matters:

(i) submission of plans of any class or description of factories to the Chief Inspector or the State Government;

(ii) obtaining previous permission of the State Government or the Chief Inspector, for the site on which factory is to be situated and for construction or extension of any factory or class or description of factories. However, replacement or addition of any plant or machinery within prescribed limits, shall not amount to extension of the factory, if it does not reduce the minimum safe working space or adversely affect the environmental conditions which is injurious to health;

(iii) considering applications for permission for the submission of plans and specifications;

(iv) nature of plans and specifications and the authority certifying them;

(v) registration and licensing of factories;

(vi) fees payable for registration and licensing and for the renewal of licences;

(vii) licence not to be granted or renewed unless notice specified under Section 7 has been given.

Automatic approval

If an application is made for the approval of site for construction or extension of the factory and required plans and specifications have been submitted by registered post to the State Government or the Chief Inspector and if no reply is received within three months from the date on which it is sent the application stands automatically approved [Section 6(2)]. Where the rules require the licensing authority to issue a licence on satisfaction of all legal requirements/record reasons for refusal. Licence could not be refused only on a direction from Government (S. Kunju v. Kerala, (1985) 2 LLJ 106).

Appeal against refusal to grant permission

If the State Government or Chief Inspector do not grant permission to the site, construction or extension of a factory, or to the registration and licensing of a factory, the applicant may within 30 days of the date of such refusal appeal to:

(i) the Central Government against the order of the State Government;

(ii) the State Government against the order of any other authority.

Test your knowledge

Choose the correct answer
What is the minimum number of workers required in a factory for the mandatory appointment of a Safety Officer?

(a) More than 100
(b) More than 500
(c) Less than 750
(d) More than 1,000

Correct answer: (d)
NOTICE BY OCCUPIER

Section 7 imposes an obligation on the occupier of a factory to send a written notice, containing prescribed particulars, to the Chief Inspector at least 15 days before an occupier begins to occupy or use a premises as a factory and at least 30 days before the date of resumption of work in case of seasonal factories, i.e. factories working for less than 180 days in a year.

Contents of notice

A notice must contain following particulars:

1. The name and situation of the factory.
2. The name and address of the occupier.
3. The name and address of the owner of the premises or building (including the precincts, etc., thereof referred to in Section 93).
4. The address at which communication relating to the factory should be sent.
5. The nature of manufacturing process to be carried on in the factory during next 12 months.
6. The total rated horse power installed or to be installed in the factory which shall not include the rated horse power of any separate standby plant.
7. The name of the Manager of the factory for the purpose of this Act.
8. The number of workers likely to be employed in the factory.
9. Such other particulars as may be prescribed.

Notice where new manager is appointed

Whenever a new manager is appointed, the occupier shall send to the Inspector a written notice and to the Chief Inspector a copy thereof, within seven days from the date on which such person takes over charge.

When there is no manager – occupier deemed as manager

During a period for which no person has been designated as Manager of a factory or during which the person designated does not manage the factory any person found acting as manager, will be the manager for the purposes of the Act. Where no such person is found the occupier should be deemed to be the manager of the factory.

GENERAL DUTIES OF THE OCCUPIER

Section 7A is inserted by the Factories (Amendment) Act, 1987, as under:

1. Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

2. Without prejudice to the generality of the provisions of Sub-section (1) the matters to which such duty extends shall include:
(a) The provision and maintenance of plant and systems of work in the factory that are safe and without risks to health;
(b) the arrangement in the factory for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
(c) the provisions of such information, instruction, training and supervision as are necessary to ensure the health and safety of all workers at work;
(d) the maintenance of all places of work in the factory in a condition that is safe and without risks to health and provisions and maintenance of such means of access to, and egress from, such places as are safe and without such risks;
(e) the provision, maintenance or monitoring of such working environment in the factory for the workers that is safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, every occupier shall prepare, and as often as may be appropriate revise, a written statement of his general policy with respect to the health and safety of the workers at work and organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision thereof to the notice of all the workers in such manner as may be prescribed.

Test your knowledge

Choose the correct answer:

To which authority can appeals be made if the Chief Inspector does not grant a license to a factory?

(a) State Government
(b) Central Government
(c) State Licensing Appellate
(d) Factories Commissioner

Correct answer: (a)

GENERAL DUTIES OF MANUFACTURERS ETC.

Section 7B provides that every person who designs, manufactures, imports or supplies any article (including plant and machinery) or use in any factory, shall observe the following:

(a) ensure, that the article is so designed and constructed as to be safe and without risks to the health of the workers when properly used;
(b) carry out such tests and examination as may be considered necessary for the effective implementation of the provisions of clause (a);
(c) take such steps as may be necessary to ensure that adequate information will be available:
   (i) in connection with the use of the article in any factory;
(ii) about the use for which it is designed and tested; and
(iii) about any condition necessary to ensure that the article, when put to
such use, will be safe, and without risks to the health of the workers.

The Section further provides that where an article is designed or manufactured
outside India, it shall be obligatory on the part of the importer to see:

(a) that the article (including plant and machinery) conforms to the same
standards if such article is manufactured in India, or

(b) if the standards adopted in the country outside for the manufacture of such
article is above the standards adopted in India, that the article conforms to
such standards.

For the above purpose, the concerned person may carry out or arrange for the
carrying out of necessary research with a view to the discovery and so far as is
reasonably practicable, the elimination or minimisation of any risk to the health or
safety of workers to which design or article (including plant and machinery) may give
rise.

The section further provides that if research, testing, etc. has already been
exercised or carried out, then no such research is required again.

The above duties relate only to things done in the course of the business carried
out by him, and to matters within his control.

However, the person may get relief from the exercise of above duties if he gets
an undertaking in writing by the user of such article to take necessary steps that the
article will be safe and without risk to the health of the workers.

MEASURES TO BE TAKEN BY FACTORIES FOR HEALTH, SAFETY AND
WELFARE OF WORKERS

Such measures are provided under Chapters III, IV and V of the Act which are as
follows:

A. Health

Chapter III of the Act deals with the following aspects.

(i) Cleanliness

Section 11 ensures the cleanliness in the factory. It must be seen that a factory is
kept clean and it is free from effluvia arising from any drain, privy or other nuisance.
The Act has laid down following provisions in this respect

(1) All the accumulated dirt and refuse on floors, staircases and passages in the
factory shall be removed daily by sweeping or by any other effective method. Suitable
arrangements should also be made for the disposal of such dirt or refuse.

(2) Once in every week, the floor should be thoroughly cleaned by washing with
disinfectant or by some other effective method [Section 11(1)(b)].

(3) Effective method of drainage shall be made and maintained for removing
water, to the extent possible, which may collect on the floor due to some manufacturing process.

(4) To ensure that interior walls and roofs, etc. are kept clean, it is laid down that:

(i) white wash or colour wash should be carried at least once in every period of 14 months;

(ii) where surface has been painted or varnished, repair or revarnish should be carried out once in every five years, if washable then once in every period of six months;

(iii) where they are painted or varnished or where they have smooth impervious surface, it should be cleaned once in every period of 14 months by such method as may be prescribed.

(5) All doors, windows and other framework which are of wooden or metallic shall be kept painted or varnished at least once in every period of five years.

(6) The dates on which such processes are carried out shall be entered in the prescribed register.

If the State Government finds that a particular factory cannot comply with the above requirements due to its nature of manufacturing process, it may exempt the factory from the compliance of these provisions and suggest some alternative method for keeping the factory clean. [Section 11(2)]

(ii) Disposal of waste and effluents

Every occupier of a factory shall make effective arrangements for the treatment of wastes and effluents due to the manufacturing process carried on in the factory so as to render them innocuous and for their disposal. Such arrangements should be in accordance with the rules, if any, laid down by the State Government. If the State Government has not laid down any rules in this respect, arrangements made by the occupier should be approved by the prescribed authority if required by the State Government. (Section 12)

(iii) Ventilation and temperature

Section 13 provides that every factory should make suitable and effective provisions for securing and maintaining (1) adequate ventilation by the circulation of fresh air; and (2) such a temperature as will secure to the workers reasonable conditions of comfort and prevent injury to health. What is reasonable temperature depends upon the circumstances of each case. The State Government has been empowered to lay down the standard of adequate ventilation and reasonable temperature for any factory or class or description of factories or parts thereof. It may direct that proper measuring instruments at such places and in such position as may be specified shall be provided and prescribed records shall be maintained.

*Measures to reduce excessively high temperature:* To prevent excessive heating of any workroom following measures shall be adopted:

(i) Walls and roofs shall be of such materials and so designed that reasonable temperature does not exceed but kept as low as possible.
(ii) Where the nature of work carried on in the factory generates excessively high temperature, following measures should be adopted to protect the workers:

(a) by separating such process from the workroom; or
(b) insulating the hot parts; or
(c) adopting any other effective method which will protect the workers.

The Chief Inspector is empowered to direct any factory to adopt such methods which will reduce the excessively high temperature. In this regard, he can specify the measures which in his opinion should be adopted. (Section 13)

(iv) Dust and fume

There are certain manufacturing processes like chemical, textile or jute, etc., which generates lot of dust, fume or other impurities. It is injurious to the health of workers employed in such manufacturing process.

Following measures should be adopted in this respect:

1. Effective measures should be taken to prevent the inhalation and accumulation of dust, fumes etc., in the work-rooms.

2. Wherever necessary, an exhaust appliances should be fitted, as far as possible, to the point of origin of dust fumes or other impurities. Such point shall also be enclosed as far as possible.

3. In stationery internal combustion engine and exhaust should be connected into the open air.

4. In cases of other internal combustion engine, effective measures should be taken to prevent the accumulation of fumes therefrom. (Section 14)

It may be pointed that the evidence of actual injury to health is not necessary. If the dust or fume by reason of manufacturing process is given off in such quantity that it is injurious or offensive to the health of the workers employed therein, the offence is committed under this Section.

Lastly the offence committed is a continuing offence. If it is an offence on a particular date is does not cease to be an offence on the next day and so on until the deficiency is rectified.

(v) Artificial humidification

Humidity means the presence of moisture in the air. In certain industries like cotton, textile, cigarette, etc., higher degree of humidity is required for carrying out the manufacturing process. For this purpose, humidity of the air is artificially increased. This increase or decrease in humidity adversely affects the health of workers.

Section 15(1) empowers the State Government to make rules (i) prescribing the standards of humidification, (ii) regulating methods to be adopted for artificially increasing the humidity of the air, (iii) directing prescribed tests for determining the humidity of the air to be correctly carried out, and recorded, and (iv) prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the work-room.

Section 15(2) lays down that water used for artificial humidification should be
either purified before use or obtained from a public supply or other source of drinking water.

Where the water is not purified as stated above. Section 15(3) empowers the Inspector to order, in writing, the manager of the factory to carry out specified measures, before a specified date, for purification of the water.

(vi) Overcrowding

Overcrowding in the work-room not only affect the workers in their efficient discharge of duties but their health also.

Section 16 has been enacted with a view to provide sufficient air space to the workers.

(1) Section 16(1) prohibits the overcrowding in the work-rooms to the extent it is injurious to the health of the workers.

(2) Apart from this general prohibition Section 16(2) lays down minimum working space for each worker as 14.2 cubic metres of space per worker in every workroom.

For calculating the work area, the space more than 4.2 metres above the level of the floor, will not be taken into consideration.

Posting of notice: Section 16(3) empowers the Chief Inspector who may direct in writing the display of a notice in the work-room, specifying the maximum number of workers which can be employed in that room. According to Section 108, notice should be in English and in a language understood by the majority of the workers. It should be displayed at some conspicuous and convenient place at or near, the entrance. It should be maintained in clean and legible conditions.

Exemptions: The chief Inspector may by order in writing, exempt any work-room from the provisions of this section, subject to such conditions as he may think fit to impose, if he is satisfied that non-compliance of such provision will have no adverse effect on the health of the workers employed in such work-room.

(vii) Lighting

Section 17 of the Factories Act makes following provisions in this respect:

(1) every factory must provide and maintain sufficient and suitable lighting, natural, artificial or both, in every part of the factory where workers are working or passing;

(2) all the glazed windows and sky lights should be kept clean on both sides;

(3) effective provisions should be made for the prevention of glare from a source of light or by reflection from a smooth or polished surface;

(4) formation of shadows to such an extent causing eye-strain or the risk of accident to any worker, should be prevented; and

(5) the state government is empowered to lay down standard of sufficient and suitable lighting for factories for any class or description of factories or for any manufacturing process.
(viii) Drinking water

Section 18 makes following provisions with regard to drinking water.

(1) every factory should make effective arrangements for sufficient supply of drinking water for all workers in the factory;
(2) water should be wholesome, i.e., free from impurities;
(3) water should be supplied at suitable points convenient for all workers;
(4) no such points should be situated within six metres of any washing place, urinals, latrine, spittoon, open drain carrying sullage or effluent or any other source of contamination, unless otherwise approved in writing by the Chief Inspector;
(5) all such points should be legible marked Drinking Water in a language understood by majority of the workers;
(6) in case where more than 250 workers are ordinarily employed, effective arrangements should be made for cooling drinking water during hot weather. In such cases, arrangements should also be made for the distribution of water to the workers; and
(7) the State Government is empowered to make rules for the compliance of above stated provisions and for the examination, by prescribed authorities, of the supply and distribution of drinking water in factories.

Test your knowledge

Choose the correct answer

What is the minimum space to be allocated to each worker as per the Factories Act, 1948?

(a) 12.2 cubic metres
(b) 13.2 cubic metres
(c) 14.2 cubic meters
(d) 15.2 cubic metres

Correct answer: (c)

(ix) Latrines and urinals

Every factory shall make suitable arrangement for the provision of latrines and urinals for the workers. These points as stated below, are subject to the provisions of Section 19 and the rules laid down by the State Government in this behalf.

(1) every factory shall make provision for sufficient number of latrines and urinals of prescribed standard. These should be conveniently situated and accessible to all workers during working hours;
(2) separate arrangement shall be made for male and female workers;
(3) all these places shall have suitable provisions for lighting and ventilation;
(4) no latrine or urinal shall communicate with any work-room unless in between
them there is provision of open space or ventilated passage;

(5) all latrines and urinals shall be kept in a clean and sanitary conditions at all times;

(6) a sweeper shall be employed whose exclusive job will be to keep clean all latrines and urinals;

(7) where more than 250 workers are ordinarily employed in a factory, following additional measures shall be taken under Section 19(2):
   (i) all latrines and urinals accommodation shall be of prescribed sanitary type.
   (ii) all internal walls upto ninety centimetres, and the floors and the sanitary blocks shall be laid in glazed tiles or otherwise furnished to provide a smooth polished impervious surface;
   (iii) the floors, walls, sanitary pan, etc., of latrines and urinals shall be washed and cleaned with suitable detergents and/or disinfectants, at least once in every seven days.

(8) the State Government is empowered to make rules in respect of following:
   (i) prescribing the number of latrines and urinals to be provided to proportion to the number of male and female workers ordinarily employed in the factory.
   (ii) any additional matters in respect of sanitation in factories;
   (iii) responsibility of the workers in these matters.

(x) Spittoons

Every factory should have sufficient number of spittoons situated at convenient places. These should be maintained in a clean and hygienic condition. (Section 20)

B. SAFETY

Chapter IV of the Act contains provisions relating to safety. These are discussed below:

(i) Fencing of machinery

Fencing of machinery in use or in motion is obligatory under Section 21. This Section requires that following types of machinery or their parts, while in use or in motion, shall be securely fenced by safeguards of substantial construction and shall be constantly maintained and kept in position, while the parts of machinery they are fencing are in motion or in use. Such types of machinery or their parts are:

(1) every moving parts of a prime-mover and flywheel connected to a prime-mover. It is immaterial whether the prime-mover or fly-wheel is in the engine house or not;

(2) head-race and tail-race of water wheel and water turbine;

(3) any part of stock-bar which projects beyond the head stock of a lathe;
(4) every part of an electric generator, a motor or rotary converter or transmission machinery unless they are in the safe position;

(5) every dangerous part of any other machinery unless they are in safe position.

(ii) Safety measures in case of work on or near machinery in motion

Section 22 lays down the procedure for carrying out examination of any part while it is in motion or as a result of such examination to carry out the operations mentioned under clause (i) or (ii) of the proviso to Section 21(1). Such examination or operation shall be carried out only by specially trained adult male worker wearing tight fitting clothing (which shall be supplied by the occupier) whose name has been recorded in the register prescribed in this behalf and who has been furnished with a certificate of appointment and while he is so engaged. No woman or young person shall be allowed to clean, lubricate or adjust any part of a prime-mover or any transmission machinery while the prime-mover or transmission machinery is in motion or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication and adjustment thereof would expose the woman or the young person to risk of injury from any moving part either of that machine or of any adjacent machinery [Section 22(2)].

(iii) Employment of young persons on dangerous machines

Section 23 provides that no young person shall be required or allowed to work at any machine to which this section applies unless he has been fully instructed as to dangers arising in connection with the machine and the precautions to be observed and (a) has received sufficient training in work at the machine, or (b) is under adequate supervision by a person who has a thorough knowledge and experience of the machine.

(iv) Striking gear and devices for cutting off power

Section 24 provides that in every factory suitable striking gears or other efficient mechanical appliances shall be provided and maintained and used to move driving belts to and from fast and loose pulleys which form part of the transmission machinery and such gear or appliances shall be so constructed, placed and maintained as to prevent the belt from creeping back on the fast pulley. Further, driving belts when not in use shall not be allowed to rest or ride upon shafting in motion. Suitable devices for cutting off power in emergencies from running machinery shall be provided and maintained in every work-room in every factory. It is also provided that when a device which can inadvertently shift from ‘off’ to ‘on position in a factory’, cutoff power arrangements shall be provided for locking the devices on safe position to prevent accidental start of the transmission machinery or other machines to which the device is fitted.

(v) Self-acting machines

Section 25 provides further safeguard for workers from being injured by self-acting machines. It provides that no traverse part of self-acting machine in any factory
and no material carried thereon shall, if the space over which it runs is a space over which any person is liable to pass whether in the course of his employment or otherwise, be allowed to run on its outward or inward traverse within a distance of forty five centimetres from any fixed structure which is not part of the machines. However, Chief Inspector may permit the continued use of a machine installed before the commencement of this Act, which does not comply with the requirement of this section, on such conditions for ensuring safety, as he may think fit to impose.

(vi) Casing of new machinery

Section 26 provides further safeguards for casing of new machinery of dangerous nature. In all machinery driven by power and installed in any factory (a) every set screw, bolt or key on any revolving shaft, spindle, wheel or pinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger; (b) all spur, worm and other toothed or friction gearing which does not require frequent adjustment while in motion, shall be completely encased unless it is so situated as to be so safe as it would be if it were completely encased. The section places statutory obligation on all persons who sell or let on hire or as agent of seller or hire to comply with the section and in default shall be liable to punishment with imprisonment for a term which may extend to 3 months or with fine which may extend to Rs. 500 or with both.

Test your knowledge

State whether the following statement is “True” or “False”

Fencing of machinery in use or in motion is not obligatory under Section 21 of the Factories Act, 1948.

- True
- False

Correct answer: False

(vii) Prohibition of employment of woman and children near cotton openers

According to Section 27, no child or woman shall be employed in any part of factory for pressing cotton in which a cotton opener is at work. However, if the feed-end of a cotton opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the inspector may in any particular case specify in writing, women and children may be employed on the side of partition where the feed-end is situated.

(viii) Hoists and lifts

Section 28 provides that in every factory: (i) every hoist and lift shall be of good mechanical construction, sound material and adequate strength. It shall be properly maintained and thoroughly examined by a competent person at least once in every period of six months and a register shall be kept containing the prescribed particulars of every such examination, (ii) every hoist way and lift way shall be sufficiently protected by an enclosure fitted with gates and the hoist or lift and every such enclosure shall be so constructed as to prevent any person or thing from being
trapped between any part of the hoist or lift and any fixed structure or moving part,
(iii) the maximum safe working load shall be marked on every hoist or lift and no load
greater, than such load shall be marked on every hoist or lift and no load greater than
such load shall be carried thereon, (iv) the cage of every hoist and lift shall be fitted
with a gate on each side from which access is afforded to a landing (v) such gates of
the hoist and lift shall be fitted with interlocking or other efficient device to secure that
the gate cannot be opened except when the cage is at the landing and that the cage
cannot be moved unless the gate is closed.

(ix) Lifting machines, chains, ropes and lifting tackles

In terms of Section 29, in any factory the following provisions shall be complied
with respect of every lifting machine (other than a hoist and lift) and every chain, rope
and lifting tackle for the purpose of raising or lowering persons, goods or materials:

(a) all parts including the working gear, whether fixed or movable, shall be (i) of
good construction, sound material and adequate strength and free from
defects; (ii) properly maintained; (iii) thoroughly examined by a competent
person at least once in every period of 12 months or at such intervals as
Chief Inspector may specify in writing and a register shall be kept containing
the prescribed particulars of every such examination;

(b) no lifting machine or no chain, rope or lifting tackle, shall, except for the
purpose of test, be loaded beyond the safe working load which shall be
plainly marked thereon together with an identification mark and duly entered
in the prescribed register and where it is not practicable, a table showing the
safe working loads of every kind and size of lifting machine or chain, rope or
lifting tackle in use shall be displayed in prominent positions on that
premises;

(c) while any person is employed or working on or near the wheel track of a
travelling crane in any place where he would be liable to be struck by the
crane, effective measures shall be taken to ensure that the crane does not
approach within 6 metres of that place.

(x) Safety measures in case of use of revolving machinery

Section 30 of the Act prescribes for permanently affixing or placing a notice in
every factory in which process of grinding is carried on. Such notice shall indicate
maximum safe working peripheral speed of every grindstone or abrasive wheel, the
speed of the shaft or spindle upon such shaft or spindle necessary to secure such
safe working peripheral-speed. Speed indicated in the notice shall not be exceeded
and effective measures in this regard shall be taken.

(xi) Pressure plant

Section 31 provides for taking effective measures to ensure that safe working
pressure of any plant and machinery, used in manufacturing process operated at
pressure above atmospheric pressure, does not exceed the limits. The State
Government may make rules to regulate such pressures or working and may also
exempt any part of any plant or machinery from the compliance of this section.

(xii) Floor, stairs and means of access

Section 32 provides that in every factory (a) all floors, steps, stairs passages and
gangways shall be of sound construction and properly maintained and shall be kept free from obstruction and substances likely to cause persons to slip and where it is necessary to ensure safety, steps, stairs passages and gangways shall be provided with substantial handrails, (b) there shall be so far as is reasonably practicable, be provided, and maintained safe means of access of every place at which any person is at any time required to work; (c) when any person has to work at a height from where he is likely to fall, provision shall be made, so far as is reasonably, practicable, by fencing or otherwise, to ensure the safety of the person so working.

(xiii) Pits, sumps, openings in floors etc.

Section 33 requires that in every factory every fixed vessel, sump, tank, pit or opening in the ground or in a floor which, by reason of its depth, situation, construction, or contents is or may be source of danger shall be either securely covered or securely fence. The State Government may exempt any factory from the compliance of the provisions of this Section subject to such conditions as it may prescribe.

(xiv) Excessive weights

Section 34 provides that no person shall be employed in any factory to lift, carry or make any load so heavy as to be likely to cause him injury. The State Government may make rules prescribing the maximum weights which may be lifted, carried or moved by adult men, adult women, adolescents and children employed in factories or in any class or description of factories or in carrying on any specified process.

(xv) Protection of eyes

Section 35 requires the State Government to make rules and require for providing the effective screens or suitable goggles for the protection of persons employed on or in immediate vicinity of any such manufacturing process carried on in any factory which involves (i) risk of injury to the eyes from particles or fragments thrown off in the course of the process or; (ii) risk to the eyes by reason of exposure to excessive light.

(xvi) Precautions against dangerous fumes, gases etc.

Section 36 provides (1) that no person shall be required or allowed to enter any chamber, tank, vat, pit, pipe, flue or other confined space in any factory in which any gas, fume, vapour or dust is likely to be present to such an extent as to involve risk to persons being overcome thereby, unless it is provided with a manhole of adequate size or other effective means of egress.

(2) No person shall be required or allowed to enter any confined space as is referred to in sub-section (1), until all practicable measures have been taken to remove any gas, fume, vapour or dust, which may be present so as to bring its level within the permissible limits and to prevent any ingress of such gas, fume, vapour and unless

(a) a certificate in writing has been given by a competent person, based on a test carried out by himself that the space is reasonably free from dangerous gas, fume, vapour or dust; or

(b) such person is wearing suitable breathing apparatus and a belt securely attached to a rope, the free end of which is held by a person outside the confined space.
(xvii) **Precautions regarding the use of portable electric light**

Section 36A of the Act provides that in any factory (1) no portable electric light or any other electric appliance of voltage exceeding 24 volts shall be permitted for use inside any chamber, tank, vat, pit, pipe, flue or other confined space unless adequate safety devices are provided; and (2) if any inflammable gas, fume or dust is likely to be present in such chamber, tank, vat, pit, pipe, flue or other confined space unless adequate safety devices are provided, no lamp or light other than that of flame proof construction shall be permitted to be used therein.

(xviii) **Explosive or inflammable dust gas, etc.**

Sub-section (1) of section 37 of the Act provides that in every factory where any manufacturing process produces dust, gas, fume or vapour of such character and to such extent to be likely to explode on ignition, all practicable measures shall be taken to prevent any such explosion by (a) effective enclosure of the plant or machinery used in the process (b) removal or prevention of the accumulation of such dust, gas fume or vapour, and (c) exclusion or effective enclosure of all possible sources of ignition.

(xix) **Precautions in case of fire**

Section 38 provides that in every factory all practicable measures shall be taken to outbreak of fire and its spread, both internally and externally and to provide and maintain (a) safe means of escape for all persons in the event of fire, and (b) the necessary equipment and facilities for extinguishing fire.

Effective measures shall be taken to ensure that in every factory all the workers are familiar with the means of escape in case of fire and have been adequately trained in the outline to be followed in such case.

(xx) **Power to require specification of defective parts or test to stability**

Section 39 states that when the inspector feels that the conditions in the factory are dangerous to human life or safety he may serve on the occupier or manager or both notice in writing requiring him before the specified date to furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, machinery or plant can be used with safety or to carry out such test in such a manner as may be specified in the order and to inform the inspector of the results thereof.

(xxii) **Safety of buildings or machinery**

Section 40 provides that the inspectors in case of dangerous conditions of building or any part of ways, machinery or plant requires the manager or occupier or both to take such measures which in his opinion should be adopted and require them to be carried out before a specified date. In case the danger to human life is immediate and imminent from such usage of building, ways of machinery he may order prohibiting the use of the same unless it is repaired or altered.

(xxii) **Maintenance of buildings**

Section 40-A provides that if it appears to the inspector that any building or part of it is in such a state of disrepair which may lead to conditions detrimental to the
health and welfare of workers he may serve on the manager or occupier or both, an order in writing specifying the measures to be carried out before a specified date.

(xxiii) Safety officers

Section 40-B provides that in every factory (i) where 1,000 or more workers are ordinarily employed or (ii) where the manufacturing process or operation involves risk of bodily injury, poisoning or disease or any other hazard to health of the persons employed therein, the occupier shall employ such number of safety officers as may be specified in the notification with such duties and qualifications and conditions of service as may be prescribed by State Government.

(xxiv) Power to make rules to supplement this Chapter

This is vested in the State Government under Section 41 for such devices and measures to secure the safety of the workers employed in the factory.

C. WELFARE

Following provisions under Chapter (v) of the Act, relate to the measures to be taken for the welfare of workers.

(i) Washing facilities

Section 42 provides that every factory should provide and maintain adequate and suitable washing facilities for its workers. For the use of male and female, such facilities should be separate and adequately screened. Such facilities should be conveniently accessible for all workers and be kept in a state of cleanliness. The State Government is empowered to make rules prescribing standards of adequate and suitable washing facilities.

(ii) Facilities for storing and drying clothing

Section 43 empowers the State Government in respect of any factory or class or description of factories to make rules requiring the provision, therein of (i) suitable places for keeping clothing not worn during working hours, and (ii) for drying of wet clothing.

(iii) Facilities for sitting

There are certain operations which can be performed by the workers only in a standing position. This not only affects the health of a worker but his efficiency also.

According to Section 44(1), every factory shall provide and maintain suitable facilities for sitting, for those who work in standing position so that they may make use of them as an when any opportunity comes in the course of their work. If, in the opinion of the Chief Inspector, any work can be efficiently performed in a sitting position, he may direct, in writing, the occupier of the factory, to provide before a specified date such seating arrangements as may be practicable, for all workers so engaged. The State Government, may by a notification in the Official Gazette, declare that above provisions shall not apply to any specified factory or any manufacturing process.

(iv) First aid appliances

As per Section 45, the following arrangements should be made in every factory in
respect of first-aid facilities.

(1) Provision of at least one first-aid box or cupboard, subject to following conditions, for every 150 workers ordinarily employed at any one time in the factory.

(2) It should be equipped with prescribed contents and nothing else should be stored in it.

(3) It should be properly maintained and readily accessible during all working hours.

(4) A responsible person who holds a certificate in first-aid treatment, recognised by the State Government should be made the in-charge of such first-aid box or cupboard. Such a person should be readily available during working hours of the factory. Where there are different shifts in the factory, a separate person may be appointed for each shift provided he is a responsible person and trained in first-aid treatment.

(5) Where more than 500 workers are ordinarily employed in a factory, an ambulance room should be provided and maintained by every such factory. Such room should be of prescribed size containing prescribed equipments and is in charge of such medical and nursing staff as may be prescribed.

(v) Canteens

(1) The State Government may make rules requiring that in any specified factory wherein more than 250 workers are ordinarily employed, a canteen shall be provided and maintained by the occupier for the use of workers.

(2) Such rules may relate to any of the following matter:

(i) the date by which canteen shall be provided;

(ii) the standards in respect of construction, accommodation, furniture and other equipment of the canteen;

(iii) the foodstuffs to be served and the prices to be charged;

(iv) the items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the employer;

(v) the constitution of a Managing Committee for the canteen and the representation of the workers in the management of the canteen; and

(vi) the delegation, to the chief inspector, subject to such conditions as may be prescribed, of the power to make rules under clause (iii). (Section 46)

Employees working in canteens in industrial establishments run by Managing Committee are not employees of the Managing Committee, but are employees of occupier (Kanpur Suraksha Karmachari Union v. Union of India, AIR 1988 SC).
Where the statute casts an obligation to own a canteen in the factory, and the establishment runs a canteen through a contractor who brings the workers for the canteen would be part and parcel of the establishment and the canteen workers would be deemed to be regular employees of the establishment entitled to arrears of salary and other monetary benefits (Tamil Maniila Thozilalar Sangam v. Chairman TNEB, 1994 CLA 34 Mad. 63.)

(vi) Shelters, rest rooms and lunch rooms

The provision of some sort of shelter is a must, where the workers can take their meals brought by them during rest interval. The following provisions under Section 47 of the Act have been made in this respect:

(1) In every factory where more than 150 workers are ordinarily employed, the occupier should make adequate and suitable arrangements for shelters or rest rooms and lunch-room with provision of drinking water where the workers can take rest of or eat meals brought by them. However any canteen which is maintained in accordance with provisions of Section 45 shall be regarded as part of the requirements of this sub-section. Where a lunch room exists no worker shall eat any food in the workroom.

(2) Such places should be equipped with the facility of drinking water.

(3) Such places should be sufficiently lighted, ventilated and kept in cool and clean conditions.

(4) The construction and accommodation, furniture and equipment of such place should conform to the standards, if any, laid down by the State Government.

By a notification in the Official Gazette, the State Government may exempt any factory from the compliance of these provisions. Further, where any canteen is maintained under Section 45, then provision of such shelter room, etc., is not necessary.

(vii) Creches

Following provisions have been made in respect of creches in the factories:

(1) In every factory wherein more than 30 women workers are ordinarily employed, the facility of suitable room or rooms should be provided and maintained for the use of children under the age of six years of such women.

(2) There should be adequate accommodation in such rooms.

(3) These places should be sufficiently lighted and ventilated and kept in clean and sanitary conditions.

(4) Women trained in the case of children and infants should be made incharge of such rooms.

The State Government is empowered to make rules in respect of following
matters:

(1) Location and standards in respect of construction, accommodation, furniture and other equipment of such places.

(2) Provisions of facilities for washing and changing clothing of children or any other additional facility for their care.

(3) Provisions of free-milk or refreshment or both for children.

(4) Facilities for the mothers of such children to feed them at suitable intervals in the factory. (Section 48)

Choose the correct answer

Which of the following provisions do not come under the ‘Welfare Chapter’ in the Factories Act, 1948?

(a) Washing facilities

(b) Drinking water

(c) Facilities for sitting

(d) First-aid appliances

Correct answer: (a)

(viii) Welfare officers

According to Section 49(1), in every factory wherein 500 or more workers are ordinarily employed, the occupier should employ such number of welfare officers as may be prescribed. The State Government is empowered to prescribe the duties, qualifications and conditions of service of such welfare officers. The provisions of Section 49 also apply to seasonal factories like sugar factories etc.

The State Government is empowered to lay down rules as to the conditions of service of welfare officers. The conditions of service may include matters in respect of pay grades, period of probation and confirmation, dismissal or termination or retirement etc. In the case of Associated Cement Cos. Ltd. v. Sharma, A.I.R. 1965 S.C. 1595, the Supreme Court held that Rule 6 of Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, requiring the concurrence of the Labour Commissioner before the management can dismiss or terminate the services of Welfare Officer is not ultra vires.

(ix) Powers to make rules to supplement this chapter

The State Government is empowered to make rules exempting factory or class or description of factories from the compliance of provisions of this chapter, provided alternative arrangements for workers welfare have been made to the satisfaction of the authorities. Such rules may require that workers representatives shall be associated with the management of the welfare arrangements of the workers. (Section 50)
SPECIAL PROVISIONS RELATING TO HAZARDOUS PROCESSES

41A. Constitution of Site Appraisal Committees: (1) The State Government may, for purpose of advising it to consider applications for grant of permission for the initial location of a factory involving a hazardous process or for the expansion of any such factory, appoint a site appraisal committee consisting of

(a) the Chief Inspector of the State who shall be its Chairman;
(b) a representative of the Central Board for the prevention and control of water pollution appointed by the Central Government under Section 3 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);
(c) a representative of the Central Board for the Prevention and Control of Air Pollution referred to in Section 3 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);
(d) a representative of the state board appointed under Section 4 of the Water (Prevention and Control of Pollution) Act, 1974 (6 or 1974);
(e) a representative of the state board for the prevention and control of air pollution referred to in Section 5 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);
(f) a representative of the Department of Environment in the State;
(g) a representative of the Meteorological Department of the Government of India;
(h) an expert in the field of occupational health; and
(i) a representative of the Town Planning Department of the State Government.

and not more than five other members who may be co-opted by the State Government who shall be

(i) a scientist having specialised knowledge of the hazardous process which will be involved in the factory,
(ii) a representative of the local authority within whose jurisdiction the factory is to be established, and
(iii) not more than other person as deemed fit by the State Government.

(2) The Site Appraisal Committee shall examine an application for the establishment of a factory involving hazardous process and make its recommendation to the State Government within a period of ninety days of the receipt of such application in the prescribed form.

(3) Where any process relates to a factory owned or controlled by the Central Government or to a corporation or company owned or controlled by the Central Government, the State Government shall co-opt in the Site Appraisal Committee a representative nominated by the Central Government as a member of the Committee.

(4) The Site Appraisal committee shall have power to call for any information from the person making an application for the establishment or expansion of a factory involving a hazardous process.
(5) Where the State Government has granted approval to an application for the establishment or expansion of a factory involving a hazardous process. It shall not be necessary for an applicant to obtain a further approval from the Central Board or the State Board established under the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), and the Air (Prevention and Control of Pollution) Act, 1981 (14 or 1981).

41B. Compulsory disclosure of information by the occupier: (1) The occupier of every factory involving a hazardous process shall disclose in the manner prescribed all information regarding dangers, including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes, to the workers employed in the factory, the Chief Inspector, the local authority within whose jurisdiction the factory is situated and the general public in the vicinity.

(2) The occupier shall, at the time of registering the factory involving a hazardous process, lay down a detailed policy with respect to the health and safety of the workers employed therein and intimate such policy to the Chief Inspector and the local authority and, thereafter, at such intervals as may be prescribed, inform the Chief Inspector and the local authority of any change made in the said policy.

(3) The information furnished under Sub-section (1) shall include accurate information as to the quantity, specifications and other characteristics of wastes and the manner of their disposal.

(4) Every occupier shall, with the approval of the Chief Inspector, draw up an on-site emergency plan and detailed disaster control measures for his factory and make known to the workers employed therein and to the general public living in the vicinity of the factory the safety measures required to be taken in the event of an accident taking place.

(5) Every occupier of a factory shall,

(a) if such factory engaged in a hazardous process on the commencement of the Factories (Amendment) Act, 1987, within a period of thirty days of such commencement; and

(b) if such factory proposes to engage in a hazardous process at any time after such commencement, within a period of thirty days before the commencement of such process, inform the Chief Inspector of the nature and details of the process in such form and in such manner as may be prescribed.

(6) Where any occupier of a factory contravenes the provisions of Sub-section (5), the licence issued under Section 6 to such factory shall, notwithstanding any penalty to which the occupier or factory shall be subjected to under the provisions of the this Act, be liable for cancellation.

(7) The occupier of a factory involving a hazardous process shall, with the
previous approval of the Chief Inspector, lay down measures for the handling, usage, transportation and storage of hazardous substances inside the factory premises and the disposal of such substances outside the factory premises and publicise them in the manner prescribed among the workers and the general public living in the vicinity.

Test your knowledge

Choose the correct answer

Who is the Chairman of the Site Appraisal Committee?

(a) Chief Factory Officer of the State
(b) Chief Inspector of the State
(c) Chief Labour Officer of the State
(d) Chief Welfare Officer of the State

Correct answer: (b)

41C. Specific responsibility of the occupier in relation to hazardous processes:

Every occupier of a factory involving any hazardous process shall

(a) maintain accurate and up-to-date health records or, as the case may be, medical records, of the workers in the factory who are exposed to any chemical toxic or any other harmful substances which are manufactured, stored handled or transported and such records shall be accessible to the workers subject to such conditions as may be prescribed;

(b) appoint persons who possess qualifications and experience in handling hazardous substances and competent to supervise such handling within the factory and to provide at the working place all the necessary facilities for protecting the workers in the manner prescribed;

Provided that where any question arises as to the qualifications and experience of a person so appointed, the decision of the Chief Inspector shall be final;

(c) provide for medical examination of every worker

(a) before such worker is assigned to a job involving the handling of, a working with, a hazardous substance, and

(b) while continuing in such job, and after he has ceased to work in such job at intervals not exceeding twelve months, in such manner as may be prescribed.

Power of Central Government to appoint Inquiry Committee: (1) The Central Government may, in event of the occurrence of an extraordinary situation involving a factory engaged in a hazardous process, appoint an Inquiry Committee to inquire into the standards of health and safety observed in the factory with a view to finding out the causes of any failure or neglect in the adoption of any measures or standards prescribed for the health and safety of the workers employed in the factory or the general public affected, or likely to be affected, due to such failure or neglect and for
the prevention and recurrence of such extraordinary situations in future in such factory or elsewhere.

(2) The Committee appointed under sub-section (1) shall consist of a Chairman and two other members and the terms of reference of the Committee and the tenure of office of its members shall be such as may be determined by the Central Government according to the requirements of the situation.

(3) The recommendations of the Committee shall be advisory in nature.

Emergency standards: (1) Where the Central Government is satisfied that no standards of safety have been prescribed in respect of a hazardous process or class of hazardous processes or where the standards so prescribed are inadequate, it may direct the Director-General of Factory Advice Service and Labour Institutes or any institution specialised in matter relating to standards of safety in hazardous processes, to lay down emergency standards for enforcement of suitable standards in respect of such hazardous processes. (Section 41D)

(2) The emergency standards laid down under sub-section (1) shall, until they are incorporated in the rules made under this Act, be enforceable and have the same effect as if they had been incorporated in the rules made under this Act. (Section 41E)

Permissible limits of exposure of chemical and toxic substances: (1) The maximum permissible threshold limits of exposure of chemical and toxic substances in manufacturing processes (whether hazardous or otherwise) in any factory shall be of the value indicated in the Second Schedule (may refer to the bare Act).

(2) The Central Government may, at any time, for the purpose of giving effect to any scientific proof obtained from specialised institutions or expert in the field, by notification in the Official Gazette, make suitable changes in the said Schedule. (Section 41F)

Workers participation in safety management: (1) The occupier shall, in every factory where a hazardous process takes place, or where hazardous substances are used or handled, set up a safety Committee consisting of equal number of representatives of workers and management to promote co-operation between the workers and the management in maintaining proper safety and health at work and to review periodically the measures taken in that behalf;

Provided that the State Government may, by order in writing and for reasons to be recorded, exempt the occupier of any factory or class of factories from setting up such Committee.

(2) The composition of the safety Committee, the tenure of office of its members and their rights and duties shall be such as may be prescribed. (Section 41G)

Right of workers to warn about imminent danger: (1) Where the workers employed in any factory engaged in a hazardous process have reasonable apprehension that there is a likelihood of imminent danger to their lives or health due to any accident, they may bring the same to the notice of the occupier, agent, manger or any other person who is incharge of the factory or the process concerned directly
or through their representatives in the Safety Committee and simultaneously bring the same to the notice of the Inspector.

(2) It shall be the duty of such occupier, agent, manager or the person incharge of the factory or process to take immediate remedial action if he is satisfied about the existence of such imminent danger and send a report forthwith of the action taken to the nearest Inspector.

(3) If the occupier, agent, manager or the person incharge referred to in sub-section (2) is not satisfied about the existence of any imminent danger as apprehended by the workers, he shall, nevertheless, refer the matter forthwith to the nearest inspector whose decision on the question of the existence of such imminent danger shall be final. (Section 41H)

**WORKING HOURS OF ADULTS**

Chapter VI contains provision for regulating working hours for the adult workers and the same are explained below:

(i) **Weekly hours**

An adult worker shall be allowed to work only for forty eight hours in any week. (Section 51)

(ii) **Weekly holidays**

Section 52 provides that there shall be holiday for the whole day in every week and such weekly holiday shall be on the first day of the week. However, such holiday may be substituted for any one of the three days immediately before or after the first day of the week provided the manger of the factory has:

(i) delivered a notice at the office of the Inspector; and

(ii) displayed a notice in the factory to this effect.

The effect of all this is that subject to above said conditions (i) and (ii) there shall be a holiday during ten days. In other words no adult worker shall work for more than ten days consecutively without a holiday for the whole day. It is not possible for an employer to change the weekly off solely on the ground that there was no material available for work to be provided on a particular date, avoiding requirements to be fulfilled under Section 25(m) of Industrial Disputes Act regarding lay off (LAB IC 1998 Bom. 1790).

Such notices of substitution may be cancelled by an appropriate notice but not later than the day of weekly holiday or the substituted holiday whichever is earlier.

(iii) **Compensatory holidays**

When a worker is deprived of any of the weekly holiday as result of passing of an order or making of a rule exempting a factory or worker from the provisions of Section 52, he is entitled to compensatory holidays of equal number of the holidays so lost. These holidays should be allowed either in the same month in which the holidays became due or within next two months immediately following that month. (Section 53)
(iv) **Daily hours**

According to Section 54, an adult worker, whether male or female shall not be required or allowed to work in a factory for more than 9 hours in any day. Section 54 should be read with Section 59. In other words, the daily hours of work should be so adjusted that the total weekly hours does not exceed 48. The liability of the employer under this Section cannot be absolved on the ground that the workers are willing to work for longer hours without any extra payment.

The daily maximum hours of work specified in Section 54 can be exceeded provided

(i) it is to facilitate the change of shift; and

(ii) the previous approval of the Chief Inspector has been obtained.

(v) **Intervals for rest**

No adult worker shall work continuously for more than 5 hours unless a rest interval of at least half an hour is given to him. [Section 55(1)]

The State Government or subject to the control of the State Government the Chief Inspector may, by written order for the reasons specified therein, exempt any factory, from the compliance of above provisions to the extent that the total number of hours worked without rest interval does not exceed six. [Section 55(2)]

(vi) **Spreadover**

Section 56 provides that the daily working hours should be adjusted in such a manner, that inclusive of rest interval under Section 55, they are not spreadover more than 10-1/2 hours on any day. Thus, we see this Section restricts the practice of forcing the stay of workers in the factory for unduly long periods without contravening the provision of Section 54 relating to daily hours of work.

Proviso to Section 56 provides that the limit may be extended upto 12 hours by the Chief Inspector for reasons to be specified in writing.

(vii) **Night shifts**

Where a worker in a factory works in night shifts, i.e., shift extending beyond midnight:

(i) the weekly or compensatory holiday shall be a period of 24 consecutive hours beginning when his shift ends;

(ii) the following day shall be deemed to the period of 24 hours beginning when shift ends, and the hours he has worked after mid-night shall be counted in the previous day. (Section 57)

(viii) **Prohibition of overlapping shifts**

According to Section 58(1), where the work in any factory is carried on by means of multiple shifts, the period of shifts should be arranged in such a manner that not more than one relay of workers is engaged in work of the same kind at the same time.
In case of any factory or class or description of factories or any department or section of a factory or any category or description of workers, the State Government or subject to the control of the State Government, the Chief Inspector may, by written order and for specified reasons, grant exemption from the compliance of the provisions of Section 58(1) on such condition as may be deemed expedient. [Section 58(2)]

Test your knowledge

Choose the correct answer

What is the maximum number of hours in a week that an adult worker is allowed to work for?

(a) 35 hours  
(b) 40 hours  
(c) 45 hours  
(d) 48 hours

Correct answer: (d)

(ix) Extra wages for overtime

The following provisions have been made in respect of overtime wages:

(i) Where a worker works in a factory for more than 9 hours in any day or more than 48 hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages. [Section 59(1)]

Meaning of ordinary rate of wages

According to Section 59(2) ordinary rate of wages means:

(i) basic wages; plus,

(ii) allowances which include the cash equivalent of the advantage accruing through the concessional sale to workers of foodgrains and other articles as the worker is for the time being entitled to, but it does not include a bonus and wages for overtime work.

House rent allowance, though payable to employers who were not provided with accommodation, cannot be taken into account to calculate overtime wages of employees provided with such accommodation (Govind Bapu Salve v. Vishwanath Janardhan Joshi, 1995 SCC (L&S) 308). An employer requiring the workman to work for more than the maximum number of hours overtime work postulated by Section 64(4)(iv) cannot merely on this ground, deny him overtime wages for such excessive hours (HMT v. Labour Court, 1994 I LLN 156).

Rate of wages for piece rate workers

Where the workers in a factory are paid on piece rate basis, the time rate shall be deemed to be equivalent to the daily average of their full-time earnings for the days on which they actually worked on the same or identical job during the month.
immediately preceding the calendar month during which the over-time work was done and such time rates shall be deemed to be the ordinary rates of wages of those workers:

Provided that in the case of a worker who has not worked in the immediately preceding calendar month on the same or identical job, the time rate shall be deemed to be equivalent to the daily average of the earnings of the worker for the days on which he actually worked in the week in which the overtime work was done. [Section 59(3)]

(x) Restriction on double employment

According to Section 60, no adult worker shall be required or allowed to work in any factory on any day if he has already been working in any other factory on that day. However, in certain exceptional circumstances as may be prescribed, the double employment may be permitted.

(xi) Notice of period of work for adults

As per Section 61(1), a notice of period of work, showing clearly for everyday the periods during which adult workers may be required to work, shall be displayed and correctly maintained in every factory. The display of notice should be in accordance with the provisions of Section 108(2).

(2) The periods shown in the notice shall not contravene the provisions of the Factories Act regarding:
   (a) Weekly hours, Section 51.
   (b) Weekly holidays, Section 52.
   (c) Compensatory holidays, Section 53.
   (d) Daily Hours, Section 54.
   (e) Intervals of rest, Section 55.
   (f) Spread over of working hours, Section 56 and
   (g) Prohibition of overlapping shifts, Section 58.

(3) The periods of work shall be fixed before hand in any of the following ways:
   (i) where all the adult workers work during the same periods, the manager of the factory shall fix those periods for such workers generally; [Section 61(3)]
   (ii) where all the adult workers are not working during the same period, the manager of the factory shall classify them into groups according to the nature of their work indicating the number of workers in each group; [Section 61(4)]
   (iii) the manager shall fix periods of work for each such group provided they are not working on shift basis; [Section 61(5)]
   (iv) where any group is working on a system of shifts, periods shall be fixed, by the manager, during which each relay of the group may work provided such relays are not subject to predetermined periodical changes of shift; [Section 61(6)]
(v) where the relays are subject to predetermined periodical changes of shifts, the manager shall draw up a scheme of shifts, whereunder the periods during which any relay of the group may be required to work and the relay which will be working at any time of the day shall be known for any day. [Section 61(7)]

(4) The form of such notice and the manner in which it shall be maintained, may be prescribed by the State Government. [Section 61(8)]

(5) Any proposed change in the system of work in the factory, which necessitates a change in the notice, shall be notified to the Inspector in duplicate before the change is made. No such change shall be made except with the previous sanction of the Inspector and that too until one week has elapsed since the last change, [Section 61(10)]. This provision intends to prevent sudden variations or casual alterations in the periods of work.

(xii) Register of adult workers

The manager of every factory shall maintain a register of adult workers to be available to the Inspector at all times during working hours containing the following particulars:

(i) the name of worker;
(ii) the nature of his work;
(iii) the group, if any, in which he is included;
(iv) where his group works on shifts, the relay to which he is allotted; and
(v) other particulars as may be prescribed.

Where any factory is maintaining a muster roll or a register which contains the abovementioned particulars, the Inspector may, by order in writing, direct that such muster roll or register shall be maintained in place of and be treated as the register of adult workers in that factory (Section 62). Further, an adult worker shall not be required or allowed to work in the factory unless his particulars have been entered in this register. [Section 62(IA)]

Inspection of the register

Section 62(1) empowers the Inspector to demand the production of register of adult workers at all times during working hours or when any work is being carried on in the factory. It is the duty of the manager to produce the register when demanded at the time of inspection. If the manager does not happen to be on the premises at the time of inspection he should make arrangement that the register is made available to the inspector. The evident intention of the legislature is that the register should be at the place where the work is going on. Thus, where a manager is absent at the time of inspection of the factory by the inspector and the assistant manager, who is present at that time fails to produce register on demand, the manager has committed breach of Section 62.

Effect of entry in the register

If the name of any person is entered in the register of adult workers, it is a conclusive evidence that the person is employed in the factory. In other words, there is a presumption that the person whose name appears in the attendance register, is employed in the factory.
Liability to maintain register

The liability to maintain register of adult workers has been imposed on the manager of the factory. The occupier cannot be held liable for failure of the manager to maintain the register. But if somebody else has been made responsible for maintaining such register, manager can plead under Section 101 that the offence was committed by another person including the occupier.

(xiii) Hours of work to correspond with notice under Section 61 and register under Section 62

No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of period of work for adults displayed in the factory and the entries made before had against his name in the register of adult workers of the factory. (Section 63)

Presence of worker during rest period

Where a worker is merely present during the rest period as notified or is found working during that period, there is no contravention of Section 63 and hence not punishable.

(xiv) Power to make exempting rules

(1) The State Government is empowered under Section 64, to make rules defining certain persons holding supervisory or managerial or confidential positions and granting exemptions to them from the provisions of this chapter except Section 66(1)(b) and proviso to Section 66(1) provided that such person shall be entitled for extra wages in respect of overtime under Section 59 if his ordinary rate of wages is not more than Rs. 750 per month.

ADDITIONAL PROVISIONS REGULATING EMPLOYMENT OF WOMEN IN A FACTORY

We have discussed the provisions relating to working hours of adult workers, both male and female. However, certain additional restrictions have been found necessary on the working hours of female workers. Section 66 makes following provisions in this respect.

(1) No exemption may be granted to female worker, from the provisions of Section 54 relating to daily hours of work.

(2) Women workers shall not be employed except between the hours of 6 a.m. and 7 p.m. However, the State Government may by a notification in the Official Gazette, vary these limits to the extent that no woman shall be employed between the hours of 10 p.m. and 5 a.m.

(3) There shall be no change of shifts except after a weekly holiday or any other holiday.

Exemptions from the above restriction

The State Government has been empowered to make rules granting exemptions
from above stated restriction in respect of women working in fish-curing or fish canning factories. This has been done with a view to prevent damage to or deterioration in any raw material. However, before granting any exemption, the State Government may lay down any condition as it thinks necessary. Such rules made by the State Government shall remain in force for not more than three years at a time. [Section 66(3)]

EMPLOYMENT OF YOUNG PERSONS AND CHILDREN

Most of the civilised nations restrict the employment of children in the factories. The Royal Commission on Labour observed that this is based on the principle that the supreme right of the State to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights. Workers as young as five years of age may be found in some of these places working without adequate meal, intervals or weekly rest days at as low as 2 annas in the case of those tenderest years. Therefore, to curb these and other evil practices of employing children, following legislative measures have been adopted.

(i) General prohibition as to employment of children

According to Section 67, a child who has not completed his fourteenth year of age, shall not be employed in any factory.

(ii) Employment of children and Adolescents—Conditions

According to Section 68, children completing their fourteenth year or an adolescent, shall not be required to work in any factory, unless following conditions are fulfilled:

(i) the manager of the factory has obtained a certificate of fitness granted to such young person under Section 69;

(ii) while at work, such child or adolescent carries a token giving reference to such certificate.

(iii) What is a certificate of fitness

Under Section 69 of the Act, before a young person is employed in the factory, a Certifying Surgeon has to certify that such person is fit for that work in the factory. To get this certificate, an application to a Certifying Surgeon has to made either:

(i) by the young person himself; or

(ii) by his parent or guardian; or

(iii) by the manager of the factory.

If the application is made by a person other than the manager, it must be accompanied by a document, signed by the manager, that such young person will be employed in the factory if a certificate of fitness is granted in his favour. [Section 69(1)]

(iv) Certificate of fitness to work as a child

The Certifying Surgeon may grant or renew to any such young person, a
certificate of fitness, in the prescribed form to work as a child, if, after examination, he is satisfied that

(i) such young person has completed his 14th year;
(ii) has attained the prescribed physical standards; and
(iii) is fit for such work. [Section 69(2)(a)]

(v) Certificate of fitness to work as an adult

If the Certifying Surgeon, after examination is satisfied that such a young person has completed his 15th year and is fit for a full days work in the factory, he may grant or renew a certificate of fitness, in the prescribed form, to such young person, to work as an adult. [Section 69(2)(b)]

Proviso to Section 69(2) provides that before granting or renewing a certificate of fitness, the Certifying Surgeon must have personal knowledge of the place of the work and manufacturing process wherein such young person will be employed. If he has no personal knowledge, he must examine such place personally.

Other features of certificate of fitness

(i) Validity: The certificate is valid for a period of 12 months from the date of issue [Section 69(3)(a)].

(ii) Conditions of Issue: It may be issued subject to conditions in respect to (i) the nature of work in which a young person may be employed, or (ii) the re-examination of such young person before the expiry of 12 months. [Section 69(3)(b)]. Such young person shall not be required or allowed to work except in accordance with these conditions. [Section 69(6)]

(iii) Revocation of the certificate: The certificate can be revoked by the certifying surgeon, at any time if, in his opinion, the worker is no longer fit to work as such in the factory. [Section 69(4)]

(iv) Certifying Surgeon to state reasons for refusal or revocation: Where a Certifying Surgeon refuses to grant or renew a certificate or revokes a certificate he shall state his reasons in writing if requested by any person, for doing so. [Section 69(5)]

(v) Fee for the certificate: Any fee payable for a certificate shall be paid by the occupier and it cannot be recovered from the young person, his parents, or guardian. [Section 69(7)]

Test your knowledge

Choose the correct answer

Who is liable to pay the fee for a Certificate of Fitness?

(a) The occupier of the factory
(b) The person himself
(c) The person’s guardian
(d) Trade Union

Correct answer: (a)
(iv) Effect of certificate of fitness granted to adolescents

(1) The effect of granting a certificate of fitness to an adolescent and who while at work in a factory carries a token giving reference to such certificate is that he is deemed to be an adult for the purpose of Chapter VI relating to working hours, and Chapter VIII relating to annual leave with wages. [Section 70(1)]

(2) No female adolescent or a male adolescent who has not attained the age of seventeen years but who has been granted a certificate of fitness to work in a factory as an adult, shall be required or allowed to work in any factory except between 6 a.m. and 7 p.m.

Provided that the State Government may by notification in the Official Gazette, in respect of any factory or group or class or description of factories:

(i) vary the limits laid down in this sub-section, so, however, that no such section shall authorise the employment of any female adolescent between 10 p.m. and 5 a.m.

(ii) grant exemption from the provisions of this sub-section in case of serious emergency where national interest is involved. (Section 70 IA)

(3) Where an adolescent has not been granted this certificate, he shall notwithstanding his age, be deemed to be a child for all the purposes of this Act. [Section 70(2)]

(v) Penalty for using false certificate of fitness

If a certificate of fitness is granted to any person, no other person can use it or attempt to use it. The person granting the certificate, cannot allow its use or attempt to be used by another person. In other words, where a person knowingly uses or attempts to use a false certificate and thus, contravenes above provisions, can be punished with imprisonment extending up to two months or with fine upto Rs. 1000 or with both. (Section 98)

Working hours for children

Section 71, lays down further restrictions on the employment of children in the factories. These restrictions as stated below relate to working hours for children.

(1) A child shall not be employed or permitted to work for more than 4-1/2 hours in any day. [Section 71(1)(a)]

(2) He is not permitted to work during night, i.e., during a period of at least 12 consecutive hours, including intervals, between 10 p.m. and 6 a.m.

(3) The period of work shall be limited to two shifts only. [Section 71(2)]

(4) These shifts shall not overlap.

(5) Shifts should not spread over more than 5 hours each.

(6) Each child shall be employed in only one of the relays.

(7) The relays should not be changed more frequently than once in a period of 30 days, otherwise previous permission of the Chief Inspector should be sought in writing.
(8) The provision relating to weekly holiday under Section 52, also apply to child workers. But Section 7(3) does not permit any exemption in respect of these provisions.

(9) No child shall be required or allowed to work in any factory on any day on which he has already been working in another factory. [Section 71(4)]

(10) No female child shall be required or allowed to work in any factory except between 8 a.m. and 7 p.m.

The Act not only prohibits the double employment of a child by the occupier or manager, but also prohibits under Section 99 his parent or guardian or person having custody of or control over him or obtaining any direct benefit from his wages, from allowing him to go for double employment. If they contravene this provision, they can be punished with a fine extending upto one thousand rupees unless the child works without the consent or connivance of his parent or guardian or such other person.

Notice of periods of work for children

(1) A notice, showing clearly for every day the period during which children may be required or allowed to work, shall be displayed and correctly maintained as per Section 108(2) in every factory which employs children.

(2) The periods of work shall be fixed beforehand according to the method prescribed for adult workers under Section 61.

(3) The periods of work so fixed shall not contravene the provisions of Section 71 relating to working hours for children. [Section 72(2)]

(4) The provisions of sub-sections (8), (9) and (10) of Section 61 shall apply to such a notice. (Section 72)

Register of child workers

According to Section 73(1), in every factory, in which children are employed, a register of child workers should be maintained and should be available for inspection by the inspector at all times during working hours or when any work is being carried on in the factory.

Hours of work to correspond with notice under Section 72 and register under Section 73

According to Section 74, the employment of any child shall be in accordance with the notice of periods of work for children to be displayed under Section 72 and the entries made beforehand against his name in the register of child workers of the factory maintained under Section 73.

Power to require medical examination

Section 75 empowers the inspector to serve on the manager of a factory, a notice requiring medical examination of a person by a surgeon, if in his opinion, such person is a young person and is working without a certificate of fitness or, such person, though in possession of certificate of fitness, is no longer fit to work in the capacity stated therein.
The inspector may further direct that such person shall not be employed or permitted to work in any factory until he has been examined and also granted a certificate of fitness or fresh certificate of fitness or has been certified by the Certifying Surgeon not to be a young person.

Certain other provisions of law not barred

The provisions relating to the employment of young persons in factories shall be in addition to, and not in derogation of the provisions of the Employment of Children Act, 1938. (Section 77)

Test your knowledge

Choose the correct answer

What is the maximum number of hours that a child can be employed for as per the Factories Act, 1948?

(a) 3 ½ hours in any day
(b) 4 ½ hours in any day
(c) 5 ½ hours in any day
(d) 6 ½ hours in any day

Correct answer: (b)

ANNUAL LEAVE WITH WAGES

This aspect has been dealt with under Chapter VIII of the Act.

Application of the Chapter

(1) According to Section 78(1), the provisions contained in this chapter shall not operate to the prejudice of any right to which a worker may be entitled under any other law or under the terms of any award, agreement including settlement or contract of service.

(2) Where such award, agreement including settlement or contract of service provides for a longer annual leave with wages than provided in this Chapter, the worker shall be entitled to such longer annual leave but if those provisions are less favourable, then this Chapter shall apply [proviso to Section 78(1)].

(3) The provisions of this chapter do not apply to workers in any factory of any railway administration by the Government, who are governed by leave rules approved by the Central Government.

Annual leave with wages

Under Section 79, the following provisions have been made with regard to annual leave with wages.

Basis of leave

(a) According to Section 79(1), where a worker has worked for a minimum period of 240 days or more in a factory during any calendar year, i.e., the
year beginning from 1st January, he is entitled to leave with wages on the following basis—

(i) for adults – One day for every 20 days of work performed by them during the previous calendar year.

(ii) for children – One day for every fifteen days of work performed by him during the previous calendar year.

(b) If a worker does not commence his services from 1st January, he is entitled to these leaves at the above mentioned rates provided he has worked for 2/3rd of the total number of days in the remaining part of the calendar year.

(c) These leaves are exclusive of all holidays whether occurring during or at either end of the period of leave.

(d) In calculating leave, fraction of leave of half a day or more shall be treated as one full day's leave and fraction of less than half a day shall be ignored.

(e) Computation of qualifying period of 240 days: For the purpose of calculating the minimum period, following periods are also included:

(i) any days of lay-off as agreed or as permissible under the Standing Orders.

(ii) for female workers, period of maternity leave not exceeding 12 weeks.

(iii) leave earned in the year prior to that in which the leave is enjoyed.

Though the above mentioned days included in calculated the qualifying period, but the worker will not be entitled to earn leave for these days.

A worker who is discharged or dismissed from service or quits his employment or is superannuated or dies while in service during the course of calendar year, he or his heir or nominee as the case may be, shall be entitled to wages in lieu of the quantum of leave to which he was entitled immediately before his discharge, dismissal, quitting of employment, superannuation or death, calculated at the rates specified in sub-section (1), even if he had not worked for the entire period specified in sub-section (1) or (2) making him eligible to avail of such leave and such payment shall be made:

(i) where the worker is discharged or dismissed or quits employment, before the expiry of second working day from the date of such discharge, dismissal or quitting;

(ii) where the worker is superannuated or dies while in service, before the expiry of two months from the date of such superannuation or death. [Explanation to Section 79(1)]

Accumulation or carry forward of leaves

If any worker does not avail any earned leave entitled to him during the calendar year, it can be carried forward to the next calendar year subject to the maximum of 30 days for an adult worker and 40 days for a child worker.

But if a worker applies for leave with wages and is not granted such leave in accordance with any approved scheme under Sections 79(8) and (9), or in contravention of Section 79(10), he can carry forward the leave refused, without any limit. [Section 79(5)]
How to apply for leave with wages

(i) If a worker wants to avail leave with wages earned by him during the year, he must apply in writing, to the manager of the factory at least 15 days before the date on which he wishes to go on leave. [Section 79(6)]

(ii) In case a worker is employed in a public utility service as defined in Section 2(n) of the Industrial Disputes Act, 1947, the application for leave with wages shall be made at least 30 days in advance.

(iii) The annual leave with wages cannot be availed for more than three times during any year.

(iv) The application to avail annual leave with wages for illness purposes can be made at any time. [Section 79(7)]

(v) An application for leave which does not contravene the provisions of Section 79(6) shall not be refused unless the refusal is in accordance with the scheme for the time being in operation under sub-sections (8) and (9) of Section 79. [Section 79(10)]

Scheme of leave

To ensure continuity of work, the grant of leave can be regulated. For this purpose, the occupier or the manager should prepare a scheme in writing, regulating the grant of leave to the workers and lodge it with the Chief Inspector.

The Scheme should be prepared in agreement with the following bodies or persons:

(a) (i) Works Committee formed under Section 3 of the Industrial Disputes Act, 1947, or

(ii) Such other Committee formed under any other Act, or

(iii) In the absence of any of the above Committee, the representatives of the workers chosen in the prescribed manner [Section 79(8)].

(b) The scheme shall be valid for 12 months from the date on which it comes into force. It can be renewed, with or without modification, for a further period of 12 months [Section 79(9)].

A notice of renewal shall be sent to the Chief Inspector.

(c) The Scheme shall be displayed at some conspicuous and convenient places in the factory. [Section 79(9)]

Wages during leave period

According to Section 80(1), for the leave allowed to a worker under Section 78 or 79, he shall be entitled to wages at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the month immediately preceding his leave. Such full time earning will also include the dearness allowance and cash equivalent of the advantage accruing through the concessional sale to the workers of foodgrains and other articles. But will exclude any overtime wages and bonus.

Provided that in the case of a worker who has not worked on any day during the
calendar month immediately preceding his leave, he shall be paid at a rate equal to the
daily average of his total full time earnings for the days on which he actually
worked during the last calendar month preceding his leave, in which he actually
worked, exclusive of any overtime and bonus but inclusive of dearness allowance
and the cash equivalent of the advantage accruing through the concessional sale to
the workers of foodgrains and other articles.

The cash equivalent of the advantage accruing through the concessional sale to
the workers of foodgrains and other articles shall be computed as often as may be
prescribed, on the basis of the maximum quantity of foodgrains and other articles
admissible to a standard family. [Section 80(2)]

“Standard family” means a family consisting of a worker, his/her spouse and two
children below the age of 14 years requiring in all three adult consumption units.
[Expl. I to Section 80(2)]

“Adult consumption unit” means the consumption unit of a male above the age of
14 years, and the consumption unit of a female above the age of 14 years, and that
of a child below the age of 14 years, shall be calculated at the rates of 0.8 and 0.6
respectively of one adult consumption unit. [Expl. II to Section 80(2)]

Payment in advance in certain cases

Section 81 provides that where an adult worker has been allowed leave for not
less than 4 days and a child worker for not less than 5 days, wages due for the leave
period should be paid in advance, i.e., before his leave begins.

Mode of recovery of unpaid wages

Any unpaid wages due to the workers under this Chapter, can be recovered as
delayed wages under the provisions of the Payment of Wages Act, 1936. (Section 82)

Test your knowledge

State whether the following statement is “True” or “False”

The annual leave with wages cannot be availed for more than 3 times during any
year.

Correct answer: True

PENALTIES AND PROCEDURES

(1) General penalties for offences: If there is any contravention of any of the
provisions of this Act or any rules or order made thereunder, the occupier and
manager shall each be guilty of an offence and punishable with imprisonment for a
term which may extend to two years or with fine which may extend to Rs. one lakh or
with both and if the contravention is continued after conviction, with a further fine of
Rs. one thousand for each, day till contravention continues.

The provisions of Section 92 further provides penalty for contravention of any of
the provisions of Chapter IV or any rule made thereunder or under Section 87 which
has resulted in an accident causing death or serious bodily injury, the fine shall not be
less than Rs. 25,000 in the case of an accident causing death and Rs. 5,000 in case
of serious bodily injury. Explanation to this Section defines serious bodily injury, which involves the permanent loss of the use of or permanent injury to any limb or sight or hearing or the fracture of any bone excluding the fracture (not being fracture of more than one) bone or joint of any phalanges of the hand or foot.

Section 94 stipulates for enhanced penalty for any person who has already been convicted under Section 92 of the Act, and is again guilty of an offence involving contravention of the same provisions. Punishment for subsequent conviction includes imprisonment for a term which may extend to three years or with fine which may not be less than Rs. 10,000 but which may extend to Rs. two lakhs or with both. Provided that the Court may, for any adequate and special reasons to to be mentioned in the judgement impose a fine of less than Rs. 10,000. Provided further, that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under Section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than Rs. 35,000 in case of death and Rs. 10,000 in the case of an accident causing serious bodily injury.

No cognizance shall be taken of any conviction made more than two years before the commission of the offence for which the person is subsequently convicted.

(2) Liabilities of owner of premises in certain circumstances: Section 93 provides that where in any premises separate building are being leased out by the owner to different occupiers for use as separate factories, the owner of the premises shall be responsible for the provision and maintenance of common facilities and services such as approach roads, drainage, water-supply, lighting and sanitation. [Section 93(1)]

Where in any premises, independent floors or flats are leased to different occupiers for use as separate factories, the owner shall be liable as if he were the manager or occupier of a factory for any contravention of the provisions of this Act in respect of (i) latrines, urinals, washing facilities and common supply of water for this purpose; (ii) fencing of machinery and plant belonging to the owner and not entrusted to the custody or use of an occupier; (iii) safe means of access to floors or flats and maintenance and cleanliness of staircase and common passages; (iv) precautions in case of fire; (v) maintenance of hoists and lifts; and (vi) maintenance of any other common facilities provided in the premises. [Section 93(3)]

But the liability of the owner [under Section 93(3) arises only wherein any premises, independent rooms with common latrine, urinals and washing facilities are leased to different occupiers for use as separate factories so that the owner should also comply with the provisions of maintaining such facilities. (Section 93(5)]

For the purposes of sub-sections (5) and (7) computing the total number of workers employed, the whole of the premises shall be deemed to be single factory. [Section 93(3)]

The owner is liable for contravention of Chapter III except Sections 14 and 15; Chapter IV except Sections 22, 23, 27, 34, 35 and 36 where in any premises, portions of a room or a shed leased out to different occupiers for use as separate factories: Provided that in respect of the provisions of Sections 21, 24 and 32, the owners liability shall be only in so far as such provisions relate to things under his control and the occupier shall be responsible for complying with the provisions of Chapter IV in respect of plant and machinery belonging to or supplied by him and for contravention of Section 42.
The Chief Inspector has been empowered to issue orders to the owners in respect of the carrying out of the provisions as mentioned above but subject to the control of the State Government.

(3) Penalty for obstructing Inspector: Section 95 lays down penalty of imprisonment for six months or fine of Rs. 10,000 or with both for wilfully obstructing an inspector in the exercise of any power conferred on him by or under this Act or fails to produce any registers or other documents to him on demand or concealing or preventing any worker from appearing before or being examined by an Inspector.

(4) Penalty for wrongfully disclosing of results of analysis under Section 91: Section 96 provides imprisonment extending up to a term of six months and fine upto Rs. 10,000 or both for the wrongful disclosure of results of analysts of the analysis done under Section 91 of the Act.

(4A) Penalty for contravention of Sections 41B, 41C and 41H: Section 96A provides punishment of 7 years imprisonment or fine which may extend to Rs. two lakhs for the non-compliance with or contravention of any of the provisions of Section 41B, 41C, or 41H or rules made thereunder by any person. In case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention. If such failure, contravention continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to ten years.

(5) Offences by workers and penalties therefor:
   (i) Section 97 lays down that if any worker contravenes the provision of this Act or any rules or orders made thereunder imposing any duty or liability on workers he will be punishable with fine which may extend to Rs. 500/-
   (ii) Section 98 imposes penalty for using false certificate of fitness. Such punishment involves imprisonment for such a term which may not extend to two months or with fine which may extend to Rs. 1,000/- or with both.

(6) Penalty for permitting double employment of child by parents or guardians is stipulated under Section 99. Such an act is punishable with fine extending up to Rs. 1,000 unless it appears to the Court that the child so worked without consent and connivance of such parents, guardian or person.

(7) Onus of providing limits of what is practicable etc.: Onus of proving is on the person who is alleged to have failed to comply with such duty etc. to prove that he has taken all measures or it was not reasonable practicable. (Section 104A)

<table>
<thead>
<tr>
<th>Test your knowledge</th>
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<tbody>
<tr>
<td>Choose the correct answer</td>
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<tr>
<td>What is the penalty payable by parents/ guardian for permitting double employment of a child?</td>
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<tr>
<td>(a) Rs. 500</td>
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<tr>
<td>(b) Rs. 1,000</td>
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<tr>
<td>(c) Rs. 2,000</td>
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<tr>
<td>(d) Rs. 3,000</td>
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<tr>
<td>Correct answer: (b)</td>
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COMPLIANCES UNDER THE ACT

The establishment must ensure following compliances under the Act. These compliances are not exhaustive but illustrative.

1. The factory/establishment is covered by the provisions of this Act with effect from ............
   Or
   The factory/establishment is covered under the provisions of this Act by a notification dated ........ given by the government in the official gazette.

2. During the year under review, the provisions of this Act continued to have effect notwithstanding any reduction in the employees below the Statutory Minimum.

3. The factory/establishment has submitted to the authorities the returns in the prescribed form containing the particulars relating to the persons employed as per the provisions of the Act, regulation and rules made in this behalf during the said financial year.

4. Establishment employs ............ Number of workers with the aid of power during the financial year.
   Or
   Establishment employs ............ number of workers without the aid of power during the financial year.

5. The establishment has obtained permission from government/Chief Inspector of Factories for the site on which the factory is to be situated vide letter dated ............ during the financial year.

6. The notice intimating occupying or using a premises as a factory with effect from ........ was given to the Chief Inspector on .......

7. During the year under review, there has been a change in the occupier and the occupier has duly complied with the provisions of the Factories Act and has given due notice thereof.

8. The establishment has taken adequate precaution and care for the maintenance of the health of the workers during the financial year.

9. The establishment has taken adequate precaution and care for the maintenance of the safety of the workers during the financial year.

10. The establishment has taken adequate precaution and care for the maintenance of the welfare of workers during the financial year.

11. The establishment had duly complied with the provisions relating to the working hours of the adult workers during the said financial year.

12. The establishment has duly complied with the provisions relating to the employment of children during the financial year.

13. The establishment does not carry-on any manufacturing process or operation which in the opinion of the State Government, exposes any
persons employed in it to a serious risk of bodily injury, poisoning or disease during the financial year.

14. The establishment has given due notice to authorities in respect of the accident causing death, or which causes any bodily injury by reason of which the person injured is prevented from working for a period of forty-eight hours or more immediately following the accident during the financial year.

15. The establishment has given due notice to authorities in respect of the dangerous occurrence happened which caused bodily injury or disablement during the financial year.

Or

The establishment has given due notice to authorities in respect of the dangerous occurrence happened during the financial year. However, it caused no bodily injury or disablement.

16. There was no prosecution initiated against or show cause notices received by the Company and no fines or penalties or any other punishment was imposed on the Company during the financial year, for offences under the Act.

THE FIRST SCHEDULE

[List of Industries involving Hazardous Processes]

1. Ferrous Metallurgical Industries
   — Integrated Iron and Steel
   — Ferro-alloys
   — Special Steels.

2. Non-ferrous Metallurgical Industries
   — Primary Metallurgical Industries, namely, zinc, lead copper, managanese and aluminium.

3. Foundries (ferrous and non-ferrous).
   — Castings and forgings including cleaning or smoothening/roughening by sand and shot blasting.

4. Coal (including coke) industries
   — Coal, Lignite, Coke, etc.
   — Fuel Gases (including Coal Gas, Producer Gas, Water Gas).

5. Power Generating Industries.

6. Pulp and paper (including paper products) industries.

7. Fertiliser industries
   — Nitrogenous
   — Phosphatic
8. Cement Industries
   — Portland Cement (including slag cement, puzzolona cement and their products).

9. Petroleum Industries
   — Oil Refining
   — Lubricating Oils and Greases.

11. Drugs and Pharmaceutical Industries
    — Narcotics, drugs and Pharmaceuticals.

12. Fermentation Industries (Distilleries and Breweries).
13. Rubber (Synthetic) Industries.
15. Leather tanning Industries.

17. Chemical Industries
    — Coke Oven-products and Coaltar distillation products.
    — Industrial Gases (nitrogen, oxygen, acetylene, argon, carbon dioxide, hydrogen, sulphur dioxide, nitrous oxide, halogenated hydrocarbon, ozone, etc.
    — Industrial carbon.
    — Alkalies and Acids.
    — Chromates and dichromates.
    — Leads and its compounds.
    — Electrochemicals (metallic sodium, potassium and magnesium, chlorates, perohlorates and peroxides).
    — Electrothermal produces (artificial abrasive, calcium carbide).
    — Nitrogenous compounds (cyanides, cyanamides, and other nitrogenous compounds).
    — Phosphorous and its compounds.
    — Halogens and Halogenated compounds (Chlorine, Flourine, Bromine and Iodine).
    — Explosives (including industrial explosives and detonators and fuses).

18. Insecticides, Fungicides, Herbicides and other Pesticides Industries.
20. Man-made Fibre (Cellulosic and non-cellulosic) industry.
22. Glass and Ceramics.
23. Grinding or glazing of metals.
24. Manufacture, handling and processing of asbestos and its products.
25. Extraction of oils and fats from vegetable and animal sources.
26. Manufacture, handling and use of benzene and substances containing benzene.
27. Manufacturing processes and operations involving carbon disulphide.
28. Dyes and dyestuff including their intermediates.
29. Highly flammable liquids and gases.

THE THIRD SCHEDULE
(See Sections 89 and 90)

List of Notifiable Diseases

1. Lead poisoning including by any preparation or compound of lead or their sequelae.
2. Lead tetra ethyl poisoning.
3. Phosphorus poisoning or its sequelae.
4. Mercury poisoning or its sequelae.
5. Manganese poisoning or its sequelae.
6. Arsenic poisoning or its sequelae.
7. Poisoning by nitrous fumes.
8. Carbon disulphide poisoning.
9. Benzene poisoning, including poisoning by any of its homologues, their nitro or amino derivatives or its sequelae.
10. Chrome ulceration or its sequelae.
11. Anthrax.
12. Silicosis.
13. Poisoning by halogens or halogen derivatives of the hydro-carbons of the aliphatic series.
14. Pathological manifestation due to
   (a) radium or other radioactive substances.
   (b) x-rays.
15. Primary epitheliomatus cancer of the skin.
17. Toxic jaundice due to poisonous substances.
18. Oil acne or dermatitis due to mineral oils and compounds containing mineral oil base.
20. Asbestosis.
21. Occupational or contract dermatitis caused by direct, contact with chemicals and paints. These are of two types, that is, primary irritants and allergic sensitizers.
22. Noise induced hearing loss (exposure to high noise levels).
23. Beriylgium poisoning.
24. Carbon monoxide.
25. Coal miners pneumoconiosis.
27. Occupational cancer.
28. Isocyanates poisoning.
29. Toxic nephritis.

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**LESSON ROUND UP**

- The law relating to factories is governed under the Factories Act, 1948.
- The Act has been enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. For that purpose, it seeks to impose upon the owner or the occupier certain obligations to protect the workers and to secure for them employment in conditions conductive to their health and safety.
- It applies to factories covered under the Factories Act, 1948. The industries in which ten (10) or more than ten workers are employed on any day of the preceding twelve months and are engaged in manufacturing process being carried out with the aid of power or twenty or more than twenty workers are employed in manufacturing process being carried out without the aid of power, are covered under the provisions of this Act.
- The State Governments assume the main responsibility for administration of the Act and its various provisions by utilizing the powers vested in them.
- The State Governments carry out the administration of the Act through inspecting Staff; Certifying Surgeons; welfare Officers; Safety Officers.
- The Act stipulates measures to be taken by factories for health, safety and welfare of the workers, that apart it also lays down the provisions relating to working hours of adult workers, both male and female. However, certain additional restrictions have been imposed on the working hours of female workers.
- If there is any contravention of any of the provisions of this Act or any rules or order made thereunder, the occupier and manager shall each be guilty of an offence and punishable with imprisonment for a term which may extend to two years or with fine which may extend to Rs. One lakh or with both and if the contravention is continued after conviction, with a further fine of Rs. One thousand for each, day till contravention continues.
1. Discuss the object and scope of the Factories Act, 1948.

2. Define the terms: Adult, Adolescent, Manufacturing Process, Factory and Worker.


4. What are the provisions regarding annual leave with wages?

5. Write short notes on:
   (a) Powers of the Inspectors.
   (b) Hazardous processes.
   (c) Occupier.

Suggested Readings:

(1) The Factories Act, 1948 – Bare Act
(2) Industrial Law – P.L. Malik
(3) Labour Laws – H.L. Kumar
(4) Labour & Industrial Laws (Legal Manual 2007) – Universal
(5) Handbook of Industrial Law – D.N. Kapoor
EXECUTIVE PROGRAMME

ECONOMIC AND LABOUR LAWS

EP-ELL/2011

TEST PAPERS


Students are advised to attempt at least one Test Paper from Test Papers 3/2011, 4/2011 and 5/2011 i.e. either Test Paper 3/2011 or Test Paper 4/2011 or Test Paper 5/2011 and send the response sheet for evaluation to make him/her eligible for Coaching Completion Certificate. However, students may, if they so desire, be encouraged to send more response sheets including Test Paper 1/2011 and 2/2011 for evaluation.

While writing answers, students should take care not to copy from the study material, text books or other publications. Instances of deliberate copying from any source, will be viewed very seriously.
WHILE WRITING THE RESPONSE SHEETS TO THE TEST PAPERS GIVEN AT END OF THIS STUDY MATERIAL, THE STUDENTS SHOULD KEEP IN VIEW THE FOLLOWING WARNING AND DESIST FROM COPYING.

WARNING

Time and again, it is brought to our notice by the examiners evaluating response sheets that some students use unfair means in completing postal coaching by way of copying the answers of students who have successfully completed the postal coaching or from the suggested answers/study material supplied by the Institute. A few cases of impersonation by handwriting while answering the response sheets have also been brought to the Institute’s notice. The Training and Educational Facilities Committee has viewed seriously such instances of using unfair means to complete postal coaching. The students are, therefore, strongly advised to write response sheets personally in their own handwriting without copying from any original source. It is also brought to the notice of all students that use of any malpractice in undergoing postal or oral coaching is a misconduct as provided in the explanation to Regulation 27 and accordingly the studentship registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

“27. Suspension and cancellation of examination results or registration

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or the Committee concerned may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity to state his case, suspend or debar the person from appearing in any one or more examinations, cancel his examination result, or studentship registration, or debar him from future registration as a student, as the case may be.

Explanation - Misconduct for the purpose of this regulation shall mean and include behaviour in a disorderly manner in relation to the Institute or in or near an Examination premises/centre, breach of any regulation, condition, guideline or direction laid down by the Institute, malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with the writing of any examination conducted by the Institute”.

708
EXECUTIVE PROGRAMME
ECONOMIC AND LABOUR LAWS
ECONOMIC AND LABOUR LAWS
TEST PAPER 1/2011
(OPTIONAL)

Time allowed: 3 hours            Max. marks 100

PART A - ECONOMIC LAWS (60 Marks)

Note: Attempt question No. 1 which is COMPULSORY and any two from rest of this part.

1. With reference to the relevant legal enactments, write short notes on the following:
   (a) Environmental Audit
   (b) Consumer under Competition Act, 2002
   (c) Current Account Transactions
   (d) Term of trademark
   (e) Money laundering.           (4 marks each)

2. (a) Discuss briefly the salient features of National Green Tribunal Act, 2010.
   (b) Discuss in detail the Capital Account Transaction under Foreign Exchange Management Act, 1999. (10 marks each)

3. Discuss the provisions relating to Take-over of Industrial Undertaking by the Central Government without investigation under the Industries (Development and Regulation) Act, 1951. (20 marks)

4. (a) Discuss in detail the procedure for investigation of combination under Competition Act, 2002.
   (b) Discuss the powers vested with the Central Government under Essential Commodities Act, 1955. (10 marks each)

5. (a) What are the differences between law of passing off and infringement of trademark.
   (b) Explain the functions of MSME Board. (10 marks each)

PART B - LABOUR LAWS (40 Marks)

Note: Attempt all Questions.

6. Write short notes on:
   (a) Persons responsible for payment of wages under the Payment of Act, 1936
   (b) Forfeiture of gratuity.
   (c) Purposes for which ESI fund may be expended under the ESI Act, 1948.
   (d) Employment Injury. (5 marks each)
7. (a) Discuss the provisions of the EPF Act, 1952 relating to protection of amount standing to the credit of any member in the fund against attachment.

(b) An electrician, who had to go frequently to a heating room from a cooling plant, contracted pneumonia which resulted in his death. Will it be construed as ‘physical injury’?

(c) A worker went on leave. He continued to remain absent from duty even after the expiry of leave. The employer treated the ‘absence from duty without leave’ as breach of continuity of service for the purposes of the Payment of Gratuity Act, 1972. Is the employer justified?

(d) An employee was suspended, but after an inquiry, he was reinstated with full back wages. He claimed bonus for the period of suspension. Will he succeed? 

(5 marks each)
PART A - ECONOMIC LAWS (60 Marks)

Note: Attempt question No. 1 which is COMPULSORY and any two from rest of this part.

1. Write short notes on the following:
   (i) Air Pollution
   (ii) Relevant Geographic Market
   (iii) Term of Copyright
   (iv) Cartel. (5 marks each)

2. (a) Outline the salient features of Special Economic Zone Act, 2005.
    (b) What is Environmental Laboratory? What are the functions performed by Environmental Laboratory? (10 marks each)

3. (a) What do you mean by Infringement of copyright and what are its consequences?
    (b) Explain the Composition of National Green Tribunal. (10 marks each)

4. (a) Discuss the provisions relating to Anti-Competitive Agreement under Competition Act, 2002.
    (b) Write a note on Importer Exporter Code Numbers under Foreign Trade Policy (10 marks each)

5. List out the sectors/activities where FDI is prohibited. And sectors/activities where FDI is allowed. (20 marks)

PART B - LABOUR LAWS (40 Marks)

Note: Attempt all Questions.

6. (a) Explain the object and scope of the Industrial Disputes Act, 1947.
    (b) State briefly the provisions under the Factories Act, 1948 regarding working hours and weekly holidays.
    (c) What are the provisions relating to welfare and health of contract labour under the Contract Labour (Regulation and Abolition) Act, 1970?
    (d) Explain the term “standing orders” and explain their importance in the light of decided cases. (5 marks each)

7. (a) Explain the concept of continuous service under the Payment of Gratuity Act, 1972.
(b) Do salt workers which produce salt by admitting sea water in open salt panes fall within the definition of 'factory' under the Factories Act, 1948.

(c) The employer wants to modify the standing orders finally certified by the certifying officer just after the expiry of the three months from the date on which the standing orders came into operation. Give suitable advice to the employer.

(d) A dispute arose about the payment of subsistence allowance to a suspended employee. He claimed the allowance as per the rates prescribed by the law of the particular State. The employer wanted to pay as per the rate specified in the Industrial Employment (Standing Orders) Act, 1946. Will the employee succeed? *(5 marks each)*
TEST PAPER 3/2011

Time allowed: 3 hours             Max. marks 100

PART A - ECONOMIC LAWS (60 Marks)

Note: Attempt question No. 1 which is COMPULSORY and any two from rest of this part.

1. Write short notes on the following:
   (a) Legal Metrology
   (b) Trade Effluent
   (c) Export Promotion Council
   (d) Concept of industrial design. (5 marks each)

2. (a) What are the basic rights of consumer under Consumer Protection Act, 1986. (10 marks)
   (b) Define Hazardous Substance? State the consequences when a direction issued under section 12 of Public Liability Insurance Act, 1992 regarding handling of hazardous substance is not complied with? (10 marks)

3. Discuss the eligibility criteria for overseas investment by Registered Trust and Society. (20 marks)

4. (a) Discuss the scope of powers and jurisdiction of Consumer Forum/Commission under Consumer Protection Act. (20 marks)

5. (a) Discuss briefly Grant of Certificate of Registration under FCR Act, 2010. (10 marks)
   (b) Discuss the absolute grounds for refusal of registration of trade mark. (10 marks)

PART B - LABOUR LAWS (40 Marks)

Note: Attempt all Questions.

6. (a) Explain the provisions relating to hazardous process under the Factories Act, 1948
   (b) What are the unfair labour practices on the part of the workmen and trade unions of workmen under the Industrial Disputes Act, 1947?
   (c) What are the different types of benefits provided by the ESI Act, 1948?
   (d) Explain the expression “accident arising out of and in the course of employment “with reference to the liability of the employer to pay compensation to his workmen.
   (e) Distinguish between ‘Model standing orders’ and ‘certified standing orders’ (4 marks each)
7. (a) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):

(i) Bonus must be paid to employees within a period of ___________ months from the close of the accounting year.

(ii) ___________ means termination of the services of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action.

(iii) A minimum of ___________ contributory service is required for entitlement to pension under the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952.

(iv) The employer is not liable for compensation when injury to the workman does not result in disablement for a period exceeding ___________ days.

(v) The employer is required to send a report to the Commissioner for workmen’s compensation within ___________ days of the death or serious injury of the workman. (1 mark each)

(b) Can workmen be punished during the pendency of proceedings? What procedure is to be followed by the aggrieved workmen to have grievances redressed?

(c) A copy of the Memorandum of Settlement was not dispatched by the conciliation officer to the appropriate Government. Will the settlement be treated as invalid?

(d) The workman employed in railway establishment gave notice of strike stating that they would go on strike from a specified date. In fact they stuck work before that date. Is the strike illegal? (4 marks each)
PART A - ECONOMIC LAWS (60 Marks)

Note: Attempt question No. 1 which is COMPULSORY and any two from rest of this part.

1. Write short notes on:
   (i) Competition Advocacy
   (ii) Control of Noise Pollution
   (iii) Concept of Sustainable Development
   (iv) Star Export House (5 marks each)

2. Distinguish between Certification Trade Marks and Collective Trade Marks. (20 marks)

3. Discuss in details the Compounding of offence under Foreign Exchange Management Act, 1999 and Rules, Regulation made there under? (20 mark)

4. (a) Enumerate the main provisions of the public liability Insurance Act, 1991. (10 marks)
    (b) Briefly Discuss what are not inventions under Patents Act, 1970. (10 marks)

5. (a) What is the objective of Know your Customer(KYC) guidelines? When do the KYC guidelines apply? (10 marks)
    (b) Give a brief note on seizure and confiscation of Essential Commodities. (10 marks)

PART B - LABOUR LAWS (40 Marks)

Note: Attempt all questions.

6. (a) Discuss the provisions of Minimum Wages Act, regarding (a) wages to be paid to a worker who works for less than normal working day ; (b) wages to be paid to an employee who does two or more of work to each of which a different minimum rate of wages is applicable. (4 marks each)
    (b) What are the conditions for the eligibility of bonus? When is an employee disqualified from receiving bonus?
    (c) “Accident alone does not entitle a workman to claim compensation, it must arise out of and in the course of employment”. Comment.
    (d) What establishments are required to be registered under the Contract Labour (Regulation and Abolition) Act, 1970?
    (e) Distinguish between the (ii) ‘Principal employer’ and ‘immediate employer’ under the Employees’ State Insurance Act, 1948.
7.(a) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):

(i) The membership of provident fund scheme is compulsory for employees drawing a pay not exceeding Rs.__________ per month.

(ii) __________ means termination of the service of an employee otherwise than on superannuation.

(iii) Wages are to be paid within __________ working days from the date of termination of the employee whatever be the reason of termination.

(iv) Superannuation in relation to an employee, who is a member of the pension scheme, means the attainment of the age of __________ years.

(v) Under the Workmen’s Compensation Act, 1923, the employer shall not be liable when the injury does not result in disablement for a period exceeding _______ days. (1 mark each)

(b) Prem and Qureshi established a legal consultancy firm. They employed three law graduates, a stenographer and a typist to assist the firm. After five years, the services of the stenographer were terminated without assigning any reason. He raised a dispute before the Labour Court asking for reinstatement or retrenchment compensation as contemplated by the Industrial Disputes Act, 1947. Will he succeed?

(c) Sameer died suddenly while working in a factory. The workmen refused to resume work to express solidarity with the deceased worker. Does the action of the workmen amount to strike under the Industrial Disputes Act, 1947?

(d) While an employee may increase his share of provident fund contribution, is the employer also liable to proportionately increase his share of contribution under the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952? (5 marks each)
PART A - ECONOMIC LAWS (60 Marks)

Note: Attempt question No. 1 which is COMPULSORY and any two from rest of this part.

1. Write short notes on
   (a) Mese rea under the Essential Commodities Act, 1955.
   (b) Term of Patent.
   (c) Foreign Source under Foreign Contribution Regulation Act, 2010
   (d) Current Account Transaction. (5 marks each)

2. (a) What do you mean by Relevant Market? (10 marks)
   (b) Enumerate the factors which the Competition Commission of India give due regards while determining whether enterprise enjoys dominant position or not? (10 marks)

3. Distinguish between
   (i) Foreign Exchange and Foreign Securities.
   (ii) Contract of Service and Contract for Service. (10 marks each)

4. (a) Critically examine how investigation into the Affairs of Company in Liquidation under Industries (Development & Regulation) Act, 1951. (10 marks)
   (b) Discuss briefly the restriction on use of certain Industrial plants under Air (Prevention and Control of Pollution) Act, 1981. (10 marks)

5. (a) List out the heads under which compensation for damages under Green Tribunal Act, 2010 may be claimed. (10 marks)
   (b) Discuss briefly Environmental Clearance and Location of Industries under Environment Protection Act, 1986 and Rules made thereunder. (10 marks)

PART B - LABOUR AND INDUSTRIAL LAWS (40Marks)

Note: Attempt all questions.

6. Write notes on the following:
   (i) Manufacturing process.
   (ii) Lay-off compensation.
   (iii) Total disablement.
   (iv) Employees’ Provident Fund Scheme.
   (v) Voluntary reference of disputes to arbitration. (4 marks each)
7. (a) Choose the most appropriate answer from the given options in respect of the following:

(i) An application for the recovery of bonus from an employer shall be made within —
   (a) Six months from the date on which the money became due
   (b) One year from the date on which the money became due
   (c) 60 Days from the date on which the money became due
   (d) 90 Days from the date on which the money became due.

(ii) The occupier of a factory is required to send a written notice to the Chief Inspector of Factories at least —
   (a) 7 Days before he begins to occupy or use the premises as a factory
   (b) 15 Days before he begins to occupy or use the premises as a factory
   (c) 21 Days before he begins to occupy or use the premises as a factory
   (d) 10 Days before he begins to occupy or use the premises as a factory.

(iii) The State Government may make rules regarding the provisions and maintenance of a canteen for the use of workers wherein more than—
   (a) 250 Workers are ordinarily employed
   (b) 500 Workers are ordinarily employed
   (c) 300 Workers are ordinarily employed
   (d) 100 Workers are ordinarily employed.

(iv) The minimum amount of compensation in case of permanent total disablement is —
   (a) Rs.1,00,000
   (b) Rs.90,000
   (c) Rs.80,000
   (d) Rs.70,000.

(v) The Contract Labour (Regulation and Abolition) Act, 1970 applies to every establishment or contractor wherein workmen employed on any day of the preceding 12 months shall be —
   (a) 100 Workmen or more
   (b) 20 Workmen or more
   (c) 50 Workmen or more
   (d) 10 Workmen or more. (1 mark each)
7. (b) Can the following be held to be factory?
   (i) Premises in which nine workers are working for three months with
       the aid of power for exhibition of cinema films
   (ii) A railway running shed
   (iii) A hotel.

(c) Jay-Kay Ltd. employed casual workmen for a short duration of two
    months to execute a contingency plan of its operations. Are the casual
    workmen entitled for provident fund contribution from the employer?

(d) Can the compensation payable under the Employees Compensation
    Act, 1923 be assigned, attached or changed? (5 marks each)
EXECUTIVE PROGRAMME
ECONOMIC AND LABOUR LAWS

QUESTION PAPERS OF PREVIOUS SESSIONS

Question papers of immediate past two examinations of Economic and Labour Laws paper are appended to this study material for reference of the students to familiarize with the pattern and its structure. Students may please note that answers to these questions should not be sent to the Institute for evaluation.

JUNE 2011

Time allowed : 3 hours Maximum marks : 100

PART A
(Answer Question No.1 which is COMPULSORY and ANY THREE of the rest from this part.)

1. With reference to the relevant legal enactments, write short notes on any five of the following:
   (i) Functions of the National Board for micro, small and medium enterprises under the Micro, Small and Medium Enterprises Development Act, 2006
   (ii) Functions of Export Promotion Council
   (iii) Anti-competitive agreements
   (iv) Applicability of the concept of mens rea under the Essential Commodities Act, 1955
   (v) Patent agent
   (vi) ‘Defect’ in goods under the Consumer Protection Act, 1986
   (vii) Sustainable development. (3 marks each)

2. State, with reasons in brief, whether the following statements are true or false. Attempt any five:
   (i) The consumer forums can entertain a complaint arising out of the contract which provides for arbitration of disputes.
   (ii) No action for the infringement of copyright can be brought unless the copyright is registered.
(iii) Indian companies are free to issue rights/bonus shares to non-resident shareholders.

(iv) There is no difference between ‘person resident in India’ and ‘person resident of India’.

(v) A person can accept foreign contribution by way of a gift irrespective of its value.

(vi) The Standards of Weights and Measures Act, 1976 provides for the compounding of offences. 

3. (a) Distinguish between any two of the following:

   (i) ‘Competition’ and ‘cartel’.

   (ii) ‘Registered proprietor of a trade mark’ and ‘registered user of a trade mark’.

   (iii) ‘Competition Commission’ and ‘Competition Appellate Tribunal’.

   (iv) ‘Patent’ and ‘patent of addition’.

   (5 marks each)

3. (b) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):

   (i) The transfer or issue of foreign security is a _______ transaction.

   (ii) A person who has acquired or purchased foreign exchange for a specified purpose is unable to use the same and is required to surrender it within _______ days from the date of its acquisition or purchase.

   (iii) The term of every patent granted under the Patents Act, 1970 shall be _______ years from the date of filing of application for the patent.

   (iv) The literary, dramatic, musical or artistic works enjoy copyright protection for the life time of the author plus _______ years beyond.

   (v) The National Consumer Disputes Redressal Commission shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed exceeds Rs._______.

   (1 mark each)

4. (a) With reference to the relevant provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder, advise on the following:

   (i) Karan, a person resident in India, borrows US $20,000 from his friend resident outside India.

   (ii) Rakesh, a person resident in India, is interested in extending an invitation to George, a person resident outside India, to stay as his guest while on a visit to India.

   (iii) A person, resident outside India, is interested to repatriate outside India the sale proceeds of an immovable property held in India.

   (iv) A person, resident in India, wants to acquire immovable property outside India by way of gift from a person who is resident outside India.
(v) A foreign investor is interested to invest in an Indian company which is a small scale industrial unit. (1 mark each)

(b) Mohan made a deposit of Rs.1.50 lakh with the Housing Board for a house proposed to be built by it. There was a stipulation that the house would be completed within 2 years. The house could not be completed and possession was not handed over as promised. The Housing Board pleaded that construction was not up to the mark and expected level because of the use of low cost technology. Expressing regret, the Housing Board suggested that it was prepared to refund the deposit amount adding that there was no provision to pay any interest charges.

Mohan is not satisfied with the explanation and intends to approach the Consumer Disputes Redressal Forum for claim of refund amount, interest and compensation, if any. Will Mohan succeed? Refer to decided case law, if any. (5 marks)

(c) Mention the provisions of the Trade Marks Act, 1999 relating to assignment and transmission of registered trade marks. (5 marks)

5. (a) "Environmental pollution is the price a country has to pay for economic development." Comment. (5 marks)

(b) Write a note on the efficacy of existing regulatory framework providing for environmental protection in the country. (5 marks)

(c) "Despite the deleterious impact of money laundering on development, it has, of late, assumed alarming proportions and its growth has been cancerous." Discuss. (5 marks)

PART B

(Answer ANY TWO questions from this part.)

6. Write notes on any four of the following:

(i) Matters to be provided in standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(ii) General duties of an ‘occupier’ under the Factories Act, 1948.

(iii) Classes of employees not covered under the Payment of Bonus Act, 1965.

(iv) Object and scope of the Minimum Wages Act, 1948.

(v) Legality of strike under the Industrial Disputes Act, 1947.

(vi) Rights and obligations of the employer under the Payment of Gratuity Act, 1972. (5 marks each)

7. (a) Distinguish between any two of the following:

(i) ‘Sickness benefit’ and ‘medical benefit’ under the Employees’ State Insurance Act, 1948.

(iii) ‘Model standing orders’ and ‘certified standing orders’ under the Industrial Employment (Standing Orders) Act, 1946.

(b) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):
   (i) Any contract whereby a workman relinquishes any right of compensation from the employer shall be.
   (ii) It shall be the duty of the to pay wages to the contract labour.
   (iii) The function of a certifying officer or the appellate authority is to adjudicate upon the of the standing orders.
   (iv) An adolescent worker shall be allowed to work only for hours in a week.
   (v) The Contract Labour (Regulation and Abolition) Act, 1970 applies to every establishment or contractor wherein or more workmen are or were employed on any day of the preceding 12 months as contract labour.

(c) Write the most appropriate answer from the given options in respect of the following:
   (i) The government may review the minimum rates of wages so fixed and revise the same if necessary at such intervals, not exceeding—
      (a) 3 Years
      (b) 5 Years
      (c) 2 Years
      (d) 1 Year.
   (ii) Every factory or establishment to which the Employees’ State Insurance Act, 1948 applies has to be registered within—
      (a) 15 Days
      (b) 30 Days
      (c) 45 Days
      (d) 60 Days.
   (iii) As per the Contract Labour (Regulation and Abolition) Act, 1970 and the central rules, in case the work is completed before the expiry of the wage period, final payment shall be made within—
      (a) 24 Hours of the last working day
      (b) 48 Hours of the last working day
      (c) 7 Days of the last working day
      (d) 3 Days of the last working day.
   (iv) The term ‘wages’ under the Employees’ State Insurance Act, 1948 does not include—
      (a) Incentives
(b) Over-time wages
(c) Travelling allowance
(d) Any other additional remuneration.

(v) Under the Workmen’s Compensation Act, 1923, the Commissioner for Workmen’s Compensation shall not entertain any claim unless it is preferred before him on the occurrence of the accident, within—
(a) 1 Week
(b) 6 Months
(c) 1 Year
(d) 2 Years.  

8. Attempt any five of the following stating relevant legal provisions and decided case law, if any:

(i) Roler Coaster Ltd. is engaged in the manufacture of electronic goods. The company has been paying puja bonus to its workers during Diwali festival since the beginning of its operations. Subsequently, the Payment of Bonus Act, 1965 became applicable to the company. The management wants to discontinue puja bonus on the ground that the company is paying bonus as per the Payment of Bonus Act, 1965. Is the management justified?

(ii) Dinesh absent himself from duty without applying for leave and left the job. When he claimed gratuity, the company refused to pay gratuity quoting his absence from duty without proper leave resulted in break in service. Will he get gratuity?

(iii) Hotel Amravati is managed by a firm employing more than 100 employees and covered under the provisions of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952. Some of its partners started a new restaurant in the premises registering the restaurant as a new unit as per the applicable State enactment. The restaurant employed 15 employees and the management of restaurant took a stand that the restaurant is a different establishment and is not covered under the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952. Will it succeed?

(iv) Promod Electronics is a small scale industry (SSI) employing 15 workmen. Due to a fall in demand for its products, the management decided to lay-off its workmen. The workmen contended that they cannot be laid-off as there is no provision to lay-off in the terms and conditions of appointment. Examine the legality of the action of the management.

(v) A government enterprise issues raw materials to the weavers registered under it to manufacture handloom cloth as per the specifications given. The weavers take raw material and manufacture cloth in the looms installed by them. The government enterprise procures the finished goods from the weavers. State whether weavers are the workers of the government enterprise under the provisions of the Factories Act, 1948.

(vi) Gemini Ltd. has an industrial unit employing 500 workmen but has not got the standing orders certified under the Industrial Employment
(Standing Orders) Act, 1946. The management initiated proceedings against one of its workmen for misconduct. The management is of the view that as there are no certified standing orders applicable to the factory establishment, it is under no obligation to follow any procedure except the principles of natural justice. State whether the view held by the management is legally valid.

(vii) The members of a trade union who are not workmen of the employer raised a dispute and sought redressal from the authorities. Will they succeed in their dispute? (4 marks each)
PART A

(Answer Question No.1 which is COMPULSORY and ANY THREE of the rest from this part.)

1. With reference to the relevant legal enactments, write short notes on any five of the following:
   (i) Bid rigging
   (ii) Principal display panel
   (iii) Collective trade mark
   (iv) Relevant geographic market
   (v) Legal metrology
   (vi) Potential infringement of a patent
   (vii) Principles of sustainable living. (3 marks each)

2. State, with reasons in brief, whether the following statements are true or false. Attempt any five:
   (i) Registration of an undertaking belonging to the First Schedule of the Industries (Development and Regulation) Act, 1951 is not necessary in certain cases.
   (ii) The provisions of the Competition Act, 2002 are not applicable to a government company.
   (iii) Money laundering can provide short-term benefits to the economy.
   (iv) Special Economic Zones are growth engines.
   (v) The limitation period for filing a complaint under the Consumer Protection Act, 1986 is two years from the date on which the cause of action arises without any exception.
   (vi) There is no difference between the preparation for committing an offence and an attempt to commit an offence under the Essential Commodities Act, 1955. (3 marks each)

3. (a) Distinguish between any two of the following:
   (i) ‘Wholesale package’ and ‘retail package’.
   (ii) ‘Carry on business licence’ and ‘industrial licence’.
   (iii) ‘Invention’ and ‘patentable invention’.
   (iv) ‘Appellate tribunal’ and ‘court’. (5 marks each)

   (b) Re-write the following sentences after filling-in the blank spaces with
appropriate word(s)/figure(s):

(i) An appeal against the order passed by the Consumer Disputes
Redressal Forum has to be preferred within ______  days from the
date of the order to the State Commission.

(ii) Prior approval of RBI is required for the release of foreign exchange
for meeting the expenses of medical treatment exceeding US $
_______ or its equivalent.

(iii) Any person aggrieved by an order of confiscation of an essential
commodity may prefer an appeal to the ________ within one month
from the date of passing of the order.

(iv) Foreign direct investment (FDI) in trusts other than ______ is not
permitted.

(v) Prior approval of RBI is required for availing of foreign exchange
facility exceeding ______ for persons going to USA for employment.

4. (a) With reference to the relevant provisions of the Foreign Exchange
Management Act, 1999 and the rules and regulations made thereunder,
advise on the following :

(i) Ram, a person resident in India, intends to invest `25,000 in foreign
securities in a calendar year.

(ii) Infotech Ltd., an Indian company owning a micro/small enterprise,
intends to issue shares against foreign direct investment.

(iii) Shyam, an Indian resident, wishes to acquire qualification shares for
becoming a director of a company outside India and the
consideration is US $30,000.

(iv) Naresh, an Indian citizen, enters into an agreement for the lease of
machinery to a foreign party and intends to ship the machinery
abroad.

(v) Mohan, an Indian citizen resident outside India, intends to acquire
immovable property in India.

(b) Ram Dhenu Ltd. and Diamond Engineers entered into a contract for the
supply of electrical equipments. The contract contained an arbitration
clause to refer the disputes to an arbitral tribunal. Ram Dhenu Ltd. made
a complaint to the Consumer Disputes Redressal Forum for ‘deficiency in
service’. The opposite party opposed the complaint in view of the
arbitration clause contained in the contract. Will it succeed? Give
reasons. (5 marks)

(c) Mention the obligations of banking companies, financial institutions and
intermediaries under the Prevention of Money Laundering Act, 2002.

(5 marks)

5. (a) Describe the powers of the National Green Tribunal constituted under the
National Green Tribunal Act, 2010. (5 marks)
(b) An enterprise which is engaged in hazardous or inherently dangerous activity and an industry which poses a potential threat to the health and safety of the persons and of those residing in the surrounding areas owes an absolute and non-delegatable duty to the community. Comment. (5 marks)

(c) Briefly mention the provisions of the Noise Pollution (Regulation and Control) Rules, 2000 relating to control of noise pollution. (5 marks)

PART—B
(Answer ANY TWO questions from this part.)

6. Write notes on any four of the following:
   (i) ‘Forfeiture of gratuity’ under the Payment of Gratuity Act, 1972.
   (iii) ‘Manufacturing process’ under the Factories Act, 1948.
   (iv) ‘Partial disablement’ under the Workmen’s Compensation Act, 1923.
   (v) ‘General prohibition of strikes and lock-outs’ under the Industrial Disputes Act, 1947.
   (vi) ‘Temporary application of model standing orders’ under the Industrial Employment (Standing Orders) Act, 1946. (5 marks each)

7. (a) Distinguish between any two of the following:
   (i) ‘Arbitration’ and ‘conciliation’ for the resolution of industrial disputes under the Industrial Disputes Act, 1947.
   (iii) ‘Principal employer’ and ‘contractor’ under the Contract Labour (Regulation and Abolition) Act, 1970.
   (iv) ‘Committee method’ and ‘notification method’ for the fixation of minimum wages under the Minimum Wages Act, 1948. (5 marks each)

(b) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):
   (i) The Payment of Bonus Act, 1965 is applicable to every factory and to every other establishment where _____ are employed on any day during an accounting year.
   (ii) All contributions paid under the Employees’ State Insurance Act, 1948 and other moneys received on behalf of the ESI Corporation shall be paid into a fund called _________.
   (iii) The employer shall arrange to pay the amount of gratuity within_____ days from the date of its becoming payable to the person to whom it is payable.
(iv) Under the Employees Deposit-Linked Insurance Scheme, employers are required to pay contributions for the insurance fund at the rate of _____ of the total emoluments.

(v) The Contract Labour (Regulation and Abolition) Act, 1970 shall not apply to establishments in which work only of ______ is performed.

(c) Write the most appropriate answer from the given options in respect of the following:

(i) An employee is not entitled to bonus if —
   (a) He has worked for less than 6 months
   (b) He is guilty of any misconduct
   (c) He is in managerial cadre
   (d) He is a part-time permanent employee.

(ii) The Employees’ Provident Fund and Miscellaneous Provisions Act, 1952 is applicable to all factories and certain establishments employing —
   (a) 20 or more persons
   (b) 50 or more persons
   (c) 10 or more persons
   (d) Without any limit.

(iii) Compensation under the Workmen’s Compensation Act, 1923 becomes due —
   (a) On the date of death/accident of the workman
   (b) On the date of order of the Commissioner for workmen’s compensation
   (c) On the completion of one month from the date of accident
   (d) On demand from the workman.

(iv) The employment of contract labour can be prohibited —
   (a) By an order of the labour court
   (b) By notification of the Government
   (c) When the number of workmen exceeds 50
   (d) By the Central Advisory Board.

(v) The interpretation of certified standing orders is within the jurisdiction of —
   (a) Labour court
   (b) Certifying officer
   (c) Workmen
   (d) Employer and workmen.

8. Attempt any five of the following stating relevant legal provisions and decided case law, if any:

(i) Raghu, on retirement, has withdrawn the entire amount of his accumulation in the provident fund. Later on, he was re-appointed for a fixed tenure. The provident fund inspector claimed contribution
(i) In respect of the salary paid to Raghu. Is the demand made by the inspector tenable in law?

(ii) XYZ Ltd., employing more than 50 workmen in its factory, failed to register itself and pay contributions under the Employees' State Insurance Act, 1948. The inspector of the ESI Corporation issued a notice to the company and directed it to register and pay contributions towards its employees. On failure to comply with the terms of notice, ESI Corporation determined the contributions payable by the company and demanded payment with interest and penalty. The company disputed its liability and asked the ESI Corporation to approach the ESI Court for adjudication of the claim. Is the company justified?

(iii) Sooraj Hospital has a laundry in its premises to ensure a high degree of hygiene standard for washing the linen used in the hospital. The employees of the hospital work in the laundry and the laundry cannot be separated from the hospital. The inspector of factories issued a notice to Sooraj Hospital to register it as a factory. Is he justified?

(iv) Harish, a mechanic, was alleged to have indulged in an act of misconduct. An inquiry was held into the charge against him as per the procedure laid down in the certified standing orders. The copy of the inquiry report was not furnished to him before imposing penalty on the ground that it was not provided under the certified standing orders. Is the plea of the management tenable in law?

(v) Lotus Info. Ltd. entered into a settlement with its workmen providing for payment of gratuity at the rate of one month's salary for every completed year of service. An employee retired on superannuation and claimed gratuity as per the settlement. The employer pleaded that he is under no obligation to pay gratuity more than the rate prescribed under the Payment of Gratuity Act, 1972. Is the employer's contention tenable in law?

(vi) A workman was dismissed from service on 15th February, 2009 after a departmental enquiry for an act of misconduct. No bonus was paid to him for the accounting year during which he was dismissed. Subsequently, he was reinstated by the court with full back wages. Will the workman be entitled to claim bonus along with full back wages?

(vii) Amar was the owner of a ginning factory. Certain persons were engaged in putting the ginned cotton into what was called bojhas and they were engaged for that work not by the owner but by the merchants who owned cotton. The owner had not entered their names in the attendance register of the factory. Are the persons employed by the merchants covered under the category of 'workers' under the provisions of the Factories Act, 1948?

(4 marks each)