

## BA 5104: LEGAL ASPECTS OF BUSINESS

### UNIT- 1

#### THE INDIAN CONTRACT ACT, 1872

Law: Law includes all the rules and principles which regulate our relations with other individuals and with the state (Govt.).

Law is the body of principles recognized and applied by the state in the administration of justice.

**Mercantile law:** It deals with contractual situations and the right & obligations arising out of mercantile transactions between mercantile persons.

#### **The Indian Contract act 1872**

The law relating to contract is contained in the Indian contract Act, 1872. This act deals with: (a) The general principles of the law of contract (b) Some special contracts (indemnity, guarantee, agency, bailment, pledge, etc.).

### CONTRACT

**Meaning:** A contract is an agreement made between two or more persons, which enforceable by law. (Every agreement and promise enforceable at law is a contract).

**Contract = Agreement (offer & acceptance) + Enforceability by law**

**Agreement:** Every promise/ every set of promises forming the consideration of each other and an agreement become a contract, if enforceable by law.

“All contracts are agreements but all agreements are not contract”.

#### **Types/ Classification of contract**

Contracts may be classified into the three main categories according to their (1) Validity, (2) Formation and (3) Performance.

#### **1. Classification according to Validity**

- a) **Valid contract:** A contract which satisfies all the legal requirements laid down in Sec.10 of the Act, is known as a valid contract. A valid contract is enforceable by law.
- b) **Void agreement:** An agreement not enforceable by law is said to be void and it has no legal effect. It confers no rights on any person and creates no obligations.
- c) **Void contract:** A void contract is that which is not enforceable by law. Sec.2 (j) of the

act lays down that “A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable” An agreement which is not enforceable by either of the parties to it is void. Such an agreement is without any legal effect **ab initio** (from the very beginning). Under the law, an agreement with a minor is void.

A contract which is enforceable by law at the time it was made, but later on if it becomes legally unenforceable due to some reasons, it is called void contract. Example, A and B contract to marry each other. Before the time fixed for the marriage A goes mad. The contract becomes void. (Subsequent impossibility)

- d) **Voidable contract** - A contract, which is enforceable by law at the option of one party thereon, but not at the option of the other or others, is a voidable contract. In such a case where the consent is not free, the party whose consent was so caused becomes the aggrieved party who can either affirm the contract or set aside or rescind it. This right of recession should, however, be exercised within reasonable time and before the third party acquires rights under the contract.

Example: Mr.A, threatens to shoot Mr.B, if he does not sell his new Bajaj bike to Mr.A for Rs.2000 and Mr.B agrees. The contract has been brought about by coercion and is voidable at the option of Mr.B.

- e) **Illegal agreement:** An agreement is illegal and void if its object or consideration:
- (a) Forbidden by law or
  - (b) Is of such a nature that, if permitted, it would defeat the provisions of any law or
  - (c) Is fraudulent or
  - (d) It involves or implies injury to another person or
  - (e) The court regards it as immoral, or opposed to public policy or
- f) **Unenforceable contract:** The contracts which cannot be enforced in a court of Law because of some technical defects. If any contract, which is not, fulfilled some basic formalities, such as must be in writing, must be attested, must be registered, etc., the contract cannot be enforced in a Court of Law.

## 2. Classification according to formation/ mode of creation

- a) **Express contract:** In case the proposal or acceptance of any promise is made in words the promise is said to be express. An express promise will result in an express contract.

Example: X writes a letter to Y that he offers to sell his bike for Rs.36,000 and Y in reply informs X that he accepts the offer. This is an express contract.

- b) **Implied contract:** If any proposal or acceptance is made otherwise than words (by action/ conduct), such promise is said to be implied.

Example: Mr.A went to a Ice-cream parlor and have an ice-cream. In this case, there is an implied contract exists that Mr.A will pay for the ice-cream, even though he makes no express promise to do so.

- c) **Quasi contract:** Under certain circumstances, a person may receive a benefit of another person should pay to the other person, even though there is no contract between the parties called Quasi contract. “Certain relations resembling those created by contracts”  
Example: A finder of lost goods is under an obligation to find out the true owner and return the goods.

### 3. Classification according to Performance

- a) **Executed contract:** When both the parties have completely performed their respective obligations, under the contract, the contract is said to be executed.
- b) **Executory contract:** In this contract the obligations of the parties are to be performed at a later time. When both the parties have not performed their respective obligations under the contract is called Executory contract.

Example: X agrees to sell his bike to Y for a certain amount. The delivery and payment are to be made in next month, the contract is said to be Executory.

- c) **Unilateral contract:** In a contract, one party has to fulfill his obligations, whereas the other party has already performed his obligations. This is a Unilateral/ one sided contract.
- d) **Bilateral contract:** In which, the obligation on the part of both the parties to the contract are outstanding at the time of formation of the contract. Example: X promised to paint Y’s house for a sum of Rs.1000. It is a bilateral contract as there is exchange of promises and obligations of both the parties are outstanding at the time of formation.

### Essential elements of a valid contract

1. **Offer and acceptance:** There must be lawful offer and acceptance. Offer must be definite and acceptance must be absolute and unconditional.
2. **Intention to create legal relations:** When the two parties enter into an agreement, their intention must be to create legal relationship between them.  
-Agreements of social/ domestic nature – no legal relationship
3. **Lawful consideration:** The agreement is legally enforceable only, when both the parties give something and get something in return.
4. **Capacity of parties:** Parties must be capable. i.e, (i) the age of maturity (ii) in sound mind (iii) not disqualified (due to minority, lunacy, drunkenness, etc.,).

5. **Free consent:** There must be free and genuine consent of the parties to the agreement.
6. **Lawful object:** The object of the agreement must be lawful, i.e, it must not be (i) illegal (ii) opposed to company policy, etc.
7. Agreement has not been declared void
8. **Certainty and possibility of performance** – Eg. A agrees to sell to B “a hundred tones of oil”. There is nothing whatever to show what kind of oil was intended. This agreement is void for uncertainty.
9. **Legal formalities:** Contract must be in writing (not compulsion) and must be registered.

### Void agreements

“A void agreement is one which is not enforceable by law” – “Void ab initio” – void from the very beginning (Eg. An agreement with a minor or without consideration).

Expressly declared void agreements

1. Agreements by incompetent parties
2. Agreements made under a mutual mistake of fact
3. Agreement the consideration/ object of which is unlawful
4. Agreements made without consideration
5. Agreements in restraint of marriage
6. Agreements is restraint of trade

“Every agreement by which any one is restrained from exercising a lawful profession, trade is to that extent void”

Exceptions: 1. Seller of goodwill – Cannot use the goodwill

2. Partners’ agreement – partner is not allowed to do business

3. Trade combinations – Agreement to regulate business, agreement made by all manufactures that not to sell below a certain price.

4. Service agreement – auditor not to involve any company account before left the service.

7. Agreements in restraint of legal proceedings: Restricted to enforce contract rights, usual legal proceedings, etc.
8. Uncertain agreements: Agreements which is not certain is void (Eg. A agrees to sell to B “a hundred tones of oil”. There is nothing whatever to show what kind of oil was intended. This agreement is void for uncertainty).
9. Agreement by way of wager (a betting) – ordinary betting agreements (Eg. A and B agreed that if it rains today ‘A’ will pay B Rs.100 and if not ‘B’ will pay ‘A’ Rs.100.  
 “A wagering agreement is one by which two persons; hold an agreement about the future uncertain events”
10. Agreements contingent on impossible events: Eg. A agrees to pay B, Rs.100, if B will marry A’s daughter ‘C’. ‘C’ was dead at the time of agreement – void
11. Agreement to do impossible act: A agrees with B to run with a speed of 100km/hr.
12. In case of reciprocal promises to do things legal and also other thing illegal, the illegal reciprocal promise is void.

**Wagering:** A wager is an agreement between two parties by which one promises to pay money (or worth) on the happening of some uncertain future event in consideration of the other party’s promise to pay if the event does not happen.

**Restitution:** It means return of the benefit received from the plaintiff under a void contract.

“A person who has been unjustly enriched at the expenses of another is required to make return (Compensate) to that other.

## FORMATION OF CONTRACT

**Express contract:** When both the offer and acceptance constituting an agreement enforceable by law are made in spoken / written is called express contract.

**Implied contract:** Where both the offer and acceptance constituting an agreement enforceable at law are made otherwise than in words, i.e., by act and conduct of parties.

- ‘A’ a coolie in uniform takes up the luggage of B without asking him and got money for his service.

**Constructive or quasi contract**

- Certain relations resembling those created by contracts.
- Nothing but law of restitution
- Under certain circumstances, a person may receive a benefit, for which other person has better title, he should give such benefit to other person, even though there is no contract between the parties – such relationships are called ‘quasi’ contracts.

Eg. Obligation of finder of lost goods to return them to the true owner.

### PERFORMANCE OF CONTRACT

Performance of a contract takes place, when the parties to the contract fulfill their obligations arising under the contract with in the time & prescribed manner.

- Attempted performance/ Tender: Where the promisor offers the performance, but not accepted by the promisee.
- Who can demand performance: Only the promisee.
- By whom contract must be performed
  - i. By the promisor himself – involved his skill
  - ii. By the promisor or his agent
  - iii. By the legal representative
  - iv. By the third party.
- Performance of joint promisors (Devolution of joint liabilities): Devolution means passing over from one person to another. When two or more persons have made a joint promise, they are known as joint promisors, all joint promisors must jointly fulfill the promise.

Promisor	Promisee
Several (A,B,C)	Single (D)
Single (A)	Several (B,C,D)
Several (A,B,C)	Several (D,E,F)

- Order of performance of reciprocal promises  
Promises, which form the consideration for each other are called ‘reciprocal’ / ‘mutual’ or ‘bilateral’ promises. Eg. A promises to do or not to do something in

consideration of B's promises to do or not to do something, the promises are reciprocal.

1. Mutual and Independent – each party must perform independently and irrespectively of the fact whether the other party has performed or not. Eg In a contract of sale, B agrees to pay the price of goods on 10<sup>th</sup> instant. S promises to supply the goods on 20<sup>th</sup> instant. The promises are Mutual and Independent.
2. Conditional and Dependent – Promisor first – promisee next (Promisee need not perform his promise, if promisor fails to perform.
3. Mutual & concurrent – Two parties performed simultaneously.

### **Time and Place of performance**

- Where the time is not specified : Must be performed within a reasonable time
- Where time is specified & no application is to be made: Must be performed with to application by the promisee.
- Application for performance on certain day and place: If the promisor accepts must perform accordingly
- Application by the promisor to the promisee to appoint place: The promisor must appoint a reasonable place.

### **Time as the essence of the contract**

The performance of the promise by the party to the contract is essential within the specified time.

1. **When time is of the essence:** If it is commercial contract, if there is a failure on the part of the promisor to perform his obligation within the fixed time, the contract becomes voidable at the option of the promisee.
2. **When time is -not of the essence:** In a contract, in which time is not of the essence of the contract, failure on the part of the promisor to perform his obligation within the fixed time does not make the contract voidable, but the promisee is entitled to compensation for any loss.

### **Appropriation of payment**

**When a debtor owes several distinct debts to a creditor and makes a payment insufficient to satisfy the whole indebtedness, the following three rules will be applied for appropriation.**

1. **Where the debtor intimates – The creditor must do accordingly.**

(# A owes B, among other debts, Rs.1000 upon a pro-note which falls due on 1<sup>st</sup> June. He owes B no other debt of that amount. On 1<sup>st</sup> June A pays to B Rs.1000. The payment is to be applied to the discharge of the promissory note)

2. **Where the debtor does not intimate and the circumstances are not indicative:** The creditor's choice (Interest first, Principal next).
3. **Where the debtor does not intimate and the creditor fails to appropriate:** The rule of Clayton's case will apply, i.e., the payment of shall be applied in discharge of the debts in chronological order, i.e., in order of time/date.

### ASSIGNMENT OF CONTRACT

**Transfer of contractual rights and liabilities to a 3<sup>rd</sup> party with/ without concurrence of the other party to the contract.**

#### 1. Act of the parties

##### a. Assignment of contractual obligations:

- i. Contractual obligations involving personal skill – cannot be assigned.
- ii. The promisee cannot be compelled – The promisor can not assign.

##### b. Assignment of contractual rights

- i. The rights and benefits under a contract not involving personal skill may be assigned.

2. An actionable claim (Cheque) can be assigned.
3. **Operation of law:** a. Death b. Insolvency.



### Discharge of Contract

**Meaning: Termination of the contractual relationship between the parties. A contract said to be discharged when it ceases to operate, i.e., when the rights and obligations created by it come to an end.**

**A contract may be discharged in the following way**

1.By Performance		2.By agreement or consent		3. By impossibility of performance (void ab initio)		4.By laps of time	5.By operation of law	6.By breach of contract
<b>1.Actual</b>	<b>2.Attempted (Tender)</b>	<b>1.By Express consent</b>	<b>2.By implied consent</b> <b>a.Novation</b> (Creation New Contract) <b>b.Rescission</b> (All/ some of terms cancelled) <b>c.Alteration</b> (Terms Altered) <b>d.Remission</b> (Acceptance of Lesser fulfillment) <b>e.Waiver</b> (Mutual abandonment of rights) <b>f.Merger</b> (Lessee become a as Leaser)	1.Impossibility at the time of contract i.Known to the parties - Void ab initio  ii.Unknow to the parties – Impossibility during performance – become void at that time/ may be altered	2.Impossibility arising subsequent to formation of contract (Supervening impossibilities/ Post contractual impossibilities)  <b>a.An excuse</b> i.Destruction of subject matter ii.Non-existence of a state of things iii.Death or incapacity for personal services iv.Change of law v.Out-break of war  <b>b.Not an excuse</b> i.Difficulty of performace ii.Commercial impossibilities iii.Failure of a 3 <sup>rd</sup> party iv.Strikes, lockouts &Civil disturbances v.Failure of one of the object (Can't discharge)	Discharged due to laps of time – In credit sale, if the amount not paid by Dr. and efforts was not taken by Cr. Contract discharged	1.Death (P'Skill –Terminate, If Other –Legal-heir to perform. 2.Merger 3.Insolvency 4.Unauthorised alteration of terms of contract (Material alteration) 5.Rights & Liabilities vesting in the same person	1.Actual a.At the time of the performance b.During the performance i.Implied repudiation (Rejection) ii.Express repudiation  2.Anticipatory When a party to an contract declares his intention of not performing the contract

- **Breach of Contract – A Breaking of obligation which a contract imposes**

## Remedies for Breach of Contract

### Breach of Contract

**A breaking of the obligation which, a contract imposes. It occurs when a party to the contract without lawful excuse does not fulfill his contractual obligation.**

### Remedies for Breach of Contract

When a contract is broken, the injured party has one or more of the following remedies.

1. **Recession:** The affected party may refuse further performance
2. **Suit for damages**
3. **Suit upon Quantum meruit**
4. **Suit for specific performance of the contract**
5. **Suit for injunction**

1. **Recession:** The affected party may refuse/ rescinded further performance, when the contract is broken by one party. (# A promises B to supply of 10 bags of cement on a certain day. B agrees to pay the price after the receipt of the goods. A does not supply the goods. B is discharged from liability to pay the price).
2. **Suit for damages:** Damages are a monetary compensation allowed to injured party by the court for the loss suffered by him by the breach of the contract.  
# Hadley vs. Baxendale case.

#### Rules relating to damages:

- i. Damages arising naturally and directly in the usual course of things from the breach – ordinary damages  
# A contract to sell and deliver 50 quintals of Wheat to B at Rs.475/quintal, the price to be paid at the time of delivery. The price of wheat rises to Rs.500/ quintal and A refuses to sell the wheat. B can claim damages at the rate of Rs.25/ quintal (Damages will be the differences b/w the contract price and the market price of such goods).
- ii. Damages in contemplation of the parties- Special damages
- iii. Vindictive (bitter/painful) or Exemplary damages – Compensation in the form of punishment – Punishing the banker due to wrong dishonour.
- iv. Nominal damages: If the party is not suffered due to breach, nominal damage is changed.
- v. Damages for loss of reputation: Generally not recoverable
  - Affected party is Trade-man – recoverable
  - Affected party is not a trade-man- irrecoverable
- vi. Damages for inconvenience and discomfort

- vii. Mitigation of damages: The injured party to take effort to mitigate (diminish) the loss caused by the breach.
  - viii. Difficulty of assessment – Cannot recovered
  - ix. Cost of decree (Legal charges) – can be recovered
  - x. Damages agreed upon in advance in case of breach – Aggrieved party is entitled to receive such amount only.
3. Suit upon Quantum meruit: Quantum meruit “As much as earned” – When a person did some work under a contract, and the other party repudiate the contract or unable to continue, then the party who has performed the work can claim remuneration for the work he has already done. The aggrieved party must pay what he has received, if the contract is performed partly.
  4. Specific performance: If the damages are not an adequate, the court will order to perform the contract.
  5. Injunction: Where the party is doing something which he promised not to do, the court may restrain him from doing what he promised not to do.

### Quasi Contract

Under certain circumstances, a person may receive a benefit of another person should pay to the other person, even though there is no contract between the parties – called Quasi contract. “Certain relations resembling those created by contracts”

- Quasi contract is also known as law of restitution. (QC is not a contract, it is a law).

#### **Kinds of Quasi contract (U/s.68 to 72), Five kinds of QC:**

1. **Supply of necessities (u/s.68):** If any person supplying anything to incapable person to his condition in life is entitled to be reimbursed from the property of such incapable person.

**Eg:** A supplies B, a lunatic, with necessities suitable to his condition in life, A is entitled to be reimbursed from B’s property.

2. **Payment by an interested person:** A person who paid money on behalf of another (bound to pay), is entitled to be reimbursed.
3. **Obligation to pay for non-gratuitous (needful) act:**  
When a person lawfully does anything for another, not intending to do so gratuitously and such other person enjoys the benefit thereof, he should give compensation.  
Eg. ‘A’ leaves goods at B’s house by mistake, ‘B’ treats the goods as his own and he should pay to ‘A’.

**4. Responsibility of finder of goods**

The finder of the lost goods is entitled to retain them against the whole world except the true owner.

The finder can sell it in the following case:

- i. Found goods in danger of perishing
- ii. Owner cannot be found
- iii. The owner found out, but refuses to pay the lawful charges of the finder
- iv. When the law full charges amount to 2/3 of the found goods.

**5. Mistake or coercion**

A person to whom money has been paid by mistake/coercion, must repay or return it to the person who paid it by mistake.

**QUANTUM MERUIT**

The party, who has performed the work of repudiated contract, can claim remuneration/benefit for the work he has already done.

**Circumstances to claim for quantum meruit**

1. When an agreement is discovered to be void
2. When something is done without intention
3. Where there is a contract to render service but no agreement to remuneration
4. When the completion of contract prevented by other party
5. When the contract is divisible
6. When contract is completed by badly.

**AGENCY**

**Agency:** A contract which creates the relationship of Principal and agent.

**Agent:** A person employed to do any act for another/ to represent another in dealings with 3<sup>rd</sup> persons. The person for whom such act is done is called Principal.

**General rules of Agency**

1. A person competent to contract may do by himself, he may do through an agent – except for acts involved personal skill. – A person cannot marry through an agent.
2. He who does through another, does by himself.
  - The acts of the agent are the acts of principal

**Agency:** Agency exists, “whenever a person has the authority to act on behalf of the other and to create contractual relations between that others and 3<sup>rd</sup> person”.

*Who may employ an agent?* – Any person who is of the age of majority and sound mind may employ an agent – Minor, lunatic (Mad) or drunken person cannot employ.

*Who may be an agent?* – Any person may become an agent including minor/ a person of unsound mind.

- No consideration is necessary to create an agency

### **Kinds of Agent/ Classification of agent**

#### **A. On the basis of authority**

1. General agent: Employed to do all acts connected with a particular business
2. Special agent: To do some particular act, eg. To sell a motor car
3. Universal agent: Whose authority is unlimited, authorised to do all the acts, which the principal can lawfully do.

#### **B. On the basis of nature of work**

1. **Mercantile agent:** Authority to buy/ sell goods or raise money on the security of goods.
  - a. **Factor:** He is entrusted with the possession of goods with discretionary authority to sell, pledge goods with 3<sup>rd</sup> party.
    - Sell goods his own name and fix the price by own
  - b. **Broker** – He brings 2 parties together into contract
  - c. **Commission agent** – He may/ may not possession of goods. He buys/sells goods for commission.
  - d. **Auctioneer** – Authority to sell the goods of principal in public auction.
    - Cannot sell goods on credit
    - Agent of the seller till the time of sale
  - e. **Del-credere agent:** - An agent who for an extra commission
    - His extra commission is known as “Del-credere commission”.
    - He becomes responsible, if the other party does not perform the contract.
2. **Sub-agent:** An agent appointed by the original agent
3. **Co-agent:** 2 or more persons are appointed an agent
4. **Substitute agent:** The original agent name another to act for principal

## Creation of Agency

### 1. Agency by express agreement

- Appointed either by word of mouth/ agreement in writing

### 2. Agency by implied agreement

Agency exist by the circumstances/ the conduct of the parties etc.,

Different forms:

a) agency by estoppel, b)Agency by Holding out, c)Agency by necessity

#### a. Agency by estoppels

- Where a person by his words/conduct led another to believe that certain set of circumstances or facts exists, the principal is bound by such acts/ obligations.

#### b. Agency by Holding out

- The Principal is bound by the acts of the supposed agent, if he has induced 3<sup>rd</sup> persons to believe that they are done with his authority/ knowledge.
- It requires some positive act/conduct by the Principal to establish agency.

#### c. Agency by necessity

- Where one is compelled to act as an agent of another without the authority of the other.
- Agency created under pressing circumstances necessity
- Conditions for valid agency by necessity:
  - i. It should be impossible to obtain Principal's instructions
  - ii. Necessity must exist
  - iii. The agent must act in the BEST interests of the Principal reasonably.
    - The agent should act in a fair and in a reasonable manner
    - Acts in a reasonable manner in times of emergency
    - Agent must act 'Bonafide' in the interest of the Principal

### 3. Agency by ratification

When a person subsequently adopts the unauthorized acts of another, done without his authority/consent, agency by ratification is constituted.

Likewise, when an agent exceeds the authority bestowed upon him by the principal, the principal may ratify the unauthorized act.

An act done by one person (Agent) on behalf of another (Principal), without his (Principal's) knowledge or authority, binding on the other person (Principal) as if they had been performed by his authority.

- Once the act is ratified, it relates back to the date when the act was first done by the agent.

### **Ratification (U/s.196 – 200 of Contract of Agency)**

It is adopting or accepting subsequent a past act of an agent done on behalf of another without authority.

- Ratify or to disown (reject) such act is optional
- Ratification may be express or implied
- If ratifies, the same effects will follow as it performed by his authority

### **Rules governing ratification**

1. Act must be done on behalf of another, if the agent contracts in his own name, cannot be ratified
2. It must have been done without knowledge of the Principal
3. The act is done must be legally in existence
4. Ratification may be express/ implied
5. The transaction must be valid and not illegal
6. The Principal must be competent to ratify
7. Ratification must be done within a reasonable time
8. Ratification must be communicated
9. Ratification can be for the whole contract and not part of it
10. Ratification should not put a 3<sup>rd</sup> party to damage.

### **4. Agency by operation of Law**

Sometimes an agency arises by operation of law. When a company is formed, its promoters are its agents by operation of law. A partner is the agent of the firm for the purpose of the business of the firm.

### **Substitute agent**

Where an agent holding an express or implied authority to name another person to act for the Principal, has named another person accordingly such person is a 'Substitute agent'.

**Case:** A directs B, his solicitor, to sell his estate by auction and to employ an auctioneer for the purpose. B names C, auctioneer to conduct the sale, C is a substitute agent.

### **Sub- agent**

- An agent appointed by an original agent is called a ‘Sub-agent’.
- A ‘Sub-agent’ is a person employed by and acting under the control of the original agent in the business of agency.
- The relation of sub-agent to the main agent is that of an agent & principal.
- “Delegatus non protest delegare” – Delegate cannot delegate
- An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally.

**Exceptions:** - An agent can appoint another person as a sub-agent under the following circumstances

- i. Employed under the custom of trade
- ii. Where unforeseen emergencies arise
- iii. Acts of purely ministerial nature
- iv. From the nature of agency (Eg. An agent authorised to file a suit may engage a lawyer).

### **Relationship between Principal, Agent and Sub-agent**

#### **A. If the sub-agent is properly appointed**

- i. The Principal is responsible for the acts of a subagent
- ii. The agent is responsible to the principal for the acts of the sub-agent
- iii. The sub-agent is responsible for his acts to the agent, but not to the Principal except in case of fraud or willful wrong.

#### **B. If the sub-agent is not properly appointed**

- i. The principal is not responsible for the acts of a sub-agent
- ii. The agent is responsible to Principal & 3<sup>rd</sup> party
- iii. Sub-agent is not responsible to the Principal

- **Termination of Sub-agent:** Termination of authority of an agent causes the termination of sub-agent/ agency.



**Principal's Liability when agent exceeds his authority**

- Where authority can be separated – The principal is not responsible for unauthorized acts of his agent.
- Where authority cannot be separated – The principal is not bound to recognise the transaction.

**Agent's duties and liabilities to Principal**

1. To conduct principal's business & follow his directions/ custom
  - According to his directions, obey the directions, if no direction may follow the custom
2. Conduct the Business with skill & diligence
3. To render proper accounts
4. To pay sums received for principal
5. To communicate with principal
6. On Principal's death or insanity – acts on behalf
7. Not to deal on his own account
8. Use of information – shall not use the business information against principal
9. Secret profit – Shall not make any secret profits
10. Adverse title - agent must not setup an adverse title
11. Not to delegate
12. Liable for acts of sub-agent
13. Liable to pay damages – for breach of contract
14. Liable for misconduct

**Rights of Agent**

1. Right to receive remuneration
  - Entitled to receive his agreed remuneration
  - Can claim remuneration once he has completed his work
  - Effect of misconduct – not entitled to any remuneration
2. Right of retainer – out of any sum received for principal
3. Right of lien

4. Right to be indemnified against consequences of lawful acts – if unlawful cannot claim.
5. Right to be indemnified against consequences of acts done in good faith
6. Right to compensation – for injuries sustained, due to principal's neglect
7. Right to stoppage of goods in transit
  - Bought goods either with his own money
  - Principal has become insolvent.

### **Principal's liability for the acts of the agent**

- **Principal's liability to 3<sup>rd</sup> party for the acts of the agent**

1. When agent acts within the scope of his actual and apparent authority (ostensible).
2. When agent exceeds his actual as well as apparent authority – Principal has option either ratify or disown (reject) the unauthorized acts.
3. Liability for agent's misrepresentation or fraud
  - Principal is liable for misrepresentation or fraud committed by the agent
  - Law treats the principal & his agent as one
  - Liable to the acts done within the course of agency business
  - Does not matter whether the agent has done the act for his personal benefit or principal's benefit
  - Principal not liable which do not fall within his authority
4. Notice given to agent as notice to principal
5. Liability based on the doctrine of Estoppels

### **Personal Liability of agent to Third party – Agent's Liability to 3<sup>rd</sup> party**

**An agent is presumed to be personally liable in the following cases**

1. Where the agent expressly agrees
2. Where the agent acts for a foreign principal
3. Where the agent act for an unnamed principal – If he could not disclose the identity of the principal (due to sudden death).
4. Where the agent act for an undisclosed principal
  - If the 3<sup>rd</sup> party comes to know the existence of the principal, he may hold both of them liable.

5. Where the agent acts for a principal who cannot be sued
  - As the company non-existent at the time of contract/ Minor/incompetent person
  - Agent act for an ambassador etc.,
6. Where the agent exceeds his authority – if that activity can't be separable, liable for whole.
7. Where there is a trade usage or custom
8. Where agent's authority is coupled with interest – Agent has interest with subject matter and entered contract with 3<sup>rd</sup> party.

### **Termination of Agency**

**Two ways** – A) By act of the parties    B) By operation of law

#### **A. Termination by act of the parties**

1. **Agreement** – Terminated any time by mutual agreement between Principal and Agent.

#### **2. Revocation by the principal**

- Principal can revoke the authority at any time before the agent has exercised his authority
- Revocation may be express/ implied
- It cannot be revoked with regard to acts already done in the agency
- Reasonable notice should be given to agent and 3<sup>rd</sup> party
- If agency created for a fixed period – principal can revoke before expiry of the period
- Without sufficient cause, principal should pay compensation

#### **3. Renunciation (denial) by the agent (revocation by the agent)**

- Termination by an express renunciation by the agent- he must give a reasonable notice.
- If agency for a fixed period – renounces before expiry of the period – agent should compensate

#### **B. Termination by Operation of law**

1. Completion of the business of agency (Performance of the contract)
2. Expiry of time

3. Death of the principal or the agent
4. Insanity (Madness/ Lunacy) of the principal or the agent
  - P & A become of an unsound mind (insane)
  - A person of unsound mind can be appointed (initially) as an agent
5. Insolvency of the principal – Puts an end to the agency but Insolvency of an agent may be puts an end to the agency or not.
6. Destruction of the subject matter
  - If an agency created for a subject matter will be terminated due to destruction of that matter

Eg: If agency created for the sale of a house and the house is destroyed by fire, the agency ends.
7. Dissolution of a company
8. Principal or agent becomes alien enemy

### **Irrevocable agency**

When the authority given to an agent cannot be revoked is said to be an irrevocable agency – in the following cases

1. Where the agency is coupled with interest –Agent (dr.) for collection of rent by Principal (Cr.)
  - The agent has himself an interest in the subject matter
  - The interest must exist at the time of the creation
2. When revocation would cause the agent personal loss
3. When the authority has been partly exercised by the agent.

### **THE SALE OF GOODS ACT 1930**

**Contract of Sale:** A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price

#### **Essentials:**

##### **1. Two parties: There must be two distinct parties (Buyer & Seller)**

- Undivided joint owners (Hostel students) – ‘Part owner’ – A person cannot buy his own goods.

- Exception: When a person may buy his own goods, where a person's goods are sold in execution of a decree, he may himself buy them. – Possible under 'part ownership'.

## **2. Transfer of property: (Transfer of ownership)**

- To complete the contract of sale, the seller must either transfer/ agree to transfer the property (ownership) in the goods to the buyer.
- Mere transfer of possession of the goods cannot be termed as sale
- General property (ownership) – Can transfer

Special property (ownership) – Cannot transfer

Eg: 'A' pledges the goods to 'R', 'A' – Real owner: Has general ownership, 'R' – Pawnee – Has special property

## **3. Goods: Every kind of movable property, other than actionable claims and money**

- Goods include stock and shares, growing crops, gross and things attached to or forming part of the land

## **4. Price: The consideration for a contract of sale must be money consideration call the 'price'.**

- Goods sold under Barter system – not a sale
- Goods sold partly for money, partly for goods – the contract is one of sale.

## **5. Includes both a 'sale' and 'an agreement to sell'.**

Sale: Goods are transferred immediately at the time of making the contract

Agreement to sale: Goods will be transferred to buyer at a future time or subject to some condition

## **6. No formalities to be observed**

- Mere offer & acceptance is enough, Neither payment nor delivery is necessary at the time of making the contract of sale and Contract may be either orally/ in writing/ partly orally & partly in writing

Where articles are exhibited for sale and a customer picks up one the sales assistant packs – it is a sale

### Differences b/w 'Sale' and 'Agreement to sell' (Distinguished)

#### Sale

1. Transfer of property (ownership) – Ownership in goods passes to the buyer immediately – 'Just in rem' – gives right to the buyer to enjoy goods as against the whole world

2. Risk of loss: If the goods are destroyed the loss falls on the buyer, even it is in the possession of buyer

3. Consequences of breach – If buyer neglects, the seller can sue for price

4. Right of resale –If the goods in the possession of the seller, he cannot resell the goods, if he sold, the subsequent buyer, does not acquire a good title

5. Insolvency of buyer before he pays for the goods. – Goods must be delivered to the official receiver

6. Insolvency of seller, if the buyer has paid – The buyer is entitled to recover the goods

#### Agreement to sell

1. There is no transfer of property - Just in personam' – it gives a right either buyer/ seller against the other for any default in fulfilling his part of the agreement

2. Loss has to be borne by the seller

3. If the buyer breaks his promise, the seller can only sue for damages and not for the price

4. The seller can dispose of the goods as he likes, the original buyer can sue him for the breach of contract only.

5. The seller may refuse to deliver the goods to the official receiver/ Assignee unless paid for

6. The buyer can only claim for price paid and not the goods.

### Conditions and Warranties

A Contract of sale of goods contains – Stipulations (Conditions)

Eg: for stipulation – Qty, price, delivery, etc.,

Stipulations ---- Major terms – important ---- Conditions

----- Minor terms – Not important – Warranties

Conditions & warranties – Statement of commendation/ praise/ expressions of opinion not coming under same

These are not a statutory obligation

**Conditions:** A condition is a stipulation (specification) *essential to the main purpose* of the contract, the breach of which gives the aggrieved party a right to repudiate (reject) the contract itself.

**Warranty:** A 'warranty' is a stipulation *collateral to the main purpose* of the contract, the breach of which gives the aggrieved party a right to sue for damages only and not to avoid the contract itself.

**There is no hard & fast rule as to which stipulation is a condition which one is a warranty. If the stipulation is such that its breach would be fatal (serious) to the rights of the aggrieved party – it is condition (Guarantee), if not it is a warranty.**

#### **Distinction between a Condition and a Warranty**

1. **As to value:** Condition is essential to the main purpose of the contract, but a warranty is collateral to the main purpose of the contract.
2. **As to breach:** In case of breach of condition, the aggrieved (affected) party has the right to repudiate the contract and also to claim damages. In case of warranty, the aggrieved party can claim damages only.
3. **As to treatment:** A breach of condition may be treated as a breach of warranty, but a breach of warranty cannot be treated as a breach of a condition.

#### **When breach of condition is to be treated as breach of warranty**

In this situation, the buyer loses his right to repudiate the contract and can claim for damages only.

##### **1. Voluntary waiver by buyer**

Although on a breach of condition, the buyer has a right to treat the contract as repudiated and reject the goods. Or he may elect to waive the condition, i.e. treating the breach of condition as breach of warranty and accept the goods and sue the seller for damages.

##### **2. Acceptance of goods by buyer**

Where the buyer has accepted the goods and subsequently he comes to know of the breach of condition, he cannot reject them, but can only claim the damages.

**Acceptance of only part of the goods**

- Goods indivisible – Assumed that he accepted the remaining part
- Goods divisible – he can repudiate as regards remaining goods.

**Acceptance: Taking possession/ delivery is no considered as acceptance, such as:**

- i. When he intimate the seller about acceptance
- ii. If he consumes, uses, pledges or resells the goods
- iii. After laps of time, retains the goods without intimating to seller.

**Implied conditions:****1. Condition as to title**

The seller must have a right to sell the goods, if the seller's title turns out to be defective the buyer entitled to reject the goods and to recover his price.

**2. Condition in a sale by description**

Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description.

**3. Condition in a sale by sample**

Goods are to be supplied according to a sample agreed upon- bulk shall correspond with the sample in quality.

**4. Condition in a sale by sample as well as by description****5. Condition as to fitness or quality**

- The Goods supplied shall be reasonably fit for the purpose for which the buyer wants them, if the following conditions are satisfied.
  - i. The buyer, expressly or impliedly should make known to the seller about the purpose.
  - ii. The buyer should rely on the seller's skill/ judgment
- Sale under patent/ trade name – there is no implied condition as to its fitness for any particular purpose.
- But the condition as to fitness will apply, if the buyer makes known to the seller about the purpose.



## 6. Condition as to merchantability

This condition is implied only where the sale is by description, this condition is applicable if,

- The seller should be a dealer
- The buyer must not have any opportunity of examining the goods – if the buyer had an opportunity, but refused can not claim.

Merchantability: The goods must be such as are reasonably saleable under the description by which they are known in the market.

## 7. Condition as to wholesomeness

- Applicable to sale of eatables
- The goods must be as to description, merchantable but must also be wholesome, i.e., free from any defect which render them unfit for human consumption.

## Implied warranties

### 1. Warranty of quiet possession

The buyer shall have and enjoy quiet possession of goods. If the buyer disturbed by a person (other than seller) can claim damages from the seller.

### 2. Warranty of freedom from encumbrances

The goods shall be free from any change/ encumbrance in favour of any 3<sup>rd</sup> party

### 3. Warranty of disclosing the dangerous nature of goods to the ignorant buyer.

## Doctrine of Caveat emptor (“Let the buyer beware”)

It is the duty of the buyer to be careful while purchasing goods of his requirement and in the absence of any enquiry from the buyer; the seller is not bound to disclose every defect in goods.

- The buyer must examine the goods thoroughly and must see that the goods he buys are suitable for the purpose for which he wants them.

## Exceptions: DCE is subject to the following exception:

1. Where the seller makes a mis-representation
2. Where the seller makes a false representation amounting to fraud – seller actively conceals the defect.

3. Where goods are purchased by description from seller and not correspond with the description
4. Where the goods are not of 'merchantable quality'.
5. Where the goods are bought by sample, if the bulk of the goods does not correspond with the sample.
6. If the purchased goods, do not correspond with the sample & description.
7. The goods supplied are unfit for the specified purpose, if the seller known the purpose of buyer.
8. If the seller deviates from the standard quality or fitness.

### **Transfer of property**

**Transfer of property in goods** – Transfer of ownership of the goods/ ownership title of the goods.

Different – Property in goods  
 - Possession of goods – the custody over the goods.

#### **Features:**

1. Risk '**prima facie**' (Risk of the loss of goods) passes with property or vice versa.
  - Risk shall pass even before passing of property or vice-versa, risk follows ownership
2. Action against 3<sup>rd</sup> parties – When the goods are in any way damaged or destroyed by third party, the owner has to take action against him.
3. Suit for price – seller can only sue for the price
4. Insolvency of the seller/ buyer: If the seller becomes insolvent – buyer paid – should be delivered to buyer (not to official receiver).

#### **Rules regarding transfer of property – under two heads**

1. Transfer of property in specific or ascertained goods
2. Transfer of property in unascertained goods & future goods

### 1. Transfer of property (ToP) in specific or ascertained goods

The ToP takes place, when the parties intend to pass it, i.e, at the time of making contract or the goods delivered or paid for the goods.

Circumstances/ intention rules:

- i. When goods are in a deliverable state – Deliverable state – the buyer would take delivery of them.
- ii. When goods have to be put into a deliverable state
  - Something to be done on goods means – it is not in deliverable state (eg. Polishing, finishing shape, packing, etc.,)
  - Mere putting the things in a deliverable state are not enough – should be informed to the buyers.
- iii. When the goods have to be measured to ascertain price
  - The property does not pass until such act is done and received notice thereof
  - If the seller has done all, but due to buyer's request they do something, - the property passes.
- iv. When goods are delivered on approval
  - When the buyer signifies his approval
  - If he does not signify his approval but retains beyond the time fixed for return.

### 2. Transfer of property in unascertained/ future goods

Goods to be sold are not ascertained/ future goods, the property in goods does not pass to the buyer, until the goods are ascertained. Until goods are ascertained/ appropriated there is merely “an agreement to sell”.

**Ascertainment:** It is unilateral act of the seller that is he alone may set apart the goods.

**Appropriation:** Element of mutual consent of the seller & buyer.

“Nemo det quod non habet” – No one can give what he has not got. The seller can not transfer to the buyer of goods a better title than he himself has” – If the title of the seller is defective, the buyer's title will also be subject to the same defect.

**Exceptions:** Transfer of property by non-owner

The buyer gets a better title to the goods, than what the seller himself possesses.

1. An unauthorized sale by a mercantile agent

2. Transfer of title by estoppels
3. Sale by a joint owner
4. Sale by person in possession under voidable contract
5. Sale by seller in possession after sale
6. Sale by buyer in possession after 'agreement to buy'.
7. Resale by an unpaid seller
8. Other exceptions
  - i. Sale by finder of lost goods
  - ii. Sale by pledgee
  - iii. Sale by official receiver/ assignee in case of insolvency of an individual
  - iv. Endorsee of a negotiable instrument.

### **Performance of contract of sale**

#### **Performance of a contract of sale**

Delivery of goods by the seller and acceptance of the delivery of goods and payment for them by the buyer in accordance with the contract is called performance of contract of sale.

**Delivery:** Delivery of goods means, voluntary transfer of possession of goods from one person to another. If transfer of possession of goods is not voluntary, i.e., possession is obtained under pistol point/ by theft there is no delivery.

#### **Modes of delivery**

1. Actual delivery: Goods are physically handed over by the seller to the buyer
2. Symbolic delivery: Goods remain, where they are, but the means of obtaining possession of goods is delivered.  
Eg. The seller hands over to the buyer the key of the godown/ car.
3. Constructive delivery: A person holding the goods on behalf of the buyer, it is deemed to be constructive delivery of goods.

**Rules as to delivery of goods:**

1. Delivery may be either actual/ symbolic/ constructive
2. Delivery and payment are concurrent conditions
3. Delivery of the part is equivalent to the delivery of the whole – But if the intention of serving it from the whole – not regarded as delivery.
4. Buyer to apply for delivery
5. Time of delivery – The seller is bound to send them within a reasonable time
6. Place of delivery
  - If Place of delivery is stated – must be delivered at the named place during business hours on a working day
  - If place of delivery is not stated
    - Sale – at the place at which they made sale
    - Agreement to sell – at the place where the agreement is made
    - Future goods- At the place where it is manufactured/ produced
7. Delivery of goods where they are in possession of 3<sup>rd</sup> party
  - It requires the consent of all the 3 parties (seller, buyer & 3<sup>rd</sup> party)
  - Where the seller hands over the delivery order to the buyer, there is no delivery unless the seller's agent (3<sup>rd</sup> person) holding the goods has assented (agreed) thereto.
  - Where the goods are sold through the document of title of goods – the 3<sup>rd</sup> party's consent is not necessary.
8. Expenses of delivery: Must be borne by the seller
9. Delivery of wrong quality/ different quality: In case of defective delivery, it entitles the buyer:
  - i. To reject the whole or
  - ii. To accept the whole or
  - iii. To accept the quantity and quality he ordered and rejects the rest of the goods.
  - The buyer is not bound to return them to the seller, mere intimation is enough
  - Right to reject the goods is not equivalent to
  - If the buyer accepts the goods, he must pay what he has actually accepted at the contract rate.

- “The law does not take trivial (Unimportant) deviations into account” – The deficiency/ excess is so small due to negligence, the court does not take care.
- 10. Installment deliveries – The buyer is not bound to accept delivery by installments unless otherwise he accepted.
- 11. Delivery to carrier on wharfing (for safe custody) – seller is responsible
- 12. Liability of buyer for neglecting or refusing to take delivery of goods – If the buyer does not take the goods in reasonable time – the loss should borne by the buyer.

### **Acceptance of Delivery by buyer**

The buyer is deemed to have accepted the goods under the following circumstances

1. When the buyer intimates to the seller that he has accepted the goods – the buyer may use it for checkup.
2. When he does any act in relation to the goods. Eg. Consumes, uses, resells or puts his mark on them.
3. When, after the laps of a reasonable time, he retains the goods without intimating the seller about rejection.

### **Remedial Measures (To Unpaid seller)**

**Unpaid seller:** The seller of goods is deemed to be an “Unpaid” seller, if

- a) When the whole of the price has not been paid
- b) Where a bill of exchange/ other negotiable instrument has been received

### **Characteristics of an unpaid seller – Two fold rights**

#### **A. Right of unpaid seller against the goods and**

#### **B. Right of unpaid seller against the buyer personally**

#### **A. Right of unpaid seller against the goods**

1. Right of lien
2. Right of stoppage of goods in transit and
3. Right of resale

- 1. Right of lien:** Lien is the right to retain possession of goods and refuse to deliver them to the buyer until the price due is paid.

**# It is possible under the following circumstances**

- a. Where the goods have been sold without any stipulation as to credit
- b. Goods sold on credit, but credit has expired
- c. Where the buyer becomes insolvent

*(Possessory lien:* The unpaid seller's lien is a possessory lien. The transfer of documents of title of the goods does not affect the exercise of this right. The seller's lien when property has not passed to the buyer is termed as '*a right of withholding delivery*').

The right of lien can be exercised only for the non-payment of the price and not for any other charges.)

**2. Right of stoppage of goods in transit**

The right of stopping further transit of the goods, while they are with a carrier for the purpose of transmission to the buyer.

The Unpaid seller can exercise this right under the following circumstances:

- i. The buyer becomes insolvent
- ii. When the goods are in transit (When the transit comes to an end the right of stoppage of goods cannot be exercised).

(The transit is deemed to be at an end – under the following circumstances:

- a. When the buyer/ agent take delivery from the destination
- b. The carrier handed over to the buyer
- c. As per the request of the buyer, the carrier takes them to the new destination
- d. When part delivery of the goods has been made to the buyer).

**3. Right of resale**

- It is a valuable right
  - Unpaid seller can resell the goods in the following cases
- i. Where the goods are of a perishable nature
  - ii. Where the seller has given a notice to the buyer of his intention to resell

- If there is a loss on resale, the seller can recover from the buyer, in case of surplus, the seller can keep it with him.
- If the notice is not issued, the seller cannot recover the loss.
- In case of resale, the subsequent buyer acquires a good title.

### **B. Right of unpaid seller against the buyer personally**

1. Suit for price
2. Suit for damages for non-acceptance
3. Suit for special damages & interest

### **Buyer's right against seller**

1. Suit for damages for non-delivery
2. Suit for specific performance (If the damages are not adequate, for eg. The subject matter of the contract is rare goods – a picture by a dead painter)
3. Suit for damages for breach of warranty
4. Suit for damages for repudiation of contract before due date and
5. Suit for recovery of the price together with interest

## **NEGOTIABLE INSTRUMENTS ACT, 1881**

Negotiable – Transferable by delivery

Instrument – A written document by which a right is created in favour of some person.

Negotiable instrument – A written document transferable by delivery

Negotiable instrument act – A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer.

“A Negotiable instrument is one which is by a legally recognized custom of trade or by law, transferable by delivery or by endorsement and delivery in such circumstance that

- (a) The holder of it for the time being may sue on it in his own name and
- (b) The property in it passes, bonafide transferee for value, notwithstanding any defect in the title of the transferor.



### Characteristics of a Negotiable instrument

1. Easy negotiability: Right of ownership is transferable from one person to another without any formalities.
2. Transferee can sue in his own name without giving notice to the debtors: In case the cr. (actually drawn in his name) transfers his right, the transferee of a Negotiable instrument is entitled to sue on the instrument in his own name in case of dishonor without giving notice to debtor.
3. Better title to a bonafide transferee for value: Holder in due course gets the instrument “free from all defects”. He is not affected by any defect of title of the transferor.
4. Presumptions: (i) Negotiable instruments are made, drawn, accepted, transferred, etc., for consideration
  - (ii) Every Negotiable instrument bearing a date was made/ drawn on such date
  - (iii) Bill of Exchange must be accepted within a reasonable time
  - (iv) Transfer should be made before its maturity
  - (v) The holder of a Negotiable instrument is a Holder in due course.
5. Ownership: The possessor of the instrument is the holder and owner thereof
6. Payable to order/ bearer.

### Negotiable instruments

1. Promissory note
2. Bills of exchange
3. Cheque

#### 1. Promissory note (Pro-note)

U/s 4 of Negotiable instruments act, “A promissory note is an instrument in writing containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to the bearer of the instrument”

#### Essentials:

1. It must be in writing: Oral promise to pay does not become a pro-note – written in pencil, pen, etc., - the word ‘promise’ should be there. Eg.

<b>Rs.10000</b>	<b>24.10.2013</b>
Sixty days after date I <b>promise</b> to pay to <b>Mr.K</b> the sum of Rs.10000	
Stamp/ Signature	

2. It must contain a promise or undertaking to pay
3. It must be unconditional – Eg. I promise to pay “B”, Rs.5000, seven days after date, if my marriage with “C”.
4. It must be signed by the maker
5. The maker must be the certain person
6. The payee must be certain
7. The sum payable must be certain
8. It must be stamped

## 2. Bill of Exchange

A BoE is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

### Essential elements of a BoE

1. Must be in writing
2. Three parties – drawer, drawee and payee
3. Order to pay – order by the drawer to the drawee
4. Must be unconditional
5. It must be signed by the drawer
6. The drawer, drawee & payee must be certain
7. Sum payable must be certain
8. The bill must contain an order to pay money only
9. Date & consideration must exist

<b>Rs.10000</b>		<b>24.10.2013</b>
Three months after date I <b>promise</b> to pay to <b>Mr.C</b> or order the sum of Rs.10000 for value received		
To A	Accepted by A	Stamp/ Signature

## 3. Cheque

A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand

**Distinctive features of Cheque and BoE**

S.No.	Cheque	Bills of Exchange
1	Drawn on banker	On any person
2	Payable on demand	On demand/ expiry of the date
3	Payable to bearer on demand – valid	void
4	Does not require any acceptance	Requires acceptance
5	Does not require any stamp	Must be properly stamped
6	Can be crossed	Can not

**Parties to Negotiable instruments****A. Parties to a Pro-note**

1. Maker      2. Payee      3. Holder      4. Indorser      5. Indorsee

**B. Parties to a bills of exchange**

1. Drawer      2. Drawee      3. Acceptor      4. Payee      5. Holder      6. Indorser  
7. Indorsee      8. Drawee in case of need      9. Acceptor for honour.

**C. Parties to a Cheque**

1. Maker      2. Drawer      3. Payee      4. Holder      5. Indorser      6. Indorsee

**Holder & Holder-in-due course (HIDC)**

**Holder:** Any person entitled in his own name to the possession thereof, and to receive or recover the amount due thereon from the parties thereto.

**Holder-in-due course:** The holder in due course means, any person who for consideration become the possession of a negotiable instrument (if payable to bearer or the payee or Indorsee thereof if payable to order), before the amount mentioned in it become payable and without sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

**Conditions to be fulfilled**

1. He must be a holder
2. He must be a holder for valuable consideration
3. He must have become the holder of the Negotiable instrument before its maturity

4. He must take the instrument complete and regular on the fact of it (No material alteration, signature of drawer, stamped, etc.,)
5. He must have become holder in good faith without having sufficient cause to believe that any defect existed in the title of the transferor
6. Instrument must not be obtained by unlawful means or for unlawful consideration

### **Liability of parties**

1. **Liability of drawer:** Drawer of a Bill of exchange/ Cheque is liable to payee in case of dishonor by the drawee/ acceptor – Provided due notice of dishonor has been given.
2. **Liability of drawee of cheque:** Generally, The drawee of a cheque (always banker) must honour the cheque, if everything perfect – In default of such payment, the banker (drawee) must compensate the drawer for any loss or damage caused by such default (The payee is not to be compensated, because no contract b/w banker (drawee) and payee).
3. **Liability of maker of note & acceptor of BoE:** Liable to pay the amount to the holder on demand.
4. **Liability of Indorser:** Liable to all subsequent holders in case of dishonor of instrument.
5. **Liability of prior parties to a HIDC:** Every prior party to a Negotiable instrument is liable to HIDC.
6. **Maker, drawer and acceptor** – Maker of a pro-note/ cheque, drawer of BoE (until accepted), acceptor of BoE are respectively the parties primary liable.
7. **Acceptor's liability for a bill in a fictitious name:** An acceptor of a bill of exchange drawn in a fictitious name of the drawer – relieved from liability to any holder in due course.

### **Transfer of Negotiable instruments (Negotiation)**

Negotiable instruments are freely transferable from one party to another. Such transfer by (a) Negotiation and (b) By assignment.

**Case:** If A hands over a cheque to B asking B to keep it in safe custody, the cheque is not negotiated to B, because the delivery of the cheque to B, as a bailee, does not make him its holder.

#### **a. Transfer by Negotiation**

- i. **Negotiation by delivery:** An instrument payable to bearer is negotiable by delivery thereof.

**Case: A is the holder of a negotiable instrument payable to bearer. He delivers it to B's agent to keep it for B. The instrument has been negotiated.**

- ii. **Negotiation by indorsement & delivery:** A Negotiable instrument payable to order is negotiable by the holder by indorsement (Endorsement) & delivery thereof.

**Two conditions: The holder should – a. Endorse it and b. deliver to his Indorsee.**

- b. **Transfer by assignment: When a person transfers his right to receive the payment of a debt, 'assignment of the debt' takes place** (Thus, where the holder of an instrument transfers it to another so as to confer a right on the transferee to receive the payment of the instrument, transfer by assignment takes place).

### Negotiation

When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

### Indorsement

**The writing of a person's name on the face or back of a Negotiable instrument or on a slip of paper annexed thereto, for the purpose of negotiation is called indorsement/endorsement.**

- Who signs the instrument – Indorser
- To whom the instrument is indorsed – Indorsee

### Kinds of Indorsement

1. **Blank/ General indorsement:** The indorser signs his name only on the face or back of the instrument – if not specifies the name of Indorsee.
2. **Full or Special indorsement:** The endorser signs his name and adds a direction to pay the amount or a specified person etc.
3. **Restricted indorsement:** When the endorsement restricts the further negotiability of instrument.
4. **Partial indorsement:** Endorsing only the part of the amount of instrument.
5. **Conditional indorsement:** An indorsement is conditional/ qualified, If it limits or negatives the liability of the indorser (Different with restrictive indorsement).
  - a. **'Sans recours' (without recourse) indorsement:** Where the indorser excludes his liability to Indorsee. Here if the instrument is dishonoured, the indorsee cannot look to the indorser for payment of the same.

- b. **Facultative indorsement:** Where an indorser by express words (Notice of dishonour waived) increases his liability under an instrument called facultative indorsement. The indorsee need not give notice to indorser, if it dishonoured, but the indorser is liable.
- c. **'Sans frais' (without expense) indorsement:** Where an indorser does not want the indorsee of the instrument to incur any expense on his account on the instrument.

### **Discharge of Negotiable instrument**

An instrument is said to be discharged, when all rights of action under it are completely extinguished and when it ceases to be negotiable.

The right against all the parties thereto comes to an end.

#### **It is in two senses:**

- i. Discharge of the instrument and
- ii. Discharge of one or more of the parties from liability thereon

#### **i. Different modes of discharge of an instrument**

- 1. By payment in due course
- 2. By party primarily liable becoming holder
- 3. By express waiver: Holder of the instrument, after its maturity, conditionally renounces (rejects) in writing against all parties to the instrument.
- 4. By cancellation
- 5. By discharge as a simple contract: Expiry of period, mutual contract, etc.,

#### **ii. Discharge of a party or parties**

- 1. By payment
- 2. By cancellation – when holder cancels the name of a party
- 3. By release: Holder releases any party from liability instead of cancellation
- 4. By allowing drawee more than 48 hours
- 5. By non-presentation of cheque – cheque is not presented by holder for payment
- 6. Cheque payable to order
- 7. Draft drawn by one branch on another
- 8. If the BoE accepted by qualified acceptor
- 9. By operation of law
  - By an order of insolvency court
  - By merger: The debt under the bill is merged to judgment debt
  - By lapse of time
- 10. By material alteration; Alters the character or identity of the instrument, or which shakes the very foundation of the instrument.

## COMPANY LAW

### Unit - II

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#### Definition, Nature and Kinds of a Company

**Definition:** A company is an Association (Voluntary) of many persons who contribute money or money's worth to a common stock & employs it in some common trade/ business and share the profit or loss arising them.

#### Nature/ Characteristics of a Company

**1. An artificial person created by law**

It is an artificial person, because it does not take birth but created by law.

**2. Separate legal entity:**

- An entity separate from its members
  - It has an independent corporate existence
  - The Company's money & property belong to them not to the shareholders
- Eg. Salomon Vs. Salomon & Co. case**

**3. Limited liability:** If the company limited by shares, the liability of the members is limited to the unpaid value of the share. (Eg. Face value: Rs.10, he paid Rs.7, yet to pay only Rs.3).

**4. Perpetual succession**

- The company never dies, nor does it's life depends on the life of its members.
- The members may come and go but the company can go on forever (until dissolved), it continues to exist even if all its human members are dead.
- A company's exist persist irrespective of the change in the composition of its membership.

**5. Common seal:** The company seal acts as the official signature of the company

**6. Transferability of shares:** Company shares are subject to certain conditions, freely transferable.

**7. Separate property:** Being a separate person, company is able of owning, enjoying & disposing of property in its own name.

**8. Capacity of sue:** A company can sue and be sued in its own corporate name.

#### Kinds of Companies

- I. Classification on the basis of incorporation

1. Statutory companies
2. Registered companies
- II. Classification on the basis of liability
  1. Companies with limited liability
    - a. Companies limited by shares
    - b. Companies limited by guarantee
  2. Companies with unlimited liability
- III. Classification on the basis of Number of members
  1. A private companies
  2. A public companies
- IV. Classification on the basis of control
  1. Holding companies
  2. Subsidiary companies
- V. Classification on the basis of ownership
  1. Govt. companies
  2. Non- Govt. companies
- VI. Association not for profit
- VII. One man company

#### I. Classification on the basis of incorporation

1. **Statutory companies:** - Created by a special act of the legislature, Eg.RBI, SBI, etc. – These are mostly concerned with public utilities Eg. Railways.
2. **Registered companies:** -formed and registered under the companies' act 1956/2013.

#### II. Classification on the basis of liability

##### 1. Companies with limited liability

###### a. Companies limited by shares

- Where the liability of the members of a company is limited to the amount of unpaid/paid on the shares.
- The liability can be enforced during the existence of the company as also during the winding up.

###### b. Company limited by guarantee

- The member's liability is limited to a fixed amount, which the members undertake to contribute to the assets of the company.

##### 2. Unlimited company

- Every member is liable for the debts of the company
- Their liability is unlimited
- These may/may not have share capital

#### III. Classification on the basis of Number of members



1. **Private company** (close corporation): Sec.3 (1)(iii), defined, a private company has a minimum paid up capital of Rs.1,00,000 or more as prescribed and also.
  - a. Restricts the right to transfer its shares
  - b. Limited members (Max.200)
  - c. Prohibits any invitation to the public to subscribe for any shares/ debentures
  - d. Prohibits any acceptance of deposits from persons other than its members
  - e. Number of debenture holders in a private company may exceed 50
  - f. Joint holders of shares are treated as a single member

## 2. Public company

- Minimum paid up Rs.5 lakhs and maximum as prescribed
- Shares freely transferable
- It can invite the public to subscribe for shares
- 

### Distinction between a Public company and a Private company

S.N.	Particulars	Public	Private
1	Minimum capital	Rs.5,00,000	Rs.1,00,000
2	Minimum members	07	02 (1 person company)
3	Max. members	Unlimited	200
4	No. of Directors	Atleast 03	Atleast 02
5	Restriction on appointment of directors	Qualification approval from Registrar is must	It is not necessary
6	Restriction on invitation to subscribe for shares	Can invite the public	Prohibited to invite public
7	Transferability of shares & Debentures	Freely transferable	Restricted
8	Quorum	5 members must be present	2 members must be present
9	Managerial remuneration	Total remuneration should not exceed 11% on Net profit	No restriction (If it is not a subsidiary of a public co.)

10	"Limited" title	The word of "Limited" should be added followed by company name	The word of "Private Limited" should be added followed by company name
11	Special privileges	No such privileges to Public limited companies	<p>It enjoy the following privileges:</p> <p>a. Need not issue prospectus</p> <p>b. Mini. 2 members enough</p> <p>c. May issue any kind of shares</p> <p>d. 2 directors enough</p> <p>e. Statutory meeting and reporting is not necessary</p> <p>f. No restriction on managerial remuneration (If it is a subsidiary of Public co. limited to 11% on NP)</p> <p>g. Can commence business immediately on incorporation</p>

#### IV. Classification on the basis of Number of control

1. **Holding company:** If a company has control over the other company
2. **Subsidiary company:** If a company coming under the control of another company (Holding company) called subsidiary company.

Other conditions:

- a. Holding company must control the appointment and removal of the directors of the subsidiary companies
- b. Holding company must have the majority shares of the subsidiary company
- c. Subsidiary company of another subsidiary co. – must come under the Holding company.  
Eg. H → S1 S2 Here S1 and S2 are the subsidiaries of H.

#### V. Classification on the basis of Ownership

**1. Govt. Company:** A company in which not less than 51% of the paid up share capital held by (a) The Central Govt. or (b) State Govt. or (c) Partly Central and partly by State.

**Rules:** - Appointment of auditors – Auditors should be appointed by Central Govt. on the advice of Auditor General of India.

- Audit report to be submitted to Auditor General of India
- Annual report to be placed before parliament
- 51% of paid up share should be held by the Govt.

**2. Foreign company:** Any company incorporated outside India, which has an established place of Business in India.

**Rules:**

**a. Documents:** Every foreign company, within 30 days of its establishment in India, shall file with the Registrar the following documents.

- i. Certificate copy of the Charter, AoA, MoA, etc.,
- ii. Full address & Principal office
- iii. A list of directors and Secretaries
- iv. The name & address of any person reside in India

**b. Books of Accounts – as Indian company**

- c. Obligation to furnish the country of incorporation
- d. Documents to be delivered to registrar

VI. **Association not for Profit:** The Central Govt. may grant a license to an association for

- a. Promoting commerce, science, religion, charity or any other useful object
- b. Using its profit for its objective and not for payment of dividend

VII. **One Man Company (OPC –One Person Co.):** This is a company in which, one man holds the whole of the share capital of the company. Some dummy members may be appointed to satisfy the statutory requirements.

VIII. **Illegal association:** If the number of members in an association/ orgn. exceeds the limit and it is not registered under the companies act 1956 is called an illegal company or association.

## FORMATION OF A COMPANY

Formation of the company means incorporating or creating the company.

**Project 'MCA-21'** - Ministry of Corporate Affairs has launched a programme for managing the work relating to filing of documents, etc. with ROCs etc. and getting approvals from Ministry of Corporate Affairs. The physical filing of all forms has been discontinued and converted into electronic filing. This project is termed as Project 'MCA-21'.

### **Incorporation of Company**

#### **1. Provisions relating to filing of applications, documents, inspection, etc., through electronic form**

- Applications and required documents shall be filed through the electronic form and authenticated in such manner as may be specified in the rules.
- 'Certificate Filing Centers' (to be operated by professionally qualified persons/CA/ICWA/CS) will facilitate e-filing of documents.
- Every director will have to obtain DIN (Director's Identification Number).
- Filing of forms and application will be through internet
- Payment of fees can be through internet through credit card/ net banking
- Office of ROC, Regional Director and Delhi HQ will process the documents and applications submitted electronically by companies.
- Issuance of certificated and approvals will continue to remain on paper. This will be dispatched by post or courier to applicant.

#### **2. Documents to be filed with the Registrar:** The following documents duly stamped together with the necessary fees are to be filed with the Registrar of Companies.

- a. The Memorandum of Association
- b. The Articles of Association
- c. Agreements & appointment of Managerial persons
- d. A list of directors
- e. A declaration about the formalities and should be signed by the following persons
  - i. An advocate of Supreme court/ High court
  - ii. An attorney
  - iii. Secretary or Chartered accountant
  - iv. A person named in articles as director
- f. Notice about the situation of the Registered office

#### **3. Certificate of Incorporation**

If the Registrar satisfied with the documents, which are submitted, he retains them and issues a "Certificate of Incorporation" (of the formation of the company), the Registrar is not required to carry out any investigation about the truthfulness of the given documents.

#### 4. Conclusiveness of Certificate of Incorporation

A certificate of incorporation given by the Registrar is the conclusive evidence that means the company has fulfilled all the requirements - this is known as **Rule in Peel's case**.

##### Ref. case:

- The date mentioned in the certificate of Incorporation (Col) is the date of the Birth of the company
- Even though the company got Col, its illegal activities cannot be legalized

#### 5. Effect of Registration

- The company becomes a distinct legal entity
- It acquires a perpetual succession
- It's property is not the property of its shareholders

#### 6. Business commencement certificate

Private limited company can commence business immediately after its incorporation; but Public limited company can commence business after getting Business commencement certificate.

# **Promoter:** He is a person do all the necessary preliminary work and takes preliminary essential decisions (such as whether it should be a private/ public co., capital, etc.).

#### # Pre- incorporation/ Preliminary contracts

If any contracts agreed before incorporation (Before getting Col) by the promoter is called Pre-incorporation or Preliminary contracts.

- The company is not liable for the acts of the promoters done before its incorporation

##### Conditions:

- Company not bound by pre-incorporation contracts
- Company cannot enforce pre-incorporation contract
- Promoters are personally liable.

### # Provisional contracts

It refers to contracts entered into by a public company after its incorporation but before it is to be issued the certificate of commencement of business.

## MEMORANDUM OF ASSOCIATION

It is a fundamental document defines its **raison d'être** (i.e. reason for existence)

### Features:

- a. It contains fundamental conditions
- b. Regulates the external affairs of the company
- c. Lays down the area of operation
- d. Reason for existence
- e. Possible scope of the company

### Content of Memorandum of Association

1. **Name clause:** The name of a company followed by limitation/ private limited and its identity and symbol of its existence is given in the Memorandum of Association (MoA).

### Rules/ Conditions:

- a. Undesirable name to be avoided
  - As per the opinion of the Central Govt. the company must avoid
    - i. Too similar to the name of another company
    - ii. Misleading
- b. Injunction if identical name adopted
- c. 'Limited' or 'Private Limited' as the last word of words of the name
- d. Prohibition of use of certain names – such as
  - i. Emblem and Name of United Nations Organisation, WTO, etc.,
  - ii. Indian National flag, the name, emblem, official seal etc.,
  - iii. Emblem and seal of Central & State Govt. and President of India
- e. Use of some key words according to authorized capital

S.N	Key word	Authorized Capital
1	Corporation	5 Crores
2	International, Global, Universal, Asia, Continental – being first word	1 Crore
3	Hindustan, India, Bharat – Being first word	50 Lakhs
4	Industries/ Udyog	1 Crore
5	Enterprise, Products, Business, Manufacturing	10 Lakhs

#### Publication of Name:

- Paint its name with address, it should be placed on the outside of the registered office
- It should be in legible character
- It should be used in all business letters, bill heads, invoices, receipts, etc.

#### 2. The Registered office clause

Every company should have the registered office at the time of registration. All communications and notices are to be send to that address.

Notice of situation of the registered office and every change shall be given to Registrar within 30 days after the date of incorporation

Incase of default, the director will be punished with fine of Rs.500 for every day during which the default continues.

#### 3. The objects clause:

The objects clause of a company shall be clearly stated in Memorandum, it defines the scope of the company and any alteration could be made only as per the law.

It enables the subscriber to know the purpose of their investment and enables the creditors to know the persons involved in company activities.

The object clause in Memorandum of every company has to state (i) Main object and (ii) Other object.

#### 4. The Capital clause

- The Registered/ authorized/ Nominal capital should be stated
- It also be stated the amount of shares, its type etc.

#### 5. The Liability clause

The liability of its members is stated in this clause, whether they are limited by share or limited by guarantee.

#### 6. The Association clause

- Declaration of all the directors & members/ subscribers is stated
- The names, addresses & description of the subscribers and number of shares taken by each one of them is mentioned

The MoA shall be signed by at least 7 subscribers in case of public company (2 in case of private company). Their signature shall be attested by at least 1 witness (the witness should not be the relative/ another subscriber).

### Alteration of Memorandum – Alteration of Conditions:

#### 1. Change of name

- The company may change its name with the approval of the Central Govt.
- Mere changing the word 'Private' to 'Public' or vice versa, need not get the approval
- The company may change its name by ordinary resolution and shall change its name within 12 months of its registration as per the direction of the Central Govt.
- If the company does not follow the direction given by the Govt., shall be punishable with fine of Rs.100 for every day during which the default continues.
- Where the company changes its name, the Registrar shall enter the new name & issue a fresh certificate of incorporation in new name.



**2. Change of registered office***a. Change of Registered office from one place to another within a state:*

- The company has to give an application to the Regional Director for getting confirmation order
- The Regional Director issues the order and it should be send to the Registrar within 2 months for getting approval.

*b. Change of Registered office from one state to another*

- It is possible by passing a special resolution

**3. Alteration of Objects**

The objects of a company may be altered by special resolution, so as to enable the company:

- a. To carry on its business more economically or more efficiently
- b. To attain its main purpose by new/ improved means
- c. To enlarge its operation
- d. To amalgamate with any other company

**4. Change in liability clause**

- A company limited by shares/ guarantee cannot change its liability clause in the memorandum
- It is possible to give additional liability to its members

**5. Change in capital clause:** The Company may change in the capital clause about increase, reduction or re-organisation.

**Doctrine of Ultra Vires (Ultra- Beyond; Vires- Power):** It means that the company doing of the act is beyond the legal power and authority of the company. Ultra Vires act is void.

*Ultra vires the directors:* They do beyond their powers, but within the powers of the company

*Ultra vires the articles:* If an act or transaction is done beyond the articles.

## Articles of Association

The Articles of association or Articles are the rules, regulations and bye-laws for the internal management of the affairs of a company.

**Forms and Signature of Articles (Sec.30)**

1. Printed    2. Divided into paragraphs    3. Signed by each members with one witness
4. Printed on computer laser printer and it should be accepted by the Registrar.

**Contents of Articles**

1. Share capital, rights of shareholders, payment of commissions etc.	10. General meetings and proceedings
2. Line on shares	11. Voting rights of members, proxies
3. Calls on shares	12. Directors appointment, remuneration, qualification, powers, etc.
4. Transfer of shares	13. Managers
5. Transmission of shares	14. Secretary
6. Forfeiture of shares	15. Dividend and reserves
7. Conversion of shares in to stocks	16. Accounts, audit and borrowing powers
8. Share warrants	17. Capitalisation of profits
9. Alteration of capital	18. Winding up

# A public company may have its own Articles of association. If it does not have its own Articles, it may adopt Table A given in Schedule I to the Act.

**Alteration of Articles:** Companies have been given full power to alter their articles, unless otherwise it is restricted by any provision.

**Procedure of alteration:** - By passing special resolution

- Alterations should be informed to the Registrar within 30 days of its passing

**Limitations to Alteration**

1. Must not be inconsistent or go beyond with the companies act

2. Must not conflict with the Memorandum
3. Must not sanction any illegal
4. Must be for the benefit of the company
5. Must not increase the liability of members
6. Alteration by special resolution only
7. Approved of Central Govt. is must – when Public co. is converted to Private co.
8. Alteration leads to breach of contract is valid
9. Must not result in expulsion (removal) of a member
10. No power of the Tribunal to amend articles
11. Alteration may be with retrospective (show) effect

### Doctrine of Indoor Management

The outsiders of company presume that all the activities of the company is being done regularly and within the scope of the MoA and AoA. This is known as “Doctrine of Indoor management” or “The rule in Royal British bank Vs. Turquand” or “Turquand rule”.

**Case:** Ref. Royal British Bank Vs. Turquand/ CL/N.D.Kapoor

Exception: 1. Knowledge of irregularity                      2. Negligence                      3. Forgery

4. Acts outside the scope of MoA & AoA

### Memorandum of Association and Articles of Association – Distinction

Memorandum of Association	Articles of Association
1. It indicates the nature	1.It indicates the rules and regulations
2. It defines relationship with outside world	2. It defines relationship with Internal management of the company
3. It defines the scope of the company, the company can not go beyond	3. They are the rules for carrying out the objects of the company
4. It is a Supreme document	4. It is subordinate to the Memorandum
5. Every company must have its own memorandum	5. Company limited by shares need not have articles of its own – Table A applies
6. There are strict restrictions on its alteration	6. AoA can be altered by special resolution, but do not conflict with Memorandum and Companies act
7. Any act of the company is Ultra vires the	7. Any act of the company is Ultra vires to Articles may

memorandum is void	be confirmed by the shareholders.
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## PROSPECTUS

Any document inviting deposits from the public or inviting offers from the public for the subscription of shares or debentures of a company is a prospectus.

# Private Company need not issue a Prospectus, because it is prohibited from making any invitation to the public to subscribe for any shares or debentures of the company.

### Features

1. It is an Invitation/ Ad./ Circular to the public to subscribe for any shares or debentures of the company
2. It should be in writing (Ads. In TV/ Films is not a prospectus)
3. Invitation to the public – any invitation made to its friends or relatives to subscribe shares is not a prospectus
4. Offer to the public
5. Must be dated
6. Must be signed by the Directors and Registered to the Registrar.

### Red- herring Prospectus or Information memorandum

It is a circular issued to the public prior to filling or issuing prospectus. Generally, it does not have complete particulars about price and number of shares to be issued.

### Content of the Prospectus

The important content of Prospectus is as follows

#### A. Part I of Schedule II

**1. General information**

1.Name & Address of Reg. office	7.Date of Opening & Closing of issue
2.Consent of the Central Govt. about present issue and about its financial soundness	8.Name & address of Auditors and lead managers
3.Name of its Regional stock exchange	9.Name & Address of Trustee
4.Provision relating to punishment for fictitious application	10.Rating from CRISIL or any other agency
5.Declaration about refund of the issue, if Minimum subscription is not attained	11. Underwriting of the issue
6.Declaration about allotment of shares	

**2. Capital structure of the company**

- a. Authorised, Issued, subscribed and paid-up capital
- b. Size of present issue – its reservation (Preferential allotment)
- c. Paid up capital – after the present issue or after the conversion of debenture

**3. Terms of the Present issue**

- a. Terms of payment
- b. Rights of the instrument holder
- c. How to apply – availability of forms, etc.
- d. Any special tax benefits, if any.

**4. Particulars of the Issue**

- a. Object
- b. Project cost
- c. Sources of finance

**5. Company management and project**

1.History, objects and present business of the company	7.Collaboration agreement, if any
2.Promoters & their Background	8.Infrastructure facility for Raw material, power, water etc.
3.Subsidiary of the company	9.Schedule of implementation of project
4.Name & address of Directors	10.Nature of product & marketing etc.
5.Location of Project	11.Future prospectus and development

6.Plant, Machinery & Technology used	
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**6. Particulars about the company and its subsidiaries (Sister concerns)**

**7. Outstanding litigation relating to** – (a) Operation and finance of the company (b) Particulars of default, etc.

**8. Management perception of risk factors** – Reg. availability of raw materials, fluctuations in foreign exchange rate, marketing, etc.

**B. Part II of Schedule II**

**1. General information**

- a. Consent of Directors, Auditors, Advocates, Managers, Bankers & Registrar
- b. Expert's opinion
- c. Change of any directors or auditors, if any, in the last 3 years and its reasons
- d. Authority for the issue
- e. Procedure and time schedule for allotment and issue of certificates
- f. Name & address of Company secretary, Legal adviser, etc.

**2. Financial information**

- a. Report by the auditors – About profit and loss, Assets & liabilities and Rate of dividend paid by the company during the preceding 5 financial years.
- b. Reports by the Accountants – on the profits or losses of the business for the preceding 5 financial years and about the assets and liabilities of the business (Not more than 120 days before the date of issue of prospectus).

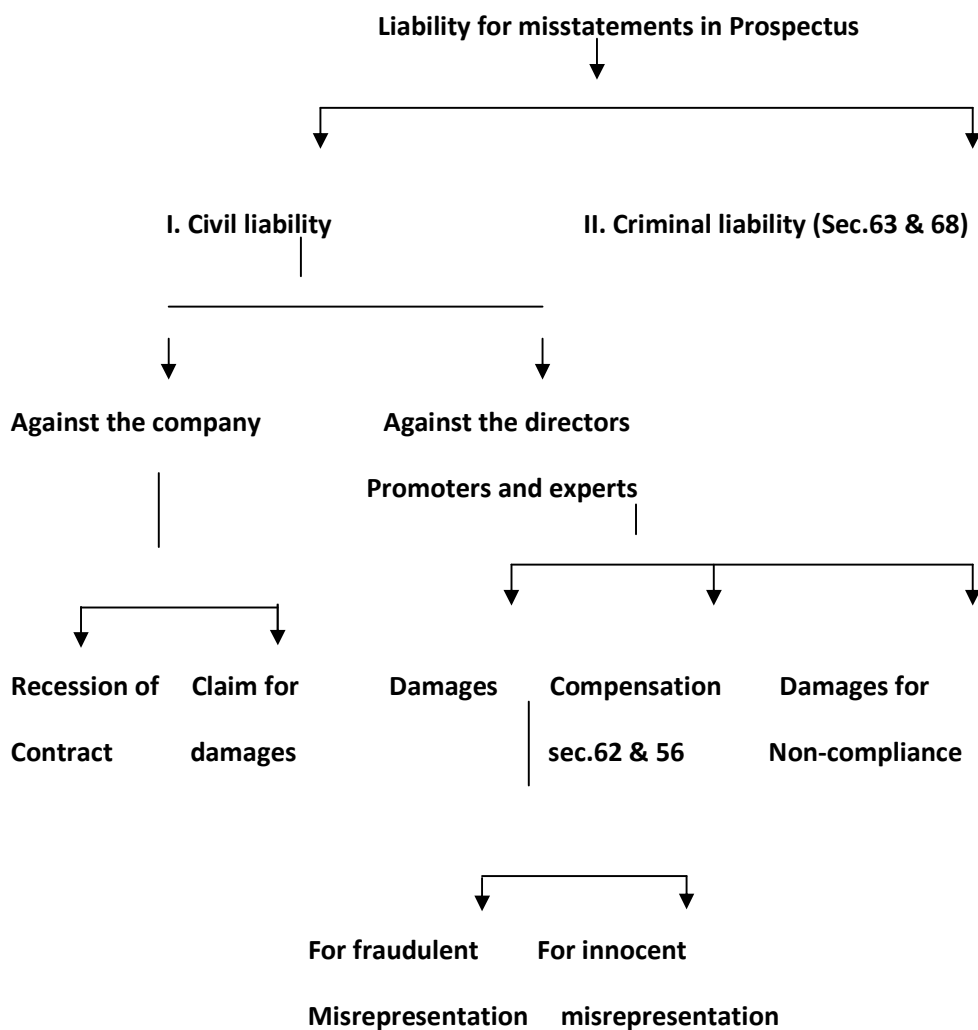
**3. Statutory and other information**

- a. Minimum subscription
- b. Expenses of the issue, fees structure etc.,
- c. Commission and brokerage
- d. Previous issue for cash
- e. Previous public issue- Date of allotment, closing date, date of refund etc.,
- f. Issue of shares otherwise than for cash
- g. Debentures and redeemable preference shares and other instruments issued by the company outstanding as on date of prospectus
- h. Options to subscribe
- i. Details of purchase of property
- j. Rights of members regarding Voting, dividend etc.,
- k. Restrictions, if any, on transfer of shares/ debentures

I. Material contracts and inspections.

## Misstatement in prospectus & their consequences

If there is any misstatement of a material fact in a prospectus, there may arise



### I. Civil liability

A person who has been induced to subscribe for shares on the faith of a misleading prospectus has remedies against the company, promoters and experts.

### 1. Remedies against the company

If there is a misstatement or withholding of material information in a prospectus and if it induced, the share-holder can

- a. Rescind/ recession of the contract
- b. Claim damages from the company, if the statement is fraudulent/ innocent

#### a. Recession of the contract (Rescind the contract)

A person can apply to the court for the recession of the contract, if such statements in the prospectus are false, fraudulent, or withholding of material information but he will have to surrender all the shares to the company. The contract can be rescinded in the following conditions are satisfied:

- i. The statement must be a material misrepresentation of fact
- ii. The statement must have induced the shareholder to buy them
- iii. The statement must be untrue
- iv. If the shares should not be purchased in open market (If so, recession is not possible)
- v. The omission of material fact must be misleading.

#### b. Damages for deceit (dishonesty)

- The affected person entitled to sue the company for damages
- He must prove the same matter
- He cannot both retain the shares and get damages against the company

### 2. Remedies against the Directors, promoters and experts – Their liabilities

#### a. Liability for damages for misstatement in prospectus – should pay the compensation.

##### Defenses of Directors:

- i. Withdrawal of consent
- ii. Absence of consent
- iii. Ignorance of untrue statement
- iv. Reasonable ground for belief
- v. Statement of experts

#### b. Liability for damages for omission



**c. Liability under general law: If the mistake is done in the following nature**

- Knowingly
- Without belief in its truth
- Recklessly, not caring whether it was true or false

**II. Criminal Liability**

Where a prospectus contains any untrue statement, every authorised person is punishable with imprisonment upto 2 years or fine upto Rs.50,000 or both.

**Criminal activities:**

- a. Issue and allotment of shares in fictitious names
- b. Fraudulently inducing persons to invest money
- c. Issuing application for shares without memorandum

**DIRECTORS**

**Directors:** A person having control over the direction, contact, management of the affairs of the company. Only an individual can be a director.

## Powers of Directors

### A. General powers of the board (Sec.291)

- Board of Directors is empowered to do all acts and things as the company is authorities to exercise and do.
- The Board shall not do any acts, which are to be done in company general meeting
- The Board shall exercise its power subject to the provision given in the companies act, MoA and AoA.

### B. Powers to be exercised at Board meetings (Sec.292)

The directors are empowered to do the following as the resolution passed in the meeting.

- a. Make call on shareholders for unpaid shares
- b. Issue debentures
- c. Borrow money through public deposits (Except debentures)
- d. Invest the funds of the company and
- e. Make loans
- f. Can delegate the last three (c, d, & e) powers to a committee/ managers

### C. Power to be exercised with the approval of company in general meeting (Sec.293)

- a. To sell, lease or dispose of the whole of the undertaking of the company
- b. To remit or give time for payment of any debt due
- c. To invest the compensation received by the co. for compulsory acquisition
- d. To borrow money
- e. To contribute to charitable and other funds, which are not directly relating to the business of the company

## Duties of Directors

1. Fiduciary duties – as fiduciaries, the directors must
  - a. Exercise their powers honestly and bonafide for the benefit of the company
  - b. They should not make any secret profit
  - c. Should not involve any matters, which are against to the development of the company
  - d. Should not involve any matters of his personal interest
  
2. Duties of care, skill and diligence (Case: City equitable fire insurance Co. ltd.)
  - Directors should carry out their duties with reasonable care, skill and diligence
  - The std. of care, skill and diligence is depends upon the nature of the company any circumstances, such standards of care depending upon the following:
    - \* The type and nature of work    \*Division of powers
  
    - \* General usage and customs        \*Directors work gratuitously or remuneratively

3. Other duties of directors:
  - a. To attend board meetings
  - b. Not to delegate his functions except to the extend
  - c. To disclose his interest regarding any contract

### Liabilities of Directors

#### 1. Liability to third parties

- a. **Under the act** – Directors are personally liable for the following activities as per the act
  - Failure to repay the application money (If minimum subscription is not attained)
  - Loss or damage is incurred due to irregular allotment of shares
  - Failure to repay the application money for which the stock exchange is not recognized
  - On failure by the company on pay a bill of exchange, pro-note, cheque etc., where the company is not mentioned in liable clause
- b. **Independently of the act**
  - Signing a negotiable instrument without mentioning the company's name
  - Any activity done in the name of the company

#### 2. Liability to the company

- a. Ultra vires acts – The Directors is personally liable to the company for the any ultra vires act relating to payment of dividend, etc.
- b. Negligence – Personally liable for any loss/ damage arises due to negligence
- c. Breach of trust – liable to the company for any loss from breach of trust
- d. Misfeasance – (Willful misconduct) – Liable for willful misconduct

#### 3. Liability for breach of statutory duties

Liable for the breach of statutory duties, ie., maintenance of proper accounts, filing of returns, observation of some statutory formalities, etc.

4. **Liability for acts of his co-directors:** A Director are not liable for the act of his co-directors provided he has no knowledge of that matter.

## WINDING UP

According to Prof. Gower, winding up of a company is process whereby its life is ended and its property administered for the benefit of its creditors and members. Otherwise called Liquidation of a company or dissolving the company.

### Modes of Winding up

There are Three modes of winding-up

1. Winding-up by the court i.e., Compulsory winding-up (Sec.433 to 483)
2. Voluntary winding-up (Sec.484 to 521)
  - a. Members' voluntary winding-up
  - b. Creditors' voluntary winding-up
3. Winding-up subject to supervision of court

#### 1. **Compulsory winding-up or winding-up by the Tribunal (Sec.433 to 483)**

Winding-up of a company under the order of a Tribunal, such as

- a. Special resolution of the company
- b. Default in delivering the statutory report to the Registrar or in holding statutory meeting
- c. Failure to commence or suspension of business without proper reason
- d. Reduction in membership – Reducing the minimum members' strength (2 or 7)
- e. Inability to pay its debts
- f. Just and equitable – It means that the Tribunal has the power to winding-up of a company under judicial discretion depending upon the facts and circumstances, such as circumstances are as follows:
  1. When the substratum (Object or foundation) of a company is gone

That is the company failed to fulfill its objectives etc.,

- a. Basis for the survival of the company is gone
  - b. Main objectives of the company has failed or impracticable
  - c. Carrying on its business at a loss and no hope for profit
  - d. Available assets are insufficient to meet the company debts
2. Oppression (Domination) of minority shareholders
  3. There is deadlock in the management of the company
  4. Where public interest is likely to be prejudiced
  5. When the company carry out fraudulent or illegal business
  6. Where the company does not carry on any business or does not have any property
  7. Acting against the interest of the state (Govt.)
  8. Winding-up of a sick company

## 2. Voluntary winding-up (Sec. 484 to 520)

Winding-up by the member creditors of a company, without interference by the Tribunal. The members of creditors of a company settle their affairs without going to the Tribunal.

### a. Members' voluntary winding-up

A declaration of solvency (Sec.488) is made by its members about winding-up in the Board meeting. The majority of the Directors at a Board meeting shall make the declaration about the winding-up, at the time the company should not have any debt or able to clear all debts within 3 years from the commencement of winding-up.

**b. Creditors' voluntary winding-up:** The Company can be wound up by the resolution passed by the creditors at the general meeting.

### Members' and Creditors' voluntary winding-up – a comparison

Particulars	Members'	Creditors'
1.Declaration of solvency	Issued by members	There is no such declaration
2.Control of winding-up	Members' control	Creditors' control
3.Meetings	No meeting with creditors	Meeting with creditors
4.Appointment of liquidator	Appointment by the company & remuneration fixed by company	Appointed by the Creditors & Remuneration fixed by the committee

5.Committee of inspection	There is no committee of inspection	There is committee for inspection
6.Powers of the Liquidator	Power is limited with the resolution passed in the company	Power is limited with the resolution passed in the committee or Tribunal.

**Extra Question:****When does a private company become a public company?****1. Conversion by default**

When a default is made by a private company in complying with the essential requirements of a private company.

i.e., - Restriction on transfer of shares

- Limitation of the number of members to 50 etc.

**2. Conversion by choice/ volition (freedom to decide)**

A private company can become a public company by altering its articles. It should be informed/ filed to the registrar within 30 days, through prospectus.

And also:

- File a copy of the resolution altering the articles, with in 30 days to registrar
- Take steps to raise its membership to at least 07 and increase the number of directors
- Altering the regulations to essential for a public company

**When does a Public company become a private company**

- A special resolution should be passed in the board meeting and alteration should be made in the articles. Such alteration should be approved by central government.
- A print copy of such alteration shall be filed to registrar within one month of the date of receipt of approval.

## Corporate Governance

It refers to “The process, mechanism, principles and structure by which the business and affairs of the company are directed and managed and governed effectively. Its goal is to enhance long term shareholder value through improving corporate performance and accountability while taking into account the interest of other shareholders”.

Corporate Governance is the system by which business corporations are directed and controlled. The Corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs

The Corporate governance structure specifies the relations and the distribution of rights and responsibilities, among primarily three groups of participants, viz. the Board of directors, managers and shareholders.

#### **Principal actors in corporate governance**

Principal actors involved in corporate governance include the governing or regulatory body. This consist of:

Internal key actors – Chief Executive Officer, the Board of Directors,

Management & Shareholders and Employees.

External key actors – Suppliers, Creditors, Investors, Lenders, Customers, Society

and Government.

#### **Stakeholders**

The stake holders are the principal players in inception, sustainability, development and growth of any organisation. They are the Shareholders, Employees, Suppliers, Customers, Lenders, Investors, Banks, Government and Community at large.

#### **4 P's of Corporate governance**

### **People – Purpose – Process - Performance**

Corporate governance has the integrated frame work, where the **people** are formally either trained or helped to develop to work for a definite and defined **purpose** in applying the systematic **processes** consistently to give the constant growth by better **performance**.

- **People** – Shareholders, Employees, Suppliers, Customers, Lenders, Investors, Society and Government
- **Purpose** – Established, Measurable, Actionable and Communicated
- **Process** – Established, Integrated, Documented, Automated, Implemented and Maintained
- **Performance** – Measured, Analyzed and Communicated

### **Principles / Elements of Corporate Governance**

#### **1. Rights and equitable treatment of shareholders**

Organisations should respect the rights of shareholders and help shareholders to exercise those rights.

#### **2. Interest of other stakeholders**

Organisations should recognise that they have legal and other obligations to all legitimate stakeholders.

#### **3. Role and responsibilities of the board**

The board needs a range of skills, ability to understand various business issues and ability to challenge management performance

It needs to be of sufficient size and have an appropriate mix of executive and non-executive directors. The key roles of chairperson and CEO should not be held by the same person.

#### **4. Integrity and ethical behaviour**



Organisations should develop a code of conduct for their directors and executives that promotes ethical and responsible decision making

**5. Disclose and transparency**

Organisations should clarify and make publicly known the roles and responsibilities of board and management to provide shareholders with a level of accountability.

### Contents of Articles

1. Share capital, rights of shareholders, payment of commissions etc.	10. General meetings and proceedings
2. Lien on shares ( <b>lien</b> on a <b>share</b> means that the member would not be permitted to transfer his <b>shares</b> unless he pays his debt to the company.)	11. Voting rights of members, proxies
3. Calls on shares (demand made by the company on its share holders to pay whole or part of the balance remaining unpaid on each share at any time during the life time of a company")	12. Directors appointment, remuneration, qualification, powers, etc.
4. Transfer of shares (an existing shareholder <i>transfers</i> issued <i>shares</i> to another person)	13. Managers
5. Transmission of shares (passing of property in shares to the legal heirs. In the event of death of the shareholder)	14. Secretary
6. Forfeiture of shares ( <b>Shares may be forfeited if call is not paid within the stipulated time</b> )	15. Dividend and reserves
7. Conversion of shares in to stocks	16. Accounts, audit and borrowing powers
8. Share warrants	17. Capitalisation of profits
9. Alteration of capital	18. Winding up

## UNIT – III: LABOUR LEGISLATIONS

### Introduction

The legislations formulated to protect the interest of the workers and also to provide them better working conditions/ environment.

### Classifications

#### HRM functions

Staffing	Compensations & Rewards	Employee maintenance	Employee relations
1. Child labour prohibition & Regulation act 1986 2. The employment Exchange act 1959 3. The Apprentice Act, 1961 4. The contract Labour act, 1970 5. Bonded Labour system (Abolition) Act, 1976.	1. <b>The Payment of wages act 1936</b> 2. The minimum wages act, 1948 3. <b>The payment of Bonus act, 1965</b> 4. The Equal remuneration act, 1976.	1. <b>The Factories act, 1948</b> 2. The Mines act, 1952 3. The Employees provident fund & Miscellaneous provisions act, 1959 4. The Employees state Insurance act, 1948 5. Payment of Gratuity act, 1972 6. The Workmen's compensation act, 1923. 7. The Maternity Benefit Act, 1961.	1. The Trade Unions Act, 1926 2. <b>The Industrial disputes act, 1947</b> 3. The Industrial Employment (Standing Orders Act), 1946 4. <i>The Sales promotions Employees (conditions of Services) Act, 1976.</i>

### Principles of Modern Labour Legislation

**1. Principle of Protection-** Example The Factories act, 1948, Child labour prohibition & Regulation act 1986, The Payment of wages act 1936, etc.,

**2. Principle of social justice:** Equality in social relationship, removing discrimination suffered by particular groups of labours. Certain group of labours having same sort of disabilities as compared to other groups. Eg. Indian slavery act, 1843, Equal remuneration act 1976.

**3. Principle of Regulation:** It regulates the relationship between employers and their associations. Eg. Trade union act 1926, The Industrial disputes act, 1947.

**4. Principle of Welfare:** Aims to provide certain welfare amenities to the workers and to ensure the provision of certain basic amenities to workers at their place of work. Eg. Beedi workers welfare fund act 1976.

**5. Principle of Social security:** Social insurance legislations and social assistance legislations. Eg. The Workmen's compensation act, 1923, The Maternity Benefit Act, 1961 and The Employees state Insurance act, 1948.

**6. Principle of economic development:** Improvement of physical working conditions, establishment of industrial peace.

**7. Principle of International obligations:** Accepted by ILO and UNO. Which are conventions and recommendations covered wide range of subjects – working conditions, employment of child labours, working hours, medical benefits, etc.

#### **Types of Labour laws:**

1. Protective Labour laws
2. Regulative Labour laws
3. Social security Labour laws
4. Welfare legislations.

## **OBLIGATIONS AND RIGHTS OF EMPLOYEES**

**Obligations:** Under the Factories act, 1948, No workman in the factory is entitled to:

1. Interfere willfully or misuse any appliance, convenience or other things provided in a factory for the purpose of securing the health, safety and welfare of the factory workers.
2. Do willfully and without any reasonable cause anything likely to endanger himself or others.
3. Neglect willfully to make use of any appliance or other things provided in the factory for the purpose of securing the health and safety of factory workers.
4. **Employees are expected to:**
  - \* arrive at work on time
  - \* dress suitably for the job (wear safety equipment if required);
  - \* work to the best of their ability throughout their work day;
  - \* respect their employers, colleagues and customers;

- \* take care of employer's property;
- \* follow the employer's 'reasonable and lawful' instructions;
- \* obey safety rules;
- \* ask for help if they need it;
- \* know what the employer expects the employee to do if the employee can't be at work for any reason;
- \* not discriminate or harass others in the workplace; and
- \* not act in a way that puts the employee – or others – at risk of injury in the workplace.

**Rights of Employees:** The workers enjoy the following rights under the Factories act, 1948.

1. They can claim minimum health and safety welfare facilities, annual leave, observance of working hours for adults, women and children.
2. They can refuse to work in contravention of provisions of the act and observe the statutory working hours, rest intervals, weekly holidays and overtime restrictions.
3. They can claim overtime payment at double the ordinary rates of wages, and also advance payment for annual leave if the period of leave is of not less than four days.
4. They can claim wages for the proportionate annual leave even before he puts in the qualifying service, if he/she is discharged or dismissed.
5. **Employees are entitled to:**
  - \* be paid the right wage for the job they do;
  - \* protection from unfair dismissal;
  - \* sick leave, annual leave, public holidays, family leave and long service leave;
  - \* have an unfair contract of employment which is not covered by an industrial award or a contract for services, amended or invalidated; and
  - \* freedom to belong to or not belong to a union.

## **INDUSTRIAL LAW**

### **THE FACTORIES ACT-1948**

- It came in to force on 01.04.1949
- Its object is to regulate the conditions of work in manufacturing establishments which come within the definition of the term 'factory'.

**Factory:** A factory is a premise whereon 10 or more persons are engaged if power is used, or 20 or more persons are engaged if power is not used in a manufacturing process.

\* Factory does not include: Mines, Railway running shed, a hotel & restaurant

**Approval, Licensing & Registration of factories:**

- The state govt. is empowered for giving approval, licensing and registration
- Application for permission to be sent to – Chief inspector or the State govt.

**Occupier:** The person who has ultimate control over the affairs of the factory

**Labour welfare:** The term ‘Labour Welfare’ refers to the facilities provided to workers in and outside the factory premises such as canteens, rest and recreation facilities, housing and all other services that contribute to the wellbeing of workers.

**# Health, Safety and Welfare**

**HEALTH**

The Health of the workers in the conditions under which work is carried on in factories:

1. Cleanliness: - Free from effluvia and dirt
  - Dirt should be removed daily
  - Work room shall be cleaned at least once in a week
  - Effective means of drainage and use of disinfectants
2. Disposal of wastes and effluents:
3. Ventilation and temperature
4. Dust and fume - install exhaust appliances, it would be installed near the point of origin of the dust, fumes, or other impurity
5. Artificial humidification - cotton textile mills and in cigarette making factories.
6. Overcrowding should be avoided - The Chief Inspector of factories by order in writing shall fix the maximum member of workers to be employed
7. Lighting – sufficient and suitable lighting should be provided
8. Drinking water - Drinking points must be marked, away from urinal
  - Cooling water should be provided where more than 250 workers
9. Latrines and urinals – separate L & U for male and female and must be enclosed
  - cleaned at least once in every seven days with suitable detergents or disinfectants or with both.
10. Spittoons – The Persons shall not spit within the premises except in spittoons.

**SAFETY**

1. Fencing of machinery – dangerous part of machines to be securely fenced
2. Examination of machinery in motion by a trained adult male worker – restriction on women and young persons.
3. Restriction on young persons to work on dangerous machines
4. Striking gear and device for cutting of power

5. Self acting machines allowed within a distance of 45 centimeters
6. Casing (covering) of new machines
7. Prohibition of employment of women & young persons near cotton openers
8. hoist and lifts to be of good condition
9. Lifting machines, chains, ropes to be of good construction
10. Notice of maximum safe working speed to be kept near machine
11. Effective measures shall be taken to ensure safe working pressure
12. Floors, passage etc., should be properly constructed and maintained
13. Pits, sumps, openings in floors to be securely covered
14. Excessive weight – Workers should not be allowed to lift of excessive weight
15. Materials should be provided to protect eyes of the employees
16. Precautions against dangerous Furness
17. Precautions regarding the use of portable electric light
18. Precautions against explosives
19. Precaution in case of fire
20. Safety officers: must be employed if 1000 or more workers employed and manufacturing process carried on.

### **WELFARE**

1. Washing allowance and facility
2. Facility for storing and drying clothing
3. Facilities for sitting
4. First aid appliances - one for every 150 workers
5. Shelters, rest rooms and lunch rooms should be provided
6. Crèches – If more than 50 women employees are working
7. Canteen – where more than 250 workers employed
8. Welfare officers – where more than 500 workers employed

### **Welfare facilities outside factory premises**

In addition to providing welfare facilities in the factory premises, workers are also provided certain benefits and facilities outside the factory. These include:

- Maternity benefits;
- Gratuity, pension and provident fund benefits;
- Medical benefits;
- Educational facilities;
- Housing facilities;
- Recreational facilities including sports and cultural activities;
- Library and reading rooms;
- Holiday home and leave travel facilities;
- Consumers' cooperative stores and fair price shops;
- Vocational training; and
- Transportation facility to and from the place of work

## EMPLOYMENT OF YOUNG PERSONS

**Children:** The age of children not completed 14 year shall not be allowed /employed in a factory

**Young person (Adolescent):** Who has completed the age of 14 years and not completed the age of 18 years

**Adult :** Who has completed the age of 18 years

**Certificate of fitness (CoF):**

It should be produced by young person before joining a duty or getting employment.

*Apply :* For getting CoF, the Young person by himself or guardian must apply for that

*Validity :* The CoF valid for 12 months from the date of issue, but it can be renewed.

*Revocation of CoF:* It can be revoked any time by the certifying surgeon.

*Fees :* Fees for getting CoF to be paid by the employer ( at the time of renewal)

Working hours to Young persons:

- Not more than 4 1/2 hours per day
- Weekly holiday is must
- No young persons allowed to work in two factories
- Female young person to be allowed to work only between 8am to 7pm
- Display of notice of work of young person must be there
- Register of young person workers should be maintained by the manager.

## EMPLOYMENT OF WOMEN

All provisions regarding employment of adult male worker is applicable to adult female worker, except the following:

1. Work on or near machinery in motion is not allowed
2. Prohibition of employment near cotton openers
3. Crèches
4. Maximum of 48 hours in a week and 9 hrs. per day
5. Working hrs. between 6am to 7pm
6. Certificate of fitness (CoF) is must
7. Restricting the employment of women in dangerous operations/ machines
8. Annual leave: One day for every 20/15 days (15 days for Female young person) and Maximum maternity leave 12 weeks

## Provisions regarding Health of factory workers under Factories Act, 1948

To take care of the health of workers in factories, the Factories Act, 1948 has provided for certain measures which are stated below:

### (i) Cleanliness of the factory premises

Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance. It is specifically provided that in a factory—



— accumulations of dirt and refuse shall be removed daily, by sweeping or any other method, from the floors and benches of work rooms and from stair cases and passages, and disposed off in a suitable manner;

— the floor of every room shall be cleaned. This shall be done at least once every week by washing, using disinfectant or by some other effective method;

— where a floor is liable to become wet in the course of any manufacturing process to such an extent as is capable of being drained, effective means of drainage shall be provided.

— all inside wall and partitions, all ceilings or tops of rooms and all walls, sides and tops of passages and staircases shall

a) be painted or varnished, and repainted and re-varnished at least once in a period of five years; where they are painted or varnished, be cleaned at least once in a period of 14 months by such methods as may be prescribed by the Government.

b) Where painting or varnishing is not required, be kept white washed or colour washed, and the white washing or colour washing shall be carried out at least once in every period of 14 months.

**(ii) Disposal of Wastes and Effluents:** Effective arrangement shall be made for the disposal of wastes and effluents arising out of manufacturing process in the factories.

**(iii) Ventilation and Temperature:** Provision to be made for ventilation and regulation of temperature in the factories. Effective and suitable measures shall be adopted for securing and maintaining in every room—

— adequate ventilation by the circulation of fresh air, and

— such a temperature as will secure to workers reasonable conditions of comfort, and prevent injury to health, and in particular the walls and roofs shall be of such material and so designed that such temperature shall not exceed but kept within reasonable limits.

The state government shall prescribe the standards of adequate ventilation and reasonable temperature for any factory or part thereof.

**(iv) Dust and Fume:** In every factory, where due to manufacturing process, dust or fume or other impurity arise which is likely to be injurious to the health of workers employed, effective measures shall be taken to prevent its inhalation, and accumulation in any workroom. If it is necessary to install exhaust appliances, it would be installed near the point of origin of the dust, fumes, or other impurity. Measures shall be taken to enclose such points.

**(v) Artificial humidification:** Artificial creation of humidity is employed in India in cotton textile mills and in cigarette making factories. In respect of factories, where humidity of the air is artificially increased, it is provided to make rules—

— prescribing standard of humidification;

- regulating the methods used for artificially increasing the humidity of the air;
- directing prescribed tests for determining the humidity of the air to be correctly carried out and recorded, and
- prescribing methods to be adopted for securing adequate ventilation and cooling of the air and the work rooms.

#### **(vi) Over-crowding**

No room in any factory shall be overcrowded to such an extent which becomes injurious to the health of the workers employed therein. The Chief Inspector of factories by order in writing shall fix the maximum number of workers to be employed in each room in the factory.

#### **(vii) Lighting**

The Factories Act provides for sufficient and suitable lighting, natural or artificial where workers are working or passing through. Provision of cleaning of inner and outer surface is provided for all glazed windows and skylights used for the lighting of the workrooms. In every factory, effective provision shall be made for the prevention of

- a) glare, either directly from a source of light or by reflection from a smooth or polished surface;
- b) the formation of shadows to such an extent as to cause eyestrain or the risk of accident to any worker.

#### **(viii) Drinking Water**

In every factory, effective arrangement shall be made at suitable places for sufficient supply of wholesome drinking water. Such places shall be legibly marked 'Drinking Water' in a language understood by a majority of the workers employed in the factory. In case of factories employing more than 250 workers, provisions shall be made for cooling drinking water during hot weather by effective means, and for its distribution.

#### **(ix) Latrines and Urinals**

The Factories Act requires that provision should be made for —

- a) Sufficient latrine and urinal accommodation conveniently situated and accessible to workers while they are in the factory;
- b) Separate enclosed accommodation for male and female workers;
- c) Such accommodation being adequately lighted and ventilated;
- d) All such accommodation being maintained in a clean and sanitary condition;
- e) Sweepers being employed to clean latrines, urinals and washing places;

#### **Where the number of workers in a factory is more than 250**

- i) Latrines and urinals shall be of prescribed sanitary types;
- ii) The floor and internal walls of the latrines and urinals shall be laid with glazed tiles;
- iii) Floors and walls and the sanitary pans of latrines and urinals shall be thoroughly washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.

**(x) Spittoons**

Sufficient number of spittoons must be provided in every factory and maintained in clean and hygienic condition. No person shall spit within the premises of a factory except in the spittoons. A notice containing this provision and the penalty for its violation shall be prominently displayed at suitable places in the factory premises.

**Welfare provisions in the factories**

**(i) Washing facilities:** The Factories Act provides for –

a) Adequate and suitable facilities for washing for the use of workers in the factories. The workers who live in crowded areas have inadequate facilities for washing at their homes, and bathing facilities add to their comfort, health and efficiency.

b) Separate and adequately screened washing facilities for the use of male and female workers.

c) Such facilities being conveniently accessible, and being kept clean.

**(ii) Facilities for storing and drying clothes:**

A suitable place for keeping clothes not worn during working hours shall be provided in every factory. Facilities shall also be provided for the drying of wet clothes.

**(iii) Facilities for sitting:**

For workers who are to work in a standing position, suitable arrangement for sitting shall be provided in the factories. This is to enable workers to take advantage of any opportunity for rest which may occur in the course of their work.

**(iv) First-aid appliances:**

First-aid boxes or cupboards equipped with the required contents should be provided for workers in every factory. This should be readily accessible to them during all working hours. The number of such first aid boxes shall not be less than one for every 150 workers employed in the factory. Such first-aid box shall be kept in the charge of a responsible person who is trained in first-aid treatment and who shall be available during the working hours of the factory.

In factories employing more than 500 workers, there shall be an ambulance room. It should contain the prescribed equipments, and be in the charge of such medical and nursing staff as may be prescribed.

**(v) Canteens:**

In factories employing more than 250 workers, there shall be a canteen for the use of workers. The government may prescribe the rules in respect of the

— food stuff to be served in the canteen;

— charges to be made;

— constitution of a managing committee for the canteen ; and

— representation of the workers in the management of the canteen.

**(vi) Shelters, restrooms and lunch rooms:**

Adequate and suitable shelters, rest rooms, and lunch rooms with drinking water facility shall be made in factories employing 150 workers or more. Workers can eat meals brought by them in such rooms. Rest and lunch rooms shall be sufficiently lighted and ventilated. It shall be maintained in cool and clean conditions.

**(vii) Creches:**

In every factory, where more than 50 women workers are employed, provision shall be made for suitable and adequate room for the use of children under the age of six years of such women. Such a room shall be adequately lighted and ventilated. It shall be maintained in clean and sanitary conditions under the charge of a woman trained in the care of children and infants.

**(viii) Welfare Officer:**

The factories Act also provides for employment of welfare officers with prescribed qualification to look into the implementation of various facilities provided for. Such a provision exists in every factory employing more than 500 workers.

**Welfare facilities outside factory premises**

In addition to providing welfare facilities in the factory premises, workers are also provided certain benefits and facilities outside the factory. These include:

- Maternity benefits;
- Gratuity, pension and provident fund benefits;
- Medical benefits;
- Educational facilities;
- Housing facilities;
- Recreational facilities including sports and cultural activities;
- Library and reading rooms;
- Holiday home and leave travel facilities;
- Consumers' cooperative stores and fair price shops;
- Vocational training; and
- Transportation facility to and from the place of work.

**THE PAYMENT OF WAGES ACT – 1936**

It was passed to regulate the payment & unauthorized deductions of wages to certain classes of persons employed in a factory or industry.

Time of payment of wages (Rules):

1. Wages to be paid before 7<sup>th</sup> or 10<sup>th</sup> day of every month

- Less than 1000 persons 7<sup>th</sup> day
- More than 1000 persons 10<sup>th</sup> day

## 2. Wages in case of termination of employment

- To be paid before the expiry of the 2<sup>nd</sup> working day from the date of termination

## 3. Wages to be paid on a working day only

### **Deductions from wages**

#### 1. Deductions for fines:

No fine – before showing cause and completed age of 15 years

#### 2. Deductions for absence from duty

#### 3. Deductions for damages or loss

#### 4. Deductions for services provided by the employer

#### 5. Deductions for recovery of advances

#### 6. Deductions for recovery of loans

#### 7. Deductions for payment to co-operative societies and insurance schemes

#### 8. Other deductions:

- Deductions of income tax
- Deductions by order of court
- Deductions for payment to co-op societies advances
- Deductions for provident fund
- Deductions for insurance premium
- Deductions made with written authorization of the employee to donations

**Note:** The total deduction shall not exceed 75% of such wages

### **Maintenance of Registers & Records**

The employer shall maintain the following registers and records

1. The work performed by them
2. The wages paid to them
3. Deductions made from their wages
4. The receipts given by them

### **Penalty for offences under the Act (To employer)**

1. Penalty for delaying payment of wages within prescribed period
2. Penalty for not paying wages on a working day or in current coins or currency
3. Penalty for failure to maintain / furnish/ return records
4. Penalty for obstructing inspectors/ officials

## **THE PAYMENT OF BONUS ACT – 1965**

Bonus – Something to the good

This act is to provide for the payment of bonus to persons employed in certain establishments for their contribution in profit.

- To impose statutory liability upon an employer
- To define principles of payment of bonus
- To provide minimum & maximum bonus
- To provide machinery for enforcement of the liability for payment of bonus
- A minimum bonus of 8.33% of the wage or salary is payable, whether the establishment has made profit or loss.
- Liability for bonus is a statutory liability

**\* Application of the Act**

- Every factory coming under Factories act 1948
- Every other establishment, there employees strength more than 20 persons

**Act not applicable to the following categories of employees:**

- |  |   |
|--|---|
| - Employees of LIC                             | -Seamen   |
| - University & other educational institutions  | - Employed through contractors                                  |
| - Employed by NABARD, UTI, SIDBI               | - Any other financial institutions (other than banking company) |
| -Employees of red-cross society & its branches | - RBI employees   |

**\* Power of exemption for giving bonus**

The appropriate Govt. alone empowered to give exemption to the establishment for giving bonus, based on its financial position and other relevant circumstances by notification in the official Gazette.

The order of exemption can be refused by affected parties and apposed through Quasi-Judicial with proper reasons.

**\* Eligibility & Distribution for Bonus:**

Eligibility (U/S.8): Every employee shall be entitled to receive bonus, if he works not less than 30 working days in a financial year.

If he worked less than 30 days, the bonus could be reduced proportionately

**\* Disqualification (U/S: 9):**

The employee shall be disqualified from receiving bonus, if he is dismissed from service for: Fraud, Violent behaviour, Theft and Sabotage of any property of factory.

**DETERMINATION OF BONUS**

- Bonus can not be claimed by workers as a matter of right

The following is the procedure for determining bonus for two different establishments, namely Banking Company and others.

1. Determination of Gross Profit(GP) – For Banks and Others
2. Determination of available surplus
3. Allocable surplus
4. Proportionate reduction in bonus in certain cases
5. Adjustment of interim bonus paid
6. Time limit for payment of bonus
7. Recovery of bonus

### 1. Determination of Gross Profit (GP):

At first we have to Determine GP from given Net Profit, GP can be calculated as follows:

- A) For a Banking Company – First schedule - Computation of GP from NP

Particulars	Amt.	Amount (in Rs.)
Net Profit (from P&L account)		xxxx
<b>ADD:</b> Items to be added back to NP-(A)		
- Provision for bonus	xxxx	
- Provision for depreciation	xxxx	
- Any reserves	xxxx	
- Any gratuity paid/given	xxxx	
- Donations in excess of admissible for IT	xxxx	
- Capital expenditure and Capital losses	xxxx	
- Losses from business situated out side india	xxxx	<u>xxxx</u>
		xxxx
<b>LESS:</b> Items to be deducted from NP – (B)	xxxx	
- Capital receipts	xxxx	
- Profit of any business situated outside India	xxxx	
- Refund of any excess direct tax paid	xxxx	<u>xxxx</u>
- Cash subsidy given by Govt.		
<b>Gross Profit for Bonus</b>		<b>xxxx</b>

- A) For Other Companies – First schedule

- Computation of GP form NP

Particulars	Amt.	Amount (in Rs.)
Net Profit (from P&L account)		xxxx

<b>ADD:</b> Items to be added back to NP-(A)		
- Provision for bonus	XXXX	
- Provision for depreciation/ Direct taxes	XXXX	
- Any reserves	XXXX	
- Any gratuity paid/given	XXXX	
- Donations in excess of admissible for IT	XXXX	
- Capital expenditure and Capital losses	XXXX	
- Losses from business situated out side india	<u>XXXX</u>	<u>XXXX</u>
		XXXX
<b>LESS:</b> Items to be deducted from NP – (B)	XXXX	
- Capital receipts	XXXX	
- Profit of any business situated outside India	XXXX	
- Refund of any excess direct tax paid	<u>XXXX</u>	<u>XXXX</u>
- Cash subsidy given by Govt.		
<b>Gross Profit for Bonus</b>		<b>XXXX</b>

**2. Determination of available surplus:** After determining the GP, the establishment should determine the available surplus as under.

Particulars	Amt.	Amount (in Rs.)
Gross Profit (Calculated as above)		XXXX
<b>Less:</b> Items to be deducted	XXXX	
- Any depreciation admissible	XXXX	
- Any amount spent for development	XXXX	
- Any direct taxes paid	XXXX	
- Amount specified in 3 <sup>rd</sup> <b>Schedule</b> *	<u>XXXX</u>	<u>XXXX</u>
<b>Available surplus</b>		<b><u>XXXX</u></b>

\* **The items specified in 3<sup>rd</sup> Schedule:**

- Dividend payable to preference share holders
- 8.5/ 7.5% of its paid up equity share capital for commencement of Business
- 6% of it reserves
- Remuneration payable to the partners of the firm
- Rs. 48,000 or remuneration paid to employees which ever is less.

### 3. Allocable surplus:

After determining the available surplus, the employee's share is called allocable surplus. The allocable surplus is the workers' share in the available surplus.

a. *The amount of bonus:*

- Mini.. bonus: **8.33%** of the salary earned during the accounting year (U/s.10) **OR**  
**Rs.100 p.m.**(Rs.60 in case of below 15 years)w.e.is Higher.
- Maximum Bonus: (U/s. 11): It is possible only the allocable surplus exceeds the minimum bonus – i.e **20%** of salary.



b. 'Set on' & 'Set off' of allocable surplus (u/s.15):

The rule set-on and set-off is applicable on the allocable surplus.

- (i) 'Set on' : Where the allocable surplus for any accounting year exceeds the maximum bonus amount, the excess shall be carried forward to next/succeeding years. It should be utilized only for payment of bonus (the year in which there is no allocable surplus)
- (ii) 'Set- off': In an accounting year, if the allocable surplus is not available to pay minimum bonus, the unpaid amount is set-off to next year.

**Ex. The 4<sup>th</sup> schedule.**

Minimum bonus: Rs.1,04,167

Maximum bonus: Rs.2,50,000

Year	Allocable surplus	Bonus	Set-off / Set-on	Total C/f
1	1,04,167	1,04,167	Nil	Nil
2	6,35,000	2,50,000	2,50,000 (maxi)	
3	2,20,000	2,50,000 (30000 from 2 <sup>nd</sup> year)	-	2,20,000
4	Nil	1,04,167	1,15,833	Nil

**4. Proportionate reduction in bonus in certain cases:** If any employee has not worked for all the working days in an accounting year, the minimum bonus will be reduced proportionately.

**5. Adjustment of interim bonus paid:** If any interim bonus paid during that accounting year, that shall be reduced from actual bonus.

**6. Time limit for payment of bonus:** - With in a month from the date on which the settlement comes into operation. - Or with in a period of 8 months, from the close of the accounting year.

**7. Recovery of bonus:** In case of any due in payment of bonus, the affected person can recover them through Government.

## THE INDUSTRIAL DISPUTES ACT- 1947

This act is amended for the prevention and settlement of industrial disputes, through 2 new institutions namely Works committee and Industrial Tribunals.

### Objectives:

1. To secure industrial peace (A state in industrial relations in which both employer and employees abstain (withhold) from industrial action, such as strikes and lockouts.)
2. By preventing & settling industrial disputes between employer and workmen
3. To maintain good relations through external machinery (Conciliation, Courts, Industrial Tribunals etc.)
4. To ameliorate (improve) the condition of workmen in the industry

5. By redressal of grievances of workmen in industry
6. By providing job security

**Extent of the act:** Applicable to whole of the India, to all industries (Private/Public).

**Industry:**

U/s.2 (j) of Industrial disputes act, Industry is “any systematic activity carried on by Co-operation between on employer and his workmen.

What is not an Industry:

- Any agricultural operation
- Hospitals/dispensaries
- Khadhi and village industry
- activities of any associations
- Educational, scientific, research, training institutes.

**Industrial disputes:**

Any dispute/differences between – Employers & Employees, Employers & Workmen and Workmen & Workmen.

Generally it means a dispute between the Workmen and the Management.

Three ingredients of Industrial disputes:

1. There should be real dispute
2. Dispute between Employer & Workmen
3. Dispute connected with employment or non-employment

**Types of Industrial disputes**

- a) Individual disputes: Any dispute between that workmen & employer connected with dismissal, termination or retrenchment of that workmen.
- b) Collective dispute – effected all the workmen relating to
  - Wages, bonus, compensation, hours of work, leave,
  - Holidays, Rules of discipline, closure of organization,
  - Retrenchment ect.,

**LAY – OFF (U/s.2(kkk))**

Lay-off means, the failure, refusal or inability of an employer to give employment to a workmen due to – shortage of coal, power, raw material or the accumulation of stocks or the breakdown of machinery or natural calamity.

**LOCK-OUT (U/s.2(l))**

It means the temporary closing of a place of employment or suspension of work or refusal by an employer to any number of employees

- Lock-out is a weapon available to employer
- Strike is a weapon available to employees.

**Differences between Lay-off and Lock out**

Lay- off	Lock-out
1. Employer refuses to give employment due to shortage of resources	1. Due to closing of a place of employment
2. Due to trade reasons, beyond the control of the employer	2. It is a weapon used by the employer influencing workmen to accept his

3. No way connected with Industrial dispute

demand

3. It is connected with Industrial dispute

### **RETRENCHMENT (U/s.2 (OO))**

The termination by the employer of the service of a workman for any reason otherwise than as punishment by way of disciplinary action.

Retrenchment not include: -Voluntary retirement - Retirement due to reaching the R'age  
- Termination due to non-renewal of contract.

### **STRIKE U/s.2 (q)**

- a. A cessation of work by a body of persons employed in any industry acting in combination
- b. A concerted refusal of any number of employees
- c. Refusal under a common understanding of any number of employees

### **UNFAIR LABOUR PRACTICE (U/s.2(ra))**

It means any of the practices specified in the 5<sup>th</sup> schedule on the part of employer, trade unions and on the part of workmen.

## **UNFAIR LABOUR PRACTICE (LISTED IN 5<sup>TH</sup> SCHEDULE)**

### **I. On the part of employer & Trade unions of employers**

1. To interfere with/coerce workmen in the exercise of their right to organize/form/joint activities for collective bargaining
  - a. Threatening workmen with dismissal
  - b. Threatening a lock-out/closure
  - c. Granting wage increase without consulting Trade unions
2. To dominate the activities of Trade unions
  - a. The employer taking an active interest in organizing Trade unions
  - b. Employer showing partiality to one of the trade unions
3. To establish employer – sponsored trade unions of workmen
4. To encourage/discourage membership in any trade unions
  - a. Punishing workman (WM) to join in a Trade union
  - b. Dismissing WM for taking part in legal strike
  - c. Changing seniority of WM due to active participation in Trade union activities
  - d. Refusing promotion for showing interest in Trade union
5. To discharge or dismiss workmen
  - a. by way of victimization
  - b. not in good faith
  - c. by falsely evidence
  - d. for misconduct of a minor/technical character
6. To abolish the work of a regular nature
7. Transferring a workmen

8. Showing partiality to one set of workers
9. To employ workmen as 'badlis', casuals/temporaries for long period
10. To recruit workman during legal strike
11. Failure to implement award
12. To indulge in acts of violence
13. Proposing/continuing a lock-out

## **II. On the part of Workmen & Trade unions of workmen**

1. To advise/actively support illegal strike
2. To coerce workmen to join a Trade union
3. To indulge in acts of violence
4. Squatting on the work premises after working hours
5. 'Gherao' of any of the managerial or staff members
6. To stage demonstration at the residence of the employer
7. Damaging properties of establishment

### **Workman**

Any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, clerical or supervisory work for hire or reward.

Who are not workmen:

- Employed in Police service/ Employee of prison
- Employed in managerial/ administrative work
- Supervisors drawing wages exceeding Rs.1600 per mensem

## **Procedure for settlement of Industrial disputes & Authorities under the act**

Setting up authorities for prevention, investigation and settlement of Industrial disputes, they are:

- |                                   |                                   |
|-----------------------------------|-----------------------------------|
| 1. Works committees (Sec.3)       | 5. Labour courts (Sec.7)          |
| 2. Conciliation officers (Sec.4)  | 6. Industrial Tribunals (Sec.7-A) |
| 3. Boards of Conciliation (Sec.5) | 7. National Tribunals (Sec.7-B)   |
| 4. Courts of inquiry (Sec.6)      |                                   |

3 modes of settlement of disputes under this act

- A. Voluntary settlement and conciliation
- B. Adjudication
- C. Arbitration

### **[A] CONCILIATION MACHINERY**

Which include Works committees, Conciliation officers, Board of Conciliation and Courts of Inquiry. They can only make inquiry about the disputes, but can not make any awards.

### 1. Works committees (WC): (Sec.3)

- Where 100 or more workmen are employed, the WC must be constituted
- Members: The employer & employees should be the members of the committee, the employees strength should not be less than the employer's representatives in the committee.

#### **Powers & Duties**

- Securing & preserving amenity or good relations between employers and workmen
- Comment upon matters of their common interest
- Compose any material difference of opinion in welfare, wages, holidays etc.

### 2. Conciliation officers (Sec.4)

The appropriate Government through notification in Official Gazette appoint Conciliation officers. Their duty is to mediate and promote the settlement of Industrial disputes.

#### **Duties:**

- a. To hold conciliation proceeding s- where any disputes exists.
- b. To investigate the dispute
- c. To send a report & memorandum of settlement to appropriate Govt.
- d. To send a full report about their efforts for settlement, to the Govt. in case no settlement is arrived.
- e. Report should be submitted within 14 days of the commencement of the conciliation proceedings or within the time period fixed by Govt.

#### **Powers:**

1. Power to enter premises
2. Power to call for and inspect documents

### 3. Boards of Conciliation (Sec.5)

The appropriate Govt. constitutes this board and appoints its members through official gazette.

#### **Members:**

It consist of a Chairman ( An independent person) & 2 or 4 other members. The other members appointed to represent the disputed parties on the recommendation of them.

#### **Duties:**

- a. To Bring about a settlement of the dispute
- b. To send a report & memorandum of settlement to appropriate Govt.
- c. To send a full report about their efforts for settlement, to the Govt. in case no settlement is arrived.
- d. To communicate reasons to the parties, if no further reference made.
- e. To submit report within 2 months.

#### **Power:**

1. Power to enter premises
2. Power of Civil court
  - Enforcing attendance

- Compelling the submission of document
- Issuing notice for the examination of witnesses.

#### 4. Court of enquiry

It is for inquiring into any matter appearing to be connected with or relevant to an industrial dispute.

##### Duties:

- It should inquire into the matters referred to it.
- To send report of Govt. within 6 months.
- The reports should be in writing & signed by all the members.
- It should record any minutes of recommendations in report

##### Power:

1. Power to enter premises
2. Power of Civil court
  - Enforcing attendance
  - Compelling the submission of document
  - Issuing notice for the examination of witnesses.
3. This court may appoint any person having special knowledge of the matter under consideration.

### [B] ADJUDICATION MACHINERY

Sec.7 to 9, explain the adjudication authorities are:

1. Labour court (Sec.7)
2. Industrial Tribunal (Sec.7-A)
3. National Tribunal (Sec.7-B)

#### 1. Labour court (Sec.7)

The appropriate Govt. may constitute one or more labour courts for adjudication of Industrial disputes specified in the 2<sup>nd</sup> schedule.

##### ***Matters within the Jurisdiction of Labour court (The 2<sup>nd</sup> Schedule)***

- a. The legality of an order passed by an employer
- b. Discharge and dismissal of Workman
- c. Withdrawal of any customary concession or privilege
- d. Illegality of strike and lock-out

\* The Labour court should consist of only one person, to be appointed by the appropriate Government.

**Qualification of the Authority:** - The person should be,

- a. The Judge of High court

- b. District judge or Additional district judge (Not less than 3 years of service)
- c. Presiding officer of Labour court ( Not less than 7 years of service)

**Duties:**

- a. To adjudicate upon Industrial disputes, specified in 2<sup>nd</sup> schedule
- b. To give award within the specified period
  - Award to be in writing & signed and its published

**Power:**

- a. Power to enter premises
- b. Power of Civil court
  - Enforcing attendance
  - Compelling the submission of document
  - Issuing notice for the examination of witnesses.

**2. Industrial Tribunal (Sec.7-A)**

Constituted for the adjudication of industrial disputes specified in the 2<sup>nd</sup> & 3<sup>rd</sup> schedule.

***Matters within the Jurisdiction of Industrial Tribunal (The 3<sup>rd</sup> Schedule)***

- a. Wages, including the period or modes of payment
- b. Compensatory & other allowances
- c. Hours of work and rest intervals
- d. Leave with wages & holidays
- e. Bonus, PF, Gratuity, etc.
- f. Shift working
- g. Classification of grades
- h. Rules of discipline
- i. Rationalization
- j. Retrenchment of workmen & Closure of establishment

**Qualification of the Authority:** - The person should be,

- a. The Judge of High court
- b. District judge or Additional district judge (Not less than 3 years of service)
- c. Presiding officer of Labour court ( Not less than 7 years of service)

**Duties:**

- a. To adjudicate upon Industrial disputes, specified in 2<sup>nd</sup> schedule
- b. To give award within the specified period
  - Award to be in writing & signed and its published

**Power:**

- a. Power to enter premises
- b. Power of Civil court
  - Enforcing attendance
  - Compelling the submission of document
  - Issuing notice for the examination of witnesses.
- c. Power to appoint assessors (Specialists of a particular field)
- d. Power to award cost

**3. National Tribunal (Sec.7-B)**

It is constituted for the adjudication of industrial disputes which, in the opinion of the central Govt. considered as National importance or the disputes of industrial establishment situated in more than one state.

\* Qualification, Duties and Power of the Authorities are as same in Labour court and Industrial tribunal.

### **Award and Settlement**

**Award:** An interim or final determination of any industrial dispute framed by Labour court, Industrial tribunal or National Tribunal or Arbitrators.

**Settlement:** - A settlement arrived at in the course of conciliation proceedings  
- A written agreement between the employer & workmen arrived during the course of conciliation proceedings.

### **Differences between Awards and Settlements**

<b>AWARDS</b>	<b>SETTLEMENTS</b>
1. Definition of Award	1. Definition of Settlement
2. Enforceable on expiry of 30 days from its publication	2. Enforceable on the date in which the agreement is signed
3. Rejection/ modification of award is possible within 90 days	3. At any time
4. Period of operation of award is 1 year	4. The period agreed or for 6 months
5. Report should be published	5. Need not be published
6. An award can be arrived through Labour court, Industrial Tribunal and National Tribunal	6. The settlement is arrived through Conciliation.

\* **Distinction between Lay-off and Retrenchment.**

### **Strike & Lock-out**

Prohibition of Strike and Lock-out in the following cases: (Sec.22 & 23)

#### **1. Strike in a Public utility services:**

- a. Without giving to the employer notice of strike, within 6 weeks before striking
  - b. Within 14 days of giving such notice
  - c. Before the expiry of the date of strike
  - d. During any conciliation proceedings & 7 days after the conclusion
- A strike notice is valid only for 6 months.

#### **2. Lock-outs in a Public utility services:**

- a. Without giving to the employer notice of strike, within 6 weeks before striking
  - b. Within 14 days of giving such notice
  - c. Before the expiry of the date of strike
  - d. During any conciliation proceedings & 7 days after the conclusion
- A Lock-out notice is valid only for 6 months.



**3. Strike and Lock out in an Industrial establishment**

- a. During the course of any conciliation proceedings & 7 days after the conclusion
- b. During the pendency of proceeding before LC, IT and NT
- c. During the pendency of proceeding before arbitration
- d. During the period in which a settlement or award is in operation.

## UNIT – IV

### Corporate Tax Planning

#### **Tax Planning**

Tax planning can be defined as an arrangement of one's financial and economic affairs by taking complete legitimate benefit of all deductions, exemptions, allowances and rebates so that tax liability reduces to minimum.

#### **Direct Taxes**

Direct taxes are those which a person pays directly from his income, wealth, or estate. It is paid after the income or benefit reaches the hands of the person, which are Income tax, wealth tax, corporate tax and gift tax.

#### **Indirect Taxes**

Which are not directly charged from the persons, which are collected in the form of excise duty, customs duty and sales tax.

#### **Taxable Turnover**

It means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed.

#### **Tax Avoidance**

Tax avoidance is reducing or negating tax liability in legally permissible ways and has legal sanction. Tax avoidance is sound law and certainly not bad morality for anybody to so arrange his affairs in such a way that the brunt of taxation is the minimum. This can be done within the legal framework even by taking help of loopholes in the law.

#### **Tax Evasion**

All methods by which tax liability is illegally avoided are termed as tax evasion. Tax evasion may involve an untrue statement knowingly, submitting misleading documents, suppression of facts, not maintaining proper accounts of income earned (if required under law), omission of material facts on assessment.

#### **Tax Planning Vs. Tax Management**

<b>Tax Planning</b>	<b>Tax Management</b>
The objective of tax planning is to reduce the tax liability to the minimum.	The objective of tax management is to comply with the provisions of law.

Tax planning is futuristic in its approach.	Tax management relates to past (i.e., assessment proceedings, rectification, revision, appeals etc.), present (filing of return of income on time on the basis of updated records) and future (corrective action).
Tax planning is very wide in its coverage and includes tax management.	Tax management has a limited scope, i.e., it deals with specific activities such as filing of returns of income on time, drafting appeals, deduction of tax at source on time, updating records from time to time, etc.
The benefits arising from tax planning are substantial particularly in the long run.	As a result of effective tax management, penalty, penal interest, prosecution, etc., can be avoided.

### Tax Avoidance Vs. Tax Evasion

<b>Tax Avoidance</b>	<b>Tax Evasion</b>
Any planning of tax which aims at reducing tax liability in legally recognised permissible ways, can be termed as an instance of tax avoidance.	All methods by which tax liability is illegally avoided is termed as tax evasion.
Tax avoidance takes into account the loopholes of law.	Tax evasion is an attempt to evade tax liability with the help of unfair means/methods.
Tax avoidance is tax hedging within the framework of law	Tax evasion is tax omission.
Tax avoidance has legal sanction	Tax evasion is unlawful and an assessee guilty of tax evasion may be punished under the relevant laws.
Tax avoidance is intentional tax planning before the actual tax liability arises	Tax evasion is intentional attempt to avoid payment of tax after the liability to tax has arisen

### Causes of Tax evasion

1. Multiplicity of tax laws
2. Complicated tax laws
3. Higher rate of taxation
4. Inadequate information as to sources of tax revenue
5. Investment in real property

6. Ineffective tax enforcement
7. Deterioration of moral standard

#### Remedies for evasion

1. Through overhauling of tax laws
2. Reduction in tax rates
3. Replacement of sales tax & excise duties
4. Tax on agricultural income
5. Maintenance of proper accounts
6. Introduction of expenditure tax
7. Tightening of tax enforcement

#### Types of tax planning

There are four types of tax planning open to a business.

ILLEGAL	LEGAL		
Tax evasion	No tax planning	Basic tax planning	Advance tax planning
		Tax bills reduced by 5%- 20%	Tax bills reduced by 50% – 100%

#### (1) Tax evasion

All methods by which tax liability is illegally avoided are termed as tax evasion. Tax evasion may involve an untrue statement knowingly, submitting misleading documents, suppression of facts, not maintaining proper accounts of income earned (if required under law), omission of material facts on assessment.

#### (2) No tax planning

This is what many businesses do by default. They simply complete their tax returns and send them off to the taxman, having taken no prior action to arrange their affairs in such a way to legally pay less tax.

#### (3) Basic tax planning

Most businesses do this since it is what most of the accountants advising them are good at. Basic tax planning such as incorporating the business, taking dividends rather than salaries and timing when they spend money can often reduce tax bills by 5% to 20%.

#### **Various Basic methods of Tax Planning as follows :**

- a) *Short Term Tax Planning:*** Short range Tax Planning means the planning thought of and executed at the end of the income year to reduce taxable income in a legal way.
- b) *Long Term Tax Planning:*** Long range tax planning means a plan at the beginning or the income year to be followed around the year. This type of planning does not help immediately as in the case of short range planning but is likely to help in the long run ;
- c) *Permissive Tax Planning :*** Permissive Tax Planning means making plans which are permissible under different provisions of the law, such as Planning of taking advantage of different incentives and deductions, planning for availing different tax concessions etc.
- d) *Purposive Tax Planning:*** It means making plans with specific purpose to ensure the availability of maximum benefits to the assessee through correct selection of investment, making suitable programme for replacement of assets, varying the residential status and diversifying business activities and income etc.

#### **(4) Advanced tax planning**

Historically this has really only been available to the richest entrepreneurs. Indeed it has helped them become even richer as it can reduce tax bills by 50% to 100%. In recent years this has changed, and now all good accountants (including One Accounting) can access a range of advanced tax planning solutions on behalf of their clients.

#### **Central Sales Tax Act 1956 (CST Act 1956)**

**Central Sales Tax (CST):** It a tax on Inter-state sale of goods, where the buyer and seller are in different state. CST will be chargeable under the CST Act, 1956 passed by Central Govt. in parliament.

**Scope of CST**

1. To regulate or determine the sales in case of interstate trade or commerce
2. To levy tax on sale of goods in the course of Inter-state trade
3. To declare certain goods to be of special importance in the course of Inter-state trade.
4. To specify the restrictions and conditions in respect of Inter-state trade

**Sale**

Sale means transfer of property in goods by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes:

- Transfer of property in goods
- Work contract
- Hire purchase
- Right to use
- Supply of goods by unincorporated association
- Supply of food as part of any service

**Dealer:** Any person carrying on the business of buying, selling or distributing goods directly or indirectly for cash, deferred payment, commission or any remuneration.

- Business: Any trade, commerce or manufacture with or without a profit motive
- Sale: Transfer of property from one person to another for a valuable consideration.
- Goods: All materials, articles, commodities except newspapers, shares, money, claims
- Rate: As prescribed in the Act.

***Essential elements of sale:***

- Goods should be transferred
- General property in good should be transferred
- Price must be paid
- There must be a seller and a buyer
- There must be a valid consent of both buyer and seller

**Declared Goods [Section 2(C)]**

It includes those goods which are considered to be of special importance in interstate trade or commerce under section 14. Some of these goods is –

• Cereals	• Cotton	• Jute	• Pulses
• Coal	• Crude Oil	• Oilseeds	• Sugar

### Goods [section 2(d)]

This includes all material articles or commodities and all kind of movable property excluding newspapers, actionable claims, stocks, shares, and securities.

If newspapers are sold as scrap then, it will be charged to central sales tax if it is an inter- state sale.

### Important Features of this Act

1. It extends to the whole of India.
2. Every dealer who makes an inter-state sale must be a registered dealer and a certificate of registration has to be displayed at all places of his business.
3. There is no exemption limit of turnover for the levy of central sales tax.
4. Under this act, the goods have been classified as:
  - Declared goods or goods of special importance in inter-state trade or commerce and
  - Other goods.

The rates of tax on declared goods are lower as compared to the rate of tax on goods in the second category.

5. The tax is levied under this act by the Central Government but, it is Collected by that state government from where the goods were sold. The tax thus collected is given to the same state government which collected the tax. In case of union Territories the tax collected is deposited in the consolidated fund of India.
6. The rules regarding submission of returns, payment of tax, appeals etc. are not given in the act. For this purpose, the rules followed by a state in respect of its own sales tax law shall be followed for purpose of this act also.
7. Even though the central sales tax has been framed by the central government but, the state governments are allowed to frame such rules, subject to such notification and alteration as it deem fit.

### Scope of CST

1. To regulate or determine the sales in case of interstate trade or commerce
2. To levy tax on sale of goods in the course of Inter-state trade
3. To declare certain goods to be of special importance in the course of Inter-state trade
4. To specify the restrictions and conditions in respect of Inter-state trade

### Principles for determining Inter-State Sales Tax

#### The Sale or purchase

- Occasions the movement of goods from one state to another or
- Is effected by a transfer of documents to the title of goods during the movement of goods from one state to another

#### Exceptions to CST

- Sale of electric energy
- Sale to an exporter for the purpose of export (penultimate sale)
- Subsequent sale:
  - a) To registered Dealer or
  - b) To Govt.

#### Types of Goods

- Declared goods or goods of special importance: These are goods mentioned U/S 14 of CST (e.g.. Cereals, Coal, Cotton etc)
- Undeclared goods

#### Central Sales Tax rates

Types of goods	Sale to Govt.	Sale to regd. dealer	Sale to un regd. dealer
Declared goods	0% or State sales tax rate, whichever is lower. Form: D	0% or State sales tax rate, whichever is lower. Form: C	TWICE the general sales tax rate. (8%)
Undeclared goods	5% - 28 %	5% - 28 %	5% - 28 % or sales tax whichever is less

#### Penalties

- Penalties in the form of prosecution/ fine U/S 10
- Penalties in lieu of prosecution U/S 10



- Seller or buyer: Imprisonment of 6 months or fine
- Purchaser: Fine up to 1 ½ times the tax

### Forms

**Form C:** The sale is from one registered dealer to another registered dealer

**Form D:** The sale is from one registered dealer to the Government

**Form E-I:** This form is filled by the dealer who affects the first sale under the Inter-State trade or commerce.

**Form E-II:** This form is filled by the dealer who affects the subsequent sale under inter–state trade or commerce.

### Incidence of CST

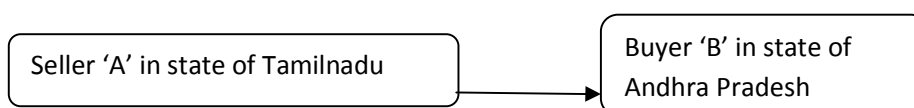
CST will be imposed/ levied on Inter-state sale of goods. It means a sale of goods shall be taken place in the course of Inter-state trade of commerce.

#### Example 1: (Case I)



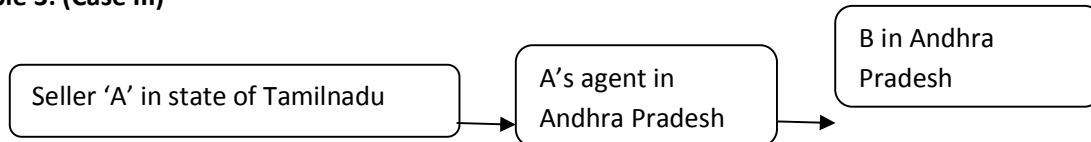
Here, dealer to delivery from TISCO factory (Bihar) as per delivery order after payment. This process is an Inter-state trade.

#### Example 2: (Case II)



Here, 'A' (Seller) sends goods to 'B' to the state Andhra Pradesh, if goods moved from Tamilnadu to Andhra Pradesh by booking the goods in the name of 'B' is an Inter-state sale.

**Example 3: (Case III)**



Here, 'A' (Seller) agrees to sell goods to 'B', but goods are booked by 'A' from the state Tamilnadu and send to Andhra Pradesh in his own name. Agent of 'A' receives the goods in the state Andhra Pradesh and supplied to 'B'. In is an Intra-state sale not an Inter-state sale

**Example 4: (Case IV):** If 'B' comes to State Tamilnadu and purchases the goods from 'A' and takes the goods to the state on his own name, it is also an Intra-state sale.

**In case of Inter-State trade/ Sale/ Commerce, the following conditions should be satisfied:**

**1. Movement of Goods from one state to another**

- a. There should be a sale
- b. There should be movement of goods from one state to another
- c. There should be physical movement of goods
- d. It is immaterial in which state the property (Ownership) of goods passes to the buyer
- e. Sale can be either before the movement or after the movement of goods
- f. Mode of transfer is immaterial. It may be aircraft, rail, ship, post, motor vehicle, etc.
- g. Sale is not a Inter-state sale, if movement of goods are not related to contract for sale
- h. If movement of goods starts from one state and ends in the same state is not an Inter-state trade. Even if during transit goods passes through other state.

**2. Transfer of Document of Title of goods**

Inter-state sale by transfer of document of title to goods during one state to another.

**Document of title of goods:** When the goods are handed over to carrier, the carrier gives a receipt to the seller. The seller sends the receipt to the buyer then the buyer gets delivery of goods on submission of that receipt to the carrier.

The receipt of carrier is called document of title of goods. It may be,

- a. Lorry receipt (LR) in case of transport by road
- b. Railway receipt (RR) in case of transport by rail
- c. Bill of Lading (BoL) in case of transport by sea
- d. Airway bill (AWB) in case of transport by air.

Transfer of document is a symbolic delivery of goods to the buyer. It carries with its full ownership of goods. Delivery of document of title is also an Inter-state sale, liable for CST.

**\*Stock transfer/ Branch transfer/ Depot transfer – is not an Inter-state sale.**

#### Incidence of Central sales tax in different situations

	<b>Declared goods</b> <b>Rate of tax</b>	<b>Undeclared goods</b> <b>Rate of tax</b>
Sale to Government on Form D	Lower of 0% or local sales rate	lower of 5% – 28% or local sales rate
Sale to registered dealer of specified goods on Form C	Lower of 0% or local sales rate	Lower of 5% – 28% or local sales rate
Tax free goods in state	Nil	Nil
Notified reduced rate on Form C and D	Notified rate	Notified rate
Other sale	Twice the local sales tax	10% or local sales tax rate whichever is higher

#### Procedure for registration of dealers

##### 1. Dealers who can apply

- Turnover of business exceeds Rs 20lakhs (Limit is Rs 10 lakhs for the North Eastern States).

- Any dealer intending to start a business
  - Casual dealer
  - Every dealer registered under the CST act
  - Dealer residing outside the state but carrying business inside the state
  - Every agent of a non-resident dealer
  - Every factor, broker, commission & Del-credere agent, auctioneer/other mercantile agent
- 2. Application for registration**
- An application in Form D should be filled
  - It should be submitted to Registering authority
  - A demand draft should be enclosed for the amount specified by the authority
- 3. Documents to be enclosed with Form D**
- 2 recent passport size photographs
  - Identity to prove his existence like passport/family card/bank pass book/driving license/VAO certificate
  - Copy of MOA and AOA in case of company
  - Copy of Partnership deed in case of partnership
  - Form XI of TNGST act signed by applicant and manager
  - Form A showing the estimated turnover for the year
- 4. Security money**
- The Registering authority may demand security equal to 50% of the tax due as estimated
  - In all cases Rs.2500/- has to be collected by way of security at the time of new registration
- 5. Issue of registration certificate**
- The commissioner issues certificate within 7days
  - If no notice been made with ref to the application within 20 days the dealer is deemed to be registered
  - Registration certificate should be renewed every yr. by paying 500 before 31st march without penalty.
  - Collection of tax by registered dealer
  - The registered dealer may collect the tax by issuing a bill in respect of every sale, in duplicate
  - One copy of the bill should be retained by the dealer to be checked by officials

#### **Amendment (Modification) to certificate of registration**

- Where the dealer has altered the name, place and nature of business
- Where the dealer has changed the class or classes of goods in which he carries on his business
- Where there is change in ownership in business and Cancellation of registration
- Under section 21(4) when he proves that his turnover in each of the 2 consecutive years immediately preceding the application was less than Rs.75000
- Cancellation or amendment by the prescribing authority

- Cancellation by the authority due to failure on the part of dealer to pay tax or penalty, declaration of false information, failure to provide security etc.,

#### **Duties of a registered dealer**

- Shall keep at the place of business, the certificate of registration, books of accounts.
- Shall notify the registering authority about the change in place of business
- Shall send bill of sale or delivery note or such documents along with the goods
- Shall furnish the returns before the due dates prescribed

### **VALUE ADDED TAX (VAT)**

**VAT is a tax on turnover and is added at every stage of manufacture or process, based on the value added at each stage.**

**VAT may be defined as “a tax to be paid by the manufacturers or traders of goods and services on the basis of value added by them”.**

It is not a tax on the total value of the commodity being sold but on the value added to it by the manufacturer or trader. They are not liable to pay tax on the entire value of the commodity. But they have to pay the tax only on the Net value added by them in the process of production or distribution.

In this tax, the seller will collect the tax only on the value added by him towards his produced goods by excluding the tax on purchase paid by him. The VAT is payable by seller who is termed as a 'dealer'.

The VAT works on the principle that when raw material passes through various manufacturing stages and manufactured product passes through various distribution stages, tax should be levied on the 'Value Added' at stage and not on the gross sales price.

Basically, VAT is multi-pint tax, with provision for granting set off (Credit) of the tax paid at the earlier stage. Thus, tax burden is passed on when goods are sold. This process continues till goods are finally consumed. Hence, VAT is termed as 'Consumption type' tax with 'destination principle'. VAT works on the principle of 'tax credit system'.



= 100 + 40 (Processing charge) = Rs.140, rate of tax is 10%

Therefore,  $140 + (140 \times 10/100)$

= 140 + 14 = Rs.154.

#### Method of Calculation of VAT

Purchase Price	Rs.100
Tax paid during purchase	Rs.10 (Input tax)
Selling price	Rs.150
Tax collected during resale	Rs.15
Input tax credit (Tax paid during purchase)	Rs.10
VAT payable (Out tax – Input tax)	Rs.5
Total tax collected by Government (At the time of purchase by dealer – Rs.10, At the time of resale by the dealer – Rs.5)	Rs.10
Total tax (Rs.10+5)	Rs.15

Details	With Sales Tax		With VAT	
	A	B	A	B
Purchases price	-	110 (with 10% input tax)	-	100
Value added	100	40	100	40
Sub total	100	150 (100+10+40)	100	140
Add Tax @ 10%	10	15	10	14
Total Sales price	110	165	110	154
Assume A & B are manufacturers. Tax revenue with Sales Tax Rs.25, with VAT Rs.14				

**Explanation:**

1. 'B' will purchase goods from 'A' @ Rs.110, which is inclusive of duty of Rs.10.
2. Since, 'B' going to get credit of duty of Rs.10, he will not consider this amount for his costing.
3. He will charge conversion expense of Rs.40 and sell his goods at Rs.140.
4. He will charge, 10% tax and raise invoice of Rs.154 to 'C' (140 + tax @ 10%)
5. In the invoice prepared by 'B', duty shown will be Rs.14. But, 'B' will get credit of Rs.10 paid on the Raw material purchased by him from 'A'.
6. Thus, effective duty paid by 'B' will be only Rs.4.
7. 'C' will get the goods at Rs.154 and Not at Rs.165, which he would have got in absence of VAT.
8. Thus, in effect, 'B' has to pay duty only on Value Added by him.

**Practical implications of VAT**

1. Goods purchased from unrecognized dealer, VAT cannot be imposed
2. VAT is tremendous paper work and record keeping
3. VAT system can work only if record keeping is proper and reliable
4. Bogus (Fake) Invoices on which tax credit is availed
5. Acquisition fraud (missing trade fraud) is possible – 'A' dealer imports goods and makes sale within the country. The dealer collects the tax from innocent buyer. 'A' does not pay tax (collected from buyer) to the Govt.
6. Carousel (round about) fraud – 'A' imports goods without tax. He sells goods to 'B' and charge VAT. 'B' avails credit of tax shown by 'A' in his Invoice.

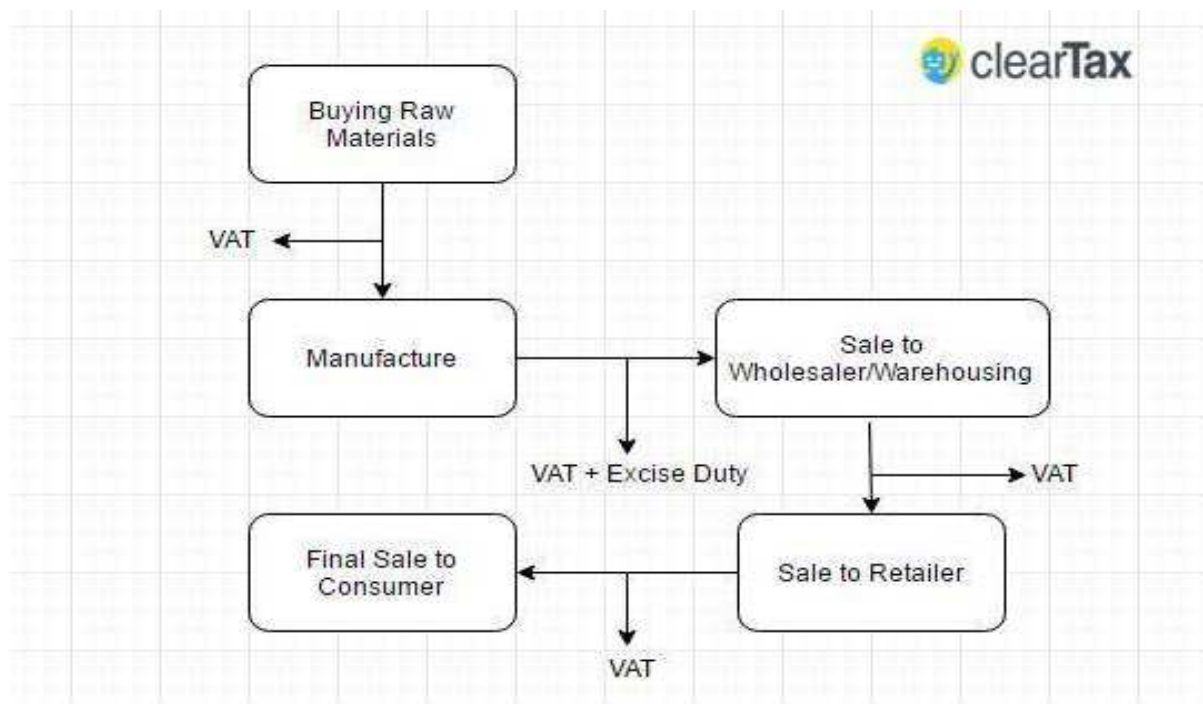
**GST - GOODS & SERVICES TAX****# What is GST?**

Goods & Services Tax Law in India is a **comprehensive, multi-stage, destination-based tax** that is levied on every **value addition**.

In simple words, Goods and Service Tax is an indirect tax levied on the supply of goods and services. GST Law has replaced many indirect tax laws that previously existed in India.

So, before Goods and Service Tax, the pattern of tax levy was as follows:





**Under the GST regime, the tax will be levied at every point of sale.**

Now let us try to understand the definition of Goods and Service Tax – “GST is a comprehensive, **multi-stage, destination-based tax** that will be levied on every **value addition.**”

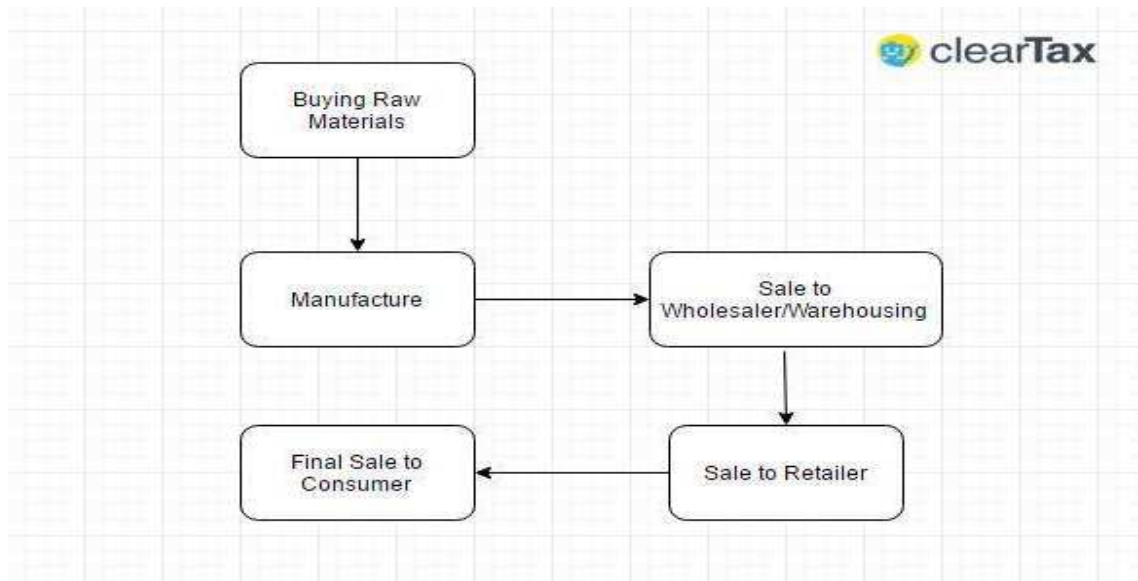
#### # Multi-stage

There are multiple change-of-hands an item goes through along its supply chain: from manufacture to final sale to the consumer.

**Let us consider the following case:**

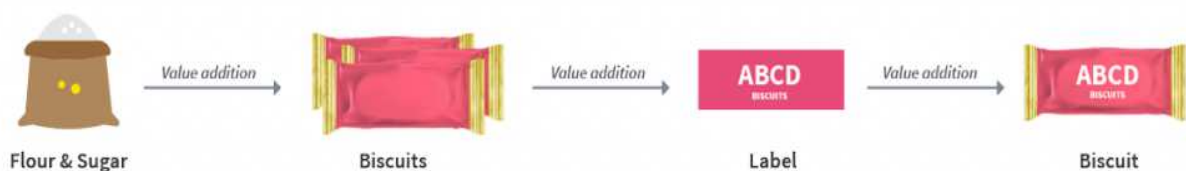
- Purchase of raw materials
- Production or manufacture
- Warehousing of finished goods
- Sale to wholesaler
- Sale of the product to the retailer

- Sale to the end consumer



Goods and Services Tax will be levied on each of these stages, which makes it a multi-stage tax.

#### # Value Addition



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The manufacturer who makes biscuits buys flour, sugar and other material. The value of the inputs increases when the sugar and flour are mixed and baked into biscuits.

The manufacturer then sells the biscuits to the warehousing agent who packs large quantities of biscuits and labels it. That is another addition of value after which the warehouse sells it to the retailer.

The retailer packages the biscuits in smaller quantities and invests in the marketing of the biscuits thus increasing its value.

GST will be levied on these value additions i.e. the monetary worth added at each stage to achieve the final sale to the end customer.

### # Destination-Based

Consider goods manufactured in Maharashtra and are sold to the final consumer in Karnataka. Since Goods & Service Tax (GST) is levied at the point of consumption, in this case, Karnataka, the entire tax revenue will go to Karnataka and not Maharashtra.

### # Advantages of GST



### # What are the components of GST?

**There are 3 taxes applicable under GST: CGST, SGST & IGST.**

- **CGST:** Collected by the Central Government on an intra-state sale (Eg: Within Maharashtra)
- **SGST:** Collected by the State Government on an intra-state sale (Eg: Within Maharashtra)
- **IGST:** Collected by the Central Government for inter-state sale (Eg: Maharashtra to Tamil Nadu)

**In most cases, the tax structure under the new regime will be as follows:**

Transaction	New Regime	Old Regime	
Sale within the State	CGST + SGST	VAT + Central Excise/Service tax	Revenue will be shared equally between the Centre and the State
Sale to another State	IGST	Central Sales Tax + Excise/Service Tax	There will only be one type of tax (central) in case of inter-state sales. The Center will then share the IGST revenue based on the destination of goods.

#### Illustration:

- Let us assume that a dealer in Gujarat had sold the goods to a dealer in Punjab worth Rs. 50,000. The GST rate is 18% comprising of only IGST.

In such case, the dealer has to charge Rs. 9,000 as IGST. This IGST revenue will go to the Central Government.

- The same dealer sells goods to a consumer in Gujarat worth Rs. 50,000. The GST rate on the good is 12%. This rate comprises of CGST at 6% and SGST at 6%.

The dealer has to collect Rs. 6,000 as Goods and Service Tax. Rs. 3,000 will go to the Central Government and Rs. 3,000 will go to the Gujarat government as the sale is within the state.

#### GST – Rates

The GST is governed by a GST Council and its Chairman is the Finance Minister of India. Under GST, goods and services are taxed at the following rates, 0%, **5%**, 12%, **18%** and **28%**. There is a special rate of 0.25% on rough precious and semi-precious stones and 3% on gold

#### Notax(0%)- Goods

No tax will be imposed on items like jute, fresh meat, fish chicken, eggs, milk, butter milk, curd, natural honey, fresh fruits and vegetables, flour, besan, bread, prasad, salt, bindi. Sindoor, stamps, judicial papers, printed books, newspapers, bangles, handloom, Bones and horn cores, bone grist, bone

meal, etc.; hoof meal, horn meal, Cereal grains hulled, Palmyra jaggery, Salt - all types, Kajal, Children's' picture, drawing or colouring book .

## UNIT – V

### CONSUMER PROTECTION ACT AND INTRODUCTION OF CYBER LAWS

#### THE CONSUMER PROTECTION ACT, 1986

The Consumer protection act is to protect interest and rights of consumers and it applies to all goods and services. The Central Govt. by notification published in the official gazette about amendment and exemptions under this act.

#### Objects of the act

1. Better protection of interest of consumers
2. Protection of rights of consumers (Sec.6)
  - The right to be protected against marketing of goods or services which are hazardous (Dangerous/Harmful) to life and property of the consumers
  - The right to be informed about the quality, quantity, potency, purity, price of goods and services
  - The right to be assured, wherever possible, access to goods at competitive price
  - To be protected against unfair trade practices
  - The right to be heard and to be assured that consumers' interest will receive due consideration
  - The right to seek redressal against unfair trade practices
  - Right to consumer education
3. Establishing and functioning consumer protection councils
4. Quasi-judicial machinery for speedy redressal of consumer disputes

**Rights of Consumers:** Sec.6 of the Act recognizes the six consumer rights. These rights are:

1. ***Right of protection to life and property:*** The right to be protected against marketing of goods which are hazardous to life and property.
2. ***Right to be informed:*** The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumers against unfair trade practices.
3. ***Right to choose:*** The right to be assured, wherever possible, access to a variety of goods and services at competitive prices.
4. ***Right to be heard:*** The right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums.
5. ***Right to redress:*** The right to seek redressal against unfair trade practices or unscrupulous (corrupt/ dishonest) exploitation of consumers; and
6. ***Right to Education:*** It means the right to acquire the knowledge and skill to be an informed consumer.

**Important definitions**

1. **Complainant:** A consumer or a voluntary consumer association or Central Govt. of State Govt. or a Legal heir to make complaint.
2. **Complaint:** Any allegation in writing made by a complainant with a view to obtaining any relief provided by or under this act.
3. **Consumer:** Any person who buys any goods for a consideration (a) which has been paid or promised or partly paid or promised of (b) under any system of deferred payment.
4. **Service:** It means service of any description, which is made available to potential users. It includes, (a) Banking (b) Financing (c) Insurance (d) Transport (e) processing (f) Supply of electric energy (g) Entertainment etc.
5. **Bargaining price:** A price that is stated in any advertisement to be a bargain price, by reference to an ordinary price.

**Unfair trade practice**

Any trader adopts any unfair methods or unfair or deceptive (Unreliable) practice for promoting the sale, etc., which includes the following:

1. Making any statement in the form of
  - a. Falsely represent about quality, quantity, grade, style, composition of a product
  - b. Falsely represent about the standard of a service
  - c. Falsely represent any re-build, second hand item as new
  - d. Represents that the seller has a sponsorship or approval (ISI) which does not have
  - e. Misleading statement about usefulness, need of a good
  - f. Giving warranty or Guarantee of the performance, efficacy without proper test
  - g. Falsely statement about the price
2. Publishing bargaining price of product but not offering it in that price
3. The offering of the gift or prizes and includes its value with selling price
4. Hoarding or destruction of goods
5. Manufacture of spurious (Imitated/Fake) goods

**Types of consumer redressal machinery under the act**

The **THREE** consumer disputes redressal agencies at the different level are as under:

- A. Consumer Disputes Redressal Forum - The District Forum - at District level
- B. Consumer Disputes Redressal Commission - The State Commission - at State level
- C. National Consumer Disputes Redressal Commission – National Commission - at National level

**A. Consumer Disputes Redressal Forum - The District Forum - at District level**

It is the redressal agency to deal with the complaints of the consumers at the District level.

Legal provisions relating to District Forum – It is as follows

**1. Composition of the district forum**

The District forum is a body of three persons appointed by the State Government. Each district forum shall consist of a President and two other members (one member should be a woman).

**2. Appointment of members of the District forum**

The appointment of the President and other members shall be made by the State Govt. with the recommendation of the President of the state commission, Secretary of Law dept. and Secretary in-charge of the dept. dealing with consumer affairs.

**3. Disqualification of members**

A person shall be disqualified for appointment as a member of the District forum in the following cases:

- a. If he has been convicted and sentenced the imprisonment for an offence
- b. If he is of un-discharged insolvent
- c. If he is of unsound mind
- d. If he has been dismissed from the service of the Govt. etc.

**4. Tennure of office of the members of the District Forum**

A person may act as a President or a member of the District Forum for 5 years or up to the age of 65 years, whichever is earlier.

**5. Jurisdiction of the District Forum**

- a. Primary jurisdiction: Complaints for the value of goods/ services and the compensation does not exceed Rs.20 Lakhs.
- b. Territorial jurisdiction: The opposite party at the time of institution of the complaint resides or Carries on business or has a Branch office or personally works for gain.

**6. Salary:** The Salary, other allowances and other terms and conditions of services of the members of the District Forum shall be prescribed by the State Government.



## **B. Consumer Disputes Redressal Commission - The State Commission - at State level**

It is a redressal agency to deal with the complaints of the consumers at the State level. This commission is established by the State Govt. by notification. Each State has a separate State Commission.

### **Legal provisions relating to State Commission**

#### **1. Composition of the State Commission**

The State Commission is a body of minimum **Three** persons appointed by the State Govt. Each State Commission shall consist of a President and atleast two other members (one member should be a woman, must not be less than 35 yrs of age, must possess a bachelor's degree, etc.). The President should be the Judge of High Court.

#### **2. Appointment of the members of the State Commission**

The appointment of the President shall be made by the State Govt. after consultation with the Chief Justice of the High court of the State and the appointment of the other members shall be made by the State Govt. with the recommendation of the President of the state commission, Secretary of Law dept. and Secretary in-charge of the dept. dealing with consumer affairs.

#### **3. Disqualification of members**

A person shall be disqualified for appointment as a member of the State Commission in the following cases:

- a. If he has been convicted and sentenced the imprisonment for an offence
- b. If he is of un-discharged insolvent
- c. If he is of unsound mind
- d. If he has been dismissed from the service of the Govt. etc.

#### **4. Tennure of office of the members of the State Commission**

A person may act as a President or a member of the State Commission for 5 years or up to the age of 67 years, whichever is earlier.

#### **5. Jurisdiction of the State Commission**

- a. *Pecuniary (financial) jurisdiction:* The State Commission has the jurisdiction to entertain complaints where the value of the goods or services and compensation claims, exceeds Rs.20 lakhs but does not exceed Rs.1 Crore.
- b. *Appellate jurisdiction:* Any person aggrieved by an order made by the District forum may appeal to State Commission within a period of 30 days from the date of order.
- c. *Revisional jurisdiction:* Any District Forum has failed to exercise its jurisdiction or has acted illegally, the State Commission has the power to call for the records and pass appropriate order in any consumer dispute which is pending in District Forum.

- d. *Territorial jurisdiction:* The opposite party at the time of institution of the complaint resides or Carries on business or has a Branch office or personally works for gain or Cause of action, wholly or in part, arises.

### C. National Commission

It is the highest body to settle disputes under this Act. It has the jurisdiction to entertain complaints on original side, to hear appeals from the orders of any State Commission.

This Commission shall ordinarily function at New Delhi and perform its functions at such other place as the Central Government notifies.

**Legal provisions relating to the National Commission are as follows:**

#### 1. Composition of the State Commission

The National Commission is a body of minimum **Five** persons appointed by the Central Govt. The National Commission shall consist of a President and at least four other members (one of whom shall be a woman, must not be less than 35 yrs of age, must possess a bachelor's degree, etc.). The President should be the Judge of Supreme Court (Sitting or Retired Supreme Court Judge).

#### 2. Appointment of the members of the National Commission

The appointment of the President shall be made by the Central Govt. after consultation with the Chief Justice of India and the appointment of the other four members shall be made by the Central Govt. with the recommendation of the selection committee consisting of (a) Sitting Judge of Supreme Court, (b) Secretary, Dept. of Legal affairs, Govt. of India, (c) Secretary, Dept. dealing with consumer affairs in the Govt. of India.

3. **Disqualification of the members:** These disqualifications are the same as already discussed in case of members of District Forum and of State Commission.

#### 4. Tenuure of office of the members of the District Forum

A person may act as a President or a member of the District Forum for 5 years or up to the age of 70 years, whichever is earlier. It is noted that the members including the President shall be eligible for reappointment for another 5 years (But age should not exceed 70 years).

#### 5. Jurisdiction of the National Commission

- a. *Pecuniary (financial) jurisdiction:* The National Commission has the jurisdiction to entertain complaints where the value of the goods or services and compensation claims, exceeds Rs.1 Crore.
- b. *Appellate jurisdiction:* Any person aggrieved by an order made by the State Commission may appeal to National Commission within a period of 30 days from the date of order.

- c. *Revisional jurisdiction:* Any State Commission has failed to exercise its jurisdiction or has acted illegally, the National Commission has the power to call for the records and pass appropriate order in any consumer dispute which is pending in State Commission.

### **Procedure for consumer grievances redressal**

The Redressal procedure starts by filing a complaint before the competent authority. The complainant or his authorised agent can file the complaint in person, along with the prescribed fee.

The complainant can also be sent by post to the appropriate consumer forum. Minimum 04 copies of signed complaint should be filed to the President of the appropriate consumer forum and should contain the following information:

- a. Name, description and address of the complainant
- b. Name, description and address of the opposite party/parties
- c. Facts relating to complaint and when and where it arose
- d. Documents, if any, in support of allegations contained in the complaint
- e. Relief which the complainant is seeking

#### **I. Persons competent to file the complaint:** The complaint can be filed by the following persons

- a. *A consumer:* A consumer to whom the goods are sold or agreed to be sold or to whom the services are provided or agreed to be provided.
- b. *One or more consumers:* Where there are numerous consumers having the same interest then with the permission of the District forum, any one or more of them can file the complaint on behalf of all
- c. *Any recognized consumer association*
- d. *Central or State Govt.*

#### **II. Where the complaint is to be filed**

The complaint is to be filed to any competent redressal agency depends upon the value of the goods or services, which is as under

- a. If the value of the goods or services and the compensation does not exceed 20 lakhs,- to the District forum
- b. If, Claim exceeds rupees 20 lakhs but does not exceed one Crore – to State commission
- c. If, claim exceed rupees one Crore, then the complaint is to be filed in the National Commission

**III. What complaint may be lodged:** A complaint may relate to one or more of the following:

- a. An unfair/ restrictive trade practices has been adopted by the seller
- b. Goods are in defects
- c. Service/ availed goods are suffer from deficiency in any respect
- d. Trader charged more than MRP
- e. The goods which will be hazardous to life and safety when used

**IV. Limitation period within which the complaint is to be filed**

The complaint before the concerned consumer forum should be filled **within Two years** from the date on which the cause of action has arisen. However, a complaint may be entertained after the expiry of this limitation period (two year), if the complainant satisfied the concerned consumer forum with sufficient cause for not filing the complaint within such period

**V. Procedure on receipt of complaints**

On receipt of the complaint, the District Forum may allow the complaint to be proceeded. The admissibility of the complaint shall ordinarily be decided by the District Forum within 21 days from the date of receipt of the complaint. Once a complaint has been admitted by the District Forum, it shall not be transferred to any other court.

**VI. Procedure on admission of complaint:**

The procedure to be followed would be depends upon the nature of the complaint:

1. If the complaint relates to any defect in goods, Section 13(1) shall be followed:
  - a. Reference of sample to laboratory
  - b. Deposit of fees
  - c. Remission of fees to laboratory and forwarding of report to opposite party
  - d. Objections by any of the parties
  - e. Reasonable opportunity to parties of being heard and issue of order
2. If the complaint relates to any defect in services, Section 13(2) shall be followed:
  - a. Settlement of dispute – though ex-parte on the basis of evidence
  - b. Proceedings of the district forum final.

**V. Time limit for disposal of complaint**

- a. Where the complaint does not require analysis or testing of commodities – The complaint shall be disposed within a period of **Three months** from the date of receipt of notice by the opposite party.
- b. Where the complaint requires analysis or testing of commodities – The complaint shall be disposed within a period of **Five months** from the date of receipt of notice by the opposite party.

## **Information Technology Act 2000 & 2002**

IT Act 2000 & 2002 aims to provide the legal infrastructure for e-commerce in India, enables the conclusion of contracts and the creation of rights and obligations through the electronic medium. The Cyber laws are contained in the IT act 2000 & 2002.

### **Objectives of the Act**

- a. To grant legal recognition for transactions carried out by e-commerce
- b. To give legal recognition to digital signature for authentication
- c. To facilitate electronic filing of documents with Govt. departments
- d. To facilitate electronic storage of data
- e. To facilitate and give legal sanction to Electronic fund transfer
- f. To give legal recognition for keeping books of accounts by bankers in electronic form

### **Digital signature**

It means authentication of any electronic record by a subscriber by means of an electronic method or procedure.

## **CYBER LAW**

**Cyber law:** It is a Law amended to prevent and regulate computer related crimes and offences.

### **Prevention of Computer crimes/ cyber crimes**

- a) **By educating everyone**
  - Understand how technology can be used to help & hurt
  - Think about computer pirate etc.
- b) **By practicing safe computing**
  - Always ask – who has access to my log in address

### **List of Cyber crimes and Cyber offences (U/s.65 to 78)**

1. **Tampering with computer source documents** – conceal/ destroy/ alter any computer source code used for a computer programme/ system/ network.  
If any person knowingly or intentionally conceals, destroys or alters computer source code used in computer programmes or computer is an offence (Punishment upto 3 years imprisonment or fine of Rs.2,00,000 or both).
2. **Hacking with computer system** – Unauthorised access to computer network and damaging information in PC.  
\* Hacking with company: Breaking in to Computer system or Network
3. Publishing of information which is obscene (Highly offensive) in electronic form.
  - Punishment for sending offensive messages through communication service, etc.

Any person sends, by means of a computer resource or a communication device,

- Any information has menacing (threatening) character
- Any information which is false, but to causing annoyance (irritate), inconvenience, danger, insult, criminal intimidation, injury, etc.

4. **Mis-representation** – Mis representation of any package which is authorized or licensed
5. **Financial crimes** – It includes cheating, credit card frauds etc.,
6. **Cyber pornography** – That is representation of sexual activities
7. **Sale of illegal articles** – Sale of any illegal articles by using computers, i.e., Sale of drugs, weapons and wild life. Eg.: In India ‘cocaine’ was sold in the name of ‘honey’.
8. **On-line gambling**
9. **Intellectual property crimes** – Software piracy, trade mark violations, theft of computer source code.
10. **Forgery** – Forgery of currency notes, postage or revenue stamps or mark sheets by using computer/ printer/ scanners
11. **Cyber defamation** – Publishing false/ wrong statement that damaging to a person’s reputation.
12. **Cyber stalking** – Following a person’s movement, by e-mail, that is bombarding the victim
13. **E-mail bombing** – Sending threatening e-mail and e-mail frauds.
14. **Data diddling** (cheating) – Altering raw data just before it is processed by a company and changing it back after the processing is completed.
15. **Virus/ worm attacks**
16. **Internet time thefts**
17. **Web jacking** – forcefully takes control of a website
18. **Theft of computer system (PCs)**

### **Cyber law Offences**

1. Punishment for dishonestly receiving stolen computer resource or communication device
2. Punishment of identity theft: Whoever, fraudulently or dishonestly makes use of the electronic signature, password or any other unique identification code of other person, shall be punishable.
3. Punishment for cheating by personating by using computer resource: Whoever, by means of any communication device cheats by personating shall be punishable.
4. Punishment for violation of privacy: Whoever, intentionally or knowingly captures (images), published/ transmits the image of a private area of any person and violating the privacy of that other person.
5. Punishment for cyber terrorism

- a. With intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people
  - b. Usage of any information, data or computer data base against the interest of the sovereignty and integrity of India.
6. Punishment for publishing or transmitting obscene material in electronic form
  7. Punishment for publishing or transmitting of material containing sexually explicit act, etc.
  8. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form
    - Create text digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner and facilitating abusing children online, etc.
  9. Preservation and retention of information by intermediaries
  10. Penalty for misrepresentation
  11. Penalty for breach of confidentiality and privacy
  12. Punishment for disclosure of information in breach of lawful contract
  13. Confiscation (deletion).

### **Cyber Regulations Appellate Tribunal**

1. Establishment : By Central government by notification in official gazette
2. Composition of Tribunal : One person only (Presiding officer)
3. Qualification of Presiding officer
  - Judge of High court or
  - Member of Indian legal services in I-Grade services for at least 3 years
4. Term of office of Presiding officer – 5 years or Until he attains the age of 65 years
5. Staff of Tribunal : All the required staff are provided by Central government and their salary, allowances, etc. also provided by the Central Govt.
6. Functions
  - Summoning & enforcing the attendance of any person and examining him
  - Requiring production of documents/ electronic records
  - Receiving evidence
  - Reviewing its decision
  - Dismissing any application

## **Intellectual Property Rights (IPR)**

### What is Intellectual Property?

Intellectual Property refers to creations of mind i.e. *inventions, industrial designs for article, literary & artistic work, symbols, names and images etc.* used in commerce.

Intellectual property is divided into **two** categories:

- a. **Industrial property**, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source: and
- b. **Copyright** - Covers literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures) and architectural design.

Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and broadcasters in their radio and television programs.

According to the *TRIPS (Trade Related Intellectual Properties) Agreement*, the intellectual property has been classified into-Patents, *Industrial Designs, Trade Marks, Copyright, Geographical Indications, Layout Designs of Integrated Circuits, Protection of Undisclosed Information/Trade Secrets.*

**Intellectual property (IP)** is a term referring to a number of distinct types of creations of the mind for which a set of [exclusive rights](#) are recognized—and the corresponding fields of [law](#). Under intellectual property law, owners are granted certain exclusive rights to a variety of [intangible assets](#), such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property rights include [copyrights](#), [trademarks](#), [patents](#), [industrial design rights](#) and [trade secrets](#) in some jurisdictions.

The *Convention Establishing the World Intellectual Property Organization* (1967) gives the following list of subject matter protected by intellectual property rights:

- literary, artistic and scientific works;
- performances of performing artists, phonograms, and broadcasts;
- inventions in all fields of human endeavor;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and
- “All other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”

### World Intellectual Property Organization (WIPO)



Established in 1970, the World Intellectual Property Organization (WIPO) is an international organization dedicated to helping ensure that the rights of creators and owners of intellectual property are protected worldwide, and that inventors and authors are therefore recognized and rewarded for their ingenuity.

## **COPYRIGHT**

Copyright is the exclusive right given by law to the creators of literary, musical and artistic worlds, films and records. Copyright laws grant authors, artists and other creators' protection for their literary and artistic creations, generally referred to as "works". The person who created the work will be called as "Author".

The creators of literary works and artistic works such as writer, poets, composers of music and artists have rights of ownership of their works. These rights are afforded legal protection to prevent unlawful re-protection of such works.

Copyright is an exclusive right to dispose sell and commercially exploit an intellectual work, by means of printing, lithography, graphic protection, copying, moulds, photography, a cinematography film, gramophone record, or rolls for mechanical instruments, concerts, oral delivery or recitation, the clerical representation, translation, adaptation, performance, broadcast transmission or any other form of reproduction, multiplication of copies or dissemination.

### **What is copyright?**

Copyright protects the following categories of published and unpublished works for specified periods of time.

The eight categories of works protected by copyright and relevant examples include:

- Literary Works – (for example, emails and newspaper articles)
- Dramatic Works – (for example, plays)
- Musical Works – (for example, songs, musical scores and soundtracks)
- Artistic Works – (for example, paintings, photographs and images)
- Films – (for example, videos and cinematic performances)
- Sound Recordings – (for example, oral history tapes and recorded lectures)
- Broadcasts – (for example, TV and radio)
- Typographic Works – (for example, the arrangement of websites and Translations).

### **What rights do copyright and related rights provide? – Rights of Owner/Author**

The creators (Author) of works protected by copyright, and their heirs and successors (generally referred to as "right holders"), have certain basic rights under copyright law.

- a. To reproduce the work in any material form, including its storing in an electronic medium
- b. To publish the work
- c. To perform the work in public
- d. To make any cinematographic film

- e. To make any translation
- f. To make copies of the film
- g. To broadcast or other means

### **Duration of Copyright protection**

Copyright protection is available only for a limited number of years.

- a. In the case of literary, dramatic, musical or artistic work (other than photograph), when published during the lifetime of the author, copyright subsists first during the lifetime of the author. In addition, it subsists for the next 60 years from the death of the author.
- b. In the case of literary, dramatic, musical or artistic work (other than photograph), which is anonymous, copyright for 60 years from the date of publication.
- c. The copyright for a photograph and films is for a period of sixty years from the year of its publication.

## **TRADEMARK**

### **What is a trademark?**

A trademark is a distinctive sign that identifies certain goods or services produced or provided by an individual or a company.

Its origin dates back to ancient times when craftsmen reproduced their signatures, or “marks”, on their artistic works or products of a functional or practical nature. Over the years, these marks have evolved into today’s system of trademark registration and protection. The system helps consumers to identify and purchase a product or service based on whether its specific characteristics and quality – as indicated by its unique trademark – meet their needs.

### **What do trademarks do?**

Trademark protection ensures that the owners of marks have the exclusive right

- To use them to identify goods or services, or
- To authorize others to use them in return for payment.
- Trademarks promote initiative and enterprise worldwide by rewarding their owners with recognition and financial profit.
- Trademark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services.

### **What kinds of trademarks can be registered?**

- Trademarks may be one or a combination of words, letters and numerals.
- They may consist of drawings, symbols or three dimensional signs, such as the shape and packaging of goods.
- Non-traditional marks, such as holograms, motion, color and non-visible signs (sound, smell or taste).

- Collective marks are owned by an association whose members use them to indicate products with a certain level of quality. Such associations might represent, for example, accountants, engineers or architects.
- Certification marks, for example, “ISO 9000” quality standards and Eco-labels for products with reduced environmental impact.

### **How is a trademark registered?**

First, an application for registration of a trademark must be filed with the appropriate national or regional trademark office. The application must contain a clear reproduction of the sign filed for registration, including any colors, forms or three-dimensional features. It must also contain a list of the goods or services to which the sign would apply.

The sign must fulfill certain conditions in order to be protected as a trademark or other type of mark. It must be distinctive, so that consumers can distinguish it from trademarks identifying other products, as well as identify a particular product with it. It must neither mislead customers nor violate public order or morality.

Finally, the rights applied for cannot be the same as, or similar to, rights already granted to another trademark owner. This may be determined through search and examination by national offices, or by the opposition of third parties who claim to have similar or identical rights.

## **PATENT**

### **What is a Patent?**

A patent is an exclusive right granted for an invention – a product or process that provides a new way of doing something, or that offers a new technical solution to a problem. A patent provides patent owners with protection for their inventions. Protection is granted for a limited period, generally 20 years.

### **Why are patents necessary?**

Patents provide incentives to individuals by recognizing their creativity and offering the possibility of material reward for their marketable inventions. These incentives encourage innovation, which in turn enhances the quality of human life.

### **What kind of protection do patents offer?**

Patent protection means an invention cannot be commercially made, used, distributed or sold without the patent owner’s consent. Patent rights are usually enforced in courts that, in most systems, hold the authority to stop patent infringement (violation).

### **Rights of patent owners (Patentees)**

**The person in whose favour a patent is granted is called a Patentee.**

- A patent owner has the right to decide who may – or may not – use the patented invention for the period during which it is protected.

- Patent owners may give permission to, or license, other parties to use their inventions on mutually agreed terms.
- Owners may also sell their invention rights to someone else, who then becomes the new owner of the patent. Once a patent expires, protection ends and the invention enters the public domain. This is also known as becoming off patent, meaning the owner no longer holds exclusive rights to the invention, and it becomes available for commercial exploitation by others.

### **What can be Patented?**

- For an invention (Invention means, a new product or process involving an inventive step and capable of industrial application).
- Permitting only process patenting of drugs – Through ‘reverse engineering’.
- The new invention should not be a mere rearrangement or duplication of known devices
- It should not be a substance obtained by a mere admixture of components thereof
- It should not be a discovery of living or non living thing substance occurring in nature
- No patent for new medicine or chemical product. However, if a person comes up with a new process, whether it is for making a new product/ existing product, he can claim a patent for the process.
- A new antibiotic is a product invention – its process of making the substance is an invention, can be patentable.

**Important Note: The patentable invention/ idea must fulfill three requisites of novelty/ inventiveness, non-obviousness and usefulness.**

### **How is a patent granted?**

The first step in securing a patent is to file a patent application. The application generally contains the title of the invention, as well as an indication of its technical field. It must include the background and a description of the invention, in clear language and enough detail that an individual with an average understanding of the field could use or reproduce the invention. Such descriptions are usually accompanied by visual materials – drawings, plans or diagrams – that describe the invention in greater detail. The application also contains various “claims”, that is, information to help determine the extent of protection to be granted by the patent.

**As per the Indian Patent Act, 1970, the period of a patent right for all inventions is 20 years.**

## COMPETITION ACT 2002

The Competition bill having been passed by both the houses of Parliament received the assent of the President on 13<sup>th</sup> January 2003. It came on the Statute book as “The Competition Act 2002” and replaces the MRTP (Monopolies and Restrictive Trade Practices) Act 1969.

### Objectives of the Act

An act 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 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 there-with or incidental there to.

### Main focus/ Major Prohibitions of the Competition act 2002 – U/S. 3 to 6

Or

### Core of the law relating to Competition

#### *Sec.3 – Prohibition of entering into anti-competitive agreements*

The enterprises or persons shall not enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods to affect competition (to have an appreciable adverse effect on competition) in India. If so, it is void.

**That is:-** Any agreement entered into between enterprises/ Associations of enterprises to

- Directly or indirectly determines purchase or sale prices
- Limits or controls production, supply, markets, technical development, investment or provision of services
- Shares the market based on geographical locality, type of goods or services, number of services among them.
- Directly or indirectly results in bid rigging/ collusive bidding/ Cartel

**Bid rigging** is a form of fraud in which a commercial contract is promised to one party even though for the sake of appearance several other parties also present a *bid*.

**Collusive bidding** refers to agreements by contractors or suppliers in a particular trade or area to cooperate to defeat the competitive bidding process in order to inflate prices to artificially high levels.

**Bid-rigging/ Collusive bidding:** Any agreement between enterprises engaged in similar production, reducing the competition or purposefully affects the process of bidding.

**Cartel:** An association of producers, sellers or distributors, who by agreement among themselves, limit or control production, distribution or sale of goods.

#### **Sec.4 – Prohibition of Abuse of dominant position**

Sec.4 prohibits abuse of dominant position by any enterprise, such as

- a. Directly or indirectly impose unfair or discriminatory – Selling the goods at ‘Predatory’ price (Sale of goods at a price which is below the cost to eliminate competition)

- b. Limits or restricts production of goods
- c. Indulges in practices resulting in denial or market access
- d. Concluding contract
- e. Uses its dominant position
- f. Operate independently of competitive forces prevailing in the relevant market
- g. Affect its competitor or consumers in its favour

### **Sec.5 & 6– Regulation of Combinations**

**Combination** – The acquisition of one or more enterprises by one person or merger or amalgamation of enterprises shall be a combination.

No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be a void.

No combination shall come into effect *until 210 days* have passed from the day on which the notice has been given to the Commission under sub-section or the commission has passed orders, whichever is less.

The Commission shall, after the receipt of notice, deal with such notice in accordance with the provisions contained in Secs.29, 30 and 31. These sections deal with

- (i) Procedure for investigation of combination (Sec.29)
- (ii) Inquiry into disclosures (Sec.30) and
- (iii) Orders of the Commission on certain combinations (Sec.31)

#### ***Combination in the following forms***

- Acquisition of control, shares, voting rights or assets
- Acquisition of control over production, distribution or trading
- Merger or amalgamation

### **Competition Commission of India**

The Central Government has established a Commission called “Competition Commission of India” for the purpose of implementation the Competition act, 2002.

#### **Duties of Commission**

- a. To eliminate practice having adverse effect on competition
- b. To promote and sustain competition
- c. To protect the interests of consumers, and
- d. To ensure freedom of trade carried by other participants in markets in India

#### **Powers and Functions of Commission**

##### **1. Inquiry into certain agreements – any alleged contravention of the provisions**

The Commission shall, while determining whether agreements have an appreciable adverse effect on competition under Sec.3, have due regard to all or any of the following factor, namely:-

- a. Creation of barriers to new entrants in the market

- b. Driving existing competitors out of the market
- c. Foreclosure of competition (Anti-competitive practices) by hindering (Obstruct) entry into the market
- d. Accrual (increase) of benefits to consumers
- e. Improvements in production or distribution of goods or provision of services
- f. Promotion of technical, scientific and economic development

## **2. Inquiry whether an enterprise enjoys dominant position**

The Commission shall, while inquiring whether an enterprise enjoys a dominant position or no under Sec.4, have due regard to all or any of the following factors, namely:-

- i. Market share of the enterprise
- ii. Size and resource of the enterprise
- iii. Economic power of the enterprise
- iv. Dependence of consumers on the enterprise
- v. Market structure and size of the market, etc.

## **3. Inquiry into combination by commission**

For the purpose of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factor, namely:-

- a. Level of combination in the market
- b. Effect of combination on price increase
- c. Availability and effect of substitutes in the market
- d. Possibility of failing business
- e. Whether the benefits of the combination outweigh the adverse impact of the combination, etc.