



**The Power to Empower**

# **FICCI Ladies Organisation**

**presents**

# **A HANDBOOK ON**

# **BUSINESS LAWS**

# **IN INDIA**



**Compiled and written by**



**cyril amarchand mangaldas**  
advocates & solicitors



## FICCI Ladies Organisation

- FLO is the women wing of the Federation of Indian Chamber of Commerce & Industry (FICCI).
- An all India forum for women, FLO has its headquarters in New Delhi, with 14 chapters covering different geographical regions of India.
- FLO represents over 5000 women entrepreneurs and professionals.
- With over 34 years of experience, FLO has been promoting entrepreneurship and professional excellence among women through workshops, seminars, conferences, training and capacity building programmes etc.
- The objective of the organization is to encourage and facilitate women to showcase their talents, skills, experiences and energies across sectors and verticals of the economy, for a truly inclusive economic growth trajectory.

### We work with women at 3 levels

Grassroots	Middle level	Senior level
<ul style="list-style-type: none"> <li>□ Entrepreneurship and Skill Development programs to make women more employable and absorbable in markets.</li> </ul>	<ul style="list-style-type: none"> <li>□ To help women set up their own business</li> </ul>	<ul style="list-style-type: none"> <li>□ To promote more women in leadership and board positions</li> </ul>

### Methodology used:

- Awareness Programmes □ Long-Term Projects
- Policy Advocacy □ Consultancy Services
- Training □ Recognition & Mentoring
- Research & Publications □ International Connections

## Preface

(From the desk of the President of FLO)



Women entrepreneurs make a significant contribution to the Indian economy. According to an International Financial Corporation (IFC) report, there are nearly 3 million micro, small and medium enterprises owned or partially owned by women. Collectively, women enterprises contribute only 3.09% of the industrial output of the country, although they employ over 8 million women. Women primarily work in the micro or small scale sector. The potential for women to contribute more effectively to the Indian economy is enormous.

Access to formal finance, lack of knowledge of opportunities, legal tools available, social & cultural biases are key factors in inhibiting the growth of women's entrepreneurship.

The FLO Advocacy and Legal Cell was launched in 2016, with the aim of equipping women with legal and political tools to effectively participate in decision making at all levels and influence discourse in the country in a gender equitable way. It, eventually hopes to channelize the collective voice of women into policy making for the equitable sharing of resources.

In this attempt to publish a Handbook on Business Laws with Cyril Amarchand Mangaldas Advocates and Solicitors

(CAM), FLO hopes to give women a ready reckoner to understand how to set up a business and run it effectively.

I thank CAM for taking the lead in putting this book together. I acknowledge the extensive hard work and expertise that they have put into compiling it. This handbook is user friendly and easy to navigate, and I am sure that women in the country will find it extremely useful.

I am thankful to Reena George, Head of the FLO Advocacy and Legal Cell for the idea and the execution of this handbook.

Special thanks to Archana Garodia Gupta, Vinita Bimbhet, Aarti Rajkumar, Joyshree Das Verma, Sunitee Abbi, Poonam Mahajan, Shruti Garodia and Rashmi Sarita for their inputs and contribution.

Best Regards,  
**Vasvi Bharat Ram**  
 National President 2017-18  
 FICCI Ladies Organisation

## Introduction

(From the desk of the Managing Partner of  
Cyril Amarchand Mangaldas)



The Indian economy is progressively regaining its momentum as 2018 dawns and is again at the cusp of becoming the next global powerhouse. Last year brought in many big reforms which will have a deep-rooted impact on doing business in India. These include the introduction of a unified indirect taxation regime in the form of Goods and Service Tax, adoption of the Insolvency and Bankruptcy Code, continued liberalization of foreign investment rules and falling barriers to entry as well as attempts at addressing corruption and streamlining the regulatory landscape.

These efforts have not gone unnoticed, with India breaking into the top 100 of the 'Ease of Doing Business' rankings published by the World Bank. The beginning of 2018 has demonstrated that India's focus this year continues to remain on easing the long standing regulatory pain points. We are living in exciting and interesting times - be it from a political, economic or regulatory perspective, and global capital will find India as one of the best opportunities (despite all its challenges).

I thank the FICCI Ladies Organisation for giving us this opportunity to come up with this book. I believe this book will help provide to entrepreneurs who wish to set up businesses, and do not know how to model it, a comprehensive guide on relevant subjects. As such, it is my fond hope that this book motivates people and provides solutions to their ideas.

As a handbook it aims to cover the full range of issues that relate to a business. Each aspect is covered in a set of

easy to understand articles covering the important point that must be understood. Being available on the FICCI's website, it is openly accessible to the smallest business. Therefore, it is a useful value addition to FICCI Ladies Organisation to support small and new businesses. While the handbook can in no manner exhaustively cover all possible business laws in India, it makes a solemn effort to guide aspiring individuals and groups and especially women towards kick starting and achieving their professional goals. The handbook discusses a broad range of topics which include laws governing the setting-up of business, contractual relationships, property, consumer protection, intellectual property, taxation and labour and employment.

It has been an honour for us to partnership with the FICCI Ladies Organisation who we believe are providing the guidance and encouragement to entrepreneurs.

We hope we can work on other initiatives together.

Cyril Shroff  
Managing Partner  
Cyril Amarchand Mangaldas  
cyril.shroff@cyrilshroff.com  
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## Glossary of Terms

<b>Air Act</b>	Air (Prevention and Control of Pollution) Act, 1981
<b>AoP</b>	Association of Persons
<b>AY</b>	Assessment Year
<b>CGST</b>	Central Goods and Service Tax
<b>Companies Act</b>	Companies Act, 2013
<b>CS Act</b>	Cooperative Societies Act, 1912
<b>Composition Scheme</b>	Composition Levy Scheme
<b>Consumer Act</b>	Consumer Protection Act, 1986
<b>CLRA</b>	Contract Labour (Regulation and Abolition) Act, 1970
<b>CIRP</b>	Corporate Insolvency Resolution Plan
<b>District Forum</b>	District Consumer Dispute Redressal Commission
<b>DDT</b>	Dividend Distribution Tax
<b>Compensation Act</b>	Employees' Compensation Act, 1923
<b>EPF Act</b>	Employees' Provident Funds and Miscellaneous Provisions Act, 1952
<b>Remuneration Act</b>	Equal Remuneration Act, 1976
<b>ESI Act</b>	Employees' State Insurance Act, 1948
<b>Firm</b>	Partnership Firm
<b>FSS Act</b>	Food Safety and Standard Act, 2006
<b>FSS Regulations</b>	Food Safety and Standard (Licensing and Regulation of Food Business) Regulations, 2011
<b>FY</b>	Financial Year
<b>GST</b>	Goods and Service Tax
<b>GST legislations</b>	CGST Act, 2017, State GST Act, 2017 and Integrated GST Act, 2017 (colly, individually, as the case may be)
<b>IBC</b>	Insolvency and Bankruptcy Code 2016
<b>Contract Act</b>	Indian Contract Act, 1872
<b>ID Act</b>	Industrial Disputes Act, 1947
<b>IGST</b>	Integrated GST
<b>IT Act</b>	Income Tax Act, 1961
<b>Legal Notice</b>	A legal notice issued to the drawer of a dishonoured cheque for demanding payment of an amount within 30 (Thirty) days from the date of receipt of information from the bank as regards bouncing of the cheque
<b>LLP</b>	Limited Liability Partnership
<b>LLP Act</b>	Limited Liability Partnership Act, 2008
<b>Master Circular</b>	RBI's Master Circular on Policy Guidelines on Issuance and Operations of Prepaid Instruments in India dates July 14, 2016
<b>Maternity Act</b>	Maternity Benefit Act, 1961
<b>MCS Act</b>	Multi-State Cooperative Societies Act, 2002
<b>Minimum Wages Act</b>	Minimum Wages Act, 1948
<b>National Commission</b>	National Consumer Dispute Redressal Commission
<b>NCLT</b>	National Company Law Tribunal
<b>NI Act</b>	Negotiable Instruments Act, 1881
<b>O&amp;M</b>	Operation and Mismanagement
<b>PAN</b>	Permanent Account Number
<b>Partnership Act</b>	Partnership Act, 1932
<b>Bonus Act</b>	Payment of Bonus Act, 1965

<b>PCBs</b>	Pollution Control Boards
<b>Gratuity Act</b>	Payment of Gratuity Act, 1972
<b>POSH</b>	Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
<b>Settlements Act</b>	Payment and Settlements Act, 2007
<b>Wages Act</b>	Payment of Wages Act, 1936
<b>Property Act</b>	Transfer of Property Act, 1882
<b>RBI</b>	Reserve Bank of India
<b>S&amp;E Act</b>	Shops and Establishment Act
<b>SGST</b>	State Goods and Services Act
<b>Specific Relief Act</b>	Specific Relief Act, 1963
<b>State Commission</b>	State Consumer Disputes Redressal Commission
<b>State PCB</b>	State Pollution Control Board
<b>TAN</b>	Tax Deduction Account Number
<b>Water Act</b>	Water (Prevention and Control of Pollution Act), 1974

## Chapter 1

# CHOOSING A BUSINESS FORM AND ORGANISATION IN INDIA

### I. Introduction

While commencing a new business in India, choosing the right form of business organisation becomes a critical aspect. Given the long term commitment involved in such an initiative, this crucial decision should be made after considerable thoughts and deliberations. The different factors that may be considered while choosing a business include: nature of business activity, scale of operations (large, medium or small), capital requirements, degree of risk and liability, market area (local, national or international) degree of control and power, tax implications, stability, and division of profits and losses.

Primay forms of business organisations include sole proprietorship, company, limited liability partnership, partnership, cooperative and franchise. There are different legislations governing each of these entities. Every type of business organisation has its own merits and demerits.

Each of the aforementioned forms of businesses, have been discussed in detail below.

### II. Different forms of Business Organisations: Conceptual Overview and Key Considerations

#### A. Sole Proprietorship

##### Overview

A sole proprietorship is a form of business organization which is managed and owned by a single person. Although the proprietor has the option of engaging more number of people in such a form of business, the owner is personally liable for all financial obligations of the business. This kind of a business structure is the most prevalent form of business organization for small scale business operations.

Since the proprietor and the business form one legal entity in case of a sole proprietorship, the proprietor is entitled to the entire profits of the business and is solely responsible for any liability that is incurred during the course of such business.

##### Legislation governing Sole Proprietorship

There is no legislation exclusively governing sole proprietorship in India, therefore, registration is not necessary for a sole proprietorship. However, certain registration requirements under local laws may apply depending on the nature of the business activity being undertaken by the sole proprietorship.

##### Advantages of Sole Proprietorship

Some of the advantages of sole proprietorship are: (i) easy to form and wind up; (ii) complete ownership over the business resulting in quick decision making; (iii) high level of confidentiality over the affairs of the business; and (iv) no profit sharing.

A person may choose a sole proprietorship as a form of business if he or she wishes to work as any of the following, or such other businesses:

- Wedding planner
- Managing a guest house
- Running a tutorial
- Yoga teacher
- Catering services
- Photographer
- Restaurant Business

##### Disadvantages of Sole Proprietorship

Some of the disadvantages of sole proprietorship are: (i) unlimited liability; (ii) limited capital can be raised; (iii) no perpetual succession; and (iv) not suitable for large scale operations.

##### Dissolution

A sole proprietorship can be dissolved at any time at the will of the proprietor. The proprietor should ensure that all the outstanding debts of the business are paid off before the business is put to an end. Further, the proprietor must also collect all outstanding money from its creditors.

#### B. Limited Liability Partnership

##### Overview

A Limited Liability Partnership (“LLP”) firm is a body corporate with a distinct legal entity independent from its partners. LLPs which provides a flexible alternative to the concept of traditional partnership governed by the Indian Partnership Act, 1932. Since an LLP is a separate legal entity, it is liable to the full extent of its assets with the liability of partners being limited to their agreed contribution which may be of tangible or intangible nature, or both. Therefore, an LLP contains elements of both a corporate structure as well as a partnership firm structure.

Partnerships and LLPs as a form of business may be suitable for the conduct of the following businesses/ professions:

- Chartered Accountancy
- Advocacy
- Engineering
- Architectural Firm
- Medical Practise

## Legislation governing Limited Liability Partnership

LLPs in India are governed by the Limited Liability Partnership Act, 2008 (“LLP Act”) and the relevant rules made thereunder. The LLP Act defines an LLP to mean a partnership formed and registered under the LLP Act.<sup>1</sup> A LLP consists of a minimum of 2 (Two) partners<sup>2</sup> who can either be individuals or body corporates.<sup>3</sup>

LLP has perpetual succession and can continue to exist irrespective of any change in its partners.<sup>4</sup> Further, every LLP is required to have at least two designated partners who are individuals and at least 1 (One) of them shall be a resident of India.<sup>5</sup>

### Registration

LLPs are required to be registered with the Registrar of the State in which the registered office of such LLP is proposed to be situated.<sup>6</sup> Upon registration, LLP is capable of suing and being sued; acquiring, owning, holding, developing or disposing off property, whether movable, tangible or intangible; and doing and suffering such acts and things as body corporates may lawfully do and suffer.<sup>7</sup> The LLP Act provides for conversion of an existing (i) partnership firm (constituted under Indian Partnership Act, 1932); (ii) private company; and (iii) unlisted company, into a LLP.<sup>8</sup>

The designated partners of a LLP are responsible for all acts, matters or things as are required to be done by such LLP in respect of the compliance of the provisions of the LLP Act including filing of any document, returns, statement etc., in accordance with the terms set out in LLP agreement.<sup>9</sup>

### Advantages and disadvantages of Limited Liability Partnership

Some of the advantages of LLPs are: (i) limited liability of the partners; (ii) flexibility of partnership; (iii) perpetual succession; (iv) no limit on the maximum number of partners; and (v) rights and liabilities are governed by an agreement between partners.

Some of the disadvantages of LLPs include inability to raise money from public, certain limitations in availing finance and ownership rights are not transferable easily. A LLP will be held liable if a partner of such LLP is liable to any person for any wrongful act or omission committed on his part during the course of the business of the LLP.

**“ The liability of every designated partner of a dissolved LLP shall continue and can be enforced as if LLP had not been dissolved.<sup>10</sup> ”**

## Dissolution

A LLP may either be wound up voluntarily or by the National Company Law Tribunal (“NCLT”) upon which it may be dissolved.<sup>11</sup> A LLP may be wound up by the NCLT in any of the following situations<sup>12</sup>:

- If the LLP decides that the LLP may be wound up by the NCLT;
- If the number of its partners is reduced to below two;
- If the LLP has acted against the interest of sovereignty and integrity of India, the security of State or public order;
- If the LLP has made a default in filing with the Registrar, the statement of account and solvency or annual return for any consecutive 5 (Five) financial years; and
- If the NCLT is of the opinion that it is just and equitable that the LLP may be wound up.

The procedure for the winding up of the LLPs has been prescribed in the Limited Liability Partnership (Winding up and Dissolution) Rules, 2012.

## C. Partnership (other than a limited liability partnership)

### Overview

Partnership is a form of business organisation, where 2 (two) or more persons jointly carry on a business. The three main elements of partnership are: (i) there must be an agreement entered into by all the parties concerned; (ii) the agreement must be to share profits of the business; and (iii) the business must be carried on by all or any of the persons concerned. The element of mutuality, as between partners, is an essential condition for the subsistence, and continuance, of partnership. In every partnership each partner is the agent of the other and has the authority to act for the others.

### Legislation governing Partnership

A partnership firm is governed by the Partnership Act, 1932 (“Partnership Act”). Section 4 of the Partnership Act defines the term ‘partnership’ as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

A partnership firm has no existence of its own. The law recognizes a partnership firm as a distinct personality only for the purpose of income tax by virtue of the provisions of Income Tax Act, 1961 (“IT Act”). Since a partnership firm has no legal personality of its own and since it is not a juristic person, the partners are the real representatives of the firm. The partnership firm cannot

<sup>1</sup> Section 2 (n) of the LLP Act

<sup>2</sup> Section 6 of the LLP Act

<sup>3</sup> Section 5 of the LLP Act

<sup>4</sup> Section 3 of the LLP Act

<sup>5</sup> Section 7 (1) of the LLP Act

<sup>6</sup> Section 11 read with Section 12 of the LLP Act

<sup>7</sup> Section 14 of the LLP Act

<sup>8</sup> Section 56 and 57 of LLP Act

<sup>9</sup> Section 8 of the LLP Act

<sup>10</sup> Rule 37 (5) of the Limited Liability Partnership (Winding Up and Dissolution) Rules, 2012

<sup>11</sup> Section 63 of the LLP Act

<sup>12</sup> Section 64 of LLP Act

exceed beyond 100 (One hundred) members without being registered as a company.<sup>13</sup>

The rights and liabilities of the partners forming a part of the partnership firm are governed by a partnership deed.<sup>14</sup> In case no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, such a partnership is called partnership at will.<sup>15</sup>

### Registration

The Partnership Act provides the procedure for the filing of an application for registration of a partnership firm.<sup>16</sup> However, the Partnership Act does not make registration of firms compulsory. Therefore, a partnership firm can come into existence and function without being registered at its own risk or at the risk of the third party who deals with it.

Unless a firm is registered and the name of the person suing is shown in the register of firms as a partner in the firm, no suit to enforce a right, arising from a contract or conferred by the Partnership Act, can be instituted in any court of law by or on behalf of the firm against any third party or by a partner against the other partners of the firm.<sup>17</sup> Further, non-registration of a partnership deed under the Partnership Act does not invariably render it as invalid or void.

### Advantages and disadvantages of Partnership Firm

Some of the advantages of a partnership firm are: (i) rights and liabilities are determined by contract between partners; (ii) there is diffusion of risk between the partners; and (iii) very limited regulatory.

Some of the disadvantages of a partnership firm are: (i) joint and several liability of the partners; (ii) no perpetual succession; (iii) limited capital infusion as there is restriction on the number of partners; and (iv) no separate legal status. In a partnership form of business every partner is jointly as well as severally liable for all acts of the firm done while he is a partner.<sup>18</sup> In other words, it means that if an act on behalf of a firm has been done by a partner during the continuance of his partnership, the other partners would also be held liable to the third party for committing such an act.

Further, in case a partner commits any wrongful act or omission in the ordinary course of the business of the partnership firm, resulting in loss or injury or penalty to any third party, the firm shall be liable to the same extent as that of such partner.<sup>19</sup>

### Dissolution

The dissolution of a firm means the dissolution of partnership between all the partners of a firm either in

accordance with the contract between the partners or with the consent of all the partners.<sup>20</sup> There is a compulsory dissolution of a partnership when all or all but one partner is adjudicated as insolvent, or by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the partners to carry on in the partnership.<sup>21</sup> It can also be dissolved subject to contract, if the contract has been executed for a fixed term, by expiry of that term or if constituted to carry on one or more adventures or undertakings, by the completion thereof or by death of a partner.<sup>22</sup>

Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the partners of his intention to dissolve the firm and that the firm shall be dissolved from the date mentioned in the notice as date of dissolution.<sup>23</sup> The dissolution can also be made by a court order on grounds of certain specified events.<sup>24</sup>

Mere cessation of business by a partnership firm does not mean dissolution of partnership.

Neither the shifting of business to another place, in the absence of an agreement between partners, nor the transfer of a running business, nor the mere failure of a company to dissolve it, nor the leaving of management to one partner, can amount to a dissolution.

Oral consent of all the partners, in absence of any provision in the partnership deed, is not insufficient for dissolving a partnership. A subsequent execution of a formal deed of dissolution may be intended to be an evidence of the fact of dissolution.

Under the Partnership Act, even after the dissolution of a firm, partners continue to be liable as such to third parties for any act done by them which would have been an act of the firm if done before the dissolution until the public notice of dissolution is given except in cases of death, insolvency and retirement.<sup>25</sup>

## D. Company

### Overview and Legislation

The Companies Act, 2013 ("Companies Act") defines a company to mean a company incorporated under the Companies Act.<sup>26</sup> Under the Companies Act, there are

<sup>13</sup> Section 464 of Companies Act, 2013. However, the Companies Act, 1956 limited the number of partners to 10 in case of a partnership carrying on banking business and 20 in case of a partnership carrying on any other business in which the object is the acquisition of gain by the partnership.

<sup>14</sup> Section 11 of the Partnership Act

<sup>15</sup> Section 7 of the Partnership Act

<sup>16</sup> Section 58 of Partnership Act

<sup>17</sup> Section 69 of Partnership Act

<sup>18</sup> Section 25 of the Partnership Act

<sup>19</sup> Section 26 of the Partnership Act

<sup>20</sup> Section 39 and Section 40 of the Partnership Act

<sup>21</sup> Section 41 of the Partnership Act

<sup>22</sup> Section 42 of the Partnership Act

<sup>23</sup> Section 43 of the Partnership Act

<sup>24</sup> Section 44 of the Partnership Act

<sup>25</sup> Section 45 of the Partnership Act

<sup>26</sup> Section 2 (20) of the Companies Act

mainly three types of companies which can be formed: (i) public company; (ii) private company; and (iii) one person company. Such companies may be either: (a) a company limited by shares; (b) a company limited by guarantee; or (c) an unlimited company.<sup>27</sup> A company is a juristic person with a separate identity and perpetual succession with the right to own properties in its own name. The status as a juristic person of a company is attained upon registration of such company with the registrar of companies.<sup>28</sup>

The Companies Act has, for the first time, allowed formation of a limited liability company by just 1 (One) person and has been described as a “one person company”.

**Private Company:** A private company means a company which has a minimum paid-up share capital of Rupees 1,00,000 (One Lakh) or more as may be prescribed.<sup>29</sup> In India, private companies are governed by the Companies Act and the relevant rules made thereunder.

As per the Companies Act, a minimum of 2 (Two) persons are required to form a private company<sup>31</sup> and it is compulsory for such a company to limit, through its articles, the number of its members to 200 (Two hundred).<sup>31</sup> The memorandum of a private limited company should state the name of such company with “private limited” as the last words.<sup>32</sup>

**Public Company:** A public company is defined in the Companies Act as a company which is not a private company and which has a minimum paid-up share capital of Rupees 5,00,000 (Five Lakhs) or more as may be prescribed. A private company, which is a subsidiary of a public company, will be deemed to be a public company for the purposes of the Companies Act, meaning thereby that all provisions of the Companies Act as applicable to a public company will be applicable to that of a private company.<sup>33</sup>

For a company to be incorporated as a public company should have a minimum of 7 (Seven) persons.<sup>34</sup> Unlike a private company, in case of a public company there are no restrictions in respect of the maximum number of members and the transferability of shares of such company.

**One Person Company:** The Companies Act has, for the first time, allowed formation of a limited liability company by just 1 (One) person and has been described as a “one person company”.<sup>35</sup> Such a form of company is a one share holder corporate entity, where the legal and financial liability is limited to the company only.

## Advantages and Disadvantages of a Company

**Public Company:** Some of the advantages of a public company limited by shares are: (i) limited liability; (ii) perpetual succession; (iii) can issue prospectus to public; (iv) no restrictions on the transferability of shares; and (v) no restrictions on the maximum number of members.

Some of the disadvantages of a public company limited by shares are (i) restrictions on the amount of managerial remuneration; (ii) restrictions on giving loans to directors; and (iii) restrictions on giving guarantee and security to directors.

**Private Company:** Some of the advantages of a private company limited by shares are: (i) limited liability; (ii) perpetual succession; (iii) can be formed with only two persons; (iv) exempted from the requirement of appointing an independent director; and (v) no restrictions on the managerial remuneration.

One of the requirements envisaged by the definition of a private company is that there should be a restriction on the transferability of the shares of the company.<sup>36</sup> Such a restriction should uniformly apply to all the shareholders of the private company and accordingly, the articles should prescribe that the directors of the private company, may in their absolute discretion and without assigning any reason, decline to register or transfer any share whether fully or partly paid. Further, a restriction on the right of a shareholder to transfer his shares is also permissible by exercising the right of pre-emption in favor of the other members of the company. However, the aforesaid restrictions should not be construed as a total ban on the transferability of shares.

The Companies Act requires that a private company should, by its articles, prohibit itself from issuing any invitation to the public to subscribe for any security.<sup>37</sup> It means that a private company should not make a public issue of its prospectus or publish any other advertisement or resort to any other method of inviting public to invest in its securities. A private company may, however, solicit investment in its shares or debentures only by private approach, as distinguished from a public appeal, by giving an opportunity of investment to the persons approached and not to others.

**One Person Company:** Some of the advantages of a one person company are: (i) limited liability; (ii) separate legal entity; (iii) perpetual succession; (iv) lesser compliance requirements; (v) only one member required to start the company; (vi) no requirement of holding annual general meetings or extra ordinary meetings; and (vii) easier management.

Some of the disadvantages of a one person company are: (i) suitable only for small businesses; (ii) cannot be

<sup>27</sup> Section 3 (1) read with Section 3 (2) of the Companies Act 28 Section 7 read with Section 9 of the Companies Act

<sup>28</sup> Section 7 read with Section 9 of the Companies Act

<sup>29</sup> Section 2 (68) of the Companies Act

<sup>30</sup> Section 3 (1) (b) of the Companies Act

<sup>31</sup> Section 2 (68) (b) of the Companies Act

<sup>32</sup> Section 4 (1) (a) of the Companies Act

<sup>33</sup> Section 2 (71) of the Companies Act

<sup>34</sup> Section 3 (1) (a) of the Companies Act

<sup>35</sup> Section 2 (62) read with Section 3 (1) (c) of the Companies Act

<sup>36</sup> Section 2 (68) (a) of the Companies Act

<sup>37</sup> Section 2 (68) (c) of the Companies Act

converted to any private or public limited company until the expiry of 2 (Two) years from the date of incorporation; (iii) cannot carry out non - banking financial investment activities including investment in securities of any body corporates; and (iv) a person shall not be eligible to incorporate more than 1 (One) of such companies or become a nominee in more than 1 (One) of such company.

### Directors of a Company

The Companies Act defines a 'director' to mean a director appointed to the board of the company.<sup>38</sup> The Companies Act defines 'board of directors' or 'board' in relation to a company to mean the collective body of directors of a company.<sup>39</sup> Since a company itself cannot act in its own person, it acts through its directors or the board of directors who are the primary agents of the company to transact its operations and act as the trustee of the property and assets of the company.<sup>40</sup>

Subject to the provisions of the Companies Act, or the memorandum or articles, the board of directors of a company are entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do. Only an individual can be appointed as a director and no body corporate, association or firm can be appointed as director of a company. Every director of a company is required to be appointed by a company in its general meeting.

The minimum number of directors in case of a: (i) public company is 3 (Three); (ii) private company is 2 (Two); and (iii) one person company is 1 (One). The maximum number of directors in a public company or a private company can be 15 (Fifteen) directors. However, a company may appoint more than 15 (Fifteen) directors by passing a special resolution to this effect.<sup>41</sup>

**Women Directors:** Section 149 of The Companies Act requires appointment of at least 1 (One) woman director on the board of directors of every listed company, every other public company having (a) paid up share capital of Rupees One Hundred Crore or more; or (b) turnover of Rupees Three Hundred Crore or more.

Company as a form of business is suitable for the conduct of medium to largescale businesses like:

- Banking
- Infrastructure
- Software
- Manufacturing
- Mining
- Non-banking financial services

**Independent Directors:** Every listed public company is required to appoint at least 1/3 (One-third) of the total number of directors as independent directors. The Central Government has prescribed the requirement of appointing at least 2 (Two) independent directors in a public company.<sup>42</sup>

The directors of a company have a number of roles and responsibilities under the various provisions of Companies Act and can be held liable for any breach of fiduciary duty, ultra vires acts, negligence and malafide acts.

Further, the directors of a company may be held liable for any breach of fiduciary duty, ultra vires acts, negligence and malafide acts.

### Meetings

Under the Companies Act the different types of meetings conducted by the members are: (i) annual general meeting; and (ii) extraordinary general meeting.

(i) **Annual General Meeting:** Annual general meeting of a company is an annual meeting of the body of the members of a company. The first annual general meeting of a company should be held within 9 (Nine) months from the date of closing of its financial year. Subsequent annual general meetings should be held once in each calendar year. The gap between 2 (Two) annual general meetings should not be more than 15 (Fifteen) months.<sup>43</sup>

(ii) **Extraordinary General Meeting:** All general meetings other than the annual general meetings are called as extraordinary general meetings.<sup>44</sup> An extraordinary general meeting is convened for the purpose of transacting a special or urgent business that may arise in between 2 (Two) annual general meetings. The board of directors of a company shall convene an extraordinary general meeting of a company upon request or requisition from the members of the company.

The articles of association of a company empower the board of directors of a company to convene general meeting by giving not less than 21 (Twenty one) days clear notice.

### Dissolution

Winding up or liquidation of a company is the process by which the management of a company's affairs is taken out of its directors hands, its assets are realised by a liquidator, and its debts and liabilities are discharged out of the proceeds of realisation and any surplus of assets remaining is returned to its members or shareholders. Under the Companies Act, a company may be wound up in any one of the following ways: (i) compulsory winding up (by the NCLT making a winding up order); (ii) voluntary winding up (by passing of an appropriate resolution by the company for voluntary winding).<sup>45</sup>

<sup>38</sup> Section 2 (34) of the Companies Act

<sup>39</sup> Section 2 (10) of the Companies Act

<sup>40</sup> Section 149 read with Section 152 of the Companies Act

<sup>41</sup> Section 149 of the Companies Act

<sup>42</sup> Section 149 (4) and (6) of the Companies Act read with Rules 4 and 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014

<sup>43</sup> Section 96 of the Companies Act

<sup>44</sup> Clause 42 of Table F (Schedule 1) of Companies Act

<sup>45</sup> Section 270 (1) of the Companies Act

**Compulsory Winding Up:** The grounds on which a company can be compulsorily wound up under the Companies Act are:

- passing of a special resolution by the company;
- any action of the company which is detrimental to the interest of the sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality;
- in case the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent or unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct, on the basis of an application made by the Registrar or any other person authorised by the Central Government;
- any default by the company in filing, with the Registrar, its financial statements or annual returns for the immediately preceding 5 (Five) consecutive financial years; and
- in case the Tribunal is of the opinion that it is just and equitable for the company to be wound up.

**Voluntary Winding Up:** The grounds on which a company can be voluntarily wound up under the Companies Act are:

- if a company passes a resolution for voluntary winding up in the general meeting (i) where the period fixed by the articles for the duration of the company has expired, or (ii) any event in respect of which the Articles provide that the company should be dissolved has occurred; or
- if the company resolves by passing a special resolution that it shall be wound up.

In case of a voluntary winding up, the company is required to appoint a company liquidator from the panel prepared by Central Government for the purpose of winding up its affairs and distributing assets of the company.

The Companies Act prescribes the procedure for winding up of companies and does not specifically deal with insolvency and bankruptcy proceedings which are dealt under the IBC.

## E. Cooperative

### Overview

Co-operative society is a society which has as its objectives the promotion of the economic interests of its members in accordance with the co-operative principles.

### Legislation governing Cooperatives

In India, Cooperatives are governed by the Co-operative Societies Act, 1912 ("CS Act"). Since the Constitution of

India empowers states to enact legislations in respect of cooperatives, few states such as Maharashtra, Karnataka, Orissa, Rajasthan, Punjab etc. have enacted specific legislations in this regard.<sup>46</sup> A minimum of 10 (Ten) persons above the age of 18 (Eighteen) are required to form a cooperative.<sup>47</sup>

Cooperative societies formed in different states in India, may join together to form a multi-state cooperative society. Such multi-state cooperative societies are governed by the Multi-State Cooperative Societies Act, 2002 ("MCS Act") facilitates and regulates incorporation of cooperative societies whose objects and functions spread over to several states. A cooperative society may extend its jurisdiction and convert itself into a multi-state cooperative society by amendments its bye-laws.<sup>48</sup>

The liability of a cooperative society may be limited or unlimited.<sup>49</sup> In case a member of a society is a registered society under the CS Act, the liability of such society will be limited. However, a society formed with the object of creation of funds to be lent to its members, of which the majority of the members are agriculturalists, and of which no member is a registered society, the liability of such society will be unlimited.

Cooperatives as a form of business is suitable for the conduct of businesses like:

- Financial credit unions
- Dairy
- Art and Craft
- Agricultural Supply

### Registration

The CS Act provides the procedure for the registration of a cooperative society with the Registrar of Cooperative Societies.<sup>50</sup> Upon registration, a cooperative society will be a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits, legal proceedings and to do all things necessary for the purposes of its constitution.<sup>51</sup> However, the state government, by an order, may exempt a society from the requirements of registration under the CS Act.<sup>52</sup>

Under the provisions of the MCS Act an application for registration of a multi-state cooperative society is required to be made to the Central Registrar in accordance with the particulars prescribed under the MCS Act.<sup>53</sup>

### Advantages and Disadvantages

Some of the advantages of a cooperative society are: (i) formation of a cooperative society is an easy process; (ii) perpetual succession; and (iii) any person having common interest can form a cooperative society.

Some of the disadvantages of a cooperative society are: (i) limited capital can be raised; (ii) liability is unlimited;

<sup>46</sup> List II Entry 32 Schedule VII of the Constitution of India

<sup>47</sup> Section 6 of the CS Act

<sup>48</sup> Section 22 of the MCS Act

<sup>49</sup> Section 4 of the CS Act

<sup>50</sup> Section 8 and Section 9 of the CS Act

<sup>51</sup> Section 17 of the CS Act

<sup>52</sup> Section 45 of the CS Act

<sup>53</sup> Section 6 of the MCS Act

(iii) dependence on government because of inadequacy of capital; and (iv) requires periodic compliances.

#### Dissolution

If the Registrar, after an inquiry or after an inspection has been made or on receipt of an application made by 3/4 (Three-fourth) of the members of a registered society, is of the opinion that the society should be dissolved, he may cancel the registration of the society.<sup>54</sup>

Further, the Registrar may by an order in writing cancel the registration of a society at any time if it is proved to his satisfaction that the number of members has been reduced to less than ten.<sup>55</sup> Upon cancellation of the registration, a society will cease to exist as a body corporate.<sup>56</sup>

Pursuant to the cancellation of registration of a society, the Registrar may appoint a competent person to be the liquidator of such society.<sup>57</sup> The CS Act lays down the powers of the liquidator with respect to the winding up of a cooperative society.<sup>58</sup>

### F. Franchise

#### Overview

Franchising is a business model wherein the franchisor grants a licence to the franchisee to use the franchisor's diverse intellectual property rights, such as, know how, designs, brands, trademarks, patents, and trade secrets along with the franchisor's proven name, reputation and marketing techniques to market the franchisor's products or services in return for a sum of money.

Franchising is gaining popularity in the retail segment in India, more particularly in the areas of food products and drinks, restaurant chains, consumer goods, and computer training centres.

#### Legislation Governing Franchises

In India, there is no specific legislation on franchising. As the relationship between a franchisor and a franchisee flows from a contract, in the absence of any specific governing legislation, the law of contracts as embodied in the Indian Contract Act, 1872 is applicable to a franchise. Some other areas of law which are applicable to a franchise are: intellectual property laws, competition laws, consumer protection laws, labour laws, property laws etc. In a franchising agreement there are two parties involved: a franchisor and a franchisee.

#### Characteristic Features of a Franchise

Some of the features of a franchise are:

- (i) a franchise agreement is based upon a contractual relationship;
- (ii) the franchisor should have developed a business model or format, which is identified with a brand name;
- (iii) the franchisee makes a substantial initial capital investment and normally owns the business operation; and

- (iv) some form of consideration is paid by the franchisee to the franchisor for the rights licensed and the services rendered.

#### Advantages and Disadvantages

Some of the advantages of this form of business model are: (i) exponential growth of brand name; (ii) financial investment and commitment is limited; (iii) exploitation of a wider territorial area; and (iv) a franchisee capitalises and benefits from the franchisor's brand name.

Some of the disadvantages of this form of business model are: (i) dilution of brand name by any adverse acts done by a franchisee; (ii) imposition of control and supervision by the franchisor; and (iii) franchisor's policies may affect the franchisee's profitability and business operations.

#### Termination and Liabilities

Typically, the grounds on which a franchise can be terminated are contractually agreed. Usually these include: (i) breach of any terms and conditions stipulated in the franchise agreement; or (ii) impossibility of performance of franchise agreement.

Franchise as a form of business is suitable for the conduct of businesses like:

- Food restaurants and fast food
- Motels and hotels
- Retail clothing
- Automotive repair

### III. Permits and Registrations

Indian industries are regulated by several laws which govern the aspects of licensing and other necessary permits that are required to start up and run a business. the various licenses and permits that are to be obtained would depend on the nature of business proposed to be established.

#### A. Shops and Establishments

The Shops and Establishments Acts ("S&E Acts") regulate the conditions of work and employment in shops and establishments or commercial establishments in relation to registration of the establishment, payment of wages, hours of work, leave etc. and sets out the procedure thereof. The S&E Acts are regulated by the Department of Labor. The S&E Acts not only regulates the working of commercial establishments, but also societies, charitable trusts, printing establishments, educational institutions run for gain and premises in which banking, insurance, stock or share brokerage is carried on. Each state has enacted its own S&E Act to regulate the shops and commercial establishments operating within the state, such as Maharashtra, Delhi, Punjab, West Bengal etc. Shops are defined as premises where goods are sold either by retail or wholesale or where services are rendered to customers and includes an office, a store-room, godown, warehouse or workhouse or

<sup>54</sup> Section 39 of the CS Act

<sup>55</sup> Section 40 of the CS Act

<sup>56</sup> Section 41 of the CS Act

<sup>57</sup> Section 42 (1) CS Act

<sup>58</sup> Section 42 (2) and Section 42 (3) CS Act

work place. Establishments are defined as shop, a commercial establishment, residential hotel, restaurant, eating house, theater, or other places of public amusement or entertainment. However, factories are not covered by the S&E Act and are regulated by the Factories Act, 1948.

Any shop or commercial establishment that commences operation must apply to the Chief Inspector for a shop and establishment license within the prescribed time under the specific state S&E Act. The responsibility of taking a registration under the relevant provision of the S&E Acts are on the employer of the establishment. On submission of the application and review by the Chief Inspector, the shop or commercial establishment will be registered and a registration certificate will be issued to the occupier. The registration certificate must be prominently displayed at the shop or commercial establishment and renewed periodically, as per the S&E Acts.

#### B. Environment Regulations

Environment regulations in India intend to cover the operations of establishments which might have an impact on the environment in which they are situated. The basic purpose of the statutes given below is to control, abate and prevent pollution. In order to achieve these objectives, Pollution Control Boards (“PCBs”), which are vested with diverse powers to deal with water and air pollution, have been set up in each state.

The PCBs are responsible for setting the standards for maintenance of clean air and water, directing the installation of pollution control devices in industries and undertaking inspection to ensure that industries are functioning in compliance with the standards prescribed. These authorities also have the power of search, seizure and investigation.

All industries are required to obtain consent orders from the PCBs, which are indicative of the fact that the industry in question is functioning in compliance with the pollution control norms. These consent orders are required to be kept renewed.

(i) **Water (Prevention and Control of Pollution) Act, 1974 (“Water Act”):** The Water Act prohibits the use of any stream or well for the disposal of polluting matter, in violation of the standards set down by the State Pollution Control Board (“State PCB”). The Water Act also provides that the consent of the State PCB must be obtained prior to opening of any new outlets or discharges, which are likely to discharge sewage or effluent.

(ii) **Air (Prevention and Control of Pollution) Act, 1981 (“Air Act”):** The Air Act requires that any individual, industry or institution responsible for emitting smoke or gases by way of use as fuel or chemical reactions must apply in a prescribed form and obtain consent from the State PCB prior to commencing any activity. The consent may contain conditions relating to specifications of pollution control equipment to be installed. Within a period of four months after the receipt of the application for consent the State PCB shall, by order in writing and for reasons to be recorded in the order, grant the consent applied for subject to such conditions and for such period as may be specified in the order, or refuse consent.

#### C. Employment Related Registrations

Some other registrations and permissions under various labour and employment laws may include registration under Contract Labour (Regulation and Abolition) Act, 1970 for employment for contract labour<sup>59</sup>; Employees’ State Insurance Act, 1948<sup>60</sup>; Employees Provident funds and Miscellaneous Provisions Act, 1952 for the establishment of provident funds for employees or for any class of employees<sup>61</sup>; Minimum Wages Act, 1948 for the payment of minimum rates of wages to all employees; Payment of Wages Act, 1936; Maternity Benefits Act, 1961 applicable on establishments in which 10 or more persons (whether workmen or not) are employed; Payment of Bonus Act, 1965 for the payment of annual bonus to eligible employees (whether workmen or not) employed in an establishment in which twenty or more persons are employed and Payment of Gratuity Act, 1972.

Each of the aforementioned legislations have been elaborately explained in Chapter XI of this handbook.

#### D. Other Permits and Registrations

The respective state legislatures in India have the power to endow the municipalities with the power to implement schemes and perform functions in relation to matters listed in the Twelfth Schedule to the Constitution of India which includes regulation of public health. The respective state governments have enacted laws empowering the Municipalities to regulate public health including the issuance of a health trade license for operating eating outlets and implementation of regulations relating to such license along with prescribing penalties for non-compliance. In addition to the above, some of the other approvals and licenses that a food processor may be required to obtain from various authorities under other laws for fire prevention and safety, verification certificate under the Legal Metrology Act, 2011.

<sup>59</sup> Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970

<sup>60</sup> Section 2A of the Employees’ State Insurance Act, 1948

<sup>61</sup> Section 5 of the Employees Provident funds and Miscellaneous Provisions Act, 1952

## Chapter 2

# CONTRACTS

### I. Introduction

The Contract Act defines a contract as 'an agreement enforceable by law'. The definition implies that all contracts are agreements but not all agreements are contracts. An agreement becomes a contract when the following conditions are fulfilled:

- ❑ Intention to create legal obligations through offer and acceptance;
- ❑ Free consent of the parties;
- ❑ Competence of parties to enter into a contract;
- ❑ Lawful consideration;
- ❑ Lawful object; and
- ❑ Not expressly declared void by law.

While some of these elements seem quite clear from the definition itself, others might require a more elaborate understanding.

### II. Basis of a Contract: Offer and Acceptance

#### A. Intention to create legal obligations through offer and acceptance

Parties may enter into an agreement by communication of a proposal and its acceptance. A proposal once made is called an 'offer' and once it is accepted, it becomes a promise. A consent to an offer is called an 'acceptance'.

#### B. Offer

An offer has two elements viz., first, an offer is made by a person's willingness to do or abstaining from doing something, and second, an offer should be made with a view to obtain the consent of the person to whom the offer is made.

An offer may be any of the following types:

- ❑ **General Offer:** A general offer is made to the public at large.
- ❑ **Specific Offer:** A specific offer is made to particular individual.
- ❑ **Counter offer:** If on receipt of an offer, the offeree instead of accepting the offer imposes a condition to offer, which modifies the original offer, it is considered to be a fresh offer.
- ❑ **Conditional offer:** An offer, the acceptance of which is hinged on performance or happening of

certain conditions for instance communicating acceptance within a specific timeframe or through a specified medium is considered a conditional offer.

**‘Consideration’** means an act, abstinence or promise done or given at the request of the promisor by the promisee. The purpose of the doctrine of consideration is to put some legal limits on the enforceability of agreements and to establish which promises should be legally enforceable.

The following is a summary of the legal requirements for offer:

- ❑ **Certain and definite:** An offer should be certain and definite, if the offer is not definite and clear to arrive at the conclusion of a contract, it will be considered to be a void contract.
- ❑ **Create Legal relationship:** An offer must be made with the intention or willingness to create binding legal relationship. For example, X, a husband moved abroad and promised his wife Y, that he'll pay a certain amount every month. This will not be considered a valid contract as there was no intention to create a legal relationship.<sup>62</sup>
- ❑ **Assent of the Offeree:** An offer must be made with a view to obtain assent of the offeree.
- ❑ **Communication:** An offer must be communicated to the person to whom such offer is intended to be made. It may for example be communicated orally, or in writing, or even by conduct. If an offer is not communicated to the other person, i.e. if one does not have knowledge of the offer, one cannot possibly accept it. A communication of offer is complete when it comes to knowledge of the offeree.

An invitation to offer, however, is distinguishable from a binding offer, as it does not create a legal obligation on acceptance. In an invitation to offer there is no willingness by the person to be bound by the offer. It is only a proposal defining certain terms on which the person may be willing to negotiate. An invitation to offer cannot be accepted as it is, it is followed by an offer by the other party which is then open to acceptance. Examples of invitation to offer include display of goods in a shop and advertisement for an auction.

<sup>62</sup> *Balfour v Balfour* [1919] 2 KB 571

### C. Acceptance

The following is a summary of the legal requirements for an acceptance:

- ❑ **Communication:** To create a binding contract between the parties, an acceptance must be communicated to the offeror. When a time limit or manner is specified for acceptance of an offer, the only valid acceptance will be one made in the specified timeframe and manner. However, if the person making the offer accepts any other manner of acceptance, without any protest within a reasonable period of time, it will be considered to be a valid contract. A communication of acceptance is complete vis-à-vis the offeror when it is put in course of transmission, so as to be out of the control of the offeree and vis-à-vis the offeree when it comes to knowledge of the offeror.
- ❑ **Absolute and unqualified:** Acceptance is only valid when it is absolute and unqualified. A qualified or conditional acceptances will be a counter-offer and will not create a binding contract on communication.
- ❑ **Certain and definite:** An acceptance must be certain and definite; mere silence will not be considered to be an acceptance.
- ❑ **Before lapse of an offer:** A valid acceptance is one, which is made before the lapse of an offer. Any acceptance after the lapse of an offer will not be considered an acceptance and will not create a legal relationship between the offeror and the offeree.

### D. Revocation of an Offer / Acceptance

The Contract Act sets out that an offer may be revoked in the following circumstances:

- ❑ **At any time before the communication of acceptance is completed against the offeror:** As set out above, a communication of acceptance is completed for the offeror when it is put in course of transmission, so as to be out of the control of the offeree. For instances, if the offeror made the offer on T and subsequently rescinded through letter on T+1 day at 1pm, which reached the offeree at 5:30 pm on T+1 day. However in the meanwhile, the offeree sent a letter of acceptance on T+1 day at 3:50pm, which reached the offeror at 8:30 pm, in such case the revocation would be ineffective as the acceptance was complete vis-à-vis the offeror at the time offeree sent the letter, i.e. at 3:50 pm.<sup>63</sup>
- ❑ **By lapse of time prescribed in the offer:** When the offer prescribes a specific time period for acceptance and the acceptance is not communicated within the timeframe, the offer is

deemed to have lapsed. When no time period for acceptance is prescribed for acceptance of an offer, the offer must be accepted within a reasonable timeframe. Reasonable time will be discerned from the facts and circumstances of a case.

- ❑ **By failure of the offeree to fulfil a condition precedent:** If an offer is subject to a condition for acceptance, it will lapse if the condition is not complied with before acceptance. For instance, an employer makes an offer to the trade union, that the workers will be get a part of the profits, if the union stopped the strike. The trade union did not withdraw the strike. It was held that the union did not accept the condition, hence there was not acceptance and no legal obligation on the employer to pay.<sup>64</sup>
- ❑ **By death of insanity of the offeror:** An offer will lapse on the death of insanity of the offeror, if the death or insanity comes to knowledge of the offeree before acceptance. This a departure from the English law principle, where the death of offeror will result in revocation only 'if the offer on its true construction so provides'.

### III. Free Consent

Free consent is the basis of any contract. A contract is voidable if one of the parties to the contract has entered into a contract in absence of free consent. Contract Act provides that a consent is not said to be free if it is caused by:

- ❑ **Coercion:** Coercion is the committing, or threatening to commit any act forbidden by the Indian Penal Code 1860, or the unlawful detaining, or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

If X obtains a release deed from Y under a threat of committing suicide, such release deed would be considered to be a contract under coercion as suicide is forbidden by the Indian Penal Code and will be voidable at the option of Y (Henthorn v. Fraser (1892) 2 Ch 27).

- ❑ **Undue Influence:** When one party is in a position to dominate the other party, the former party has apparent or real authority over the other. When the dominating party takes advantage of his/her position in the contract, he/she is said to exercise undue influence. For instance, if X, an influential member of temple trust, compels Y, a follower to donate monies to the trust, such contract will be said to be induced by undue influence and will be voidable at the option of Y.<sup>65</sup>

<sup>63</sup> Henthorn v Fraser (1892) 2 Ch 27

<sup>64</sup> Pipraich Sugar Mills v Pipraish Sugar Mills Mazdoor Union, AIR 1957 SC 95

<sup>65</sup> Chinnamma v. Devangha Sangha, AIR 1973 Mys 338

- **Fraud:** Fraud means and includes any of the following acts, committed by a party to a contract or with his connivance, or by his agent, with the intention to deceive another party, or, to induce a person to enter into a contract:
  - ◆ Stating facts which are not true, when person making the statements knows them to be false.
  - ◆ Actively concealing facts, when the person has knowledge, or, belief that the fact are true.
  - ◆ Making a promise, without any intention of performing it.
  - ◆ Doing any other act fitted to deceive; or
  - ◆ Doing any act which is fraudulent under law.
- **Misrepresentation:** Misrepresentation is an assertion by a party which is not true, however, unlike fraud, misrepresentation does not involve the intent to deceive and such party believes it to be true. A contract may only be voidable for misrepresentation, if the misrepresentation was such to cause the other party to enter into a contract.
- **Mistake:** Where parties are under a mistake in relation to a fact, which is essential to the contract, then the contact is void. This is doctrine of 'consensus ad idem' which states that there must be meeting of the minds. Lack of 'consensus ad idem' renders a contract void ab initio. Mistake must be of fact and not of law.

X and Y agree to sale and purchase of a cargo, which is on its way from United Kingdom to India. However, before the agreement, the cargo was cast away by storm and the goods were lost and both the parties were unaware of the fact. In this instance the contract would be void.<sup>66</sup>

#### IV. Competence of parties to enter into a contract

Capacity to contract is yet another crucial element of contract. Contract Act provides three categories of persons who are not considered to be competent to enter into a contract:

- **Minors:** An agreement entered into by a minor is void and cannot be enforced against the minor. Whilst a minor is not competent to contract, there is nothing that stops from making the other party bound to the minor. Accordingly, minors are capable of enforcing contracts made in their favour, because although they cannot incur liability, there is nothing barring them from acquiring rights. Also legal guardians of minors can contract on behalf and for the benefit of the minors. For instance, X, a minor, executed a mortgage in favour of Y, a moneylender. Despite Y

being aware that X was a minor, Y made X sign a declaration stating that X is an adult. The mortgage deed thus executed would be void and Y would not have any right to recover monies from X.<sup>67</sup>

- **Persons of unsound mind:** A contract entered into by a person of unsound mind is void. A person is considered to be of unsound mind if at the time of entering into the contract the person is not capable of understanding it, and of forming a rational judgement of the effect of the contract upon that person's interests.

X sold a property with a value of Rs. 25,000 for Rs. 7,000. Y, X's mother claimed that X was incapable of understanding the transaction and incapable of forming a rational judgment. In this case, the contract may be considered to be void, as from the facts it is evident that X was incapable of forming a rational judgment, thus of unsound mind (Inder Singh v. Parmeshwardhari Singh (AIR 1957 Pat 491)).

A person who is of unsound mind but occasionally of sound mind can enter into a contract during the period when he is of sound mind.

- **Persons disqualified by law, from entering into a contract:** Certain persons are disqualified under law from entering into a contract. For instance, an advocate cannot enter into a contract with its client for recovery of fees and success fees, a foreign person, during a war, cannot enter into a contract with Indian persons, and a corporate cannot enter into a contract beyond the scope permitted in such Charter, Statute, or Act.

#### V. The Need for Consideration

Consideration is something which is of some value in the eyes of the law. It may be for the benefit of the promisee or to the detriment of the promisor.

##### Principles governing consideration:

- **Consideration to be at the desire of the promisor:** Consideration must be at the desire of the promisor. Consideration cannot be at the desire of any other party. For instance, where X built a shop on the order of the collector, and later on Y, the occupant of the shop agreed to pay commission to X for the monies spent on construction, the consideration would not be valid as it was not at the desire of Y.<sup>68</sup>
- **Consideration can be from the promisor or any other person:** Consideration can flow from the promisor or any other person, who is not

<sup>66</sup> *Couturier v. Hasite* 5 H.L.C.673

<sup>67</sup> *Mobiri Bibee v. Dharmadas Ghose* (1903) LR 30 Cal

<sup>68</sup> *Durga Prasad v Baldeo*, (1880) ILR 14 Cal

a party to the contract. According to this principle, as long as there is valid consideration, it is immaterial who furnished it.

- **Past Consideration:** Past consideration, as a general rule is not sufficient to make the contract binding. This is because consideration is generally concurrent with a promise. However, Contract Act recognises past consideration. It must be noted that past consideration is good consideration only if it is given by the promisee, 'at the desire of the promisor'. For instance, X teaches Y's child at Y's request. After six months Y agrees to pay X, a sum of Rs. 600/- for teaching her child. For Y's promise the services of X will be taken as past consideration.
- **Adequacy of consideration:** Consideration need not be adequate or equal in value to the promise. The only requirement under law is that the consideration must have some value. Parties to a contract are free to determine their own consideration. For example, if X voluntarily agreed to sell his land to Y for Rs. 1000 when the value of the land is Rs. 5,000, it will be a valid contract despite the inadequacy of the consideration. However, please note that though inadequacy of consideration will not invalidate a contract, it may be taken into account by the court in determining questions of capacity and consent.
- **Performance of an act that one is legally bound to perform cannot be considered to be consideration:** An act performed in discharge of a pre-existing duty cannot be consideration for another agreement. For instance performance of a public duty, such as appearing at a trial as a witness would not amount to valid consideration.

Whilst the general rule is that a contract without consideration is not valid, there are certain recognised exceptions to the rule:

- **Promise made on account of natural love and affection:** A written and registered contract between parties made on account of natural love and affection
- **Promise to compensate for voluntary services:** A contract done voluntarily and for the benefit of the promisor, is enforceable if the promisor has the intention to compensate the promisee.
  - ◆ Promise to pay a time barred debt: A written promise by a debtor to pay a time barred debt is enforceable under law.
  - ◆ Consideration is not necessary to create an agency.

- ◆ In case of completed gifts, no consideration is necessary.

## VI. Terms of a contract: Implied and Explicit terms

A contract embodies many terms that reflect the intention of the parties and promises made by the parties. These may be broadly divided into two: expressed terms and implied terms.

Expressed terms are the terms that have been captured in the contract. An implied term is a provision that is not a part of the express agreement, or has not been expressly stated between the parties, but that can be implied to be a part of the agreement. However, it cannot contradict an express term of the agreement. Where the express term is flexible, it may be widened or narrowed by an implied term, where necessary. A term can be implied into a contract through an established custom of the trade or business.

The general rule of implied term requires satisfaction of the following conditions for imputing an implied term<sup>69</sup>:

- it must be reasonable and equitable;
- it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- it must be so obvious that it 'goes without saying';
- it must be capable of clear expression, and
- it must not contradict any express term of the contract.

## VII. When is a contract considered lawfully terminated?

After the formation of the contract the next step is discharge of the contract. A contract may be discharged through any of following means:

- **By impossibility of performance:** A contract agreement to do an impossible act in itself is void. The principle of frustration states that if certain events which are beyond the control of the parties take place and which make the performance of the contract impossible, then the contract is said to have been 'frustrated' and in effect terminated. An alteration of circumstances that makes it impractical from the point of view of the purpose of the contract to perform the same, resulting in undue hardship will also render an agreement frustrated. For instance, if X and Y enter into a contract to use X's hall for a certain period time, however the hall is destroyed by fire before the period commences, the contract will be considered to be frustrated.<sup>70</sup>

<sup>69</sup> BP Refinery (Westernport) Pty Ltd vs. The Shire of Hastings (1978) 52 AJLR 20

<sup>70</sup> Taylor v Caldwell (1863) 3 B&S 826

- The ‘doctrine of frustration of contracts’ signifies a certain set of circumstances arising after the formation of a contract, the occurrence of which is due to no fault of either party and which renders the performance of such contract by one or both parties physically and commercially impossible (defined under section 56 of the Indian Contract Act, 1872).
  - **Novation, rescission, and alteration of contract:** If parties to a contract agree to substitute a new contract for the existing contract or to rescind or alter it, the original contract need not be performed.
  - **By termination clause:** Commercial contracts more often than not provide for an express termination clauses for non-performance of certain obligation or conditions; in such cases the agreement will be terminated in accordance with the termination clause. These may also provide for termination of a contract by notice. The parties may also stipulate that the contract will terminate on the happening of a certain event.
  - **By anticipatory breach:** when a party refuses to perform a contract or has disabled herself to perform the promise in entirety, the other party may terminate the contract, unless the other party by words or conduct has acquiesced the continuation of the contract. However, every breach does not result in discharge of the innocent party. It is primarily three instances wherein a party may choose to discharge itself from the contract, which are as follows:
    - ◆ **renunciation or refusal of party of its liabilities:** Renunciation may happen when a party refuses to discharge its obligations either expressly or in an implied manner. For instance, if X hired a contractor, Y, to construct a building, and X does not construct beyond a plinth and some pillar in over 7 years, X will have the ability to terminate Y's contract.<sup>71</sup>
    - ◆ **impossibility of performance created by acts of the other party:** When party due to its own acts has disabled itself from performance of its obligations the contract may be terminated by the other party. A party is said to have incapacitated itself from performance when he deliberately puts it out of its power to discharge its obligations or when his own acts or default result in the party being unable to perform its obligations. For instance, if X, made a promise to Y, to leave his land for Y after X's death, but sold

<sup>71</sup> *Yarlagadda China Rattaya v Donepudi Venkataramayya*, AIR 1959 CP 551

<sup>72</sup> *Syngle v Syngle*, (1894) 1 QB 466 CJ

<sup>73</sup> *John Usher Jones v Edward Scott Grogan*, AIR 1919 PC 190

<sup>74</sup> *Langen and Wind Ltd. v. Bell*, (1972) 1 All ER 296

the land Z, the contract would be terminated on grounds of impossibility of performance created by acts of X.<sup>72</sup>

- ◆ **partial or total failure of performance by other party:** The ability of a party to terminate a contract for failure of performance will depend on whether breach was a fundamental term of the contract and there was refusal to perform the term by the promisor. For instance, X enters into an agreement with Y to deliver timber to the nearest railway station on X's carts. X sells the carts before performance is complete. This would amount to failure of performance by the party, and Y can terminate the contract.<sup>73</sup>

The termination of contract means the contract ceases to operate, i.e. the rights and obligations created under the contract come to an end. It might also amend or rescind completely such rights and obligations of both the parties. If a contact has been terminated due to acts or omission of one party, the other party would have recourse against the party.

## VIII. Remedies available in cases of breach of a contract

### A. Specific Performance of Contracts

The Contract Act provides for remedy of damages for a breach of a contract. The Specific Relief Act, 1963 (“Specific Relief Act”) on the other hand provides a host of remedies to compensate innocent persons, who have suffered due to breach of contract by the other party, which include recovery of possession of property, specific performance of contracts, rectification and cancellation of instruments, injunction and declaratory relief. The SRA though governs the powers of the court in granting specific relief, it is not exhaustive in nature and does not cover all conceivable forms specific reliefs. The discussion on specific reliefs can be summarized by discussion of the two most important forms of specific relief viz. specific performance and injunction.

Specific Performance is an equitable relief granted by a court in case of breach of contract to enforce a promisor to perform the contract, according to its terms. The specific performance is a discretionary remedy. To enforce specific performance of a contract the following parameters have to be met:

- There is no standard to ascertain the actual damage caused by the non-performance of the act agreed to be done. For instance, X and Y enter into a contract to buy and sell shares. If X later refuses to sell the shares to Y, Y may obtain a decree of specific performance as the shares are not available on the market and monetary compensation may not be adequate;<sup>74</sup>

- The act agreed to be done is such that monetary compensation for its non-performance would not be adequate relief. For instance, X agrees to supply steel to Y and subsequently, there is a strike at the steel mills, making procuring steel difficult. In this instance, if X refuses to supply the steel as contemplated under the agreement, the court may, through specific performance, enforce X to supply steel as steel is not 'easily obtainable in the market';<sup>75</sup>
- The conditions for validity of a contract are satisfied;
- In the following instances the courts may not grant a decree of specific performance:
  - ◆ The contracts which are determinable in nature;
  - ◆ The contract was not concluded;
  - ◆ The specific formalities related to contract have not been fulfilled, for instance certain parties have not executed the contract;
  - ◆ In instances where time is essence of the contract and there is delay in performance, a decree of specific performance may be refused by the courts;
  - ◆ Specific performance cannot be granted where the agreement violates provisions of law;
  - ◆ A decree of specific performance will not be granted by courts for contracts with uncertain terms or for contracts, which have been materially altered;
  - ◆ A decree of specific performance will not be granted for contracts which have been waived or repudiated;
  - ◆ A contract that requires continuous performance of obligation, which cannot be monitored by the court;
  - ◆ The conduct of the parties, the terms of contract or the circumstances surrounding the contracts, were such that they give a party undue advantage over the other. For instance, X enters into a contract with Y to sell his land. At the time the parties entered into the contract, a canal was being dug, which had increased the value of the land tremendously. Y knew about the canal, but X did not. Specific performance was refused;<sup>76</sup> and
  - ◆ The performance of the contract involves some hardship on one party which the party did not foresee.

In certain instances, performance of a contract can only be appropriately compelled through injunction as opposed to specific performance, for instance, in case of apprehended breach of a negative covenant by the promisor, or interference by the promisor in the exercise of rights of the promisee under the contract.

Injunction is a discretionary remedy by which a person may be ordered to refrain from undertaking certain acts i.e. prohibitory injunction or directed to undertake a particular act i.e. a mandatory injunction. An injunction may be temporary in nature, as an interim relief or perpetual, that is granted after the final determination of rights of the parties. An injunction like a specific performance, will be granted in instances wherein damages will not be an adequate remedy.

The principles to be followed by courts while granting the discretionary remedy of temporary injunction were set out in the case of *Gujarat Bottling v Coca Cola Co.*<sup>77</sup>, which are:

- whether the plaintiff has a *prima facie* case;
- whether the balance of convenience is in favour of the plaintiff; and
- whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

On the other hand a perpetual injunction may be granted to prevent the breach of an obligation, express or implied, existing in the favor of a party. A perpetual injunction may be granted to prevent irreparable harm, prevent continuous injury, or in cases where there is a threat of injury.

#### **B. Damages: Measure of Damages, Remoteness, Mitigation, Liquidated Damages**

Damages in a simplistic manner may be understood as compensation for the breach of a contract by a party. The Contract Act provides that a party to a contract who breaches the contract must compensate the other party for any loss or damage that arises naturally from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of a contract. Broadly, damages can be categorised into unliquidated and liquidated damages.

When parties quantify within the contract an amount for breach of the contract, such damages are referred to as liquidated damages. For a claim of liquidated damages the pre-condition is breach of contract. Unliquidated damages are awarded by courts when parties do not stipulate a quantum in the contract, on an assessment of the loss and injury suffered by a party.

<sup>75</sup> *Howard E. Perry & Co. Ltd. v. British Railway Board*, [1980] 2 All ER 579

<sup>76</sup> *Ramakrishnam Naidu v. Palaniappa Chatter* AIR 1963 Mad 17

<sup>77</sup> AIR 1995 SC 2372

### (a) Unliquidated Damages

Unliquidated damages may be categorised into the following categories:

- **General Damages:** General damages are essentially damages which arise naturally, in the usual course from the breach itself i.e. loss directly incurred by the breach of contract. For instance, X gave an advance to Y for delivering products to X. Y failed to deliver the products. X will be entitled to receive the advance as damages from Y, along with the amount that falls short in procuring those goods from a third party.
- **Special Damages:** Special damages arise on account of unusual circumstances affecting a party. Special damages require that such circumstances were brought to the knowledge of the other party, so that both parties were aware of such special circumstances. For instance, X delivers to Y, a common carrier, a machine, to be conveyed, without delay, to X's mill, informing Y that his mill is stopped for want of machine. Y unreasonably delays the delivery of the machine, and X, in consequence, loses a profitable contract with the Government. X is entitled to receive from Y, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed.
- **Nominal Damages:** Nominal damages can be awarded by courts in cases where there is a breach of contract but no damage has been suffered by party.
- **Aggravated Damages:** Aggravated damages are additional damages that can be granted when the injury caused to the plaintiff is aggravated due to the conduct or motive of the defendant, whereby the plaintiff suffers mental distress. For aggravated damages, there must be actual evidence of aggravation and mental distress.
- **Exemplary/Punitive Damages:** Exemplary damages are essentially punitive in nature. Punitive damages are granted with the intention of not only compensating the plaintiff but punishing the defendant. However, punitive damages are not generally granted in contract cases.

### Liquidated Damages

The principle of liquidated damages is that parties to a contract may agree at the time of the contract that in the event of a breach, the defaulting party will pay a stipulated amount to other party, or certain amounts may be forfeited by the other party. The principle presupposes that liquidated damages are bona fide and a fair estimate of the damages arising from the breach, and the amount has not been fixed with the sole intent of penalizing the other party.

A breach of contract, which sets out liquidated damages does not result in an automatic pecuniary liability. Liquidated damages will be only be granted when it is determined by the court that the non-defaulting party is entitled to damages.

X contracts with Y to pay Y Rs. 1,000 if he fails to pay Y Rs. 500 on a given day. X fails to pay Y Rs. 500 on that day. Y is entitled to recover from X such compensation, not exceeding Rs. 1,000, as the court considers reasonable.

### Factors affecting damages

While granting damages, the courts will take into account the following factors:

- **Causation:** While determining damages, a causal connection has to be established between the breach committed and the loss or injury suffered, i.e. whether the damage would have accrued but for the acts of the defendant. For instance, there is an ordinance that the government would compensate for damage to property insured wholly or partially at the time of the explosion against fire under a policy, but X fails to keep goods insured resulting in loss of claim from the government, a causal link may be established for damages.<sup>78</sup>
- **Remoteness of Damage:** One of the elements to determine damages is that the injury arose in the usual course of things from such breach or damages that the parties could reasonably foresee, therefore, a party is not liable for damages that are remote to the breach of contract.
- **Profit:** A party is only accountable for the loss of profits resulting from the breach of contract i.e. loss of normal profits, however, loss of profits, which are not direct consequences of the breach of the contract would not attract damages other than in cases where the party was aware of the special circumstances. For instance, X delivers to Y, a common carrier, a machine, to be conveyed, without delay, to X's mill, informing Y that his mill is stopped for want of machine. Y unreasonably delays the delivery of the machine, and X, in consequence, loses a profitable contract with the Government. X is entitled to receive from Y, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not for the government contract.
- **Mitigation:** There is a duty on the plaintiff to take reasonable steps to mitigate the loss that may be caused from the breach of a contract and to refrain from resorting to means that would aggravate the loss. For instance, X, the highest bidder at an auction, defaults on commitment to pay the bid price. Y, the auctioneer, must accept the next highest bid, if it is still alive, to mitigate the damage.<sup>79</sup>

<sup>78</sup> *Pannalal Jankidas v. Mohanlal and Another* AIR 1951 SC 144

<sup>79</sup> *A. R. Krishnamurthy v. Arni Municipality*, (1955) 1 Mad LJ 437

## Chapter 3

### SALE OF GOODS

#### I. Introduction

The present chapter briefly explains the law relating to the sale of goods, the various aspects pertaining to this law, including the basic ingredients of a contract of sale, passage of risk in goods from buyer to seller, sale of goods by description and sale of goods by sample, and the remedies of buyer and seller.

#### II. Contract of Sale: Definition of Goods

##### A. What is a Contract of Sale

A contract of sale is an agreement contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. This transfer of property in goods entails that the buyer has the right to lawfully own, possess, enjoy and use the goods pursuant to the contract of sale.

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer.

Where the transfer of property in goods is to take place at a future date or subject to some conditions, the contract is called an 'agreement to sell'.

In a contract for sale, the property is transferred from the buyer to the seller immediately. However, in an agreement to sell, the ownership of goods is not transferred immediately. An agreement to sell contemplates a transfer at a future date upon completion of the conditions (which may be stipulated in the agreement to sell).

##### B. Elements of Contract of Sale

The following elements are the essential ingredients to constitute a contract of sale of goods-

- ❑ There must be at least two parties, the seller and the buyer.
- ❑ The subject matter of the contract must necessarily be goods. It may be either existing goods, owned or possessed by the seller or future goods.
- ❑ A price in money (not in kind) should be paid or promised to be paid.
- ❑ A transfer of property in goods from seller to the buyer must take place.
- ❑ A contract of sale may be either absolute or conditional.
- ❑ All other essential elements of a valid contract must be present in the contract of sale.

##### C. Definition of Goods

'Goods' under the Sale of Goods Act, 1930 ('Sale of Goods Act') include every kind of movable property other than actionable claims and money; and include

stock and shares, growing crops, grass, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

This is a wider definition than contained in English law, which does not consider 'stock' and 'shares' as goods.

As an illustration, the following do not fall within the purview of the Sale of Goods Act:

- ❑ Unlike shares which fall within the ambit of 'goods', debentures do not fall under the definition of goods;
- ❑ A transaction by which a mobile service operator provides SIM cards is not a sale of goods; and
- ❑ Electromagnetic waves do not fall within the ambit of goods.

'Goods' falling within the purview of the Sale of Goods Act include: (a) furniture; (b) timber; (c) fruits and vegetables; (d) shares; (e) electronics; (f) automobiles; (g) crockery and cookware; (h) sporting equipments; (i) fixed deposit receipts; (j) a software program on a CD/floppy disc; and (k) the sale of a decree.

##### D. Formalities

Except where specifically required by any law, no particular form is necessary to constitute a valid contract. A contract of sale may be made in any of the following modes:

- ❑ There may be immediate delivery of the goods; or
- ❑ There may be immediate payment of price, but it may be agreed that the delivery is to be made at some future date; or
- ❑ There may be immediate delivery of the goods and an immediate payment of price; or
- ❑ It may be agreed that the delivery or payment or both are to be made in installments; or
- ❑ It may be agreed that the delivery or payment or both are to be made at some future date.

- X agrees to sell Y his car for Rupees 5,00,000 (five lakhs). Y promises to pay the said amount to X in 10 installments of 50,000 (fifty thousand). This is a contract of sale.
- X agrees to sell Y his painting for Rupees 10,000 (ten thousand) on 28 July 2017. Y agrees to pay X the entire amount by 29 July 2017. This is a contract of sale.
- X agrees to supply Y with a quantity of turnip seeds which Y agrees to sow in his own land and sell the crop therefrom to X at a given price per ton. This is an agreement for the sale of goods by Y to X.

### III. Passage of Property and Risk: Risk usually passes with Property

#### A. Principles governing Property and Risk

The concept of risk under the Sale of Goods Act is governed by the cardinal principle that "risk follows ownership".

The Sale of Goods Act stipulates that unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer. Hence, when the property is transferred to the buyer, the goods are at the buyer's risk regardless of whether the delivery has been made or not.

The logical conclusion borne out of the aforesaid rule is that the risk is associated with ownership and not with mere possession of the property. Hence, to determine whether the risk has passed or not, one must delve into the question whether the ownership has passed or not.

However, the aforesaid rule of "risk follows ownership" is subject to two (2) qualifications namely (a) where the delivery of the goods has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party in default as regards any loss which might not have occurred but for such fault, (b) duties and liabilities of the seller or the buyers as bailee of goods for the other party remain unaffected even when the risk has passed generally.

It is important to bear in mind the distinction between risk and frustration in context of contracts of sale of goods, as there may be instances where the contract is frustrated as a result of loss or damage to goods.

A question of risk arises when the goods which are agreed to be sold are lost, damaged, destroyed or deteriorate which, however, does not result in discharge of the contract. Normally, however, an event frustrating the contract does not involve such loss or damage, but the performance of the contract becomes impossible as a result of which the parties are automatically released from their obligations.

#### B. Illustrations

X bids for an antique painting at an auction. After the bid, when the auctioneer is on the verge of striking his hammer, he mistakenly hits the antique painting. By virtue of the fact, that the ownership had not yet passed, the loss of the painting would be borne by the seller.

X purchased 975 (nine seventy five) tons of rice from Y. X took part delivery of the rice. The rest was subsequently destroyed by fire. In light of the fact that the goods already stood transferred would be liable to pay the balance of the price.

The defendant contracted to purchase 30 tons of apple juice. The plaintiff crushed the apples, put the juice in casks and kept it pending delivery. The defendant delayed taking delivery and the juice went putrid and had to be thrown away. The defendant was liable to pay the price.

#### IV. Implied Terms under the Sale of Goods Act

##### A. Fitness of Purpose & Merchantability

###### General Principles/ Introduction

Ordinarily there is no implied condition as to the quality or fitness of the goods sold for any particular purpose. However, the condition as to the reasonable fitness of the goods may be implied, if the buyer has made known to the seller the purpose of his purchase and relied upon the skill and judgment of the seller to select the best goods;

Further where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality;

**“Merchantable Quality” means that the goods should comply with the description provided in the contract so that to a purchaser who is buying goods of that description, such goods would be good tender (Sorabji Hormusha Joshi & Co. vs. V. M. Ismail & Anr (AIR 1960 Mad 520)).”**

It is pertinent to note that these implied conditions are an exception to the rule of 'caveat emptor' (explained below). The rule of 'caveat emptor' applies whenever the buyer voluntarily chooses what he buys. It does not mean that the buyer should 'take chance', but it means he should 'take care'; and

When the seller sells an article, he thereby warrants that the article is merchantable, i.e., it is fit for some purpose and if he sells it for some particular purpose, he thereby warrants it for that purpose.

###### Caveat Emptor

The rule of caveat emptor is premised on the principle that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires or, if he is buying them for a specific purpose, that they are fit for that purpose.

This principle is based upon the presumption that the buyer is relying on his own skill and judgment, when he effects a purchase.

The rule originated at a time when goods were mostly sold in open market, and the buyer therefore had every opportunity to satisfy himself as to the quality of the goods or their fitness for a particular purpose, and at Common Law it was presumed that where the buyer could examine the goods, even though he did not do so, he relied upon his own skill and judgment.

Therefore, when the goods were in existence at the time of the contract, and the buyer had the opportunity of inspecting them, for instance a part of a larger parcel, or for specific goods the actual condition of which was as capable of being ascertained by the buyer as by the seller, or were a known article, specifically described by the buyer, the buyer was presumed to be acting on his own judgment. The buyer could not afterwards hold the seller responsible if the goods turned out to be unfit for the purpose for which they were required or were found not to be of merchantable quality.

#### **Implied Condition of Fitness of Purpose**

Implied condition of fitness of purpose is attracted when the buyer expressly or by implication had made known to the seller the particular purpose for which the goods were purchased.

Implied condition of fitness of purpose applies alike to the sale of specific and unascertained goods, and makes no distinction between cases where the goods are in esse (in existence) and where they are not, so that it is immaterial whether the buyer has, or has not, the opportunity of inspecting them, or whether or not he avails himself of that opportunity if he has it.

For the purposes of determining whether this implied condition has been violated by the seller, the question that arises is whether the buyer did rely on the skill or judgment of the seller, and no presumption is raised against him on account of the fact that the goods were in existence and he had the opportunity of examining them.

If the particular purpose is made known by the buyer to the seller, then unless there is something in effect to rebut the presumption, the factum of the purpose being intimated to the seller, itself is sufficient to raise the presumption that the buyer relies upon the skill and judgment of the seller.

If a seller was told that the goods were required for a particular purpose such statement would normally suffice to show that the buyer relied on seller's skill or judgment without any further evidence on the point.

Hence, if a seller was told that the goods were required for a particular purpose, then such a statement would normally suffice to show that the buyer relied on seller's skill or judgment without any further evidence on the point.

However, this implied condition does not apply if the goods have been sold under a trademark or name.

#### **Implied Condition of Merchantability**

In the case of goods sold by description by a seller who deals in such goods, (in the absence of agreement to the contrary), he is always responsible for latent defects in the goods which render them unmerchantable, whether the buyer has examined them or not.

If, however, the buyer having the opportunity of inspection is content to examine the goods superficially, he will not be entitled to complain of defects which he would have discovered if his examination had been more thorough.

The condition of merchantable quality implies that the purchaser's reasonable expectations about the goods as well as their condition at the time of sale, be considered.

The implied condition of merchantability applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise.

Although merchantability has no fixed definition, it connotes that the article is of such quality and in such condition that a reasonable man, acting reasonably, would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article. This is applicable irrespective of whether the purchaser buys the article for his own use, or to resell the article.

This does not, however, mean that the buyer is entitled to treat the goods as unmerchantable merely because they are not fit for some particular purpose.

The Courts have held the goods to be of merchantable quality if they were suitable for one or more purposes for which they might reasonably be expected to be used but they were not required to be suitable for every purpose within such a range of purposes for which such goods were bought.

#### **Relationship between the Implied Conditions of Fitness of Purpose and Merchantability**

Although they tend to overlap, there are two major practical differences between the implied condition of fitness of purpose and the implied condition as to merchantability.

First, the condition as to merchantability requires only that the goods be merchantable. On the other hand, the condition as to fitness of purpose requires that they shall be reasonably fit for the purpose made known to the seller by the buyer expressly or by implication.

Thus, a higher standard can be exacted by a buyer who makes his special purpose known to the seller, making seller liable if the goods are not reasonably suitable for such purpose, though they may be merchantable.

Secondly, the condition as to fitness of purpose is excluded where the buyer does not rely on seller's skill or judgment, whereas the condition of merchantability is

not so limited, though it does not apply when the buyer examines the goods, as regards defects which that examination ought to reveal.

Where a defect is revealed to the buyer, not only is the condition of merchantability excluded, but that fact will normally indicate that it is unreasonable for the buyer then to rely on the seller with regard to the condition of fitness of purpose.

There can, however, be cases where the buyer relies on the seller as to the fact that the goods, even with such defect, will be suitable for their purpose.

### Illustrations

X purchased tinned salmon from Y, a grocer and provision merchant of tinned salmon. X contracted a severe stomach infection and his wife died from the effects of the poison after consuming the said can of tinned salmon. X is liable to be compensated by Y.

X purchased a boiler for the purposes, known to the seller Y, of manufacturing carbon paper. However, the boiler did not satisfy the requirements of the Indian Boilers Act, 1923. X is entitled to recover damages.

X runs a movie theatre. X purchased Asbestos sheets for making ceiling of his theatre leakproof from Z. X categorically disclosed the purpose of roofing to Z. However, the said asbestos sheets did not conform to quality or fitness and there was leakage. X is entitled to damages.

X contracts with Y to make and deliver a set of false teeth to Y. The false teeth do not fit in the mouth of Y. Y is entitled to reject the goods.

## B. Correspondence with description & Correspondence with Sample

### I. Sale by Description

#### General Principles

In a contract for sale by description, there is an implied condition that the goods correspond with the description. The said rule is premised on the principle that "if you contract to sell peas, you cannot compel the buyer to take beans".

Hence, the buyer is not bound to accept and pay for the goods which are not in accordance with the description of goods.

As a matter of law, every item in a description which constitutes a 'substantial ingredient' in the identity of the thing sold would, be a condition.

The key to the said rule is identification. The 'description' by which the goods are sold is confined to those words in the contract which are intended by the parties to identify the kind of goods which were to be supplied.

Therefore, whether the 'goods' appear to have passed to the buyer or not, he is entitled to reject the goods if they are not in accordance with the description in the

contract, provided that the description forms an actual part of the conditions of the contract and is not something collateral to it.

Ultimately the test is whether the buyer could fairly and reasonably refuse to accept the goods sold to him, on the ground that their failure to correspond with that part of what was said about the goods in the contract makes the goods of a different kind from what he had agreed to buy.

It is relevant to note that failure on behalf of the seller to supply goods answering the description in the contract is a total failure to perform it, and not merely a breach of one term of it.

When the substances lack ingredients, or are adulterated, or have deteriorated to a significant extent, the basic substance loses its identity from a commercial point of view.

Further with regard to inspection by the buyer in instances of sale of goods of a particular description, the law provides that regardless of the fact whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is unnecessary to put any other question to the jury.

When goods, whether specific or unascertained, are sold under a known trade description, and goods answering that particular description are supplied, the parties are bound by their contract; and a mistake, even mutual, and even vital to the buyers, as to the qualities of goods of that description, will not nullify the contract.

- The buyer agreed to purchase a new Tata car. On delivery, the buyer finds that it was not a new car. The buyer is well within his rights to reject the car as it did not match the description of the good as initially agreed by the parties.
- X agreed to buy "extra virgin olive oil" from Y. Upon delivery X discovered that the consignment sent by Y contained "fine virgin Olive oil" and hence did not match the description of the goods which X had agreed to purchase. X is entitled to reject the oil.
- X agreed to purchase a smart phone with "64 GB" memory card from Y. On delivery, X discovered that the smart phone only had "32 GB" memory. X is entitled to reject the goods.

### II. Sale by Sample

#### General Principles

In a contract for sale by sample, there is an implied condition that:

- The bulk shall correspond with the sample;
- The buyer shall have a reasonable opportunity of comparing the bulk with the sample; and

- The goods shall be free from any defect which may render them un-merchantable which would not be apparent on a reasonable examination.

The extent to which the goods must correspond with sample would depend on the contract and what is contemplated by the parties in regard to it. In some cases, mere visual comparison is intended and there may in other cases be a test by touching, or by chemical analysis or even microscopic examination.

However, it would not be open to a buyer to submit a sample to an analysis, unusual in the trade so as to reveal in it, certain attributes or qualities hitherto unsuspected, and then to require, by virtue of the sample clause alone, that the bulk should contain the same qualities.

It is important to note here that the right of inspecting the bulk before delivery, is not the same as the right to examine on delivery under the Sale of Goods Act. Consequently, when the right of inspection is excluded either expressly or by implication, the buyer still has the right to examine the goods upon delivery, and may reject the goods if on examination after delivery they prove not to be in accordance with the contract.

Further, the seller's duty to furnish merchantable goods matching/ corresponding to the description in the contract is paramount to any particular condition or warranty. The seller cannot have recourse to a defence that the sample was faulty. Neither inspection of bulk nor use of sample absolutely excludes an inquiry whether the thing supplied was otherwise in accordance with the contract. This is so even where the goods have been expressly warranted only equal to sample; such a term limits the buyer's right to complain of the quality, but does not deprive him of the right to have the kind of goods he bargained for.

**“ A ‘bailment’ is a delivery of a thing or good entrusted for some special object or purpose upon a contract, express or implied, to conform to the object or purpose of the trust. The person to whom such a thing or good is delivered is called a ‘bailee’ (defined under section 148 of the Indian Contract Act, 1872).**

### Illustrations

The parties agreed to a sale by sample of seeds described as common English sainfoin. The sellers gave no warranty express or implied as to growth, description or any other matters. Neither the sample nor the bulk was common English sainfoin, but giant sainfoin, as was discovered when the seed had been sown and produced a crop. The buyer may recover damages for the breach of the condition.

X sold to Y (by sample), a consignment of mixed worsted coatings to be in quality and weight equal to the samples. The goods owing to a latent defect would not stand ordinary wear when made up into coats and were

therefore not merchantable. The same defect appeared in the samples but could not be detected on a reasonable examination. The buyer was held entitled to recover damages.

**“ ‘Latent Defects’ are those defects which cannot be found on examination by a person of ordinary prudence with the exercise of due care and attention (Sorabji Hormusha Joshi & Co. vs. V.M. Ismail and Anr (AIR 1960 Mad 520)).**

X sold to Y, by sample, parcels of wheat containing 700 and 1,400 bushels respectively. The buyer went to examine the bulk subsequently. The parcel containing the 700 (seven hundred) bushels which was lying in the seller's warehouse was shown to him, but the seller refused to show him the other parcel. The buyer is entitled to rescind the contract.

### V. Remedies of Seller

#### A. Stoppage in Transit

##### General Principles

When an unpaid seller has parted with the goods to a carrier and the buyer has become insolvent, the seller can exercise the following rights:

- seller can ask the carrier to return the goods, or
- ask the carrier to stop the delivery of goods.

The said rights of the seller can be exercised only upon the fulfillment of all the conditions, which are as follows:

- The seller must be unpaid;
- Seller must have parted with the goods;
- Goods are in transit;
- Buyer has become insolvent;
- The said rights are subject to the other provisions of the Sale of Goods Act;

The seller is entitled to hold the goods stopped until the price of the whole of the goods is paid.

Further goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

It would be pertinent to briefly examine the relationship between the right to lien (briefly explained in below) and the right to stoppage in transit at this juncture. To begin with, the right to stoppage in transit begins when the right to lien ends.

The most basic difference lies in the fact that in order to exercise the right to lien, the seller should be in possession of the goods. On the contrary, while exercising the right to stoppage in transit, the possession of the goods lies with the carrier.

- X sells to Y, 100 (hundred) tons of rice. Y makes part payment for 10 (ten) tons, and price for balance 90 (ninety) tons remains unpaid. Out of the 100 (hundred) tons, Y receives 60 (sixty). Whilst the remaining 40 (forty) tons of rice was still in transit, Y becomes insolvent. X, being the unpaid seller, stops the remaining 40 (forty) tons of rice in transit. X is entitled to hold the 40 (forty) tons until the price of the balance 90 (ninety) tons is paid.
- Y at Delhi, orders goods from X, who is at Mumbai. X consigns and forwards the goods to Y. Upon arrival in Delhi, they are taken to Y's warehouse and left there. Y refuses to take these goods and stops the payment. The goods are in transit and the unpaid sellers can take them back.

Another important facet which distinguishes the right to stoppage in transit from right to lien, is that the essence of the right to lien is to retain possession whereas the right to stoppage in transit entitles the seller to "regain possession".

#### B. Retention

##### General Principles

An unpaid seller has a right of lien on the goods for the price while he is in possession, until the payment or tender of the price of such goods.

The right to lien can only be exercised in the following instance:

- ❑ Where goods have been sold without any stipulation of credit;
- ❑ Where goods have been sold on credit but the term of credit has expired;
- ❑ Where the buyer has become insolvent;

It is pertinent to point out that an unpaid seller loses his right of lien under the following circumstances:

- ❑ When he delivers the goods to a carrier or other bailee for the purposes of transmission to the buyer without reserving the right of disposal of the goods;
- ❑ Where the buyer or his agent lawfully obtain possession of the goods;
- ❑ Where the seller himself has waived his right to lien;
- ❑ Where the seller so conducts himself that he leads the buyer/third party to believe that the lien does not exist.

It is pertinent to point out, that in cases where the owner of goods sells on credit, the buyer has the right to immediate possession. However, if the goods remain with the seller until the period of payment has elapsed and indeed no payment is made, then the seller has a right to retain the said goods.

Further, an unpaid seller's lien is dependent on actual possession of the goods and not on the title and is not affected by the factum of seller having parted with the documents capable of transferring the title.

However, a seller allowing the buyer a restricted control over the goods without allowing any exclusive control, may amount to termination of his lien.

- X sold certain goods to Y for a price of Rupees 5,000 (five thousand) and allowed him to pay the price within one month. Y becomes insolvent during this period of credit. X can exercise his right of lien.
- X sells his car to Y for Rupees 1,00,000 (one lakh). X delivers the said car to the railways for the purposes of delivery to Y. The railway receipt is taken in the name of Y. X has lost his right to lien.

#### C. Re-sale

##### General Principles

The cardinal principle governing the right of a seller to re-sell is that the seller is entitled to hold all the goods as a security for the price, with a right to re-sell the goods, in case the delay in making payment by the buyer was unreasonably long.

Hence, if the unpaid seller does not receive any payment by the buyer for the goods within reasonable time, the seller can re-sell the goods and can claim damages for the loss occurred due to the breach of contract. Goods have to be sold in reasonable time.

The unpaid seller can exercise the right to re-sell the goods under the following conditions-

- ❑ Where the goods are of perishable nature, the buyer need not be informed of the intention of resale;
- ❑ Where the unpaid seller gives notice to the buyer of his intention to re-sell the goods and the buyer does not pay/ tender the price within a reasonable time.

The statutory power to re-sell arises if the property in the goods has passed to the buyer, subject to the lien of the unpaid seller. Where the property in the goods has not transferred to the buyer, the seller has no right of re-sale.

Although there is no definition of "perishable goods", the phrase connotes and includes goods which are apt to deteriorate in a mercantile sense as well, such as fruit or fresh fish, which cannot be kept for long.

A buyer cannot claim any profits on re-sale of goods.

If the notice of re-sale was not given by the unpaid seller, he cannot recover damages for the loss incurred due to breach of contract and the buyer is entitled to profit gained by re-sale.

Where an unpaid seller has exercised the right of lien or stop in transit and re-sells the good the new buyer acquires a good title against the previous original buyer.

Where the seller expressly has the right to re-sell the goods in case of default by the buyer he can re-sell the goods and the contract between the buyer and the seller is terminated and does not hamper any claim which the seller may have for damages.

#### Illustrations

X purchases 10 kgs of cement from Y for a price of Rupees 2000. X promises to pay Y within a period of 4 days. Even after the lapse of 4 days, X does not tender the payment to Y. X has the right to re-sell the cement to Z.

X purchases a motor car from ABC Motors for a price Rupees 20,00,000 in January, 2016. X promises to tender the full payment of the motor car by March, 2016. Sometime in April, 2016, on account of non-receipt of any payment on behalf of X, ABC Motors requests X to tender the payment for the motor car. Till May, 2016, ABC motors receive no response from X with regard to the payment for the motor car. In June 2016, ABC Motors again request X to tender the payment towards the motor car. Again, there is no response on behalf of X. ABC Motors has the right to re-sell the said Motor car to Z.

X sells one horse to Y on credit. Meanwhile, Z contacts X to register his interest in the horse. Y does not pay within the stipulated time. X can resell to Z or to any other person.

### VI. Remedies of a Buyer

#### A. Damages for Non-Delivery

##### General Principles

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

A buyer can sue the seller for the non-delivery of goods if the seller intentionally neglects or refuses to deliver the goods to the buyer.

In case where the property in the goods has been passed to the buyer, he has the right to immediate possession. The remedies of an owner will be given against any one whose activities are inconsistent with his rights.

Calculation of amount of damages shall be done on the basis of the difference between the contract price and the market price.

The date of breach should be taken to calculate the difference between the contract price and the sale price, and the buyer can recover this amount, along with an interest.

In order for the buyer to recover the damages in amount in excess of that which represents the difference between the market price and the contract price, it is necessary to prove the damages which have been suffered by the buyer.

##### Illustration

X purchases 65 (sixty five) tons of Finnish timber from X at the rate of Rupees 1000 per ton from Y on 23 April 2017. Y promises to deliver the said goods within the

stipulated time of one month (i.e. 23 May 2017). Y fails to deliver the 65 tons of timber to X. X, in order to satiate his urgent requirement of Finish timber, is compelled to purchase the 65 tons from Z at the rate of Rupees 2000 per ton on 23 May 2017. X is entitled to receive the difference between market price and contract price as on 23 May 2017 from Y.

#### B. Damages for Breach of Warranty

##### General Principles

If the seller breaches a warranty under the contract of sale, or puts the buyer in a situation where the buyer has to choose or treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not entitled to reject the goods merely by reason of such breach of warranty. However, he may have recourse to the following:

- (a) Set up against the seller the breach of warranty in diminution or extinction of the price; or
- (b) Sue the seller for damages for breach of warranty.

The term 'warranty' means a condition that is to be fulfilled by the seller. A buyer may consider the breach of condition as breach of warranty.

Where the warranty is given by the seller with regards to the quality of the product and the warranty has been breached, the amount of the damages will be determined on the basis of worth of goods at the time of delivery and what should have been its actual worth according to the contract.

##### Illustrations

X, a farmer buys a cow from Y who represents to X that the cow is healthy and is free from foot and mouth disease. X, within a week discovers that the cow indeed had foot and mouth disease at the time of purchase. X is entitled to damages.

X purchases 20 (twenty) cartons of tobacco sourced from Y. Y represented to X that the said tobacco was sourced from Virginia and was of the highest quality. Upon opening the cartons, X discovers that the said tobacco was not sourced from Virginia and was of an inferior quality. X is entitled to damages.

#### C. Rejection of Goods

##### General Principles

As discussed above, a buyer cannot reject the goods, merely for a breach of warranty. However, when the goods do not match the description, or do not match the sample, as was examined by the buyer, the buyer may reject the goods.

Where under a contract of sale, the seller delivers to the buyer the goods, mixed with goods of a different description which are not included in the contract, the buyer may accept the goods, which are in accordance with the contract and reject the rest, or may reject the whole of goods.

Therefore, the buyer is not bound to accept the goods, however easy it may be to separate the goods which are contracted to be sold from the others.

Further where the seller delivers to the buyer a quantity of goods less than what he contracted to sell, the buyer may reject them. In case the buyer accepts the goods so delivered, he has to pay for it as per the rate in contract. Hence in the event of a seller delivering a quantity of goods less than what is stipulated in the contract, the seller does not fulfil his contractual obligation and cannot call upon the buyer to accept it thereby entitling the buyer to reject the goods.

In effect, the tender of a lesser quantity of goods by the seller amounts to a new offer to this extent, which the buyer may accept and pay for, or otherwise reject the whole of the amount tendered.

Where the seller delivers to the buyer a quantity of goods larger than he had contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole of the consignment. In the event the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

Hence it is the buyer's option to purchase the goods included in the contract or reject the rest or the whole consignment.

The buyer is also not bound to accept the excess, nor is he bound to put himself to the trouble of separating the contracted quantity from the excessive quantity of goods delivered.

However, the buyer is at liberty, to make this choice, and may therefore accept what is in effect the new offer by the seller to sell to him the whole of the quantity delivered. If, however, he accepts the greater quantity, he cannot afterwards sue for misdelivery.

- X sold to Y certain tea cups of bone china. X packed with the tea cups, other articles of bone china, which had not been ordered and were clearly distinguishable, and sent them to the buyer. B has the right to reject the whole consignment.
- X & Y agreed for the sale of 50 (fifty) tons of steel sheets of 6, 7, 8, 9 and 10 feet, 'equal tonnage per size'. The seller, X delivered 50 (fifty) tons of one size only. The buyer, Y could accept one-fifth of the consignment as being contract goods and reject the rest.

## Chapter 4

### AGENCY

#### I. Introduction

In Chapter II we have already discussed law governing contracts under Contract Act. The present chapter briefly explains the law relating to agency under Contract Act. The principle of agency lies in the Latin maxim 'qui facit per alium facit per se', which means that one acting by another is acting for himself.<sup>80</sup> Contract Act provides a comprehensive set of rules regarding definitions of principal and agent, relationship of agency, its termination, and the effect of agency on contracts with third persons.

**‘Agency’ means the relation which exists, where one person has an authority or capacity to create legal relationship between a person occupying the position of a ‘principal’, and third parties.**

#### II. The concept of principal and agent

Section 182 of Contract Act defines an ‘agent’ as a person who is employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is represented, is called the ‘principal’. Therefore, as per Contract Act, ‘principal is the person for whom such act is done or who is represented with third parties by the agent’.<sup>81</sup>

A contract of agency can be created by an express or an implied agreement and need not be in writing. The same can also be inferred from the circumstances and conduct of the parties. No consideration is necessary to create an agency.<sup>82</sup> The relationship between the principal and agent is often confused with that of master and servant. The difference between the two is that the principal has the right to direct what work the agent has to do, but a master has the further right to direct how the work is to be done.<sup>83</sup> Therefore in order to determine the status of the agent, it needs to be seen whether the actions of the agent bind the principal or not.<sup>84</sup>

Any person who has attained the age of majority and who is of sound mind is permitted to employ an agent as per Contract Act.<sup>85</sup> Similarly, between the principal and third party any person can become an agent, but the

person needs to be of the age of majority and of sound mind.<sup>86</sup> Therefore, under Contract Act, a minor is incapable to either employ an agent, or to act as an agent.

#### III. Rights and Duties of Principal and Agent

##### A. Rights and Duties of Agent towards Principal

Under Contract Act, an agent is bound to conduct the business of his principal<sup>87</sup> as per the directions that are given to him by his principal. However, where no directions have been given to the agent by the principal, the agent is bound to conduct the business according to the custom which prevails in doing business of the same kind at the place where the agent conducts his business.<sup>88</sup> Therefore, in cases of difficulty, it is the duty of the agent to seek instructions from the principal, by using all reasonable diligence.<sup>89</sup>

For conducting the business of agency, the agent is bound to act with as much skill as is generally possessed by persons engaged in similar business, and the agent is bound to act with reasonable diligence and to use the skill that he possesses.<sup>90</sup> Furthermore, if any direct consequences are incurred by the agent due to his own neglect, want of skill, or misconduct, the agent is bound to compensate the principal for the same.<sup>91</sup> The agent is however not responsible for loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.<sup>92</sup>

**The Supreme Court in the case of Pannalal Jankidas v. Mohanlal has held that “in case of the agent’s negligence he is liable to make good the damage directly arising from his neglect but not indirectly or remotely caused by such neglect or misconduct.”**

Therefore, where there are clear directions from the principal, they have to be carried out or in the absence of directions the agent is still under a duty to carry on the business according to the custom prevalent at the place.<sup>94</sup>

<sup>80</sup> M.J. ASLAM, *Law of Contract*, Vol. II, 2085 (2<sup>nd</sup> ed., 2017), referring to Corpus Juris Secundum, Restatement of American Laws, volume 2A, page 549

<sup>81</sup> M.J. ASLAM, *Law of Contract*, Vol. II, 2084 (2<sup>nd</sup> ed., 2017)

<sup>82</sup> Section 185 of Contract Act

<sup>83</sup> *Ram Gopal and Son Ltd. v. The Government of Hyderabad* 1955 SCR 393

<sup>84</sup> *A.P. State Co-op. Rural Irrigation Corporation Ltd. v. Co-operative Tribunal and Ors.*, 2007 (1) ALT 239

<sup>85</sup> Section 183 of Contract Act.

<sup>86</sup> Section 184 of Contract Act.

<sup>87</sup> Section 211 of Contract Act.

<sup>88</sup> Section 211 of Contract Act.

<sup>89</sup> Section 214 of Contract Act.

<sup>90</sup> Section 212 of Contract Act.

<sup>91</sup> Section 212 of Contract Act.

<sup>92</sup> Section 212 of Contract Act.

<sup>93</sup> 1950 SCR 979.

<sup>94</sup> *Phoolband and Ors. v. Laxminarain*, AIR 1967 Raj 151.

In a situation where an agent acts contrary to the directions given to him by the principal, then any losses that are incurred, must be made good to the principal, and any profits that are accrued must be accounted for by the agent to the principal.<sup>95</sup> Therefore, an agent is bound to render proper accounts to his principal, when the former so demands.<sup>96</sup>

If an agent acts on his account in the business of agency, without the principal's consent, then the principal has the right to repudiate the transaction if any material fact has been dishonestly concealed by the agent, or if the dealing of the agent has been disadvantageous for the principal.<sup>97</sup> The Supreme Court in *Pannalal Jankidas v. Mohanlal*, has held that, "the quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases".<sup>98</sup> Therefore the quantum of damages liable to be paid is subjective and has to be determined on a case to case basis. The principal is also entitled to claim from the agent, any benefits that an agent gains by dealing in the business of agency on his account, instead of on account of his principal.<sup>99</sup> An agent is also bound to pay the principal all sums that an agent receives on the principal's account.<sup>100</sup>

### B. Rights and Duties of the Principal towards Agent

If a principal employs an agent to do something which makes an agent incur pecuniary liability, the principal cannot go back on his words by letting the agent bear the liability for the act carried out by the agent at his own expenses.<sup>101</sup> The employer of an agent is bound to indemnify his agent against all consequences of lawful acts done by the agent in exercise of the authority,<sup>102</sup> and indemnify the agent against all third party consequences that may arise due to acts done in good faith by the agent.<sup>103</sup>

In the case of *Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons and Ors.*, it was held that a claim for indemnification, under Section 222 of Contract Act, is only maintainable if the acts, which the agent is employed to do, are lawful.

Agreements to commit criminal acts are expressly and specifically excluded, by Section 224 of Contract Act, from the scope of any right to an indemnity. The principal must also compensate his agent for any injury

caused to the agent due to principal's neglect or want of skill.<sup>104</sup>

### C. Agent's Misrepresentation

As per Section 238 of Contract Act, in order to determine that an agent has made any misrepresentation or committed a fraud, it has to be seen whether such actions were done within the 'course of authority' of the business for the principal. Therefore, misrepresentations made or fraud committed by the agent render the principal liable to third parties, only if such actions are within the scope of the agent's authority.<sup>105</sup>

However, misrepresentations made or frauds committed by agents for matters which are not within their scope of authority, would not have any effect on their principals.<sup>106</sup> It has been held that scope of authority of the agent needs to be determined from the circumstances of the case,<sup>107</sup> and 'even if fraud is committed by agent for his own benefit the principal is liable, if the agent is acting within the scope of his implied authority'.<sup>108</sup> With regard to liability of the principal for agent's actions, in *Government of Goa, through Commissioner and Secretary (Finance) v. Goa Urban Co-operative Bank Ltd.*,<sup>109</sup> it was held that:

"The liability of the principal for the negligence and/or wrongful act of the agent is on the ground that the principal is a person who has selected the agent and the principal having delegated the performance of certain class of acts to the agent, the principal should bear the risk. All that is necessary for holding the principal liable is that the act should have been committed by the agent in the course of his employment. Although the principal did not authorise the agent to act negligently, the principal cannot escape the liability for the negligence of the agent."

### IV. Relation with third parties

In a contract of agency, there are 3 (three) parties—principal, agent and third parties. Agency in law connotes an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.<sup>110</sup>

### A. Statutory Framework

Section 226 of Contract Act embodies the above mentioned principle and provides that the agent is a conduit through whom the principal reaches out and connects with third parties in commercial relationships. Thus, where a contract is entered into or on behalf of the principal and the same is within the scope of the agent's authority, the principal is accountable for such acts.<sup>111</sup> If

<sup>95</sup> Section 211 of Contract Act.

<sup>96</sup> Section 213 of Contract Act.

<sup>97</sup> Section 215 of Contract Act.

<sup>98</sup> *Pannalal Jankidas v. Mohanlal*, 1950 SCR 979, referring to the case of *British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London*, (1912) AC 673.

<sup>99</sup> Section 216 of Contract Act.

<sup>100</sup> Section 218 of Contract Act.

<sup>101</sup> M.J. ASLAM, *Law of Contract*, Vol. II, 2304 (2<sup>nd</sup> ed., 2017), referring to *Read v. Anderson*, (1884) 13 QB 779.

<sup>102</sup> Section 222 of Contract Act.

<sup>103</sup> Section 223 of Contract Act.

<sup>104</sup> Section 225 of Contract Act.

<sup>105</sup> POLLOCK AND MULLA, *Indian Contract Act Specific Relief Acts*, Vol. II, 1822 (Updated 14<sup>th</sup> ed., 2013).

<sup>106</sup> Section 238 of ICA.

<sup>107</sup> *Firm Rupram Kailash Nath v. Co-Operative Union and Anr.*, AIR 1967 All 382.

<sup>108</sup> *Kasturbandy v. Kabulchand Asaram* AIR 1945 Nag 121.

<sup>109</sup> (2011) 1 AIIMR 94.

<sup>110</sup> *Dalmia Cement (Bharath) Ltd. v. T. V. Oommen and Ors.* 1987 KLT 273.

<sup>111</sup> *Amaranath Sangarnar v. Sonali Bank*, AIR 2003 Cal 255.

the acts of the agent are outside the scope of its authority and the same can be separated from the part which is within authority, the principal is only bound by acts done within the scope of authority and not otherwise.<sup>112</sup> If the acts are inseparable, then the principal is not bound by the transaction in toto.<sup>113</sup> Further, in the absence of a contract to the contrary, an agent cannot personally enforce contracts entered into by him on behalf of the principal; or be personally liable on such contracts.<sup>114</sup> A competent agent is legally capable of acting for the principal vis-a-vis the third party<sup>115</sup> and the third party is protected as if it has dealt with the principal itself.

### B. Types of Authorities and the Principal's liability

Actual authority can be express or implied and if the agent has performed within his scope of work, it binds the principal. Therefore, where the agent acted within the terms of written authority and the third party has acted bona fide on it, the principal cannot repudiate liability on the ground that the agent acted in his own interest and not in those of his principal.<sup>116</sup> However, in situations where the third party was aware about the limitations of the agent's authority or could have discovered it by reasonable means, the principal is not bound by it and only the agent is held liable in such a situation.<sup>117</sup>

As far as ostensible authority is concerned, Denning LJ stated that "Ostensible authority is the authority of an agent as it appears to others. It often coincides with actual authority. But sometimes ostensible authority exceeds actual authority"<sup>118</sup> However, in the case of Valapad Co-operative Stores Limited v. K. H. Srinivasa Iyer Brothers<sup>119</sup>, it was held that ostensible authority is just a phrase conveniently used to allow the agent to assume the appearance of authority and mislead an innocent third party into believing that a real authority exists. Section 237 of Contract Act deals with the concept of ostensible authority in situations where the principal himself has induced a third party to believe that the unauthorized acts of the agent are within the scope of the agent's authority.

However, if there is no such inducement, the principal cannot be bound by the acts performed by the agent and which are outside the scope of the agent's authority. For instance, the Supreme Court of India had refused to bind the principal in Harshad J.Shah and Anr. Vs. L.I.C. of India and others<sup>120</sup> as the principal had an express provision in its rules indicating that the agent did not have the requisite authority to perform the alleged acts,

and hence there was no inducement on behalf of the principal. A principal by ostensible words of conduct can represent that agent has the requisite actual authority and the person dealing with the agent can place reliance on such a representation, and whereupon the principal is estopped from denying that actual authority vests.<sup>121</sup>

Thus liability of the principal is not affected by the fact that the transaction was fraudulent or tortious or was detrimental to the interest of the principal as long as the third party has been dealing with the agent in good faith. The High Court of Madhya Pradesh had held that:

"The motive of the agent is immaterial in such a case and the principal is bound though the contract may be entered into and the act done fraudulently in furtherance of the agent's own interests, and contrary to the interests of the principal, provided the person dealing with the agent in good faith."<sup>122</sup>

However, an ostensible agent cannot bind his principal to that which the principal cannot lawfully do.<sup>123</sup>

### C. Third Party's right to deal with the agent

Though the principal is bound by the agent's acts vis-a-vis the third party, the law does not compel the third party to recognize the agent.<sup>124</sup> In fact, the third party is free to say that it will not deal with the agent and instead deal with the principal directly. However, when the third party has recognized the agent's authority, he is estopped from questioning that authority in a suit with respect to that contract.<sup>125</sup>

### V. Termination of Relationship: Revocation of Agency

Section 201 of Contract Act provides for several modes of termination of agency. It may be terminated by:

- Revocation of the agent's authority by the principal;
- Agent renouncing the agency;
- Completion of the business of agency;
- Death of the principal or agent;
- The principal or agent becoming of unsound mind; and
- The principal being adjudicated as an insolvent.

However, this section is not exhaustive. It is only illustrative and the question whether in particular circumstances an agency can be deemed to have terminated will have to be decided upon the general principles of law.<sup>126</sup>

<sup>112</sup> Section 227 of ICA.

<sup>113</sup> Section 228 of ICA.

<sup>114</sup> Section 230 of ICA.

<sup>115</sup> POLLOCK AND MULLA, Indian Contract Act Specific Relief Acts (10th Edition p. 830)  
<sup>116</sup> *Oriental Insurance Company Limited v. Indrapal and Ors.* (2008) 2 MPLJ 400; *Damodardas Khiraj v. Gourishankar Harbakas*, AIR 1958 Bom 445.

<sup>117</sup> *Ferguson v. Um Chand Boid*, (1905) 33 Cal 343.

<sup>118</sup> *Hely Hutchinson v. Bray Head Ltd* [1968] 1 QB 549.

<sup>119</sup> AIR 1964 Ker 176.

<sup>120</sup> AIR 1997 SC 2459.

<sup>121</sup> *The Kerala Agro Industries Corporation Ltd. And Anr vs. Beta Engineers* 188 (2012) DLT 373.; *Happy Home Builders (Karnataka) Pvt. Ltd. v. Delite Enterprises*, 994(1)KarlJ103; Anson Law of Contract (28<sup>th</sup> Edn.p.671).

<sup>122</sup> *Oriental Insurance Company Limited v. Indrapal and Ors.* (2008) 2 MPLJ 400.

<sup>123</sup> *Albert Jindab Jindab v. Rampada Gupta and Anr.* AIR 1959 Cal 715.

<sup>124</sup> *Mediator Company Ltd. vs. The State of West Bengal and Ors.* AIR 1958 Cal 634.

<sup>125</sup> *Moosjee Ahmad and Company v. Administrator General of Bengal*, 60 Ind. Cas.739.

<sup>126</sup> *Janardhan Jaikrishna v. Gangaram Mangaldas*, AIR 1951 Nag 313.

The termination of the authority of the agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third parties, before it becomes known to them.<sup>127</sup>

A combined reading of the sections provides that the principal has the power to revoke the authority conferred on the agent, whether or not the same was expressed to be irrevocable, however, such right is subject to liability to third parties under the principle of apparent authority<sup>128</sup> and without prejudice to the right of the agent to claim damages. Once agency is terminated, the agent is still entitled to indemnity for acts done<sup>129</sup> and to receive remuneration earned for the period before the termination.<sup>130</sup> However, an exception to termination of agency is provided in Section 202 of the Contract Act which provides that where an agent has been appointed in respect of a subject matter, and he has an interest in that subject matter, such an agency cannot be terminated in any manner so as to prejudice such an interest, unless there is an express contract to that effect.

Once agency is terminated,  
the agent is still entitled to indemnity  
for acts done and to receive remuneration  
earned for the period before  
the termination.

## VI. Revocation of Agency by the Principal

Section 203 of Contract Act gives the principal a general power to revoke the authority given to the agent, provided it is done before the agent has exercised the authority to bind the principal.

An agent cannot be said to have exercised authority to bind the principal, merely because he has taken initial steps towards the transaction. The agency can be revoked by the principal by giving a reasonable notice under Section 206 of Contract Act and if the same is not given then the agent has a claim for damages.

If the termination of the agency by the principal is inequitable or works an unjust hardship on the agent, the law requires a reasonable notice to be taken.<sup>131</sup> Revocation can be express or implied.<sup>132</sup> It is question of fact in each case whether an agency has in fact been revoked or terminated.

Moreover, the principal cannot revoke the authority after the authority has been partly exercised, with respect to such acts and obligations which arise from acts already done in the agency.<sup>133</sup> This rule is connected with the principal's duty to indemnify the agent under Section 222 of Contract Act.

<sup>127</sup> Section 208 of ICA.

<sup>128</sup> Section 237 of ICA.

<sup>129</sup> Section 222 of ICA.

<sup>130</sup> Section 205 of ICA.

<sup>131</sup> *International Oil Co. by its Proprietor, Selvaraj, Madras v Indian Oil Co. Ltd now known as Indian Oil Corp. Ltd.* Madras AIR 1969 Mad 423.

<sup>132</sup> Section 207 of ICA.

<sup>133</sup> Section 204 of ICA.

<sup>134</sup> *Kata Singh v. Bishambhar Sabai*, AIR 1929 All 578.

## Chapter 5

### PROPERTY LAW

#### I. The Concept of Ownership and the Rights of an Owner over the Rights of a Lessee

##### A. Concept of Ownership

###### Overview

The concept of ownership has its origins in Roman law, distinguished from the concept of possession. Ownership, termed as 'dominium,' was earlier referred to as the absolute right to a thing. It was only later that ownership was laid out as constituting a bundle of rights within itself.

In India, the concept of ownership has been discussed by the courts at length.

"Ownership refers to all the rights and interests in the property possessed by a particular person. Thus, ownership is the bundle of rights comprising of these rights and interests, which are transferable from one person to another. Such a right to transfer is inherent within the concept of ownership itself."<sup>135</sup>

Categorizing and delineating such rights which constitute ownership, the Supreme Court of India too has stated that ownership, in relation to a thing (which includes immovable property), can be said to comprise of the following rights:

- Power of enjoyment over the property – this includes the right to determine the use to which the property will be put and using the thing as the owner desires, and to the exclusion of the others, as well as the power to deal with the produce as the owner pleases;
- Possession, which includes the right to exclude others from enjoying the property and the benefits arising there from;
- Power to alienate the property entirely, to charge it as security for the repayment of the debt, or to alienate some rights in the bundle itself, e.g., leasing out the property so as to give to another person the possession and right to enjoyment of the property, whilst still maintaining the ownership; and
- Power to destroy the property.<sup>136</sup> As ownership consists of a bundle of rights, the various rights and interests may be vested in different persons. For example, a mortgagor and a mortgagee, a lessor and a lessee, or a tenant for life and a remainder man.<sup>137</sup>

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity...

###### Modes of acquisition of ownership of property

Ownership of property can be acquired through the following modes:

- **Transmission of ownership by way of succession**
  - ◆ **Testamentary Succession:** This refers to the disposition of the property by the person in ownership thereof to others, which such person intends to be carried out after his/her death. Such disposition is carried out by way of creating a 'Will'.<sup>138</sup> A will is revocable, and can be revoked or altered by the testator at any time when he is of sound mind.
  - ◆ **Intestate Succession:** When a person dies without making a will as to the manner of disposition of his property, the ownership of property is distributed among his heirs and family members in accordance with applicable personal laws.
- **Transfer of ownership by way of sale**

Sale refers to the transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.<sup>139</sup> An owner, in his lifetime, can transfer the ownership of the immovable property in favour of another person and get the consideration for the property in return. If the value of the property sold is more than Rupees 100 (One Hundred), then a sale deed is required to be compulsorily registered upon payment of requisite stamp duty, under Section 17 of the Registration Act, 1908 read with Section 54 of the Transfer of Property Act, 1882 (hereinafter, the "Property Act").

- **Sales through powers of attorney:** Sometimes, parties seek to transfer property by way of general power of attorney, an agreement to sell, or will. A power

<sup>135</sup> *Commissioner of Income Tax, Bombay etc. v. M/s. Podar Cement Pvt. Ltd. etc.*, AIR 1997 SC 2523.

<sup>136</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 55.

<sup>137</sup> Section 2(h), The Indian Succession Act, 1925.

<sup>138</sup> Section 54 of the Property Act

<sup>139</sup> AIR 2012 SC 206.

of attorney is a legal document by way of which one person authorizes another to act on the behalf of such person in relation to the property, but does not result in a transfer of a property. Similar is the case with an agreement to sell, which is only a contract to sell the property at a future date, and a will, which, as discussed, is revocable and only takes effect after the death of the testator. None of the above instruments operate as transfer of ownership of property. Unfortunately, in many parts of northern India, the above mechanisms have been adopted for transfer of property, primarily to evade stamp duty and registration costs.

In the landmark case of *Suraj Lamps & Industries v. State of Haryana & Anr*,<sup>140</sup> the Supreme Court clarified that sale transactions essentially carried out in the name of General power of attorney/sale agreement/will transfers (GPA/SA/Will) do not convey title in the property, nor can they be considered as a recognized or valid mode of transfer of property; this can be done only by way of a registered sale deed.

## B. Concept of lease, and rights of a lessee

### Overview

A lease is a contract between 2 (Two) parties, being the lessor and the lessee, for the possession and profits of the land in exchange for rent or other consideration. A lease creates a right or an interest in the enjoyment of the property in favour of the lessee, who is entitled to remain in possession and enjoy the profits of the land until the lease is duly terminated whether due to efflux of time, operation of law, or in accordance with contractual provisions, at which point the eviction of the tenant (lessee) takes place as laid down under the law.<sup>141</sup>

Lease is defined under Section 105 of the Property Act, and treats the contract between the lessor and the lessee as a partial transfer, i.e., a transfer of a right of enjoyment for a certain time. It does not transfer the entire bundle of rights that denote ownership, but only a part of it. The essential elements of a lease are:

- The parties, i.e., the lessor and the lessee;
- The subject matter of the contract, i.e., the immovable property let out for the possession and enjoyment of the lessee;
- The partial transfer of the interest in the property;
- The term, or the period for which the lease operates, at the end of which the lessee has to vacate the property, and the possession would revert to the lessor; and
- The consideration to be paid by the lessee to the lessor for grant of the lease.

The law in India also allows the lessee to let out the property to another person. In essence, the interest that the lessee has for a limited time, is handed over to the lessee of the lessee.

This is popularly called a sub-lease, and operates just as a lease under section 105 of Property Act, with the essential elements remaining the same. Except in the case of some agricultural lands where leases are not transferable further by the lessee, sub-leases have been permitted by the law in India.<sup>142</sup> However, such sub-letting can be restricted / prohibited by the lease agreement.

### Rights of a lessee

Section 108 of the Property Act sets out the rights and obligations of both the lessor and the lessee. However, it must be noted that such rights and liabilities as mentioned in the section are subject to a contract or local usage to the contrary. For the purpose of this article, we are restricting ourselves to the rights of a lessee.

Therefore, the rights of the lessee mentioned below shall apply, provided there is nothing to the contrary mentioned in the contract between parties to the lease deed.

- Right to take possession of the property and use it for the purposes for which it is let out to the lessee.<sup>143</sup> This right of the lessee to compel the lessor to put him in possession of the property is a statutory right.<sup>144</sup> Till this right is fulfilled, the lessor is not entitled to receive the rent from the lessee.
- Pursuant to the right of possession, the lessee has the right to enjoy the property and the benefits arising therefrom absolutely. Such enjoyment under the Property Act is unqualified, such that even the superior landlord or another person claiming on the basis of the title is not entitled to exercise re-entry or dispossess the lessee who enjoys possession. The breach of the covenant in this case can occur even if there is substantial interference with the enjoyment, though such interference may not amount to dispossession.<sup>145</sup>
- Right to any accretions made to the property during the period of the lease.<sup>146</sup> This right has its origins in English law, and gives the same legal characteristics to the land that is added to the property as the property itself. Though the lessee gets the same interest in the property that accretes as the rest of the property, such property should accrete gradually and imperceptibly. Furthermore, the lessee pays a proportionate increment of rent after such property has accreted.<sup>147</sup>
- Right to terminate the lease and treat it as void if any material part of the property is wholly destroyed by fire, flood or violence or if the property is rendered substantially and permanently unfit for the purposes for which it was taken on lease.
- The lease of a shop or that of a house is not only of the superstructure usually, but also of the site on which such superstructure exists. Thus, unless there is an express or implied exclusion, the lease of the superstructure would include the land on which it exists. If the lease includes the land, then the lessee has

<sup>140</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 762.

<sup>141</sup> Section 108 of the Property Act; SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 1099.

<sup>142</sup> Section 108(B)(c) of the Property Act

<sup>143</sup> *KC Rout v. The State of Orissa* AIR 1979 Ori 120.

<sup>144</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 855.

<sup>145</sup> Section 108(B)(d) of the Property Act

<sup>146</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 859.

<sup>147</sup> *Dhruv Dev v. Harmohinder Singh* AIR 1968 SC 1024.

the right to remain in possession of the premises even if the superstructure has been destroyed.<sup>148</sup>

- If there is an express contract compelling the lessor to bear the expenses to repair the property, and the lessor fails to do so, then the lessee has the right to get the property repaired by himself and get the amount from the lessor, or deduct the expenses along with the interest from the rent to be paid.<sup>149</sup> If there is no express contract to such effect, the liability to repair and for the upkeep of the property possessed is that of the lessee.<sup>150</sup>
- Right to recover from the lessor or deduct from the rent payable to the lessor, any payment made by the lessee which the lessor is otherwise bound to make, and on the lessor neglected to pay.<sup>151</sup> Such a right of reimbursement to the lessee has also been incorporated under Section 69 of the Contract Act, which provides that “A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.”
- The lessee's rights are heritable and transferable. This means that the lessee can transfer such an interest either absolutely, by way of assignment of the lease, mortgage or sub-lease in favour of another party.
- Lessee has the right to remove fixtures on the property attached by him, provided that, on the lessee vacating the property, it is left in the condition in which the lessee received it. This right can only be exercised during the term of the lease, whilst the lessee is in the possession of the property.<sup>152</sup> If the lessee quits the possession of the property, there is no right to return and get the fixtures removed – the fixtures become the property of the lessor.

## II. Meaning and Concept of Possession and Rights of a Possessor

### Meaning and Concept of Possession

As has been discussed above, ownership constitutes a bundle of rights. Possession is a significant constituent of such rights. The old expression states, “Possession is nine tenths of the law,”<sup>153</sup> denoting that ownership is easier to maintain if one has possession of a thing. Possession vis-à-vis ownership can be stated in the following words:

“ The right to possess, viz. to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests.<sup>154</sup> ”

While initially, possession was originally protected under the law of crime as well as that of tort, such protection soon extended to the law of property, through emphasizing the importance of possession as indicative of the title to the property that the possessor holds in such property.

In fact, conveyance of movable property can happen merely by way of delivery of possession of such property. In the case of immovable property, actual possession thereof is a notice of the title that the person has in such property.

This means that it raises a presumption of notice to a person who acquires any immovable property or any interest therein of the title that the actual possessor has.<sup>155</sup> If the transferee does not make any enquiry as to the rights of the possessor, he cannot claim to be a transferee without notice, and would not be entitled to either the ownership or the possession of the property.<sup>156</sup>

Therefore, possession, itself being a right, broadly represents two other incidents of such a right viz.:

- The right to be put in exclusive control of a thing;
- The right to remain in exclusive control of the thing.

Both these aspects derive from the right to exclusive use, which is one of the incidents of ownership. The aforementioned aspects of possession are the central elements of the right to property itself, i.e., exclusion and control. One of the important elements while discussing possession, therefore, is the intention to appropriate to oneself the exclusive use of the property possessed. Thus, possession involves power of control and the intent to control.<sup>157</sup> Furthermore, the actual or potential physical control and the intention of getting such exclusive control should be evidenced by external signs.

Parties other than the owner can also be in possession of a property in terms of the Property Act. For instance, the lessor can create a lease in favour of the lessee, whereby the lessee gets the right to take possession of the property and enjoy all the profits arising therefrom, for a specific period of time, even to the exclusion of the owner during the term of the lease.<sup>158</sup>

Following are the rights that may be claimed by a person in possession of an immovable property:

- Right to exclusively occupy and control the property. The legal possessor of a land has the right in law to exclude any other unlawful possessor and reclaim the possession over the land;
- Right to quiet enjoyment of the land; the possessor has the right to enjoy the property unhindered and away from any interruption by any person or persons

<sup>148</sup> Section 108(B)(f) of the Property Act

<sup>149</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 864.

<sup>150</sup> Section 108(B)(g) of the Property Ac

<sup>151</sup> Section 108(B)(h), Property Act (Discusses the amendments that brought such changes into place).

<sup>152</sup> BETH WALSTON-DUNHAM, INTRODUCTION TO LAW, P.384 (2011).

<sup>153</sup> AM HONORÉ, OWNERSHIP, OXFORD ESSAYS IN JURISPRUDENCE 107, at 113 (1961).

<sup>154</sup> Explanation II – Section 3 of the Property Act

<sup>155</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 44.

<sup>156</sup> *Syptd. and Remembrance of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.*, [1979] 4 SCC 274.

<sup>157</sup> Section 105 of the Property Act

<sup>158</sup> Section 108(A)(c) of the Property Act

whomsoever. If the possessor is a lessee, such a right exists against the lessor, his heirs and assigns, or by any other person or persons whomsoever;<sup>159</sup>

- Right to use the property for any use, subject to uses permitted by the law. If the possessor is a lessee, then the use of the property might not be absolute, but might be restricted by the lease agreement.<sup>160</sup> However, such use is still exclusive in law;
- Right to enjoy the benefits arising out of the land. For example, if the land in question is an agricultural land, then the possessor has the right over the yield from the land;
- Right to use reasonable force to keep someone from entering onto the land. However, if someone has already taken possession of the land, then the legal possessor should use the due process of law to get back the physical possession; and
- Right to destroy or change the character of the property, subject to the restrictions under in force at the time or the title of another person over the property.

### Part Performance

Possession is also an important element for a person seeking protection under the doctrine of part performance. The doctrine of part performance is a means of providing a shield of protection to the proposed transferee of an immovable property, by giving the right to the transferee to remain in possession of the property as against the original owner pursuant to an agreement to sell. However, such a right of possession is subject to the following conditions being satisfied:<sup>161</sup>

- An existing written (and not oral) contract to transfer for consideration (excluding gifts) any immovable property between the transferee and the transferor;<sup>162</sup>
- The aforementioned contract between the parties must be signed by the transferor or someone on his behalf;
- Words of the contract must be such that one can ascertain the terms that are necessary to construe the transaction;
- The transferee must act in pursuance of the intended transfer, i.e., he should take possession of the property or any part thereof;
- If the transferee is already in possession, then he should do some act in furtherance of the contract aforementioned. Mere retention of the possession is not sufficient to constitute part performance if the transferee is already in possession;<sup>163</sup> and
- The transferee must have performed or be willing to perform his part of the contract.

Only on the satisfaction of the aforementioned conditions can the transferee take benefit of the equity of part performance, and it debars the transferor as well as persons claiming under him to claim any right that the transferee has already taken, or to claim possession over the property. If, however, any right is given expressly to the transferor by the terms of the contract, then the transferor can claim such a right.

Pursuant to the Registration and Other Related Laws (Amendment) Act, 2001, such a contract is required to be compulsorily registered, failing which the transferee cannot claim benefit of the equity of part performance. It may be noted that the right under part-performance does not grant ownership over the property in the hands of the transferor; it merely gives a right to possession.<sup>164</sup>

### Adverse Possession

As has been discussed above (under the concept of ownership), title to immovable property may be acquired (in non-testamentary cases) only by way of a duly registered sale deed. Therefore, while a person may have been put in physical possession of a property pursuant to instruments such as a general power of attorney, agreement to sell, or a will, and such person claims the rights of a possessor as enumerated above, the same does not vest title as owner in the property in favour of such person.<sup>165</sup> The exception to the above law is the doctrine of adverse possession.

The concept of adverse possession derives from the classical jurisprudential theory that possession is determinative of the title to the property. Under Indian law, the concept of adverse possession is recognized, and its limits explained by numerous court judgements. It denotes a mode of acquisition of ownership by a person whereby such person enjoys uninterrupted and uncontested possession for a specified period, hostile to the rights and interests of the true owner.

Adverse possession comprises both physical and mental elements. First, there should be the factum of physical possession over the property by the possessor. Secondly, the possessor must have an intention to hold the property as an owner in exclusion to the actual owner.

A party claiming adverse possession must show that its possession is peaceful, open and continuous. The person claiming title to the property must assert that his possession is peaceful, open and continuous. The possession must start with a wrongful disposition of the rightful owner of the property and be actual, visible, exclusive, hostile and continued over the statutory period as mentioned in the Limitation Act, 1963 (currently 12 (Twelve) years).<sup>166</sup>

Courts are known to typically adopt the following tests to determine title on the basis of adverse possession:

- Whether there is intention to exclude others from the control of property on part of the adverse possessor;

<sup>159</sup> Section 108(B)(o) of the Property Act

<sup>160</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 12<sup>th</sup> ed., p. 331.

<sup>161</sup> *Mool Chand v. Bakbra Roban*, AIR 2002 SC 812.

<sup>162</sup> *Nanegondla v. Gangamma*, AIR 2011 SC 3774.

<sup>163</sup> *Namdeo Gajre v. Narayan Bapaji Dhotra*, 2004 (8) SCC 614.

<sup>164</sup> *Suraj Lamps & Industries v. State of Haryana & Anr.*, AIR 2012 SC 206.

<sup>165</sup> *Karnataka Board of Wakf v. Government of India*, (2004) 10 SCC 779.

<sup>166</sup> *T. Anjanappa v. Somalingappa*, (2006) 7 SCC 570.

- The nature of the possession: The possession must be open and hostile enough to be capable of being known by the parties interested in the property. However, it is not necessary that the possessor should actually be informing the real owner of the former's hostile action.<sup>167</sup> It is not necessary that the adverse possessor should know the true owner of the property he is possessing.<sup>168</sup>
- Whether the possession was open and undisputed;
- Whether the possession has continued undisputed for a period of at least 12 (Twelve) years from the date of dispossessing of the person having title over the property; and
- Whether in the aforesaid time frame, the person having title omits or neglects to take legal action against the possessor for years together.<sup>169</sup>

### III. Rights, Title and Interests In Property

#### A. Transfer of immovable property

The term 'immovable property' has been defined in Section 3 of the Property Act and Section 3 (26) of the General Clauses Act, 1897. An immovable property is defined to include land, benefits arising out of land, and things attached to earth.<sup>170</sup> The term 'Transfer of Property' is an act by which a 'living person' conveys property to one or more 'living persons', in present or in future.<sup>171</sup> The term 'living person' includes:

- An individual;
- A Hindu undivided family;
- A company;
- A firm; and
- An association of persons, whether incorporated or not.

The person transferring the property or certain rights in the property should be competent to contract.<sup>172</sup> Any person who has attained the age of 18 (Eighteen) years<sup>173</sup> and is of sound mind is competent to contract. A person being a minor has no legal competence to enter into a contract or authorize someone else to enter into a contract. However, under the Hindu Minority and Guardianship Act, 1956, a natural guardian is entitled to enter into a contract for a minor's property<sup>174</sup> on behalf of the minor and contract shall be binding and enforceable if entered into for the benefit of the minor,<sup>175</sup> subject to permission of the court.<sup>176</sup> The owner of an immovable property has unbridled rights to transfer the same, or certain rights therein. Such transfer can also be effectuated by authorized persons (by way of a power of attorney), subject to the extent and manner

allowed and prescribed under the terms of such authorization. The guiding principle in all such transactions is that no person can transfer a better title than he possesses.

All transfers of the value of Rupees 100 (one hundred) and upwards are required to be reduced in writing, with the instrument for transfer requiring to be duly stamped and registered with the concerned Sub-Registrar of Assurances (except for instruments that are exempted from registration). The rights, title and interests attached to, or vested in, the immovable property, which are intended to be transferred, stand transferred immediately upon the execution and registration of the legal transaction documents, unless a contrary intention appears in the legal transaction documents.<sup>177</sup>

“ All transfers of the value of  
Rupees 100 (one hundred) and  
upwards are required  
to be reduced in writing ”

While acquiring a property, it is important to verify as to whether the property is part of any pending litigation(s) including any appellate proceedings, arbitrations, suits, proceedings, disputes, lis-pendens, attachment, claims, demands, notices of acquisition or requisition, reservations, prohibitory orders, or notices of any nature whatsoever. The Property Act specifically provides that a property, if involved in any suit or proceedings which is not collusive so as to effect the rights of any immovable property, cannot be transferred or dealt with except under the authority of the court and on such terms as the court may impose.<sup>178</sup>

Taking into account the nuances of acquiring a property, it is always advisable that a due diligence exercise is conducted to verify the rights, title and interest of the person claiming to hold title to the property, applicable usage, encumbrances, acquisitions and requisitions (if any), litigations affecting the property, claims or demands by governmental and statutory authorities among others.

#### B. Modes of acquisition of immovable property

The various modes of acquisition of the immovable property and their corresponding legal requirements have been outlined below.

##### Sale of immovable property

In order to constitute a sale, there must be a transfer of ownership from one person to the other, i.e., all the rights and interest in the property which are possessed by the person are transferred in favour of another person. The transferor cannot retain any part of his interests or rights in

<sup>167</sup> Law Commission of India, *Consultation Paper-cum-Questionnaire on Adverse Possession of Land/ Immovable Property*.

<sup>168</sup> Law Commission of India, *Consultation Paper-cum-Questionnaire on Adverse Possession of Land/ Immovable Property*

<sup>169</sup> Section 3 (26) of the General Clauses Act, 1897.

<sup>170</sup> Section 5 of the Property Act

<sup>171</sup> Section 11 of the Indian Contract Act, 1872.

<sup>172</sup> Section 3 of the Indian Majority Act, 1875.

<sup>173</sup> Section 6 of the Hindu Minority and Guardianship Act, 1956; *Shri Manik Chand v. Shri Ramachandra*, (1980) 4 SCC 22.

<sup>174</sup> Section 6 of the Hindu Minority and Guardianship Act, 1956.

<sup>175</sup> Section 8 of the Hindu Minority and Guardianship Act, 1956.

<sup>176</sup> Section 8 of the Property Act

<sup>177</sup> Section 52 of the Property Act

<sup>178</sup> *T.L. Muddukrishna and Anr. v. Lalitha Ramchandra Rao* (1997) 2 SCC 611.

that property, in the event any right or interest is retained, the same will not constitute a sale.

Sale has been defined in Section 54 of the Property Act as the transfer of ownership in an immovable property. The transfer of ownership in an immovable property should be for a price/ consideration which should be either paid, or part paid or promised to be paid. The parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either at present or in future. The intention of the parties is to be gathered from the language of the sale deed, conduct of the parties and evidence on record. The rights and obligations of a buyer and a seller are set out in section 55 of the Property Act, which also clarifies that they are subject to any contract that the parties have between themselves to the contrary.

#### Agreement to sell

On the other hand, an agreement to sell of an immovable property is a contract for sale of such property at a future date, to take place on terms settled between the parties. It does not, in itself create any interest in or charge on such property. An agreement to sell is merely document creating a right to obtain another document for sale on fulfilment of the terms and conditions specified therein; only upon execution and registration of such document for sale does the buyer actually become the owner of the property.

**“ A purchaser may file a suit for specific performance, seeking the court to order the seller to perform its duties under the agreement to sell and execute the sale deed in favour of the purchaser. ”**

It may, however, be noted that an agreement to sell is a binding contract and can be specifically enforced, in the event of default by either of the parties, through the process of law. For example, the purchaser may file a suit for specific performance, seeking the court to order the seller to perform its duties under the agreement to sell and execute the sale deed in favour of the purchaser. Article 54 of Schedule I of the Limitation Act, 1963 prescribes that the period of limitation for instituting suits for specific performance as 3 (Three) years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused.<sup>179</sup>

An agreement to sell, therefore, does not vest any title, or transfer any interest, in an immovable property; it, however, creates a right in respect of the property in favour of the buyer – the right to obtain conveyance of the property from the seller on agreed terms and conditions.

As mentioned above, in light of the insertion of Section 17 (1- A) in the Registration Act, 1908 all agreements to sell with possession have been made compulsorily registrable with the concerned Sub-Registrar of Assurances. Such agreements are, therefore, not enforceable in the absence of registration.

#### Sale through powers of attorney

In certain instances, the intending purchaser may seek power of attorney from the seller in favour of the purchaser or his nominee for sale of the immovable property. Such a power of attorney, granted for consideration, is treated as being coupled with interest and is irrevocable.

#### Rights of buyer and seller

In terms of section 55 of the Property Act, the seller is firstly entitled to receive the consideration for handing over ownership to the buyer. He also has the right to receive the rents and the profits from the property till the time buyer gets the ownership. Additionally, the seller is entitled to a charge on the property sold to the extent of the money unpaid by the buyer, and to charge interest on the unpaid amount if the possession has passed to the buyer but the purchase price remains unpaid. The duties of the seller encompass disclosure of material defects in the property (failure to do so is considered fraudulent), showing complete and valid title to the property, taking due care of the property till the delivery of the property to the purchase, including the payment of public charges and rents and discharging any encumbrances thereon, and executing the sale deed on the payment of valid consideration for the price.

Likewise, the buyer is entitled to ownership rights on receiving the property, including benefit accruing on account of improvements or increase in the value thereof, apart from the right to receive rents and profits. He also has the right to a charge on the property against the seller for the price paid by the buyer unless he has improperly declined to accept delivery of the property. He/she is also entitled to the reliefs in a suit compelling specific performance of the contract of sale or rescission thereof. Duties of a buyer, apart from paying the entire value of the purchase-money, include disclosing any fact that the buyer believes is not known to the seller, and which increases the value of the seller's interest in the property. When the property has passed in the hands of the buyer, all obligations of ownership also pass, such as loss arising from injury/destruction or decrease in value and public charges, rent, as well as the burden on any encumbrances.

#### Lease

As has been discussed above, lease is defined in the Section 105 of the Property Act as a transfer of a right to enjoy such property, made for certain time, express or implied, or in perpetuity, in consideration of a price paid or promised to be paid which may consist of money, a share of crops, service or any other thing of value to be rendered periodically by the transferee to the transferor. The person who lets out the property is called the lessor and the person taking possession of the property is called the lessee. The right to enjoy/ use the premises is transferred in favour of the lessee, and the ownership continues to vest with the owner/ lessor of the property.

<sup>179</sup> Section 107 of the Property Act

The various kinds of leases are as follows:

- Perpetual lease;
- Lease for a specific term;
- Periodic lease, i.e., monthly or yearly lease;
- Tenancy at will: either of the parties may put an end to the lease at any time; and
- Tenancy by holding over: When a lease for a term comes to an end, if the tenant continues to be in possession, the renewal is periodic in nature wherein it is renewed on a month to month basis or year to year basis terminable at a month's or six months' notice respectively on the part of the lessor or lessee.

“ Section 17(1)(d) of the Registration Act, 1908 makes registration of lease for a period exceeding 1 (one) year compulsory, whereas Section 18(c) of the makes a lease for a term of less than 1 (one) year as optionally registrable. ”

Prior to entering into the lease, it is duty of the lessor to disclose to the lessee if there are any material defects in the property which is intended to be let out to the lessee, which the lessor was aware at the time of granting the lease. The lessor is also required to handover vacant, peaceful, uninterrupted and physical possession of the premises to the lessee, for the term of the lease as long as the lessee complies with the provisions of the lease deed.

A lease may be either made by way of a registered instrument or oral agreement. A lease of immovable property from year to year or for a term exceeding 1 (One) year or reserving a yearly rent can be made only by way of a registered instrument.<sup>180</sup> However, a lease for a duration of less than 1 (One) year is not required to be made by way of a registered instrument. Section 17(1)(d) of the Registration Act, 1908 makes registration of lease for a period exceeding 1 (One) year compulsory, whereas Section 18(c) of the Registration Act, 1908 makes a lease for a term of less than 1 (One) year as optionally registrable.

It is within the discretion of the parties to terminate a lease deed in respect of an immovable property. The termination of the lease leads to the reversion of the rights to use or enjoy the property held by lessee, in favour of lessor. However, such termination or dispossession shall happen in accordance with the agreed terms in the lease agreement by following the due process of law.

Section 111 of the Property Act provides for the conditions under which the lease for an immovable property may be terminated:

- By the efflux of time limited thereby – the lease automatically comes to an end on the expiry of the term of the lease;

- Where such time is limited conditionally on the happening of some event – by the happening of such event;
- Where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to the happening of any event – by the happening of such event;
- In case the interests of the lessee and the lessor in whole of the property become vested at the same time in one person in the same right;
- By express or implied surrender;
- By forfeiture; that is to say, (i) in the event the lessee defaults on an express condition which leads to the termination of lease; or (ii) in the event the lessee renounces his character as such by the setting up a title in the third person or by claiming the title in itself; and (iii) the lessee is adjudicated as insolvent and the lease provides that the lessor may resume the possession of the immovable property on the happening of such an event and in these cases such determination shall happen only after the lessor gives a notice to lessee in writing about his intention of terminating the lease; and
- On the expiration of a notice to determine the lease or to quit, or of the intention to quit, the property leased, duly given by one to the other.

#### License

As compared to a lease, license is a personal right granted to a person (the licensee) to do something upon an immovable property of the grantor and does not amount to the creation of interest in the property itself. It is purely a permissive right to do what, in the absence of such permission, would have been unlawful for the licensee to do, and is personal to the grantee. Unlike a lease, a license is neither heritable nor transferable. It creates no duties and obligations upon the persons making the grant and is, therefore, revocable except in certain circumstances expressly provided for in the Indian Easement Act, 1882 itself.<sup>181</sup> Further, a license is not exclusive in nature as compared to a lease.

#### Easement

In addition to the above, an owner of land has certain rights attached to the land by virtue of which the owner or occupier can beneficially enjoy the land by doing or continue to do or to prevent and continue to prevent something done in respect of certain other land which is not his own.<sup>182</sup> An easement is always inseparably attached to the land.<sup>183</sup>

The following are the essential characteristics of an easement:

- There must be a dominant and servient tenement;

<sup>180</sup> AIR 1856 Ori 156.

<sup>181</sup> Section 4 of the Indian Easements Act, 1882.

<sup>182</sup> *Amar Singh v. Kehar Singh*, AIR 1995 HP 82.

<sup>183</sup> Section 5 of the NI Act

- The easement must accommodate the dominant tenement;
- The rights of easement must be possessed for the beneficial enjoyment of the dominant tenement;
- The dominant and servient owners must be different persons;
- The easementary rights should entitle the dominant owners to do and to continue to do something or to prevent and continue to prevent something being done, or in respect of, the servient tenement; and
- The something must be of a certain or well-defined character and be capable of forming the subject matter of the grant.

The title to easements may be by grant, custom or prescription. Easements which are subject matter of written agreements, are usually for right of air, way and light. The right of way is usually seen to be easement by virtue of custom which is a legal right acquired by operation of law through continued use of land for a long time. Creation of an easement does not entail transfer of immovable property. Easement rights created by way of grant should necessarily be in written form and be duly stamped and registered. However, easement by virtue of custom or prescription need not be in writing.

## Chapter 6

### INTELLECTUAL PROPERTY RIGHTS

#### I. Introduction

Intellectual property law deals with products and fruits of human mind and intellect such as a new design, drawing, painting, invention, symbol, etc. and confers certain rights in favour of the creator owner in order to exploit such rights to the exclusion of the others for a limited period of time, where after it falls into the public domain for anyone to use.

Intellectual property is of various kinds and is narrowed down in scope and conferred protection under specific statutes or in some cases under common law, where the general principles of natural law apply. Examples of conventional statutory intellectual property are patents, trade marks, designs and copyrights. Some of the new intellectual property rights, which have been given statutory protection in recent times are semiconductor topographies, biological diversity, and geographical indications etc. Intellectual property statutes not only define the scope of protection granted but also the mode of acquiring the rights, the rights granted upon registration, the limitation upon such rights, process relating to sale / licensing of such rights.

**Illustrative examples of intellectual property rights are:**

- Novel ideas like a blue tooth technology which have been formulated into a product/ process and which involve an inventive step over the existing prior art in the field will be patentable subject matter;
- Music, cinematograph films, books, software anything where an idea finds expression is protected under the Copyright Act, 1957 ('Copyright Act');
- Any novel configuration of shape, ornamentation applied to an article which is not functional but appeals solely to the eye could be a novel shape/configurations on a bottle, handle of a mug etc. may be subject matter of Design protection;
- Any sign, mark, name, logo etc. which serves to identify the source of a product/ service will find protection under the Trade Marks Act. 1999 ('Trade Mark Act').

#### II. Copyright

##### Overview

Copyright is defined as exclusive rights granted to the authors of an original literary, dramatic, musical and artistic works and cinematographic films and sound recording.

“ Examples of copyright work are books, articles, plays, music scores and sheets, films, etc. Such rights include rights to do certain acts – such as reproduction, communication to public, etc. - in respect of the works to the exclusion of any other person. ”

Copyright in a work comes into being immediately upon creation and may also be registered by filing an application providing the details of the work and the author thereof at the Copyright Office. Even though the Copyright Act, does not make it mandatory for a work to be registered in order to accord copyright protection thereto, copyright in a work may be registered for enforcement purposes. India is a member of various International conventions on Copyright such as Berne Convention on Copyright law, Universal Copyright Convention and accordingly any work created in India would also find copyright protection in the convention countries.

In India, copyright in a published literary, dramatic, musical and artistic work, which has been published within the life of the author, subsists for the lifetime of the author and another sixty years after his death. In case of cinematographic films, sound recordings, works of the government or public undertakings or international organizations copyright subsists for a period of 60 (sixty) years from the year in which the work was published.

##### (A) Ownership and Assignment

Normally the author is the first owner of the copyright in a work, however, there are certain exceptional cases like an employer-employee relationship or a cinematographic film or in case of principal and agent relationship where the person commissioning or paying for the work to be created becomes the first owner of copyright therein subject of course to the terms of any contract / agreement between the parties. Author/owner of a work has the complete flexibility to assign his or her work either wholly or partially for the entire term of the copyright therein or part thereof for any consideration she deems fit. However, the assignment of copyright is valid only if the same is in writing and should clearly identify the work being assigned, nature of rights assigned, duration and territorial extent of the assignment. If the period of assignment is not stated it shall be deemed to be five years. A contract for licensing or sale of copyright thus must be carefully drafted keeping the provisions of the law in mind.

## Protection

The author/first owner of a copyrighted work may protect her copyright in a work against unauthorized use by approaching a court of law for infringement of copyright existing in the work and seeking reliefs such as permanent injunction, damages or accounts of profits and seizure of infringing goods. Infringement or abetment of infringement of copyright also constitutes a criminal offence punishable with imprisonment of not less than 6 (six) months and which may extend to three years and fine which is not less than rupees 50,000 (fifty thousand) which may extend to rupees 3,00,000 (three lakhs). The Copyright law has clearly defined infringement provisions as to what amounts to infringement including violation of certain moral rights attributed to the author. In addition, the law also provides for a list of acts that do not amount to infringement and are permitted as exceptions to the rights granted.

## III. Patents

### Overview

In India, copyright in a published literary, dramatic, musical and artistic work, which has been published within the life of the author, subsists for the lifetime of the author and another sixty years after his death.

Patents are limited exclusive rights to prevent third parties from making, using, selling or offering to sale and importing an invention. An invention may be a machine, apparatus, other article, substance produced by manufacture, process, method or manner of manufacture of a product and is capable of being patented only if it is novel, not obvious to a person skilled in the art and is capable of industrial application. A patent may be granted for a diverse range of products / processes falling in categories like chemical, pharmaceutical, biological, mechanical but not in respect of products / articles / material covered under the other intellectual property statutes.

In India a patent is granted for a fixed period of 20 (twenty) years in exchange for complete disclosure of the invention and the method to work the same such that any person skilled in the art is able to use or work the invention. Unlike a copyright which arises automatically on creation of the work, the rights in a patent is granted only after the applicant satisfies the onerous requirements of registration of the patent. The Patents Act, 1970 lays down extensive criteria for deciding whether an invention is patentable.

### Application

A patent application consists of a complete specification, which is a description of the invention along with the best method of performing the same and statement of claims. The claims define the scope of protection sought in the invention. The application is published after 18 (eighteen) months in the journal and if no opposition is

filed the patent proceeds to grant, whereafter, the patentee is entitled to all rights including the right to preclude others from infringing the patent grant.

## Protection

A patentee may sue for infringement of its patent rights seeking all reliefs such as permanent injunction, either damages or account of profits and seizure or destruction of the infringing goods from a court of law. Any assignment or mortgage or license or any interest created in patent rights should be in writing and should be registered with the Patent Office to be admitted as evidence of assignment of rights by the Controller of Patents or in a Court.

## IV. Design

### Overview

Design means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any by any industrial process or means which features appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which in substance is a mere mechanical device. Shape of a bottle, configurations on a bottle, designs/motifs on garments etc. would be design protectable.

### Ownership and Assignment

A design to be registrable must be new or original or even original in application (i.e. applied to a different article) and should not have been disclosed to the public anywhere in India or in any other country. A design may be registered in respect of any or all articles comprised in a prescribed class of articles and cannot be registered in more than one class. Design registration is valid for a period of 10 (ten) years from the date of registration, which period is extendible for another 5 (five) years. Any assignment or licensing arrangement in respect of a registered Design must be reduced in writing and an application for registration of title under such instrument should be filed with the Controller of Designs within 6 (six) months from the date of execution of the said instrument. Any assignment/license in respect of which no entry has been made in the Register of Designs shall not be admitted in court as evidence of proof of title of copyright in a design.

## Protection

The registered proprietor of a design is entitled to sue for infringement of its statutory rights seeking injunction and damages or accounts of profits. Any person who infringes the copyright in a registered Design shall be liable for every contravention:

to pay the registered proprietor a sum not exceeding 25,000 (twenty five thousand) rupees recoverable as a contract debt

if the proprietor elects to bring a suit for recovery of damages for any such contravention and for an injunction against the repetition thereof, to pay such damages as may be awarded and to be restrained by injunction accordingly

Provided however, that the total sum recoverable in respect of any one design under clause (a) shall not exceed 50,000 (fifty thousand rupees). Works which are industrially produced (i.e. falling within the realm of designs) shall be protected only under Designs Act and not under copyright law. In case such a work has not been registered under Designs Act even though it is capable of being registered thereunder copyright in such design shall cease as soon as any article to which such design has been applied has been reproduced more than 50 (fifty) times. It is thus recommended that fashion designers and artists who produce design bearing works industrially must protect their work under the Designs Act and not the Copyright Act.

## V. Trademarks

### Overview

A trade mark is any sign used upon goods or in relation to services which signifies certain quality and depicts their origin. Trademark can be in the form of a mark, word, logo, name, device, brand, heading, label, ticket, signature, letter, numeral, shape of goods, packaging or combination of colours, which are capable of distinguishing the goods or services of one person from those of another.

Some well known examples of trademarks are Pepsi, Coke, Haldirams, Nike, Adidas, Honeywell, Citibank, HDFC, TATA, Vodafone, etc. Words used in common parlance like Star, Taj, Super Cup, Surya, etc. may also be used and registered as a trade mark provided they have become popular on account of extensive use.

Trademarks which are very well known – even in respect of only one product – such as Mercedes, Rolex, Microsoft, Pepsi etc. cannot be misappropriated by a third party even in respect of completely different goods or services. Often marks from common ordinary language which have not acquired substantial goodwill may be used by different proprietors in respect of disparate goods or services. Example are: Amul for butter and Amul for undergarments, Lux for soaps and Lux for undergarments, Goenka as an Industrial group of companies and GD Goenka for schools. It is always advisable that before adopting a mark or logo, thorough search of the trademark register and a general search is conducted to ascertain if there are prior existing rights which may create obstacles at a later date.

### Application and Registration

An application for registration of a trade mark may be filed even if a mark is intended to be used and use thereof has not commenced. A single mark may be filed in multiple classes of goods or services and upon filing the same is examined by an Examiner to ascertain whether it is capable of distinguishing the goods/services of the owner (i.e. if its barred on account of any absolute grounds of refusal of registration) and whether there are any other prior existing rights in the said mark (i.e. if

there are any relative grounds for refusal of registration of the mark). In the event no opposition is filed the mark proceeds to registration and remains on the Register for an initial period of 10 (ten) years and can be renewed periodically thereafter.

Upon registration, the registered proprietor is conferred with the exclusive rights to the use of the mark and institute action for infringement against unauthorized users. In case the mark is very well known and has extensive goodwill, then infringement action can be instituted against identical or similar marks being used in respect of totally different goods and services as well. Infringement normally is made out when a third party makes use of an identical or deceptively similar mark in respect of identical or similar goods or services without authorisation of the registered proprietor. Examples of deceptively similar marks are Calmprose and Calmpose, Rasmola and Hajmola, Peter Scot and Scotch, Naturlizet and Naturalizer, Exite and Exide, etc. A registered proprietor may take legal action against infringement by approaching a Court of law seeking injunction, seizure of goods bearing the impugned mark and damages or accounts of profit. The law also provides for criminal remedies against counterfeiting of goods which is punishable with imprisonment and fine.

## VI. Confidential Information and Obligation of Confidentiality

The law on this subject is rooted in common law and equity. The Indian copyright law, while ensuring that all copyright entitlements are made only in accordance with its provisions, saves rights of a person to seek restraining of a breach of confidence or trust. Thus any information which is of commercial value and handed over in confidence may be protected against exploitation and illegal misappropriation. Information which is commercially sensitive may be protected by keeping it confidential and sharing the same only after imposing an obligation of confidentiality. Business methods, client lists, ingredients of a recipe, recipe, story board of a show or movie may constitute confidential information which may be protected against misappropriation.

Ample protection is accorded to confidential information under contractual and common law. Common examples of contractual protection of confidential information is seen in cases of employer-employee contracts and principal- consultant contracts, where sensitive business information is shared after imposing an obligation to maintain confidentiality. Ideas and concepts which may be encapsulated as trade secrets or protectable confidential information, whether written or oral, may be protected under the law of confidence. The remedies under breach of confidence or trust are available only against the person who has received the information or idea in confidence or has received the same with the knowledge that the said information/idea was originally given in confidence. Confidential information may be protected in the following two ways:

If a party obtains confidential information under a contract to carry out the contract or in connection with it, then, even though the contract may not have a specific

confidentiality clause the law will imply an obligation to treat such confidential matter in a confidential way as one of the implied terms of the contract; and

- In equity, when there is no contractual relationship between parties, the courts would examine the circumstances in which the information was shared and in the course of conduct whether obligation to maintain confidentiality can be presumed therefrom, whereupon the general rules of equity would be applied and breach of confidence must be restrained.
- Obligation on part of an employee of non-disclosure of confidential information is usually stipulated in terms of the contract of service or by way of specific non-disclosure agreements. However, there is also an implied duty of the employee not to misappropriate confidential information to the detriment of the employer, either during or after termination of the employment. In equity, when there is no contractual relationship between the parties, confidential information is protected by applying the principle that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use or publication of it. Ideas/story board of a show shared with a channel by the creator thereof without any agreement in place between the parties has been protected by courts as confidential information.

## Chapter 7

### NEGOTIABLE INSTRUMENTS AND BANKING AND PAYMENT SETTLEMENT

#### I. Negotiable Instruments in general: Bills of Exchange and Cheques

##### Overview and Key Concepts

Negotiable instruments are the most commonly used credit devices for conducting business these days. Negotiable instruments are written instruments/documents promising or ordering to pay money to the bearer of the instrument or in whose name the instrument is issued on a fixed specified date or on demand. The law relating to negotiable instruments in India is incorporated in the Negotiable Instruments Act, 1881 ("NI Act").

The NI Act mainly deals with 3 (Three) types of negotiable instruments, namely, bill of exchange, promissory note and cheque. A bill of exchange is a negotiable instrument in writing containing an instruction to a third party to pay a stated sum of money at a designated future date or on demand.<sup>184</sup> It usually has three parties: (1) The 'drawer' of the bill i.e. who makes or issues the bill; (ii) The 'drawee' is the person who is ordered to pay the amount mentioned in the bill of exchange; and (iii) The 'payee' is the person to whom the amount has been ordered to be paid unless the amount is payable to bearer.

Cheques, on the other hand, can be said to a sub set of bill of exchange. It is a bill of exchange drawn on a specified banker and is payable only on demand. The maker of the cheque is called 'drawer', and the person in whose favor the cheque is drawn is called 'payee'. The bank which is directed to pay the amount is known as 'drawee'.<sup>185</sup>

As per Reserve Bank of India guidelines, a cheque is valid for a period of 3 (Three) months from the date of its issue and therefore must be presented for encashment within this stipulated period.

It may be noted that both bill of exchange and cheques are frequently used to make payments for goods and services and for transacting business in India. Huge number of cheques are processed by banks on daily basis. However, it may happen that a cheque is dishonored or returned as unpaid by the bank. In such scenario, the Indian law protects the rights of the payee to initiate legal action against the drawer of the dishonored cheque. In the below section, we have discussed the law relating to dishonoring of cheque, the legal remedies and the criminal implications thereon.

#### II. Cheque Bounce: The law and the remedies: Criminal Implications

##### Overview

The law relating to dishonor of cheque is provided under section 138 of the NI Act. Section 138 of the NI Act provides that if cheque is dishonored due to insufficiency of funds or if the amount exceeds the amount arranged to be paid from that account by an agreement with the bank, the drawer of cheque is liable for imprisonment which may extend to 2 (Two) years or with fine which may extend to twice the amount of the cheque or with both. The offence is bailable in nature and therefore accused can furnish bail as a matter of right.

It may be noted that the court will take cognizance of the offence under section 138 of the NI Act only upon the written complaint made by the payee or the holder of the cheque.<sup>186</sup> Since, the offence is non-cognizable, the police cannot directly register a First Information Report or make arrest.

However, before making a complaint to the Magistrate, a party must ensure three things, namely:

- the cheque is presented before the bank within its validity period i.e. 3 (Three) months;
- a legal notice is issued to the drawer of dishonored cheque making a demand for payment of the said amount within 30 (Thirty) days from the date of receipt of information from the bank as regards bouncing of the cheque ("Legal Notice"); and
- the drawer of the cheque fails to make payment of the said amount within 15 (fifteen) days of the receipt of the aforesaid notice.

It is advisable that in the Legal Notice, facts including nature of the transactions, amount of loan or any other legally enforceable debt against which the said cheque was issued, the date of deposit in bank, the date of dishonor of cheque and the demand for payment of said amount, amongst others, are clearly specified to avoid any challenges to the Legal Notice or factum of demand at a later stage.

Further, the complaint under section 138 of the NI Act has to be filed within a period of 1 (one) month from the date of expiry of 15 (fifteen) days mentioned in the Legal Notice.<sup>187</sup> In case of delay, an application for condonation of delay has to be filed citing out the reasons for delay. The court may condone the delay if the complainant satisfies the court that he had sufficient

<sup>184</sup> Section 6 of the NI Act

<sup>185</sup> RBI Notification dated November 4, 2011, *Payment of Cheques/Drafts/Pay Orders/Banker's Cheques*, available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CVC041111.PDF>

<sup>186</sup> Section 142 of the NI Act.

<sup>187</sup> Section 142 (b) of the NI Act

The offence under Section 138 of the NI Act is compoundable and therefore, an application for compounding may be furnished by the accused if the settlement is reached between the parties.

cause for not making a complaint within such period, however, it is prudent to file the complaint within the limitation period as it is a relief solely subject to discretion of the court. The complaint has to be made before Metropolitan Magistrate or Judicial Magistrate First class within whose local jurisdiction the bank, where payee or holder of cheque maintains the account, is situated.

It may also be noted that the offence under Section 138 of the NI Act is compoundable and therefore, an application for compounding may be furnished by the accused if the settlement is reached between the parties.<sup>188</sup>

#### Dishonour of Cheque by a Company

While Section 138 of the NI Act makes dishonour of cheques a criminal offence, Section 141 of the NI Act, in case of an offence by a company, penalizes the person in charge of and responsible for the conduct of the business of the company.

A company, being a juristic person, acts through its directors and officers who are responsible for the conduct of the business of the company. Thus, the criminal liability on account of dishonour of cheque issued by a company is imputed on persons in-charge of the company. The directors of the company are made vicariously liable under this section and proceeded against. For maintaining the prosecution under Section 141 of the NI Act, arraigning of a company as an accused is imperative along with directors of the company who are made vicariously liable.<sup>189</sup>

In order to fasten liability on a director, specific averments should be made in the complaint to the effect that he is in-charge of and responsible for the conduct of the business of the company and necessary facts in this regard must be stated.<sup>190</sup> No specific averments are required against the person who has signed the cheque on behalf of the company or who the managing director of the company is as in such cases it is implied that he was responsible for affairs of company.

The liability of the director is determined on the date on which the offence is committed i.e. when the cheque is dishonored. Therefore, if a director is in charge of affairs of the company when the cheque is dishonored, prosecution can be initiated against him under section 141 of the NI Act. The Legal Notice may be sent to the company only without issuing separate notices to individual directors, however, in the complaint under section 141 of the NI Act, specific averments need to be made against each director who is made vicariously liable.

#### Conclusion

In case of dishonour of cheque, the claimant would first be required to issue a Legal Notice to the issuer of the cheque under section 138 or section 141 of the NI Act as the case may be, making a demand for payment of due amount of cheque. It should be ensured that the said notice is issued within thirty days from the date of receipt of information from bank regarding dishonour. If the issuer of the cheque fails to make the payment within fifteen days of receipt of the Legal Notice, then the claimant may file a complaint under section 200 of the Code of Criminal Procedure, 1973 to the Metropolitan Magistrate or Judicial Magistrate First Class within whose jurisdiction the bank account of claimant is situated.

The said complaint can be filed against the issuer of the cheque and if such issuer is a company against the director who signed the cheque and the directors who were in charge of or responsible for affairs of the business when the said cheque was dishonoured. However, it must be ensured that specific averments are made against each of the directors who are impleaded in the complaint.

### III. Introduction and Payment of Settlement Act

#### Overview

With the advent of technological advancements, advanced payment system are replacing the conventional payment systems. In order to regulate the newer and advanced payment system, Payments and Settlements Act, 2007 ("P&S Act") was enacted in India in the year 2007.

Payment systems have been defined under Section 2(1) of the P&S Act as a system that enables payment between a payer and a beneficiary and involves clearing, payment or settlement service or all of them.

The payment systems in India can be categorized into 3 (three) types:

- Paper-based payments such as cheque, drafts etc;
- Electronic payments such as electronic fund transfers, real time gross settlements etc; and
- Other payments systems such as pre-paid systems, automated teller machines , online transactions etc.

It is pertinent to note that under the P&S Act, no person other than the RBI can operate a payment systems except with the prior approval from the RBI, in a manner prescribed under the P&S Act and the Payments and Settlements Regulation, 2008.

#### Pre-Paid Instruments in India

Pre-paid instruments in India are currently regulated under the RBI's "Master Circular on Policy Guidelines on Issuance and Operation of Pre-paid instruments in

<sup>188</sup> Section 147 of the NI Act.

<sup>189</sup> *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.*, AIR 2012 SC 2795.

<sup>190</sup> *K.K. Abuja v. V.K. Vora*, 2009 10 SCC 48, *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, 2005 8 SCC 89.

<sup>191</sup> Section 2(d) of the CP Act.

India" dated July 14, 2016 ("Master Circular"). The Master Circular defines a pre-paid instrument to mean:

"payment instrument that facilitates purchase of goods and services, including funds transfer, against the value stored on such instruments. The value stored on such instrument represents the value paid for by the holders by cash, by debit to a bank account, or by credit card."

As per the Master Circular, the payment instruments that can be issued, are classified under the following 3 (three) categories:

- **Closed system payment instruments:** Instruments for purchasing goods and services only from the person who has issued such instrument. In relation to the closed system payment instruments, the Master Circular states that no approval is required for closed system payment instrument as these instruments do not facilitate payments and settlement for third party services;
- **Semi-closed system payment instruments:** Instruments for purchasing goods and services only at a group of clearly identified merchant locations/establishments which have a specific contract with the issuer to accept the payment instruments; and
- **Open system payment instruments:** Instruments for purchasing goods and services at any card accepting merchant locations. Additionally, such instruments permit cash withdrawal at automated teller machines.

### Conclusion

In light of the Master Circular, any person can introduce vouchers and coupons for his/her business in India, which can only be used by the consumers/customers for his/her business. Such vouchers and coupons are a form of a closed system pre-paid instrument under the Master Circular and does not require the prior approval from the RBI. However, any other form of pre-paid instrument in India requires the prior approval of the RBI and is subject to various conditions as laid down in the Master Circular.

## Chapter 8

### CONSUMER PROTECTION LAW

#### I. Introduction

The Consumer Protection Act, 1986 (“Consumer Act”) was enacted in order to provide better protection to the interests of the consumers and with an aim to provide speedy and simple redressal of consumer disputes.<sup>192</sup> The underlying intention of the Consumer Act is to protect the interests of the consumers as buyers of goods.

#### II. Meaning of a Consumer

The Consumer Act provides a comprehensive definition of the term ‘consumer.’ The term ‘consumer’ has been defined as a person who buys goods, or avails any services for consideration, but does not include a person who obtains goods for resale or avails services for any commercial purpose.<sup>193</sup> The legislature has kept the commercial users of goods and services out of the purview of the Consumer Act, i.e. any person who obtains goods for resale, or avails services for any commercial purpose, cannot be classified as a ‘consumer’ under the Consumer Act.

Therefore, a consumer has been defined as:<sup>194</sup>

- a person who buys any goods for consideration; irrespective of whether the consideration is paid or promised, or partly paid and partly promised, or whether the payment of consideration is deferred;
- a person who uses such goods with the approval of the person who buys such goods for consideration;
- but does not include a person who buys such goods for resale or for any commercial purpose.

Commercial purpose under this clause does not include use by a person of goods and services, bought and availed by him exclusively for the purposes of earning his livelihood by means of self-employment.<sup>195</sup>

#### Commercial Purpose

The Explanation to Section 2(d) of the Consumer Act provides that ‘commercial purpose’ does not include use of goods or availing of services by a person for the purpose of earning his livelihood by means of self-employment.

While the Consumer Act is silent as to what the phrase ‘commercial purpose’ means, the courts have held that it is extremely difficult to differentiate between commercial and non-commercial purpose, which therefore requires a

The term ‘consumer’ has been defined as a person who buys goods, or avails any services for consideration, but does not include a person who obtains goods for resale or avails services for any commercial purpose.

case to case analysis. The Supreme Court in *Laxmi Engineering* case, referring to *Synco Textiles*<sup>196</sup> case has held that, “*in the absence of a definition, we have to go by its ordinary meaning of the phrase ‘commercial purpose’*. ‘Commercial’ denotes ‘pertaining to commerce: mercantile’ (*Chamber’s Twentieth Century Dictionary*). The expression ‘commercial’ means ‘connected with, or engaged in commerce; mercantile; having profit as the main aim’ (*Collins English Dictionary*) whereas the word ‘commerce’ means ‘exchange of merchandise, on a large scale’ (*Concise Oxford Dictionary*)”.<sup>197</sup>

Therefore, interpreting the definition clause, the Hon’ble Supreme Court has held that persons buying goods either for resale or for use in large scale profit-making activity will not be ‘consumers’ entitled to protection under the Consumer Act. The Court noted that the Parliament as per this definition intended to restrict benefits of the Consumer Act to ordinary consumers purchasing goods either for their own consumption or even for use in some small venture which they may have embarked upon in order to make a living as distinct from large-scale manufacturing or processing activity carried on for profit.<sup>198</sup>

The National Consumer Dispute Redressal Commission (“**National Commission**”) in the case of *Harsolia Motors v. National Insurance Co. Ltd.*,<sup>199</sup> has given a wide interpretation to the term ‘commercial purpose’, and has held that it includes “*goods purchased or services hired for any activity directly intended to generate profit. Therefore, profit is the*

The National Commission has been of the opinion that where a person purchases any goods ‘with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit’ he will not be a consumer within the meaning of ‘consumer’ as defined under the Consumer Act

<sup>192</sup> On January 05, 2018, the Consumer Protection Bill, 2018 (“the Bill”) was introduced in the Lok Sabha. The Bill may bring in new provisions. However, the Bill has not been passed by the Parliament as of date.

<sup>193</sup> Section 2(d) of the Consumer Act.

<sup>194</sup> *Id.*

<sup>195</sup> Explanation to section 2(d).

<sup>196</sup> *Synco Textiles (P) Ltd. v. Greaves Cotton and Co. Ltd.*, (1991) 1 CPJ 499.

<sup>197</sup> *Laxmi Engineering Works v. P.S.G. Industrial Institute*, (1995) 3 SCC 583.

<sup>198</sup> *Id.*

<sup>199</sup> [2004] NCDRC 11

main aim of a commercial purpose". However, if goods are purchased or services are hired, for an activity which is not directly intended to generate profit, it would not be a commercial purpose.<sup>200</sup>

In *National Seeds Corpn. Ltd. v. P.V. Krishna Reddy*<sup>201</sup> the National Commission by way of illustrations, noted that a person who buys a typewriter or a car and uses it for his personal use would be considered as a consumer under the Consumer Act. However, a person who buys a typewriter or a car for typing others' work for consideration or for plying the car as a taxi can be said to be using the typewriter/car for a commercial purpose. It is important to note that if the purchaser himself works on the typewriter or plies the car as a taxi himself, he does not cease to be a consumer as it is for self-employment for earning his livelihood.

The several words employed in the explanation, viz., "uses them by himself, exclusively for the purpose of earning his livelihood and by means of self-employment" makes the intention of the legislature abundantly clear that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood.<sup>202</sup> The explanation also provides that if the commercial use is by the purchaser himself, for the purpose of carrying out his livelihood, then in that case such purchaser of goods would be classified as a consumer. Therefore, as per the explanation, what matters is the end-use to which the goods are put, and not the price at which the goods are purchased.

Therefore, the National Commission<sup>203</sup> has been of the opinion that where a person purchases any goods 'with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit' he will not be a consumer within the meaning of 'consumer' as defined under the Consumer Act.<sup>204</sup>

It has also been held by the National Commission in the *Jay Kay Puri Engineers and Ors. v. Mohan Breweries and Distilleries Ltd.*<sup>205</sup> that even where the goods are purchased for commercial purpose, if there is a warranty, for its maintenance the purchaser becomes a consumer in respect of the services rendered or to be rendered by the manufacturer or supplier during the warranty period'.

### III. Meaning of 'Defect'

'Defect' as defined under the Consumer Act means 'any fault, imperfection, or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law, or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods'.<sup>206</sup>

The courts have interpreted 'defect' in the widest possible manner to include any kind of fault, imperfection or

short-coming. The fault, imperfection or short-coming should be individually related to either of the following four namely; quality, quantity, potency, purity or standard of the goods. Therefore, under the Consumer Act, the true import of the word 'defect', is one of the widest amplitude and the standard prescribed may be either one specified by any law or as is claimed by the trader himself either expressly or impliedly.<sup>207</sup>

### IV. Manufacturer's Liability

Under the Consumer Act, a manufacturer or a trader of any goods or services may be held liable. Manufacturer has been defined under the Consumer Act as a person who 'makes or manufactures and goods or parts thereof, or does not manufacture any goods, but assembles parts thereof made or manufactured by others, or puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer'.<sup>208</sup>

Under the Consumer Act, if the District Forum is satisfied that the goods complained against suffer from defects specified in the complaint, the consumer forum may issue an order directing the manufacturer to do one or more of the following:<sup>209</sup>

- Remove the defect pointed out by the appropriate authority from the goods;
- Replace the goods with new goods of similar description which shall be free from any defect;
- Return to the complainant the price, or charges paid by complainant;
- Pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;
- Return the defects in goods;
- Not to offer the hazardous/ defected goods for sale;
- Withdraw defected/ hazardous from being offered for sale;
- Pay such sum (minimum amount is not less than 5 (Five) percent of the value of defective goods sold) as may be determined by the District Forum, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently; or
- Provide adequate costs to parties.

Therefore, with regard to manufacturer's liability, the mark (name, brand or trade mark) on the goods will determine the manufacturer's liability.<sup>210</sup>

<sup>200</sup> *Id.*

<sup>201</sup> *National Seeds Corpn. Ltd. v. P.V. Krishna Reddy*, Revision Petition No. 1029 of 2004 in Appeal No. 114 of 04.

<sup>202</sup> *Id.*

<sup>203</sup> *Supra 4.*

<sup>204</sup> *Supra 9.*

<sup>205</sup> I (1998) CPJ 38

<sup>206</sup> Section 2(f) of the Consumer Act.

<sup>207</sup> *J.D. Sharma v. Maruti Udyog Ltd.*, (1991) 1 CPR 436 (Haryana CDRC).

<sup>208</sup> Section 2 (j) of the Consumer Act.

<sup>209</sup> Section 14 of the Consumer Act.

<sup>210</sup> VK Agarwal, *Bharat's Consumer Protection Law & Practice*, 227 (7<sup>th</sup> ed., 2016)

## V. Remedies and penalties under the Consumer Protection Law: Remedies of the Buyer

### Mechanism under the Consumer Act

A three-tier mechanism is provided under the Consumer Act for redressal of consumer grievances. Depending on the amount being claimed as compensation, and the value of goods and services, the jurisdiction of consumer disputes redressal agencies varies.

There are 3 (three) Consumer Disputes Redressal Agencies that have been established under the Act, namely:

- **District Consumer Dispute Redressal Commission (“District Forum”):** District Forum<sup>211</sup> has the jurisdiction to entertain complaints where the value of goods or services, and the compensation being claimed does not exceed Rupees 20,00,000 (twenty lakhs).
- **State Consumer Dispute Redressal Commission (“State Commission”):** State Commission<sup>212</sup> has the jurisdiction to entertain matters where the value of goods or services and compensation being claimed exceeds Rupees 20,00,000 (twenty lakhs) but does not exceed Rupees 1,00,00,000 (one crore). The State Commission also has the power to entertain appeals against the orders of any District Forum within the State.
- **National Commission:** National Commission<sup>213</sup> has the jurisdiction to entertain matters where the value of goods or services and compensation being claimed exceeds Rupees 1,00,00,000 (one crore). The National Commission also has the power to entertain appeals against the orders of any State Commission. Any person aggrieved by an order made by the National Commission, can also prefer an appeal against such order to the Supreme Court.<sup>214</sup>

### Procedure for filing a complaint

An aggrieved person can file a complaint in either of the above mentioned 3 (three) forums, depending on the total value of goods purchased. The complaint must contain particulars such as name, description and address of complainant and the opposite party, along with the facts and documents relating to the complaint and relief which the complainant seeks.<sup>215</sup>

A complaint under the Consumer Act has to be filed within 2 (two) years from the date on which the cause of action had arisen.<sup>216</sup> Moreover, if the complaint instituted in either of the 3 (Three) consumer dispute redressal agencies, is found to be frivolous or vexatious, it may be

dismissed, and the complainant may be liable to pay costs to the opposite party.<sup>217</sup>

### Appeals

A person aggrieved by an order made by the District Forum has the option of appealing against such order to the State Commission within a period of 30 (Thirty) days from the date of the order.<sup>218</sup> A person aggrieved by the order made by the State Commission may prefer an appeal against such order to the National Commission within a period of 30 (Thirty) days from the date of the order.<sup>219</sup>

Under the Consumer Act, if a trader or a person against whom a complaint is made fails or omits to comply with the order made by the District Forum, State Commission, or National Commission, then such trader or person shall be punishable with imprisonment for a term which shall not be less than 1 (One) month, which may extend to 3 (Three) years, or with fine which shall not be less than Rupees 2,000 (Two Thousand), but may extend to Rupees 10,000 (Ten Thousand), or both.

The State Commission or National Commission shall endeavour to hear appeals filed before them in an expeditious manner, and dispose of the appeal within a period of 90 (Ninety) days from the date of its admission, and no adjournments shall be granted by State and National Commission unless sufficient cause is shown.<sup>220</sup>

A person aggrieved by the order made by the National Commission then has the final option of appealing against the said order to the Supreme Court of India within a period of 30 (Thirty) days from the date of the order.<sup>221</sup>

Under the Consumer Act, if a trader or a person against whom a complaint is made fails or omits to comply with the order made by the District Forum, State Commission, or National Commission, then such trader or person shall be punishable with imprisonment for a term which shall not be less than 1 (one) month, which may extend to 3 (three) years, or with fine which shall not be less than Rupees 2,000 (two thousand), but may extend to Rupees 10,000 (ten thousand), or both.<sup>222</sup>

<sup>211</sup> Section 11 of the Consumer Act.

<sup>212</sup> Section 17 of the Consumer Act.

<sup>213</sup> Section 21 of the Consumer Act.

<sup>214</sup> Section 23 of the Consumer Act.

<sup>215</sup> Combined reading of sections 12, 13 and 28A.

<sup>216</sup> Section 24A of the Consumer Act.

<sup>217</sup> Section 26 of the Consumer Act.

<sup>218</sup> Section 15 of the Consumer Act.

<sup>219</sup> Section 19 of the Consumer Act.

<sup>220</sup> Section 19A of the Consumer Act.

<sup>221</sup> Section 23 of the Consumer Act.

<sup>222</sup> Section 27 of the Consumer Act.

## Chapter 9

### DIRECT TAXES

#### I. Introduction

This Chapter, briefly summarises the income tax implications for various forms of business entities depending on the nature of business undertaken by such entities.

#### A. Sole Proprietorship

##### Tax on income earned by the entrepreneur

This is the simplest form of a business entity wherein no separate entity has to be formed. The entrepreneur may decide to start operating the business in his own name or through a trade name.

Sole proprietorship does not have any legal status in the eyes of law and income earned by it shall be subject in the hands of the entrepreneur owing it.

##### Income

In the case of a sole proprietor, the entrepreneur has to calculate the taxable income by taking into account the gross receipts from the business venture and reducing expenses incurred to earn such income. Care should be taken to ensure that personal expenses should be kept separate from the business and profession related expense as expenses incurred wholly and exclusively for the business and profession can only be claimed as an expense. Also, the entire amount of capital expenses incurred in connection with the business to acquire a capital asset like car, computer, plant and machinery, etc. shall not be allowed as a tax deductible expense during the relevant financial year. Instead, depreciation at the prescribed rate shall be allowed as a deduction while computing the taxable income. It must also be noted that any salary paid to the entrepreneur for his own efforts shall not be allowed as an expense.

It is pertinent to note that in case the entrepreneur is engaged in any business venture, such entrepreneur would be required to maintain books of account if the gross receipts from such venture exceed Rupees 25,00,000 (Twenty Five Lakhs). If the entrepreneur is engaged in a profession, then he would be required to maintain books of account only if his income exceed Rupees 2,50,000 (Two Lakhs and Fifty Thousand).

##### Tax Rate

Income is computed under 5 (Five) different heads of taxes under the IT Act in the hands of the individual entrepreneur and such taxes shall be payable as per the following slab rates:

Income	Rate <sup>223</sup>
Total income does not exceed Rupees 2,50,000	Nil
Total income exceeds Rupees 2,50,000 but does not exceed Rupees 5,00,000	5%
Total income exceed Rupees 5,00,000 but does not exceed Rupees 10,00,000	20%
Total income exceeds Rupees 10,00,000	30%

##### Compliance requirements

- **Permanent account number (“PAN”):** As per the provisions of the IT Act, in case the entrepreneur expects the taxable income to be in excess of the minimum amount that is subject to tax (i.e. in excess of Rupees 2,50,000), then it is mandatorily required to obtain a PAN. However, it may be advisable for the entrepreneur to nevertheless obtain a PAN because it may be needed for a number of other reasons i.e. for opening a bank account or a demat account, applying for other registrations, applying for loan from banks, etc.
- **Tax Deduction account number (“TAN”):** In case the entrepreneur makes any payment that is subject to deduction of tax at source as per the provisions of the IT Act, then the entrepreneur is required to obtain a TAN. It may be noted that tax has to be deducted at source while making payment of salaries to employees, rent, professional fees payable to accountants, lawyers, advocates and other advisors, commission agents, etc. in case the amount of payment exceeds the amount specified under the IT Act.
- **Audit of books of account:** The entrepreneur will be required to have the books of account audited by an independent chartered accountant if the total sales, turnover or gross receipts from the business venture exceeded Rupees 1,00,00,000 (one crore) or gross receipts from profession exceeds Rupees 50,00,000 (fifty lakhs) during the relevant financial year.
- **Filing of TDS Returns:** In case the entrepreneur deducts any tax at source while making payments to any person, as required under the provisions of the IT Act, the entrepreneur will have to deposit such taxes within the prescribed period (which is generally

<sup>223</sup> All tax rates mentioned in this note are exclusive of applicable surcharge and education cess.

the 7th (seventh) day of the month subsequent to the month during which the tax was deducted at source). Thereafter, the entrepreneur will be required to file the withholding tax return within the prescribed time period.

- **Payment of advance tax and filing of annual income tax return:** The entrepreneur is required to pay advance tax as per the requirements of the IT Act. The entrepreneur will have to deposit not less than 15%, 45%, 75% and 100% of the net tax due (after taking credit of the taxes withheld by the payers, if any) by 15th June, 15th September, 15th December and 15th March respectively of the relevant financial year.

The entrepreneur will also be required to file his annual income tax return within the prescribed period (i.e. by 31st of July of the subsequent financial year if his books of account are not required to be audited or by the 30th of September of the subsequent financial year if his books of account are required to be audited).

- **Other compliances:** In case the entrepreneur is entitled to claim any tax benefits or incentives (which will be dependent on the nature of business being carried on by the entrepreneur), she or he may be required to undertake certain other compliances as required under the provisions of the IT Act.

## B. Partnership Firm or LLP

### Tax treatment

The entrepreneur may also decide to start the entrepreneurial venture in partnership with another entrepreneur. The entrepreneur may decide to start the venture either as a partnership firm, whether registered or not ("Firm") or as a LLP. It must be noted that for the purposes of IT Act, both the Firm and the LLP are treated at par and the tax implications shall be the same.

It is important to note that tax treatment for a Firm or an LLP is exactly the same as compared to a sole proprietorship except the following:

- the Firm or the LLP shall be required to pay tax at the rate of 30% on its taxable income accruing or arising from the business or profession being carried out by it;
- any salary or other payments made to the partners may be allowed as an expense subject to the limits prescribed under the IT Act; and
- post tax income received from a Firm or an LLP will not be liable to tax again in the hands of the individual partners; and
- post tax profits of the Firm or the LLP can be distributed freely to the partners without any further incidence of tax.

It is pertinent to note that all the other tax implications including the various compliance requirements shall remain the same, as discussed in respect of a sole proprietorship concern.

## C. Association of Persons

### Tax treatment

The entrepreneur may also decide to start the entrepreneurial venture in partnership with certain other individuals either for specific ventures or otherwise, without getting into a formal partnership arrangement in the form of a Firm or an LLP. If 2 (two) or more persons join in a common purpose or common action with the object of earning income, profits or gains, then it could lead to the establishment of an Association of Persons ("AoP"). When the concerned persons associate themselves with a common objective of participating in an income-producing activity, they constitute an AoP. There must be a common design to generate income and mere common interest or production of income is not enough to constitute an AoP.

It is important to note that the tax treatment for an AoP is also the same as compared to a sole proprietorship except the following:

- the AoP shall be treated as a separate taxable entity which will be liable to tax on its own income;
- the concerned entrepreneur may be a member of more than one AoP;
- post tax income received from an AoP will not be liable to tax again in the hands of the members; and
- post tax profits of the AoP can be distributed freely to its members without any further incidence of tax.

It is pertinent to note that all the other tax implications including the various compliance requirements shall remain the same, as discussed in respect of a sole proprietorship concern.

## D. Company incorporated under Companies Act

### Tax treatment

The entrepreneur may decide to start the entrepreneurial venture in the form of a corporate entity. The entrepreneur may become a shareholder as well as a director of the company. This is the most well-structured form of business entity, but would also involve a number of additional compliances.

From an income tax perspective, apart from the following exceptions, all the other tax implications including the various compliance requirements shall remain the same, as discussed in respect of a sole proprietorship concern:

- the corporate entity shall be treated as a separate legal and taxable entity which will be liable to tax on its own income;
- the concerned entrepreneur can be a shareholder and director of the company;
- any salary or commission or other expenses payable to a director or shareholders may be allowed as a tax deductible expenses provided, is construed as reasonable and not excessive;

- post tax profits of the company can be distributed to its members as dividends subject to the payment of Dividend Distribution Tax (“DDT”) payable at the rate of 15% (effective tax rate being 20.55% approx. including applicable surcharge and education cess) and subject to the provisions of the Companies Act;
- post tax income received from a company will not be liable to tax again in the hands of the shareholders subject to the exceptions mentioned below; and
- the tax rate applicable for a company is different than other forms of business entities.

#### **Tax payable by a company**

A company incorporated under the provisions of the Companies Act shall be liable to pay tax on its income at the following rates:

- For companies who have a total sales, turnover or gross receipts of less than or equal to Rupees 50,00,00,000 (fifty lakhs) during FY 2014-15: 29%;
- For companies who have a total sales, turnover or gross receipts of less than or equal to Rupees 250,00,00,000 (two crore fifty lakhs) during FY 2016-17: 25% ;
- Others: 30%

Therefore, a company distributing dividends to its shareholders is also liable to pay a DDT of 15% (effective tax rate being 20.55% approx. including applicable surcharge and education cess) on the amount of dividends being distributed.

#### **Tax payable by the shareholder on dividends**

Dividends received by an individual shareholder on which DDT has been paid by the company distributing tax is not chargeable to tax again in the hands of the shareholder unless the amount of dividends received by the individual shareholder exceeds Rupees 10,00,000 (ten lakhs). In case an individual shareholder receives dividend in excess of Rupees 10,00,000 (ten lakh) during any financial year, such dividend income shall be subject to tax at the rate of 10% in the hands of the concerned shareholder.

## Chapter 10

### INDIRECT TAXES

#### I. Introduction

This chapter seeks to concisely analyze the necessary compliances to be adhered to by a business entity, in relation to its operations, under the indirect tax legislations of India.

India has adopted a dual Goods Services Tax ('GST') model, wherein intra-state supplies of goods and/ or services are subject to the simultaneous levy of Central Goods and Services Tax ('CGST') and State Goods and Services Tax ('SGST'). Inter-state supply of goods and/ or services including imports are eligible to Integrated Goods and Services Tax ('IGST'). The GST rates notified for supply of goods or services are categorized under broad rate slabs of 5%, 12% 18% and 28%. Further, the government is empowered to exempt, absolutely or conditionally, the supply of goods or services or both (of any specified description) from the whole or any part of tax leviable thereon.

A business entity (in any form, i.e. sole proprietorship, partnership, company etc.) shall comply with following:

- (i) Registration
- (ii) Payment of GST for supply of goods and services
- (iii) Payment of GST on procurement of inputs / input services and reverse charge mechanism
- (iv) Filing of returns
- (v) Consequences of non-compliance

#### II. Registration

Every supplier having an aggregate turnover of more than Rupees 20,00,000 (twenty lakhs) (on a pan India basis) in a financial year, is liable to obtain registration under the GST legislations.<sup>227</sup> In terms of the GST legislations, certain specified persons including e-commerce operators or persons required to pay tax under reverse charge, are mandatorily required to obtain registration, thereunder.<sup>228</sup> The 'aggregate turnover' of a supplier in a given financial year, is the total value of all the supplies undertaken by such supplier in the said year.

When a supplier becomes liable to obtain registration under GST, it is required to apply for the same within 30 (Thirty) days, in the manner and subject to conditions, as prescribed.<sup>229</sup>

<sup>224</sup> In terms of Section 22 of the CGST Act, the said threshold is Rupees 10,00,000 (Ten Lakhs) for special category states such as Jammu and Kashmir, Himachal Pradesh, Uttarakhand and North-Eastern states.

<sup>225</sup> Section 24 of the CGST Act, provides for the categories of persons who are compulsorily required to take registration under GST. Such categories *inter alia* include persons making, casual taxable persons, input service distributors, e-commerce operators, etc.

<sup>226</sup> In terms of Section 25 of the CGST Act, casual taxable person or a non-resident taxable person shall apply for registration at least five days prior to the commencement of business.

<sup>227</sup> Section 10 of the CGST Act.

<sup>228</sup> Section 10(4) of the CGST Act.

<sup>229</sup> In terms of Section 2(59) of the CGST Act, 'input' means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business.

<sup>230</sup> In terms of Section 2(60) of the CGST Act, 'input service' means any service used or intended to be used by a supplier in the course or furtherance of business.

<sup>231</sup> In terms of Section 3(7) of the Customs Tariff Act, 1975.

<sup>232</sup> In terms of Section 3(9) of the Customs Tariff Act, 1975.

<sup>233</sup> Section 122(xi) of the CGST Act.

#### III. Payment of GST on supply of Goods or Services

The applicable GST is required to be deposited by the taxpayer, with the Government, on the supplies made or received (under reverse charge), as the case may be. However, the applicable GST may be contractually recovered from the recipient by charging the same on the invoice issued to the recipient.

##### (a) Composition Levy Scheme under GST

Taxpayers with an aggregate turnover of less than Rupees 1,00,00,000 (One Crore) in a financial year, may opt for Composition Levy Scheme ("Composition Scheme"), which makes them eligible to discharge GST at lower rate.

Where the taxpayer opts for the Composition Scheme, it will have to discharge GST at the prescribed rate<sup>230</sup> on the aggregate value of all supplies made by it. However, where the taxpayer opts for the Composition Scheme, it would be disentitled to recover amounts towards the applicable GST, from the recipients or claim the offset of any GST paid on the procurement of inputs and input services for its business.<sup>231</sup>

#### IV. Payment of GST on procurement of inputs / input services and reverse charge mechanism

##### (a) GST on procurement of various Inputs and Input Services

The taxpayer is required to pay GST on the purchase of various inputs<sup>232</sup> as well as input services<sup>233</sup> used for running its business. Any GST paid by a taxpayer, in relation to the procurement of inputs/input services, shall be available as offset against the taxpayer's output GST liability, subject to the fulfilment of the conditions prescribed in this regard. Such inputs/input services may, *inter alia* include the following:

- (i) Rent paid for the premises;
- (ii) Third party services;
- (iii) Raw materials.

##### (b) GST on import of goods or services

The import of goods by a taxpayer shall be in the nature of an inter-state supply and attract the levy of

Basic Customs Duty (“BCD”), IGST<sup>234</sup>, Compensation Cess<sup>235</sup> and Social Welfare Surcharge, thereon.

The import of services by a taxpayer shall be in the nature of an inter-state supply and shall attract the levy of IGST, thereon.

(c) GST on export of goods or services

Export of goods or services can be made by the payment of applicable GST and thereafter, the refund of such GST paid, may be claimed, subject to the fulfilment of procedural compliances.

Alternatively, export of goods / services can be made under a Letter of undertaking (LUT)/ bond and bank guarantee, without the payment of GST and thereafter, the refund of any unutilized input tax credit can be claimed, subject to the fulfilment of procedural compliances.

(d) Reverse charge mechanism

There are certain services, such as legal services, sponsorship services etc., on which the service recipient is required to discharge the applicable GST under the reverse charge mechanism of indirect taxation. Accordingly, where the taxpayer receives such services, it will be statutorily liable to discharge the applicable GST on the receipt of such services. The taxpayer is liable to pay GST under reverse charge, wherever applicable, even if its overall aggregate turnover is below the threshold limit of Rupees 20, 00,000 (Twenty Lakh) detailed above.

## V. Filing of Returns and payment of GST liability

A registered supplier is required to furnish the following periodical returns and discharge GST liability as follows:

- (i) Monthly details of supply of goods and services undertaken by the supplier during a given month shall be furnished in Form GSTR-1 before the 10th day of the succeeding month;
- (ii) Monthly details of receipt of goods and services by a supplier, with or without consideration, during any given month, shall be furnished in Form GSTR-2, before the 15th day of the succeeding month;
- (iii) Payment of applicable GST on supplies pertaining to any given month shall be made by the supplier before the 20th day of succeeding month;

(iv) Details of returns of supplies and receipt of goods and/or services, input tax credit availed, tax payable, tax paid and other prescribed particulars pertaining to any given month, shall be furnished in Form GSTR-3, before the 20th day of the succeeding month;

(v) Annual return, in Form GSTR-9, shall be filed before the 31st day of December, of the succeeding financial year.

(vi) Where a supplier opts for Composition Scheme, such supplier will have to furnish a single return, every quarter, in Form GSTR-4, before the 18th day of the month succeeding the quarter. Payment of the applicable GST shall be also be done before the last date for the filing of such return.

## VI. Consequences of non-compliance

- (i) Failure to obtain registration: Where a taxpayer is liable to be registered under the GST legislations, however, it has failed to obtain such registration, it will be liable to pay a penalty of Rupees 10,000 (Ten Thousand) or an amount equivalent to the unpaid GST liability.<sup>236</sup>
- (ii) Delayed / non-payment of GST: An interest, at the rate of 18% per annum is payable on the delayed payment of GST.<sup>237</sup> Further, where a taxpayer collects GST from its recipients but fails to deposit the same with Government, beyond a period of three months from the due date of payment of GST, it will also be liable to pay a penalty of Rupees 10,000 (Ten Thousand) or an amount equivalent to the GST collected but not paid, which is higher.<sup>238</sup>
- (iii) Delay/non-filing of returns: A late fees of Rupees 100 (One Hundred) per day is levied on delay or non-filing of monthly returns, subject to a maximum amount of Rupees 5,000 (Five Thousand). Further, a late fees of Rupees 100 (One Hundred) per day is levied on delayed or non-filing of annual return, subject to a maximum of one-fourth of the value of the turnover.<sup>239</sup>

<sup>234</sup> Section 50(1) of the CGST Act read with Notification No. 13/2017 – Central Tax dated June 28, 2017.

<sup>235</sup> Section 122(iii) and (iv) of the CGST Act.

<sup>236</sup> Section 47(1) and (2) of the CGST Act.

<sup>237</sup> In view of sector specific business activities.

<sup>238</sup> Shops, hotels, restaurants, cinemas including preview theatres, road-motor transport undertakings and newspaper establishments, etc. (Please refer to each State specific list)

<sup>239</sup> Please note that we have just cited few examples of persons who would fall under the definition of employees, under the Employee Compensation Act, 1923. For an exhaustive definition of the term 'employee', please refer Section 2(dd) and Schedule II of Employee Compensation Act, 1923.

## Chapter 11

### LABOUR AND EMPLOYMENT LAWS

#### I. Introduction

In India, labour is a subject in the concurrent list of the Indian Constitution empowering both the Central (Federal) and State governments to frame certain laws or rules relating to labour relations and employment laws. Thus, the primary source of labour and employment laws (generally referred to as the Industrial laws) are the Central and State specific labour legislations. Further, the applicability of labour and employment statutes to a particular organisation would be dependent on various factors which include: (a) number of employees employed therein (direct and indirect); (b) category of employees (c) salary drawn by employees; (d) women employees; and (e) nature of business and location of the establishment (whether situated in SEZ area or a free zone), etc.

Some key Central and State legislations. The chapter discussions does not cover any aspects and law(s) which may be applicable to a specific industry/ operations or which are required to be adhered to by employers that engage persons in specific sectors/ activities such as plantation, mining, newspaper, banking, aviation and, sales promotion, etc. These matters will, however, need to be considered on case to case basis.

#### II. Categorisation and Applicability of various Labour and Employment Laws

We have covered the labour and employment laws, under 4 (four) broad categories.

- Laws relating to social security and benefits;
- Laws relating to wages;
- Laws relating to service conditions, health and safety; and
- Laws relating to industrial relations, anti-discrimination and harassment

#### III. Laws relating to Social Security and Benefits

##### A. Payment of Gratuity Act, 1972 ("Gratuity Act")

###### Applicability

The Gratuity Act applies to (i) all establishments wherein 10 (Ten) or more persons are employed, or were

employed, on any day of the preceding 12 (Twelve) months; (ii) every factory, mine, oilfield, plantation, port and railway company; and (iii) such other establishments or class of establishments, in which 10 (Ten) or more employees are employed, or were employed, on any day of the preceding 12 (Twelve) months, as the Central Government may, by notification, specify in this behalf.

Every employee who has been in 'continuous service'<sup>240</sup> for a period of 5 (Five) years is entitled to gratuity, on termination of his employment which is provided as below-

- on his superannuation; or
- on his retirement or resignation; or
- on his death or disablement due to accident or disease.

It may also be noted that the completion of continuous service of 5 (Five) years shall not be necessary where the termination of the employment of any employee is due to death or disablement.

##### B. Payment of Bonus Act, 1965 ("Bonus Act")

###### Applicability

The Bonus Act applies to (i) every establishment in which 20 (Twenty) or more persons are employed on any day during an accounting year; and (ii) every factory. An eligible employee is a person whose monthly salary does not exceed Rupees 21,000 (Twenty One Thousand) and who has worked for not less than 30 (Thirty) working days in that year.

In view of the applicability criteria mentioned herein above, if the persons engaged by the entity are more than 20 (Twenty) on any day during an accounting year, then in such a scenario, the entity would be required to comply with the provisions of the Bonus Act.

##### C. Employees Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act")

###### Applicability

The EPF Act applies to (a) every establishment which is a factory engaged in any industry specified in Schedule I to the EPF Act and in which 20 (Twenty) or more persons are employed; and (b) to any other establishment

<sup>240</sup> Section 2(ii) of the Payment of Wages Act, 1936 defines 'industrial or other establishment' to mean any-

(a) tramway service, or motor transport service engaged in carrying passenger or goods or both by road for hire or reward;  
 (aa) air transport service other than such service belonging to, or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India;  
 (b) dock, wharf or jetty;  
 (c) inland vessel, mechanically propelled;  
 (d) mine, quarry or oil-field;  
 (e) plantation;  
 (f) workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale;  
 (g) establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operation connected with navigation, irrigation, development or maintenance of buildings, roads, bridges or canals or mission and distribution of electricity or any other form of power is being carried on;  
 (h) any other establishment or class of establishment which the appropriate Government may, having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify by notification in the Official Gazette

employing 20 (Twenty) or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.

It is also relevant to mention that vide Notification No. GSR 704 dated 16.5.1961, the Central Government has extended the provisions of EPF Act to restaurants and hotels. Thus, the entity would be mandated to comply with the provision of the EPF Act, if the establishment is employing 20 (Twenty) or more persons.

#### **D. Employee State Insurance Act, 1948 ("ESI Act")**

##### **Applicability**

The ESI Act applies to: (i) all factories (including factories belonging to the Government); and (ii) any other establishment(s) to which an appropriate government may, after giving one month's notice by notification, extend the provisions of the Act. Several states have extended the ESIA to establishment<sup>241</sup> employing 20 (Twenty) or more persons while states such as Delhi and Karnataka have extended the applicability to establishments employing 10 (Ten) or more persons.

An eligible employee is a person whose monthly salary does not exceed Rupees 21,000 (Twenty One Thousand).

It may also be noted that insured person (employees covered under the ESI Act), shall not be entitled to receive or recover any compensation or damages under the Workman's and Compensation Act 1923 or any other law for the time being in force, in respect of an employment injury sustained by an employer covered by the ESI Act.

For instance, in Maharashtra, the state government vide Notification No. ESI. 1677/3910/PH-15 dated September 18, 1978 has extended the provisions of ESI Act to restaurants. Similarly, in Delhi the state government has extended the provisions of ESI Act to restaurants with effect from April 1, 2011, vide Notification No. 38025/23/2010-SS dated March 23, 2011.

#### **E. Employees' Compensation Act, 1923 ("Compensation Act")**

##### **Applicability**

The Compensation Act is applicable to every 'employee' as defined under Section 2(dd) of the Compensation Act. The definition of employees<sup>242</sup> under Compensation Act covers persons, who is (a) a master, seaman or other

member of crew of a ship; (b) a captain or other member of the crew of an aircraft; (c) person recruited as a driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle; and (d) person recruited for work abroad by a company.

If an establishment employs person who fall under the ambit of the definition of 'employee' under the Compensation Act, such establishment would be required to comply with the provisions of the Compensation Act. However, please note that the compliances mentioned under Compensation Act are contingent / event based, as they would trigger only if the employee suffers injury, by accident arising out of and in course of employment, or if the employee contract any occupational disease (as defined under the Compensation Act).

#### **F. Maternity Benefit Act, 1961 ("Maternity Act")**

##### **Applicability**

The Maternity Act is applicable to: (a) every establishment which is a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances; (b) every shop or establishment, in which 10 (Ten) or more persons are employed, or were employed on any day of the preceding 12 (Twelve) months.

Every woman employee who has worked for at least 80 (Eighty) days in the twelve months immediately preceding the date of her expected delivery is entitled to the benefit(s) under the Maternity Act.

### **IV. Laws relating to Wages**

#### **A. Payment of Wages Act, 1936 ("Wages Act")**

##### **Applicability**

The Wages Act is applicable to (a) persons employed in any factory; (b) employed upon any railway by a railway administration or, either directly or through a subcontractor, by a person fulfilling a contract with a railway administration; and (c) to persons employed in an 'industrial or other establishment' as specified in sub-clauses (a) to (g) of clause (ii) of section 2.<sup>243</sup>

Wages, Act is applicable to employed persons whose monthly salary does not exceed Rupees 18,000 (Eighteen Thousand).

<sup>241</sup> It is relevant to note that few states such as Maharashtra (2016 Amendment) and Rajasthan (2014 Amendment), the applicability threshold has been increased to 50 (Fifty) or more workmen.

<sup>242</sup> Industrial establishment or undertaking" means an establishment or undertaking in which any industry is carried on; provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then:

- (a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking;
- (b) if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or unit thereof is an industry and the other activity or each of the other activities carried on in such establishment, or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking.

<sup>243</sup> "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who is being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

## B. Minimum Wages Act, 1948 (“Minimum Wages Act”)

### Applicability

Applicable to all employees, employed in an employment specified in Part I or Part II of the Schedule to the Minimum Wages Act or employed in an employment notified by the Government.

For instance, the Government of Delhi has notified that the provisions of Minimum Wages Act is applicable to every establishment covered under the Delhi Shops and Establishments Act, 1954. Similarly, states such as Maharashtra and Gujarat has also extended the provisions of Minimum Wages Act to ‘residential hotel, restaurant or eating houses’ vide Maharashtra Act 10 of 1961 and vide Gujarat Act 22 of 1961, respectively.

## V. Laws relating to Service Conditions, Health and Safety

### A. State Specific S&E Act (depending on the location of the establishment)

#### Applicability

Every establishment or shop where any trade or business is carried on but not applicable to establishments attached to a factory or to establishments to which Factories Act, 1948 is applicable.

As mentioned above, most States have covered the activities of restaurant under the purview of the definition of ‘establishment/ commercial establishment’, through their respective shops and establishment legislation. Hence, the entity may would be required to comply with the provisions of state specific shops and establishment legislation (s), depending on the location where the establishment is (are) set up.

### B. Contract Labour (Regulation and Abolition) Act, 1970 (“CLRA”)

#### Applicability

The CLRA<sup>244</sup> applies to (a) every establishment in which 20 (Twenty) or more workmen are employed or were employed on any day of the preceding 12 (Twelve) months as contract labour; (b) to every contractor who employs or who employed on any day of the preceding 12 (Twelve) months 20 (Twenty) or more workmen.

If the entity would employ contract labour above the threshold criteria (mentioned under the CLRA), then it would be required to obtain the registration certificate and comply with the provisions of CLRA.

## VI. Laws relating to Industrial Relations, Anti-Discrimination and Harassment

### A. Industrial Disputes Act, 1947 (“ID Act”)

#### Applicability

The ID Act applies to every ‘industrial establishment or undertaking’<sup>245</sup> wherein employees who fall under the category of ‘workman’<sup>246</sup> are employed.

It may be noted that there is no straight jacket formula to determine who would fall under the definition of ‘workman’. Typically, employees who are engaged in technical, clerical or manual work are covered within the definition of ‘workman’. However, persons who are employed mainly in managerial or administrative capacity, or who, are employed in supervisory capacity drawing wages exceeding Rupees 10,000 (Ten thousand) per month, or who exercise functions mainly of managerial nature, are excluded from the purview of the definition of ‘workman’.

In view of various judicial pronouncements, the activities of restaurant would fall under the definition of an ‘industry’ under the ID Act. Hence, if the entity employs ‘workman’, then it would be required to comply with the provisions of the ID Act.

### B. Equal Remuneration Act, 1976 (“Remuneration Act”)

#### Applicability

The Remuneration Act provides for the payment of equal remuneration to men and women for same work or work of a similar nature. It casts an obligation on the employer to avoid discrimination in the work place in the matter of employment and for matters connected therewith or incidental thereto.

The Remuneration Act is applicable to restaurant, hence the entity would be required to comply with the provisions of the Remuneration Act.

### C. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“POSH”)

#### Applicability

POSH provides protection to women against sexual harassment at workplace<sup>247</sup> and provides for a compliant mechanism for the prevention of sexual harassment and for matters connected therewith. POSH inter alia provides for the constitution of an internal complaints committee at each office or branch of an organization,

<sup>244</sup> “workplace” includes

- (i) any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;
- (ii) any private sector organization or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organization, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;
- (iii) hospitals or nursing homes;
- (iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;
- (v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;
- (vi) a dwelling place or a house

<sup>245</sup> “Commissioning mother” means a biological mother who uses her egg to create an embryo implanted in any other woman.

<sup>246</sup> Where the salary or wage of an employee exceeds seven thousand rupees or the minimum wage for the scheduled employment, as fixed by the appropriate Government, whichever is higher per mensem, the bonus payable to such employee under section 10 or, as the case may be, under section 11, shall be calculated as if his salary or wage were 4 [seven thousand rupees or the minimum wage for the scheduled employment, as fixed by the appropriate Government, whichever is higher per mensem.

wherein 10 (Ten) or more workers are engaged. An aggrieved woman can file a complaint with the internal complaints committee, which is duty bound to complete the inquiry into the complaint within a period of 90 (Ninety) days.

The business activity of a restaurant would fall under the definition of 'workplace' under POSH, therefore, the entity would be mandated to comply with the provisions of POSH.

## VII. Classification of Employees: Regime under the ID Act

In light of the above, it may be noted that the ID Act provides for the definition 'workman' category of employees. Typically, employees who are engaged in technical, clerical or manual work are covered within the definition of 'workman', while employees engaged in a supervisory or managerial capacity are generally excluded. The ID Act regulates matters relating to retrenchment and lay off of workmen; closure of industrial establishment; change in service conditions; compensation to workmen in case of transfer of undertaking; and matters incidental to and connected to ensuring harmonious relationship between employers and employees; employers and workmen; and workmen and workmen etc.

Since termination of employees or closure of an establishment (undertaking) is a scenario which may be relevant to the entity that may be set up, it is important to bearing in mind the following (though it may have to be relooked at from a State specific perspective).

### Termination of an employee (workman)

Under the ID Act, in order to terminate a 'workman' category of employee, who has been in "continuous service" for a period of 1 (One) year preceding the date of his retrenchment, an employer is mandated to comply with the following conditions:

- a minimum of 1 (One) month's written notice is given to the workman, indicating the reasons for the retrenchment or wages for the notice period thereof is paid;
- retrenchment compensation calculated at the rate of 15 (Fifteen) days' "average pay" (i.e. average of last 3 (Three) months' wages in case of monthly paid workmen) for every year of continuous service or a part thereof in excess of 6 (Six) months, is paid to the workman at the time of retrenchment; and
- notice in the prescribed form is sent by registered post to the appropriate Government and other prescribed authorities within the prescribed time line.

**In case of termination of employment, the employer is not required to provide notice or pay in lieu of notice if the termination is for cause (primarily misconduct).**

Further, an employer is also required to follow the "LIFO" principle of "last in first out" (Section 25G of ID Act), whereby in any proposed retrenchment process, the employee

last employed or the one with the least length of service, has to be retrenched first. However, deviations from this rule may be permitted for valid, genuine reasons recorded in writing. Also, if the terms of the employment contract of the workman who is to be retrenched provides for more beneficial terms (longer notice, severance), then in such circumstances the workmen would be entitled to such beneficial terms.

An employer is not required to provide notice or pay in lieu of notice if the termination is for cause (primarily misconduct). In such a case, the employer would ordinarily complete and internal investigation in accordance with the principles of natural justice prior to the termination of employment of the workmen.

### Closure of an establishment

In a scenario where the establishment is being closed down, the ID Act mandates an employer to serve a notice to the appropriate government, at least 60 (Sixty) days prior to such intended closure. However, the employer is not required to serve the aforementioned notice, if the establishment employs less than 50 (Fifty) workmen or less than 50 (Fifty) workmen were employed on an average per working day in the preceding 12 (Twelve) months. However, on account of such closure, every workman shall be entitled to notice and compensation as follows-

- a minimum of 1 (One) month's written notice is given to the workman, indicating the reasons for the retrenchment or wages for the notice period thereof is paid; and
- retrenchment compensation calculated at the rate of 15 (Fifteen) days' "average pay" (i.e. average of last 3 months' wages in case of monthly paid workmen) for every year of continuous service or a part thereof in excess of 6 (Six) months, is paid to the workman at the time of retrenchment.

It may also be noted that if the terms of employment contract are more beneficial terms (longer term of notice), then the employer would be required to comply with the terms of employment contract.

### Non-workman

Such employees who are not workmen under the ID Act are generally governed by the provisions of the state specific shops and establishment legislations depending on the location of the establishment and / or by the provisions of their respective employment contract in case of their termination whether due to simple termination or due to closure, the terms of contract will prevail (provided they are compliant with the applicable State laws).

Typically, a state specific shops and establishment statute mandates an employer to provide for 1 (One) month's notice or salary in lieu of notice, before effectuating the termination of an employee.

The employing entity should also have a reason for termination besides being required by certain State specific statutes to provide reasons of termination in a notice.

## VIII. Rights of employees under various statutes

A brief snap shot of various rights which an employee is entitled to under such various labour and employment statute is provided herein below for the ease of ready reference:

Sr. No.	Name of the Legislation	Rights of the Employees / Duties of an employer
1	Contract Labour (Regulation and Abolition) Act, 1970	<ul style="list-style-type: none"> <li><input type="checkbox"/> Provision of canteens where the number of contract labour are 100 (One Hundred) or more;</li> <li><input type="checkbox"/> Provision of rest-rooms or such other suitable alternative accommodation which shall be sufficiently lighted and ventilated and shall be maintained in clean and comfortable condition;</li> <li><input type="checkbox"/> Provision of other facilities such as wholesome drinking water, latrines and urinals, and washing facilities;</li> <li><input type="checkbox"/> Provision of first-aid box equipped with the prescribed contents at every place where contract labour is deployed; and</li> <li><input type="checkbox"/> Entitlement to receiving wages from contractor in the presence of a representative of the principal employer.</li> </ul> <p>*Primary onus for the above is upon the contractor with the rider that in case the contractor fails to do so, the obligation would fall on the principal employer.</p>
2	Employees' Compensation Act, 1923	<p>Compensation to employee in case of injury in connection with accident arising out of and in course of employment, and occupational diseases at the rate of:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Death: amount equal to 50% (Fifty per cent) of the monthly wages of the deceased employee multiplied by the relevant factor or an amount of Rupees 1,20,000 (One Lakh and Twenty Thousand), whichever is more;</li> <li><input type="checkbox"/> Permanent Total Disablement: amount equal to 60% (Sixty per cent) of the monthly wages of the injured employee multiplied by the relevant factor or an amount of Rupees 1,40,000 (One Lakh and Forty Thousand), whichever is more;</li> <li><input type="checkbox"/> Permanent Partial Disablement: where the injury is prescribed in Part II of Schedule I, at the percentage prescribed therein and where it is not, at the percentage ascertained by a medical practitioner; and</li> <li><input type="checkbox"/> Temporary Total or Partial Disablement: half monthly payment of the sum equivalent to 25% (Twenty-Five per cent) of monthly wages of the employee.</li> </ul>
3	Employees' Provident Fund and Miscellaneous Provisions Act, 1952	<ul style="list-style-type: none"> <li><input type="checkbox"/> Employers are obligated to contribute 12% (Twelve per cent) of basic wages, dearness allowance including the cash value of any food concession and retaining allowance, for all employees who are earning salary less than Rupees 15,000 (Fifteen Thousand) per month. Also, it may be noted that the employer would also be required to contribute for employees who are earning salary more than Rupees 15,000 (Fifteen Thousand), if they have been member of the provident fund, previously. However, for such employees who are earning more than Rupees 15,000 (Fifteen Thousand) per month the employer can restrict the contribution to Rupees 15,000 (Fifteen Thousand).</li> <li><input type="checkbox"/> The employees are also required to make a matching contribution to the provident fund.</li> <li><input type="checkbox"/> There are 3 (Three) schemes under the EPF Act, namely, the Employees Provident Funds Scheme, 1952, the Employees' Pension Scheme, 1995 and the Employees Deposit Linked Insurance Scheme, 1976. Subject to eligibility criteria, employees may also be entitlement to pensions.</li> </ul>

Sr. No.	Name of the Legislation	Rights of the Employees / Duties of an employer
4	Employees' State Insurance Act, 1948	<ul style="list-style-type: none"> <li><input type="checkbox"/> Employers are obligated to contribute on behalf of themselves (4.75% (Four and Three-Fourth per cent) of wages and employees shall contribute at the rate of 1.75% (One Three-Fourth per cent) to the Employee State Insurance Corporation.</li> <li><input type="checkbox"/> Benefits: <ul style="list-style-type: none"> <li>◆ Medical benefit</li> <li>◆ Sickness benefit</li> <li>◆ Temporary Sickness benefit</li> <li>◆ Extended sickness benefit</li> <li>◆ Enhanced sickness benefit</li> </ul> </li> <li><input type="checkbox"/> Maternity benefit</li> <li><input type="checkbox"/> Disablement benefit <ul style="list-style-type: none"> <li>◆ Temporary disablement benefit</li> <li>◆ Permanent disablement benefit</li> </ul> </li> <li><input type="checkbox"/> Dependents' benefit</li> <li><input type="checkbox"/> Funeral expenses.</li> </ul>
5	Maternity Benefit Act, 1961	<ul style="list-style-type: none"> <li><input type="checkbox"/> Entitlement to a woman: Maternity leave for 26 (Twenty Six) weeks with remuneration at the rate of average daily wages for the period of actual absence, which is the average of the wages payable to the woman for the days on which she has worked during the period of 3 (Three) months immediately preceding the date from which she absents herself on account of maternity [the minimum rate of wage fixed or revised under Minimum Wages Act, 1948 or Rupees 10 (Ten), whichever is higher].</li> <li><input type="checkbox"/> Medical Bonus - Rupees 3,500 (Three Thousand and Five Hundred) if no pre-natal confinement and post-natal care is provided for by the employer free of charge.</li> <li><input type="checkbox"/> 2 (Two) nursing breaks.</li> <li><input type="checkbox"/> Crèche Facilities [every establishment having 50 (Fifty) or more employees]</li> <li><input type="checkbox"/> Every woman shall be entitled to 4 (Four) visits a day to the crèche, including the interval for rest.</li> <li><input type="checkbox"/> A woman who legally adopts a child below the age of 3 (Three) months, or a commissioning mother<sup>248</sup> shall be entitled a maternity leave of 12 (Twelve) weeks.</li> </ul>
6	Minimum Wages Act, 1948	<ul style="list-style-type: none"> <li><input type="checkbox"/> Entitlement to minimum wage for work in scheduled employment, as may be prescribed by the appropriate Government.</li> <li><input type="checkbox"/> Other Benefits: <ul style="list-style-type: none"> <li>◆ Regulates fixed hours of work</li> <li>◆ Entitlement to day of rest and payment thereof</li> <li>◆ Payment of overtime wages at prescribed rate (if the employee worked beyond normal hours).</li> </ul> </li> </ul>

Sr. No.	Name of the Legislation	Rights of the Employees / Duties of an employer
7	Payment of Bonus Act, 1965	<ul style="list-style-type: none"> <li><input type="checkbox"/> Eligible employees are entitled to receive bonus which can vary between 8.33 % (Eight and One-Third per cent) of (minimum bonus) to 20% (Twenty) (maximum bonus) of their salary or wages during the accounting year.<sup>249</sup></li> <li><input type="checkbox"/> Bonus linked with production or productivity in lieu of bonus based on profits payable under the payment of Bonus Act, where the employees have entered into an agreement or settlement with their employer to this effect subject to a maximum of 20% (Twenty per cent).</li> </ul>
8	Payment of Gratuity Act, 1972	<ul style="list-style-type: none"> <li><input type="checkbox"/> An employee who has been in continuous service for not less than 5 (Five) years is entitled to claim/receive gratuity, at the rate of 15 (Fifteen) days' wage for every completed year of service or part thereof in excess of 6 (Six) months, on termination of his services on account of his superannuation, or on his retirement or resignation, or on his death or disablement due to accident or disease.</li> <li><input type="checkbox"/> The maximum amount of gratuity to which an employee is entitled is Rupees 10,00,000 (Ten Lakh) (unless a higher amount is agreed contractually). It may be relevant to note that the Gratuity (Amendment) Bill, 2017 ("Bill") has been introduced in the Lok Sabha on December 18, 2017. The Bill removes the existing ceiling on the gratuity amount (Rupees 10,00,000 (Ten Lakh) and states that the ceiling may be notified by the central government from time to time.</li> </ul>
9	Payment of Wages Act, 1936	<ul style="list-style-type: none"> <li><input type="checkbox"/> Entitlement to receive wages within stipulated time frame; and</li> <li><input type="checkbox"/> Protection against deduction of wages.</li> </ul>
10	State specific Shops and establishment Act	<ul style="list-style-type: none"> <li><input type="checkbox"/> Entitles an employee to receive leaves.</li> <li><input type="checkbox"/> Provides for encashment of leave at the time of dismissal.</li> <li><input type="checkbox"/> Entitles an employee to prior notice or salary in lieu of notice, before terminating his service.</li> <li><input type="checkbox"/> Regulates hours of work and entitles an employee to receive overtime, if in case he / she works beyond the stipulated hours</li> </ul>
11	Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013	<ul style="list-style-type: none"> <li><input type="checkbox"/> Protects women from sexual harassment at work place.</li> </ul>

## Acknowledgment

We would like to express our utmost gratitude to Ms. Vasvi Bharat Ram, National President, 2017-18, FICCI - FLO whose vision and valuable contribution to the conceptualization of this Handbook on Business Laws in India played a pivotal role in helping us write and compile this comprehensive guide on business laws for aspiring entrepreneurs. We would also like to thank Ms. Reena George, Head of the FLO Advocacy and Legal Cell for the idea and the execution of this handbook. We also extend our heartfelt gratitude to Ms. Rashmi Sarita and the rest of the FICCI - FLO team for their inputs and contribution in the execution of this Handbook.

This humble effort would not have been so seamlessly brought forth without their indispensable suggestions which helped us provide in a simplistic manner, an understanding of laws relating to setting up of a business in the country.

With the rise of the Indian economy and the growth of ease of doing business in India, the present and the forthcoming generations to be informed about the various business laws affecting their proposed endeavors and it is for this reason, we at Cyril Amarchand Mangaldas, have undertaken this initiative at the instance of FICCI - FLO to guide aspiring individuals and groups and especially women towards kick starting and achieving their professional goals.

Lastly, we would like to thank, the aspiring entrepreneurs of today for inspiring us to take this initiative. It has been an honor for us to partnership with the FICCI Ladies Organisation who we believe are providing guidance and encouragement to entrepreneurs.

## About Us



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Cyril Amarchand Mangaldas was founded in May 2015 to continue the legacy of the 100-year old Amarchand & Mangaldas & Suresh A. Shroff & Co., whose pre-eminence, experience and reputation of almost a century has been unparalleled in the Indian legal fraternity. Set up on the foundation of our glorious legal tradition and the outstanding legal practice built by Mr. Suresh A. Shroff, the Firm under the leadership of Mr. Cyril Suresh Shroff, along with its partners and associates, has come together to restructure and design a new blue print for the future.

With a long and illustrious history that began in 1917, the Firm is the largest full-service law firm in India, with over 625 lawyers, including 100 partners, and offices in India's key business centres at Mumbai, New Delhi, Bengaluru, Hyderabad, Ahmedabad and Chennai. The Firm advises a large, varied client base that includes domestic and foreign commercial enterprises, banks and other financial institutions, governmental and regulators engaged in the insurance, banking and financial services sectors, various market intermediaries, private equity funds, and venture capital funds.

The Firm prides itself in having a strong value system that keeps its clients as the central focus. Building on the strength of this value system, the Firm has fostered a collaborative work culture and adopts a pragmatic and solution-oriented approach to problem solving. Today, the Firm is recognised globally as a trusted adviser which consistently delivers quality, capability and commitment to its clients.



## Contributors

### FICCI FLO



Reena George  
Head of Legal Cell - FLO



Rashmi Sarita  
Executive Director - FLO

## CYRIL AMARCHAND MANGALDAS

1. Abhilasha Singh
2. Abhinav Rastogi
3. Adishree Mishra
4. Aditi Tambi
5. Aditya Marwah
6. Aditya Sarin
7. Aman Sighania
8. Amita Katragadda
9. Ashish Jain
10. Bishwajit Dubey
11. Gurkaran Singh
12. Kapil Arora
13. Kirat Nagra
14. Manishi Pathak
15. Mekhla Anand
16. Nikhilesh Barik
17. Nishkarsh Jakhar
18. Pranav Sharma
19. Preksha Malik
20. Ranjan Negi
21. Rohil Vashist
22. S.R. Pattnaik
23. Shiladitya Dash
24. Shivam Garg
25. Shruti Khanijow
26. Shruti Nandwana
27. Shweta Dutta
28. Srideepa Bhattacharya
29. Surabhi Khattar

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2016 | Ranked no. 1 by deal  
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## Our Offices

### **Mumbai**

Peninsula Chambers, Peninsula Corporate Park, G K Marg,  
Lower Parel, Mumbai - 400 013, India.  
T: +91 22 2496 4455  
F: +91 22 2496 3666  
E: cam.mumbai@cyrilshroff.com

### **New Delhi**

4th Floor, Prius Platinum, D-3,  
District Centre, Saket,  
New Delhi - 110 017, India.  
T:+91 11 6622 9000  
F:+91 11 6622 9009  
E: cam.delhi@cyrilshroff.com

### **Bengaluru**

201, Midford House,  
Off. M. G. Road,  
Bengaluru - 560 001, India.  
T:+91 80 2558 4870  
F: +91 80 2558 4266  
E: cam.bengaluru@cyrilshroff.com

### **Ahmedabad**

Shapath -V, 1304/1305,  
Opposite Karnavati Club, S.G. Road,  
Ahmedabad - 380 051, India.  
T: +91 79 49039900  
F: +91 79 49039999  
E: cam.ahmedabad@cyrilshroff.com

### **Hyderabad**

8-2-622/5/A, 3rd Floor, Indira Chambers,  
Road No. 10, Banjara Hills,  
Hyderabad - 500 034, Telangana, India.  
T: +91 40 6730 6000  
F:+91 40 6730 6002  
E: cam.hyderabad@cyrilshroff.com

### **Chennai**

2nd Floor, ASV Chamiers Square,  
87/48, Chamiers Road, R. A. Puram,  
Chennai -600 028, India.  
T: +91 44 6668 4455  
F: +91 44 6608 3490  
E: cam.chennai@cyrilshroff.com

[www.cyrilshroff.com](http://www.cyrilshroff.com)

## Notes

## Notes

**Compiled and written by**



cyril amarchand mangaldas  
advocates & solicitors

[www.cyrilshroff.com](http://www.cyrilshroff.com)



**The Power to Empower**

Federation House, Tansen Marg, New Delhi-110001.  
T: +91-11-2373 6311 • F: +91-11-2375 2259 • E: [flo@ficci.com](mailto:flo@ficci.com) • W: [www.ficciflo.com](http://www.ficciflo.com)