CHAPTER-V

IMPORTANT ASPECTS OF SOME OF THE PROPERTY RELATED LAWS

Land is a subject falling within the powers of the State Governments under the Constitution of India\(^1\) and hence, property laws in India may differ from State to State. Besides the local laws, several laws enacted by the Central Government also govern acquisition and ownership of property (including an interest in property) through purchase/sale, transfer, mortgage, inheritance or gift. Transfer of property other than agricultural land, registration of deeds and document fall in the Concurrent List.\(^2\)

When a person acquires or owns an immovable property, the law also give him/her the right to use, lease, sell, rent or transfer/gift of the land. The owner also has a right to mortgage his immovable property as a security for loans. However, there are some laws which restrict the type of use a land can be put to, e.g., a land may be used only for residential or commercial purposes to prevent haphazard/unorganized growth of cities and towns. Laws in some of the States prevent/Restrict outsiders from acquiring property within the State. Restrictions are also placed on non-agriculturists from acquiring agricultural land. There are also other laws which prescribe rules and regulations for protection of environment or which provide for approval of building plans/designs so as to protect people from natural or man made hazards. Some laws like the Registration Act, 1908, also lay down provisions governing registration of property transactions so as to keep proper records of ownership of property in the public domain. Some laws relating to taxation like the Income Tax Act, 1956 lay down certain provisions and procedures to be observed while undertaking property transactions so as to ensure tax compliance of an owner before disbursal of property.

In India, transactions for purchasing/selling/transferring/creating an interest in immovable property and transmission of title in respect of a property are governed by several laws, rules and regulations. As matters relating to land fall within the legislative powers of State Governments under the Constitution of India, these may differ from

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\(^1\) The Constitution of India, Seventh Schedule, List II, Entry 18 and Article 246 (3).
\(^2\) Id., List III, Entry 6.
state to state. The Transfer of Property between any two parties is governed by the Transfer of Property Act, 1882. Both these parties need to be alive for transfer under the Act. In case of transfer of a property of a deceased person, Succession Laws as per the religion of the deceased will be applicable.

A. Transfer of Property Act, 1882

With the exception of certain instances, the Act does not govern the transfer of property by operation of law, such as sale by the order of court, auction or forfeiture as well as transmission of title under other laws like Hindu Succession Act. As such, transfers by will and inheritance are not governed by the Act. Section 5, under Chapter II of the Act, defines transfer of property as “an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and ‘to transfer property’ is to perform such act”. Living person includes a company or association or body of individuals, whether incorporated or not. The person/s transferring the property is referred to as the transferor while the person/s to whom the property is being transferred, is referred to as the transferee. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of lease, under Section 10 of the Act. Also, where, on a transfer of property, under Section 11, an interest is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

The Act\(^3\) covers property which can or cannot be transferred. Parties competent to contract and entitled to transferable property is competent to transfer under the Act. Thus, every person:\(^4\)

- a. competent to contract and entitled to transferable property, or
- b. authorized to dispose of transferable property not his own, is competent to transfer such property, either wholly or in part, and either, absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by the law for the time being in force.

\(^3\)The Transfer of Property Act 1887, Section 6.
\(^4\) Section 7.
This means that the parties must:

a. have attained the age of majority i.e., 18 years;
b. be of sound mind; and
c. not be disqualified to enter into a contract by some other law applicable to them.

The Act, the transfer of property passes forthwith to the transferee all the interest which the transferor is capable of passing and the legal incidents thereof. The Act also allows for oral transfer except in cases where writing is expressly required by law.\(^5\)

**Different ways in which property can be transferred**

**Sale of immovable property:** Chapter III of the Act, treats transfer of ownership in exchange for a price paid or promised or part-paid and part-promised as sale of immovable property. A contract for the sale of immovable property is a contract stating that a sale of such property will take place on terms settled between the parties. Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.\(^6\)

**Mortgage of immovable property:** Mortgage, defined by Section 58 in Chapter IV, is an instrument to secure a loan. The transferor is called a mortgagor, the transferee a mortgagee. The principal money and interest on which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

**Leases of immovable property:** Chapter V also states that a lease of immovable property is a transfer of a right to enjoy such property for a certain time, in consideration of a price paid or promised, or of money or service or a share of crop or any other thing of value, that is rendered periodically or as specified by the agreement between the transferor and the transferee.\(^7\)

**Exchange of property:** As per Chapter VI, when two persons mutually transfer the ownership of one thing for the ownership of another, neither things or both things being money only, the transaction is called an “exchange”. A transfer of property in completion

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\(^5\) Section 9.
\(^6\) Section 4.
\(^7\) Section 105.
of an exchange can be made only in manner provided for the transfer of such property by sale.\textsuperscript{8}

**Gift of Immovable Property:** Chapter VII of the Act covers the transfer of property by gift. Accordingly, a gift is the transfer of existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by, or on behalf of the donee.\textsuperscript{9} The Act states that State Governments, through notification in the official gazette, may exempt provisions under Section 54, paragraph 2 and 3, 107 and 123, but any district or tract of country excluded from the operation of the Indian Registration Act, 1908, cannot be covered by this exemption.\textsuperscript{10}

The Act specifically deals with priority of rights created by transfers. It lays down that where a person purports to create by transfer at different times rights in or over the same immovable property, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.\textsuperscript{11}

When the property is in dispute and in which any right to immovable property is in question, the property cannot be transferred during the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.\textsuperscript{12}

For this purposes, the pendency of a suit or proceeding is deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order

\textsuperscript{8} Section 118.
\textsuperscript{9} Section122.
\textsuperscript{10} Section 1.
\textsuperscript{11} Section 48.
\textsuperscript{12} Section 52.
has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

**Property that Can or Cannot be Transferred**

The Transfer of Property Act specifies that property of any kind may be transferred, except as otherwise provided by the Act or by any other law in force.\(^{13}\) Depending on the type of property to be transferred, transfer of property would include:

1. When the property is land:
   a. The easements annexed thereto;
   b. The rents and profits thereof accruing after the transfer; and
   c. All things attached to the earth.

2. Where the property is a house
   a. The easements annexed thereto;
   b. The rent thereof accruing after the transfer;
   c. The locks, keys, bars, doors, windows; and
   d. All other things provided for permanent use therewith.

Where the property is a debt or other actionable claim, the securities therefore (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer. Actionable claim is defined as a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. Where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

**Property which cannot be transferred**

The Act specifically provides for the properties which cannot be transferred under the provisions of the Act. The same are as follows: \(^{14}\)

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\(^{13}\) Section 17.

\(^{14}\) Section 6.
a. The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.
b. A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.
c. An easement cannot be transferred apart from the dominant heritage.
d. An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
e. A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.
f. A mere right to sue cannot be transferred.
g. A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
h. Stipends allowed to military, naval, air-force and civil pensioners of the government and political pensions cannot be transferred.
i. No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee.
j. Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee. According to Section 8 of the Act, the transfer of property passes to the transferee all the interest the transferor is capable of passing.

Immovable Property

Act states that “Immovable Property does not include standing timber, growing crops or grass”. 15 The General Clauses Act defines “Immovable Property” as under: “Immovable property shall include land, benefits to arise out of land, and things

15 Section 3.
attached to earth, or permanently fastened to anything attached to the earth.”

An equity of redemption is immovable property, and so is the mortgagee’s interest in the immovable property mortgaged. There are many conflicting decisions as to whether a mortgage debt is immovable property, but since mortgage debt has been excluded from the definition of an actionable claim by Act 2 of 1900, it seems that a mortgage debt is for all intents and purposes, immovable property, though for the purpose of attachment it is treated as movable property. A full Bench of Rangoon High Court has said that a mortgage, being transfer of an interest is immovable property, is immovable property, and that a suit to enforce a mortgage is a suit for land under the Letters Patent of the Chartered High Courts. Standing timbers are tree and therefore, they are not falling under the definition of immovable property. However, a fruit bearing tree is not a standing timber and therefore can be classified as immovable property.

Movable Property – There is no definition of movable property in Transfer of Property Act, 1882, Movable property has been defined in the General Clauses Act, 1897 to mean ‘property of every description except immovable property’. The Registration Act, 1908 defines movable property to include property of every description except immovable property, but including standing timber, growing crops and grass.

Property – The legislature has not attempted to define the world property’, but it is used in the Transfer of Property Act, 1882 in its wider and most generic legal sense. Section 6 says that property of any kind may be transferred. Thus an actionable claim is property and so is a right to re-conveyance of land. Property is any thing which is the subject-matter of ownership, but also includes dominum or the right of ownership or partial ownership.

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16 Section 3(26).
20 Taruadi v. Bal Kashi, (1904) ILR 26 Bom 305.
21 Vermont Chettyar v. ARARRM Chettyar Firm, (1934) ILR 12 Rang 370.
22 Sukiy v. Goondakul, (1872) 0 6 Mad HCR 71.
23 Alisaheb v. Mohidin, (1911) 13 Bom LR 874.
25 Matta Din v. Kazim Hussain, (1891) ILR 13 All 432 p.473.
26 Narasingariji v. Panaganti, (1921) Mad WN AIR 1921 Mad 498.
Interest in Property - As ownership consists of bundle of rights, the various rights and interests may be vested in different persons, eg. A mortgager and a mortgagee, a lessor and a lessee, or tenant for life. An absolute ownership is an aggregate of component rights such as the right of possession, the right of enjoying the usufruct of the land, and so on. The subordinate rights, the aggregate of which make an absolute ownership, are referred in the Transfer of Property Act as interest in property. In section 58, however, the word interest is not distinguished from absolute ownership.

Transfer - The word ‘transfer’ is defined with reference to the word ‘convey’. This word in English law in its narrower and more usual sense refers to the transfer of an estate in land; but it is sometime used in a much wider sense to include any form of an assurance *inter vivos*. The word ‘convey’ is in section 5 of the Transfer of Property Act is used in the wider sense referred to above. Transferor must have an interest in the property. A lease comes within the meaning of the word ‘transfer’. A transfer of property does not exclude property situated outside India or the territories where Transfer of Property Act, 1882 does not apply. If the transfer is effected where the Transfer of Property Act, 1882 is in force, the right of the parties are to be determined by the Court under the Transfer of Property Act.

Charge - A charge is not a transfer of property, for the charge no right is transferred but a personal obligation is created or a right to payment out of property specified can be generated. In the insolvency Acts, a transfer of property, however, defined as including a charge. The definition is wider because any obligation incurred by a debtor affecting his property may be voidable as a fraudulent preference.

Compromise - A compromise of doubtful rights is not a transfer, but based on assumption that there was an antecedent title of some kind in the parties which the agreement acknowledged and defined. The position would be different if such a compromise also transferred properties to a person who has neither a pre-existing title, nor a claim to such title.

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29 Prethi Singh v. Ganesh, AIR 1951 All 462.
31 Presidency Town Insolvency Act 1909, s 2(i).
32 Ex Parte Lancaster, Re Marsden, (1883) 23 Ch D 311.
**Deed of Appointment** – A transfer is not necessarily contractual, and included a deed of appointment. \(^{34}\) Section 5 of the Transfer of Property Act does not require that the ‘living person’ who conveys should necessarily be the same person as who owns, or owned, the property conveyed. All that is required is that there should be an act of conveyance by some living person; under the section there may be a transfer by a person exercising powers over the property of another. Thus, where the donee of power of appointment, having power to appoint a beneficial interest in the property, exercises that power, it would amount to a transfer.\(^{35}\)

**Exchange**- An exchange is a mutual transfer of the ownership of one thing for another.\(^{36}\)

**Entries in revenue records**- Entries in the revenue records is neither a proof of title upon the property nor can it be used as a camouflage to defeat the legal right, title or interest of a person, who is the owner of the property in question. Revenue entries neither can confer a title nor it can extinguish the right of title of the owner of the property. Mutation of the property in the revenue record also does not create or extinguish title nor has any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay land revenue in question. Thus, the correct proof of ownership is a registered sale deed in favour of the person. Revenue entries or revenue receipts have nothing to do with the ownership and they cannot be treated as conclusive evidence of the ownership of the property.\(^{37}\)

**Release Deed**- If the person executing the release deed holds some right, title of interest in the property, release of that interest would amount to conveyance. However, if the transferor is a *benamidar* releasing the property to real owner, it is not conveyance.\(^{38}\)

**Surrender**- A surrender is not a transfer of property as defined under Section 5 of the TP Act.\(^{39}\) It is the falling of a lesser estate into a greater one.

**Will**- Will operates from the death of testator. A deed executed by husband and wife jointly providing that on the death of either of them, the survivor would retain all rights

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\(^{35}\) U Theta v. Aresena, 199 IC 903.

\(^{36}\) Transfer of Property Act 1882, Section 118..


\(^{38}\) Suresh Chandra Gupta v. Man Mohan Gupta, AIR 2004 Del 282.

over the property including that of alienation and upon the death of the surviving 
executants the property would go to their children would be a will (and not a settlement 
of deed) as there is no transfer of a right the other executants. Transfer of shares or 
interest in a co-operative society to the nominee of its member operating on his death 
would also be executed like transfers by will. Where the beneficiary is not a living 
person, the expression used is the creation of an interest in an unborn person 
contemplated under section 13 of the Transfer Property Act, 1882. A Muslim person 
executed a document styled as ‘will’. By virtue of the executed document he delivered 
certain properties amongst his daughter and nephew in his life time and gave possession 
to person named. It was held that it was a conveyance and not a will, even though it 
described the beneficiaries as heirs. Not being a registered document, it was invalid.

**Person competent to transfer**- Every person competent to contract and entitled to 
transferable property, or authorised to dispose off transferable property not his own, is 
competent to transfer such property either wholly or in part, and either absolutely or 
conditionally, in circumstances, to the extent and in manner, allowed and prescribed by 
any law for the time being in force.

**Minor as a transferor**- The transferor must have attained the age of majority according 
to the law to which he is subject. The Privy Council has held that a contract by minor is 
void. Prior to the decision of the Privy Council, it was generally assumed that a 
minor’s contract is voidable and could be ratified. These decisions are now absolute, 
and as the contract is void there is no question of ratification. The rule of estoppels is 
not applicable in case of minor as it could have the effect of enlarging powers of the 
minor to contract. Although a minor is not capable to contract a transfer to minor is 
valid.

**Lunatic as a transferor**- in terms of the provisions of the Indian Contract Act, 1872, a 
person is of sound mind for the purpose of making a contract if he is capable of 
undertaking it, and of forming a rational judgement as to its effect upon his interest.

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40 Kusum Debi Jhinjani v. Pushpa Devi, AIR 1990 Cal 204.
41 Vaizer v Putti Begam, AIR 1986 AP 159.
42 The Transfer of Property Act 1882, Section 7.
43 Mohari Bhee v Dhurmo das Ghose, (1903) ILR 30 Cal 539 30 IA 114.
44 Bramho v Dharmo, (1898) ILR 26 Cal 381.
45 The Transfer of Property Act 1882, Section 6 (h).
contract made by lunatic person is void under section 11 of the Indian Contract Act 1872, and so also, a transfer by him of his property is void. A lunatic is competent to contract during his lucid interval, and a transfer by a lunatic during a lucid interval would be valid. However, a person adjudged a lunatic would be incapable of making a transfer even during a lucid interval.\textsuperscript{47} The unsoundness of mind may be establish by proving such conduct as was not in keeping with the character of the person concerned, but such that it could not be explained on any reasonable basis. Burden to prove or establish at least on balance of probability the transferor’s action in executing transfer deed in favour of the transferee was outcome of an unsound mind, is on the person who alleges it.

**Disqualified to transfer**- A statutory disqualification to contract imports, as in the case of a minor, inability to transfer. Such a disqualification ensures when the owner’s property is under the management of the Court of wards,\textsuperscript{48} or of an officer appointed under Encumbered Estates Act.\textsuperscript{49}

**Authority to dispose off property**- If the transferor has no title to the property, he must have authority to transfer it.\textsuperscript{50} As instance of authority to transfer the property of another, the following may be cited:-

‘An agent acting under power of attorney, the done of power of appointment, the guardian of a minor duly authorised by the Court in that behalf, the manager of a Hindu family in case of necessity or for the benefit of the family, the committee of manager of lunatic, a receiver when empowered by the Court, an executor or administrator having authority to dispose off the property of the deceased regulated by section 307 of the Indian Succession Act, 1925.\textsuperscript{51}

**Person not authorised to dispose off minor’s property**- Where the de facto guardian of the minor’s property sells it, the sale is invalid, and will be hit by section 11 of the Hindu Minority and Guardianship Act, 1956. Even subsequent ratification by the natural guardian does not validate it.\textsuperscript{52}

\textsuperscript{47} Re Walker,(1905) 1 Ch 160.
\textsuperscript{49} Radha Bai v. Kamod,(1908) ILR 30 All 38.
\textsuperscript{50} Chintu v. Charan Singh, 77 IC 705, AIR 2001 SC 1754.
\textsuperscript{52} K. Kamama v. Appana, AIR 1973 AP 20.
Construction of Deed- A document has to be construed as a whole. Real intention of the parties has to be gathered, not merely from what is stated in the description of the property in the schedule to the document could not be given any overwriting importance over the actual area specified in the document as the extent of the land determined upon measurement.\textsuperscript{53} The construction of a document as regards the legal effects will only arise where the document is an instrument of title, or is a contract, or is the direct foundation of the legal rights. Where the nature and character of the document is clear, and only question or dispute is whether the real contract is between the parties is something different from the contained in the document, no question of construction of the document is involved.

Partition- a right to partition is an incident of joint ownership of property. In Umrao Singh v Baldeo Singh,\textsuperscript{54} a testator left his property to his sons jointly with a direction that the property should not be partitioned till all the sons attain majority. The Lahore High court held that this was an invalid restriction on the right of enjoyment even though it was for a limited time. An agreement not to partition, though it may be binding on the immediate parties, will not bind their successors in interest. That Bombay High court\textsuperscript{55} has held that such an agreement is inconstant with the Hindu Law, and will not bind even the parties themselves, and the Allhabad High court has held that even an immediate party is not bound by agreement not to partition for an indefinite time.\textsuperscript{56}

An arbitrator made an award between two sisters giving each a half share of an estate and appointing the husband of one sister manager, but directed that neither sister would have a right to claim partition. One sister dies and her son sued for partition. The Privy Council held that the clause in restrain of partition afforded no defence to the son’s suit for partition. Their Lordship said:

‘It may have bound the parties who agreed among themselves to abide by it but as against the present plaintiff, the clause has no effect whatever, had no power to make property which was divisible by indivisible forever’.\textsuperscript{57}

\textsuperscript{53} Sumathy Ama v. Sankara Pillai, AIR 1987 Ker 84.
\textsuperscript{54} (1933) ILR 14 Lah 353.
\textsuperscript{55} Ramlinga v. Virupakshi, (1883) ILR 7 Bom 538.
\textsuperscript{56} Chander Shekhar v. Kundan Lal, (1909) ILR 31 All 3.
\textsuperscript{57} Jafri Begam v. Syed Raza, (1901) ILR 40 All 470.
On the other hand, an estate may be impartible by customs, or by the terms of the grant, for the Crown has power to grant or transfer land and by its grant or transfer, to limit in any way it pleases the descent of such lands.\(^5^8\)

**Conditional transfer**- An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

**B. The Indian Contract Act, 1872**

This legislation specifies when a party can be said to have the capacity to contract. A contract pertaining to realty can be entered into, among others, by an individual (who is not a minor or of an unsound mind), partners of a firm, a corporate body, a trust, a sole corporation, the manager of an undivided family, and a foreigner. All the requirements of a valid contract i.e., consideration, intention to contract and validity under the law of the land must be satisfied.

The law relating to contracts in India is contained in Indian Contract Act, 1872. The Act was passed by British India and is based on the principles of English Common Law. It is applicable to the all over India except the State of Jammu & Kashmir. It determines the circumstances in which promise made by the parties to a contract which is legally binding on them. All of us enter into a number of contracts everyday knowingly or unknowingly. Each contract creates some right and duties upon the contracting parties. Indian contract deals with the enforcement of these rights and duties upon the parties in India.

The Indian Contract Act, 1872 came into force on 1st September, 1872. It was enacted mainly with a view to ensure reasonable fulfilment of expectation created by the promises of the parties and also enforcement of obligations prescribed by an agreement between the parties. The Third Law commission of British India formed in 1861 under the stewardship of Chairman Sir John Romilly, with initial members as Sir Edward Ryan, R. Lowe, J.M. Macleod, Sir W. Erle (succeeded by Sir. W.M. James) and Justice Wills (succeeded by J. Henderson), had presented the report on contract law for India as

\(^{58}\) *Rajindra v. Raghubans*, (1918) ILR 40 All 470.
Draft Contract Law (1866). The Draft Law was enacted as The Act 9 of 1872 on 25th April 1872 and the Indian Contract Act, 1872 came into force with effect from September 1, 1872.

Before the enactment of the Indian Contract Act, 1872, there was no codified law for contract in India. In the Presidency Towns of Madras, Bombay and Calcutta law relating to contract was dealt with the Charter granted in 1726 by King George I to the East India Company. Thereafter in 1781, in the Presidency Towns, Act of Settlement passed by the British Government came into force. Act of Settlement required the Supreme Court of India that questions of inheritance and succession and all matters of contract and dealing between party and party should be determined in case of Hindu as per Hindu law and in case of Muslim as per Muslim law and when parties to a suit belonged to different persuasions, then the law of the defendant was to apply. In outside Presidency Towns matters with regard to contract was mainly dealt with English Contract Laws; the principle of justice, equity and good conscience was followed.

Indian Contract Act embodied the simple and elementary rules relating to Sale of goods and partnership. The developments of modern business world found the provisions contained in the Indian Contract Act inadequate to deal with the new regulations or give effect to the new principles. Subsequently the provisions relating to the sale of goods and partnership contained in the Indian Contract Act were repealed respectively in the year 1930 and 1932 and new enactments namely Sale of Goods and Movables Act 1930 and Indian Partnership act 1932 were re-enacted.

Definition: Act defines the term contract as “any agreement enforceable by law”. There are two essentials of this Act, agreement and enforceability. The Act also defines agreement as “every promise and every set of promises, forming the consideration for each other.”

The Act defines promise in these words: “when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Proposal when accepted, becomes a promise.”

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59 The Indian Contract Act 1872, Section.2(h).
60 Section 2(e).
61 Section. 2(b).
**Essential Elements of a Valid Contract** - According to the provisions of the Act “All agreements are contracts, if they are made by the free consent of the parties, competent to contract, for a lawful consideration with a lawful object, and not hereby expressly provided to be void.”

1. **Proper offer and proper acceptance** - There must be an agreement based on a lawful offer made by person to another and lawful acceptance of that offer made by the latter. Act lay down the rules for making valid acceptance.

2. **Lawful consideration** - An agreement to form a valid contract should be supported by consideration. Consideration means “something in return” (*quid pro quo*). It can be cash, kind, an act or abstinence. It can be past, present or future. However, consideration should be real and lawful.

3. **Competent to contract or capacity** - In order to make a valid contract the parties to it must be competent to contract. According to section 11 of the Contract Act, a person is considered to be competent to contract if he satisfies the following criterion:-
   a. The person has reached the age of maturity.
   b. The person is of sound mind.
   c. The person is not disqualified from contracting by any law.

4. **Free Consent**: To constitute a valid contract there must be free and genuine consent of the parties to the contract. It should not be obtained by misrepresentation, fraud, coercion, undue influence or mistake.

5. **Lawful Object and Agreement**: The object of the agreement must not be illegal or unlawful.

6. **Agreement not declared void or illegal**: Agreements which have been expressly declared void or illegal by law are not enforceable at law; hence they do not constitute a valid contract.

7. **Intention to create legal relationships**: when the two parties enter in to an agreement, there must be intention to create a legal relationship between them if there is no such intention on the part of the parties there is no contract between them; agreements of a social or domestic nature do not contemplate legal relationship; as such they are not contracts.

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62 Section 10.
63 Section 3 to 9.
Types of contracts: On the basis of validity:

1. **Valid contract**: An agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law.

2. **Void contract**: A void contract is a contract which ceases to be enforceable by law. A contract when originally entered into may be valid and binding on the parties. It may subsequently become void.

3. **Voidable contract**: An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract.\(^{64}\) If the essential element of free consent is missing in a contract, the law confers right on the aggrieved party either to reject the contract or to accept it. However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.

4. **Illegal contract**: A contract is illegal if it is forbidden by law; or is of such nature that, if permitted, would defeat the provisions of any law or is fraudulent; or involves or implies injury to a person or property of another, or court regards it as immoral or opposed to public policy. These agreements are punishable by law. These are void-ab-initio.

5. **Unenforceable contract**: Where a contract is good in substance but because of some technical defect cannot be enforced by law is called unenforceable contract. These contracts are neither void nor voidable.

On the basis of formation:

1. **Express contract**: Where the terms of the contract are expressly agreed upon in words (written or spoken) at the time of formation, the contract is said to be express contract.

2. **Implied contract**: An implied contract is one which is inferred from the acts or conduct of the parties or from the circumstances of the cases. Where a proposal or acceptance is made otherwise than in words, promise is said to be implied.

3. **Quasi contract**: A quasi contract is created by law. Thus, quasi contracts are strictly not contracts as there is no intention of parties to enter into a contract. It is legal obligation which is imposed on a party who is required to perform it. A quasi contract is

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\(^{64}\) Section 2 (i).
based on the principle that a person shall not be allowed to enrich himself at the expense of another.

**On the basis of performance:**

1. **Executed contract:** An executed contract is one in which both the parties have performed their respective obligation.

2. **Executory contract:** An executory contract is one where one or both the parties to the contract have still to perform their obligations in future. Thus, a contract which is partially performed or wholly unperformed is termed as executory contract.

3. **Unilateral contract:** A unilateral contract is one in which only one party has to perform his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the time of the contract or before the contract comes into existence.

4. **Bilateral contract:** A bilateral contract is one in which the obligation on both the parties to the contract is outstanding at the time of the formation of the contract. Bilateral contracts are also known as contracts with executory consideration.

Proposal is defined under The Indian Contract Act, 1872\(^{65}\) as “when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtain the assent of that other to such act or abstinence, he is said to make a proposal/offer,” Thus, for a valid offer, the party making it must express his willingness to do or not to do something. But mere expression of willingness does not constitute an offer. An offer should be made to obtain the assent of the other. The offer should be communicated to the offeree and it should not contain a term the non compliance of which would amount to acceptance.

**Classification of Offer:-**

1. **General Offer:** Which is made to public in general.

2. **Special Offer:** Which is made to a definite person.

3. **Cross Offer:** Exchange of identical offer in ignorance of each other.

4. **Counter Offer:** Modification and Variation of Original offer.

5. **Standing, Open or Continuing Offer:** Which is open for a specific period of time. The offer must be distinguished from an invitation to offer. Invitation to offer is only a

\(^{65}\) Section 2(a)
circulation of an invitation to make an offer, it is an attempt to induce offers and precedes a definite offer. Acceptance of an invitation to an offer does not result in formation of a contract and only an offer emerges in the process of negotiation. A statement made by a person who does not intend to be bound by it but, intends to further act, is an invitation to offer.

Acceptance - According to Section 2(b), “When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.”

1. Acceptance must be absolute and unqualified.
2. Communicated to offeror.
3. Acceptance must be in the mode prescribed.
4. Acceptance must be given within a reasonable time before the offer lapses.
5. Acceptance by the way of conduct.
6. Mere silence is no acceptance. Silence does not per-se amount to communication\(^66\). Mere silence cannot amount to any assent. It does not even amount to any representation on which any plea of estoppel may be founded, unless there is a duty to make some statement or to do some act.
7. Offeree and offerer must have mutual consent.

Proposal and acceptance both must be communicated- Mutual assent, a common consent, that is, a consensus ad idem is siue qua non of every contract. Two parties should become of the same mind upon the subject matter of the contract. This can only be when there is a proposal by one party and its acceptance by the other. Unless the acceptor knows of the proposal, he can not accept it. Until there is an acceptance of proposal, and the acceptance is communicated to the other side. The general rule is that it is in the acceptance of offer by the offered and intimation of that acceptance to the offer which results in a contract. But in case where the intimation of offer does not reach, it could not, although posted or dispatched be said to have been put in a course of transmission to him.\(^67\)

\(^{66}\) Bank of India Ltd. v. Rustom Cowasjee, AIR 1955 Bom 419 at p 430; 57 Bom LR 850.

\(^{67}\) Kalluram Kesharvani v. State of Madhya Pradesh, AIR 1986 MP 204 at p 206.
Lawful consideration

Consideration is defined\(^{68}\) as: “When at the desire of the promisor, the promisee has done or abstained from doing, or does or abstains from doing, or promises to do or abstain something, such an act or abstinence or promise is called consideration for the promise. “Consideration” means to do something in return. In short, Consideration means quid pro quo i.e. something in return. An agreement must be supported by a lawful consideration on both sides. The consideration or object of an agreement is lawful, unless and until it is forbidden by law, or is of such nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral, or opposed to public policy.

a. Consideration may take in any form-money, goods, services, a promise to marry, a promise to forbear etc.

b. Contract Opposed to Public Policy can be repudiated by the Court of Law even if that contract is beneficial for all of the parties to the contract.\(^{69}\) Agreement of which object or consideration was opposed to public policy, is unlawful and void.

Free Consent

According to Section 14, “two or more persons are said to be consented when they agree upon the same thing in the same sense (Consensus-ad-idem). A consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake.

Elements Vitiating free Consent

1. Coercion (Section 15): “Coercion” is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, 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.

2. Undue influence (Section 16): “Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract

\(^{68}\) The Indian Contract Act 1872,Section 2(d).

\(^{69}\) *Newar Marble Industries Pvt. Ltd v. Rajasthan State Electricity Board, Jaipur*, 1993 Cr. L.J. 1191 at 1197, 1198 [Raj].
was not induced by undue influence shall lie upon the person in the position to dominate the will of the other.”

3. Fraud (Section 17): “Fraud” means and includes any act or concealment of material fact or misrepresentation made knowingly by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract.

4. Misrepresentation (Section 18): “causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement”.

5. Mistake of fact (Section 20): “Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void”.

Fraud- Fraud, misrepresentation, collusion and mistake are different concepts in law. They have been defined in S17 to 20 of the Contract Act. They do not overlap except that their effect may be common. Presence of any one of them may render the agreement void. When applied to judicial proceedings it may make the order unenforceable or liable to be ignored. But uniformity in result does not render them one and the same. Each of them arises in different set of circumstances and in order to record a finding that any one of them is established there has to be different facts.

Fraud and misrepresentation- It is well settled by authorities that the word ‘fraudulent’ does not qualify misrepresentation. In Niaz Ahmed v. Parasatam Chandra, their Lordship held that in case of an active misrepresentation knowing that fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means discovering the truth with ordinary diligence. The fraudulent misrepresentation as regards character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable.

Fraud may become important either for the purpose of giving the defrauded person a right to sue the fraudulent person for damages in an action of deceit, or its equivalent, or

72 AIR 1931 All 154.
to enable to the defrauded person to rescind the transactions. The requirements of the law for those two purposes are not always identical. It is undoubtedly true that whenever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a contract they will certainly warrant avoidance or rescission of the bargain. In terms of the provisions of the Section 17 of the Act a mere false statement is not fraud.

**Ingredients of void and voidable contracts**- Voidable transfer remains valid until avoided and, therefore, it is necessary to avoid it by seeking the relief of setting it aside. But a transaction, which is *void ab initio*, must be deemed to have never taken place. It is not to be regarded as an alienation which is perfect till it is set aside. There is a clear distinction between a fraudulent misrepresentation as to the character of a document and as to its contents. Where the misrepresentation is both as to contents as well as character of document, the transaction is wholly void.

**Relief** : No relief can granted when the fraudulent or illegal object has been carried out and both parties are in *pari delicto*. Where a contract is not tainted by coercion, undue influence, fraud, misrepresentation or mistake, the contract has to be upheld in its entirety, unless there is any other law under which a relief can be granted to either party. For instance, where the contract amounts to a penalty, section 74 of the Contract Act provides for a relief at the discretion of the court. Again It is open to the court to modify the contract. But apart from the special rules of law, there is noting to authorise the Court to interfere with the sanctity of the contracts. Where in a suit for recovery of certain amount of money on an alleged contract, there is no alternative relief on the footing of a *quantum meruit* and the contract has been proved the Court has no jurisdiction to grant relief.

**Practice and Procedure (Section 23)**- When it is apparent on the face of a contract that it is unlawful, it is the duty of the Judge himself to take an objection, and that too, whether the parties take or waive the objection, it is, therefore, open to High Court even

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74 The defrauded party must, however, satisfy the special requirements of recession, as for instance, restoration of the consideration.
75 *Bindu Sharma v. Ram Prakash Sharma*, AIR 1997 All 429 at p430.
77 *Nathu Khan v. Sewak Koieri*, 91 : 161: 15 CWN.
without a pleading to consider the question whether the agreement relied in the case is immoral.\textsuperscript{80}

**Sale of immovable property (Sec.37):** In a contract of sale of immovable property, time would not be regarded as of essence unless it is shown that the parties intended that their right should depend upon the observance of time as the essence of the contract by calling upon the other party who had been guilty of unreasonable delay to perform the contract within a stated time by giving him a reasonable notice. It is settled law that without giving a reasonable notice to the other party to complete the contract within a specified time, the contract can not be cancelled at the sweet will of the party.\textsuperscript{81}

**Co-mortgages:** The suit by one of the mortgagees only for a part of the share in the mortgaged property is not maintainable under Order XXXIV, Rule 1 of the Code of Civil procedure (CPC) and also sec.45 of the Indian Contract Act, as would appear from a full bench case of the Court in Rameshwar Bux Singh v.Ganga Bux Singh.\textsuperscript{82}

**Agreement of repurchase:** An agreement to reconvey property after the vendor has transferred it by sale to the vendee is essentially in the nature of concession. It is stated that in the case of agreement of re-purchase the condition of repurchase must be construed strictly against the original vendor and the stipulation with regard to time of performance of the agreement must be strictly complied with as time must be treated as being of the essence of the contract the right to re-purchase is lost and can not be specifically enforced.\textsuperscript{83}

**Modification of contract (s.62):** A loan is granted in terms of contract, and grant of one time settlement or-rescheduling of the loan amount is really a modification of the contract, which can only be done by mutual consent of the parties ,vide section 62 of the Act. The Court cannot alter the terms of contract.\textsuperscript{84}

**Interpretation of contracts:** It is well accepted principal that if the contract is wholly in writing the parties re-confined within the four corners of the document in which they have chosen to enshrine their agreements and neither of them can adduce evidence to

\textsuperscript{80} Kothoraju Narayana Raio v. Tekumalla Ramchandra Rao, AIR 1965 P370 at p376.
\textsuperscript{81} Badruddin v.Tufail Ahmed, AIR 1963 MP 31 at pp 32,33.
\textsuperscript{82} AIR 1950 All.598; Lala Prasad v. St. Laxmi Devi, AIR 1968 All 201 at p 202
\textsuperscript{84} Tamilnadu Industrial Investment Corporation Ltd v.Millenium Business Solutions Pvt. Ltd., 2004 (5) CTC 689 at p.695.
say that his intention has been mis-stated in the document or that some essential feature of the transaction has been omitted. But, at the same time, in cases where it is considered that the language of the contract is susceptible of two interpretations, it is not known that the Courts do resort to the surroundings circumstances to find out the intention of the parties.  

Surety’s right to indemnity (Section145) – A surety who has been promise to pay compelled to pay the debt of the principal debtor may charge him with an implied debt or promise to pay.  

He is entitled to seek the assistance of the Court in compelling the principal debtor to pay what is due to him provided an ascertained debt, is actually due, and this relief is not limited, as once supposed, to cases where the creditor has refused to sue the principal debtor.  

Under this section there is an implied promise by a debtor to indemnify the sureties who are entitled to recover from him any sums paid by them as sureties.  

where creditor obtained a decree which was joint both against the principal debtor and the sureties.  

Before the ex parte decree against the principal was set aside, it was held that the sureties were bound to make payment. The decree against the sureties had not been set aside and they were entitled to recover the payment from principal debtor.

C. The Registration Act, 1908  
The Registration Act, 1908, lays down the procedure for registration of documents related to the transfer of immovable properties with the designated registration authorities. As per the provisions of the Act, all transactions with reference to any particular property are recorded in a register maintained by an officer appointed by the State Government. The Act has been implemented to:

a. ensure that all documents regarding the sale and purchase of land are recorded and maintained;
b. assure a clear title;
c. prevent fraud in property transactions.

85 Bharat Fire and General Insurance Ltd. v. Parmeshwari Prasad Gupta, AIR. 1968 Delhi 68 at pp.70,71.
86 Huntley v. Sanderson (1833), 2 L.J. Ex-204
89 Anand Singh v. Collector of Bijnor, AIR 1932 ALL 610 at p.613.
90 Nur Samad Khan v. Faija., AIR1924 Lah 657 at p.559.
The definition of Immovable property as per Section 2(6) of the Act: “immovable property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

If the property in question has already been registered at the Registrar’s office, the interested buyer can ascertain the details of the earlier owners of the property in question as well as verify the title of the person intending to sell the property. Verification of title from the Registrar’s record is a scrutiny to be undertaken by the buyers to come to a final conclusion regarding the title. The buyer should also verify/scrutinize some more documents/aspects. Similarly, the buyer can also find out if the property has been mortgaged with any financial institution or individual in case the mortgage is a simple mortgage. If a document which is mandatory to be registered under the Act\textsuperscript{91} is not registered, the unregistered document is regarded redundant and cannot be produced as evidence in any court of law. In other words, no agreement/instrument creating an interest in a property, except the ones made exempt under the Act, can be said to be a valid one without registration. According to the provisions of the Act,\textsuperscript{92} documents, the registration of which is compulsory, shall not:

\begin{itemize}
  \item[a.] affect any immovable property comprised therein; or
  \item[b.] be received as evidence of any transaction affecting such property, unless it is registered.
\end{itemize}

While the Act extends to the entire country, the State of Jammu and Kashmir is exempt and does not fall under the purview of the Act. Additionally, State Governments can also exclude any district or areas of the country from its operation. Registration of property is a state subject, and hence the registration process may vary from state to state. The State Governments have been empowered to ensure proper implementation of the Act across their respective states.

\textsuperscript{91} The Registration Act 1908, Section 17.
\textsuperscript{92} Section 49.
**Key Sections of the Act**

**Section 3** - Provides that the State Government has been empowered to appoint an officer to be the Inspector General of Registration with a view to perform all the functions as laid down by the Act.

**Section 5** - Directs the State Governments to form districts and sub-districts to implement the Act.

**Section 6** - Each State Government is authorized to appoint a Registrar of several districts or a Sub-Registrar of several sub-districts.

**Section 7** - Makes the State Government responsible for creating the office of the Registrar in every district, and an office of the Sub-Registrar or of the Joint Sub-Registrars in every sub-district.

**Section 17** - Defines all kinds of documents for which registration is mandatory.

**Section 17(1A)** - Immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) will be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they will have no effect for the purposes of the said Section 53A.

**Section 18** - Gives details of documents for which registration is optional.

**Section 19** - Empowers the Registering officer to refuse registering a document which is not in a language understood by the officer unless accompanied by a translated copy.

**Section 20** - Deals with documents containing interlineations, blanks, erasures or alterations.

**Section 21** - Deals with provisions relating to the description of the property and maps or plans of the immovable property.

**Sections 23,23A,24,25,26,27** - Deals with time for presentation of documents; re-registration of certain documents; documents executed by several persons; provisions where delay is unavoidable; and documents executed outside India.

**Sections 28,29,30** - Specify the place where the document should be presented for registration.

**Section 31** - Indicates special reasons wherein the Registering officer may go to the person’s house to accept the document.
Section 32 - Details of people who are required to present documents for registration.
Section 33 - Deals with power of attorney recognizable for purpose of Sec.3.
Section 34 - Empowers the Registrar to satisfy himself about the identity of the person before registering the document.
Section 35 - Outlines the power of the Registrar to admit and deny execution and the procedure to be followed.
Sections 36 & 38 - Deals with situations where appearance of executant or witness is desired and person exempted from appearance at registration office.
Sections 37 - Empowers Officer/Court to issue summons for appearance.
Section 47 - Gives details of the date from which the document is considered effective.
Section 48 - Deals with cases where registered documents relating to property to take effect against oral agreements. Provides details of when registered documents relating to property take effect against oral agreements.
Section 49 - Provides the effect of non-registration of documents required to be registered. Also states that an unregistered document cannot be admitted as evidence in any court of law.
Section 50 - Certain registered documents relating to land to take effect against unregistered documents.
Sections 51 to 70 - Duties and powers of Registering Officers.
Sections 71 to 77 - Deals with refusal to register, appeal against the decision of the Registering Authorities, time limit prescribed for filing a suit against the refusal by the Registrar.
Sections 78 to 80 - Empower the State Governments to prescribe fees for registration, searches, obtaining copies of documents, etc.
Sections 81 to 84 - Empowers the Registering Officers to levy Penalty for incorrectly endorsing, copying, translating or registering documents with intent to injure; for making false statements, delivering false copies or translations; false personation, and abetment etc. Registrar also empowered to initiate criminal proceedings.
The purpose of this Act is the conservation of evidence, assurances, title and publication of documents and prevention of fraud. It details the formalities for registering an instrument.
Documents of which registration is compulsory

Under Section 17 of the Act, the following documents relating to the transactions of properties require mandatory registration:-

a. Instruments of gift of immovable property.

b. Instruments which create or extinguish any right or title to or in an immovable property of a value of more than Rs. 100/-.

c. Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interests.

d. Lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

e. Non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

This Act provides that non document other than a will shall be accepted for registration unless presented within four months of the date of execution. In computing the period of four month, the day on which the document is executed is excluded. It is not essential for the registration of a document that it should be dated. If the document does not bear the date of execution, oral evidence is admissible to prove the date. In a case where the defendant executes a sale deed in favour of the plaintiff but he refuses to get registered, two remedies are available to the plaintiff-one is to apply for compulsory registration of the document and in case the prayer is refused, it is open to him to bring a suit. Another remedy available to the plaintiff is to take recourse to fuller and more comprehensive remedy for filing suit for the specific performance of the contract for sale.

93 The Registration Act, 1908, Section 23.

94 The General Clauses Act, 1868, Section 3(2); Malik v. Kala (1890) Punj Rec No.90.

95 Chundra Kishore v. Dinendra Nath, (1894) 1 Cal LJ 126.

96 The Indian Registration Act, 1908, Section 77.

A certified copy of a document, when its original is lost or can not be produced, cannot be registered under the Registration Act, 1908 though copies of the decrees or orders of court for which special provisions are made in the Act can be so registered.  

There is no provision in the Registration Act or the Stamp Act which says that if the document when presented is insufficiently stamped, the presentation shall be no presentation. On the contrary, the procedure provided is wholly inconsistent with the idea, because what the procedure requires is that the registering officer to whom the document is presented, receives it and make his entry accordingly: he impounds it and sends it to the collector, the collector takes the necessary steps to compel payment of the proper stamp duty and the penalty, he then returns the documents to the registering officer, who shall proceed with the matter. The effect is that the presentation is a good presentation, though the actual registration is delayed.

If a document is presented for registration after the prescribed time as stipulated and is registered, the registration is void. The act of accepting a document for registration after the expiration of the period mentioned in the Act and registering the same is not a ‘mere defect of procedure’ within the meaning of section 87. The registering officer acts without authority when he registers document not presented within the prescribed period.

Section 23(A) was inserted by the Indian Registration (Amendment) Act, 1917. The amendment became necessary by reason of the decision of their Lordship of the Privy Council in *Jambu Prashad v Moohammed Aftab Ali Khan*. It was held in that case, that when a document is presented for registration by an agent who is not authorised by a power of attorney in accordance with section 33 of the Act, the registering officer has no jurisdiction to register the document nor to endorse thereon a certificate under section 60; such registration is invalid, though the agent may have been accompanied at the time of presentation by the executants.

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100 Matahar Ali v. SK Abdul, AIR 1957 Cal 324; Nandeshwar v. Mahender Nath AIR 1956 Assam 123.
101 42 IA 22, 28 IC 422.
In Biswanath Prasad’s\textsuperscript{102} case the Privy Council, after finding that the registration was invalid, remanded the appeal for a decision on the alternative claim for a personal judgement for the mortgage debt. It is also not clear whether their Lordship treated the claim for a personal judgement as based on the improperly registered mortgage.

Every document may be presented for registration either in the office of the sub-registrar in which jurisdiction the document was executed, or in the office of any sub-registrar under the State Government at which all the persons executing and claiming under the document desire the same to be registered. The expression includes a Sub-Registrar, who is not merely a sub-registrar, but also the district registrar, has in that capacity, jurisdiction to register a document executed within the jurisdiction of another sub-registrar.\textsuperscript{103}

The Registration Act has imposed several conditions relating to presentation of document for registration, and it is of great importance that those conditions, framed with a view to meet local circumstances, should not be weakened or stained on the ground that they may appear to be existing and strict.\textsuperscript{104}

An agent who executes a document under a power of attorney is a ‘person executing’. If B gives a power of attorney to execute a document on his behalf, A may present it for registration and the power of attorney does not require authentication under section 33 of the Registration Act.\textsuperscript{105} Where a party executing a deed dies after execution thereof, and a person who held a power of attorney from him presents the deed for registration after his death, and the registration officer, knowing that the executant is dead, accepts the deed for registration and registers it, the registration is invalid. The proper person to present the document for registration in such a case is the ‘representative’ or ‘assign’ of the deceased.\textsuperscript{106} However, the registration, it is said, would be valid, if neither the registering officer nor the other party had notice of the death of deceased.

The registration of power of attorney is only for the purpose of presentation of the document as contemplated under Section 32. Execution and presentation are two distinct acts and it is important to remember this distinction. A deed of power of

\textsuperscript{102} Biswanath Prasad v. Chandra Narayan Choudhuri, 48 IA 127 60 IC833, AIR 1921 PC 8.
\textsuperscript{103} Saraswatibai v. Md Idrakuddin AIR 1963 MP 234.
\textsuperscript{104} Chotney Lal v. Collector of Moradabad, 49 IA 375 p.378.
\textsuperscript{105} Sitaram v. Dharmasukhram, (1927) 51 Bom 971.
\textsuperscript{106} Mujibunnissa v. Abdul Rahim, 28 IA 15.
attorney itself is not compulsorily registrable under section 17 of the Act and the registration that is contemplated under sections 32 and 33 is only for the purpose of these sections.

A ‘pardanashen’ lady of Rampur state signed a power of attorney behind the ‘pardah’ while the magistrate was on the other side of the pardah. The magistrate had questioned her and had also identified her through witnesses, and thereafter endorsed the signature. It was held that this was execution before magistrate. A registered document operates from the date of registration and not from the date of execution. In terms of section 49 of the Act no document required to be registered shall affect any immovable property comprised therein unless it has been registered. The section therefore does not apply unless the terms of a transaction have been reduced to the form of document.

An unregistered sale deed is admissible in evidence not as a complete sale but as proof of oral agreement of sale. It can be received in evidence by making endorsement that it was received only as evidence of oral agreement of sale under section 49 proviso. Hence where in suit for performance of alleged agreement of sale, plaintiff tendered in her evidence unregistered sale deed, admission of unregistered sale deed in such a case is not hit by section 3(b) of Specific Relief Act 1963.

Limitation - The word ‘registered’ in the Limitation Act, 1963 Sch.1 art 10, refers to the date on which the endorsement ‘registered’ is made, and not the date on which the document was presented for registration. A challenge to the sale deed and the power of attorney more than 3 years after the execution of sale, especially when the possession was found to be barred by limitation.

Cancellation of registration: The Registrar cannot cancel the registration of documents, the execution of which is not denied and which have been already

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107 Sultan Ahmed v. Gauhar Begam, 186 IC 505, AIR 1940 All 108.
110 Narsi v. Parshottam, (1928) 52 Bom 875.
111 S.Kaladevi v. VR Somasunderam and others, (2010) 5 SCC 401. Section 3(b) saves the provisions of the Registration Act as regards its applicability regardless of the provisions contained under Specific Relief Act 1963.
112 Presently Art 97 under Limitation Act, 1963.
113 Gajjan Singh v. Virsa Singh and Ors,(2007) 147 PLR 634.
registered by the sub-registrar. Such an act is ultra virus and does not affect the validity of the registration.\textsuperscript{114}

D. The Indian Evidence Act, 1872

The Act is based on English Evidence Law with few exceptions. It is not uncommon for Courts to peek into English Evidence Law in case of doubt. The Act is \textit{Lex Fori}. The Act is not applicable for domestic tribunals (such as Industrial Tribunal, Administrative Tribunal etc.) and non-judicial proceedings (such as Departmental inquiries, affidavits presented to a Court etc., proceedings under defense discipline acts). Tribunals do not follow Evidence because they have to follow rules of natural justice. Indian Evidence Act applies to both Civil and Criminal proceedings. However, some sections are applicable only to Civil, some only to Criminal and some to both. The Act has put more burden of proof on the prosecution to prove the guilt of the accused. The degree of proof required is stricter in criminal proceeding than in a civil proceeding. In a criminal proceeding, the accused must be proved guilty beyond all reasonable doubts.

Despite being a sister Act of Criminal Procedure Code, 1973 and Civil Procedure Code, 1908, it is a complete Act. Object of the Act is to get the truth of the several disputed facts or points in issue. Burden of proof is on the party claiming to prove the substance of the issue to the satisfaction of the court. Direct and circumstantial evidence is given importance over Hearsay Evidence. No person is bound to incriminate himself. Some categories of witnesses are given protection and privilege.

The enactment and adoption of the Indian Evidence Act was a path-breaking judicial measure introduced in India, which changed the entire system of concepts pertaining to admissibility of evidences in the Indian courts of law. Until then, the rules of evidences were based on the traditional legal systems of different social groups and communities of India and were different for different persons depending on caste, religious faith and social position. The Indian Evidence Act introduced a standard set of law applicable to all Indians.

The title and the preamble of the Evidence Act undoubtfully throw light on the intents and designs of the Legislature, and indicate the scope or the purpose of Legislature.

\textsuperscript{114} Hussain Ali v. Sardar Ali, AIR 1933 Lah 786.
and might be an aid to the construction of a statute. The preamble of a statute is a good means of finding out its meaning, and a key to understanding of it; and, as it usually states the general object and intention of the Legislature in passing the enactment, it may legitimately be consoled to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its scope, whenever the enacting part is in any of these respects open to doubt. Where object and scope of the statute are not open to the doubt, the preamble can not either restrict or extend the enacting part. If the enacting part of a statute is not exactly co-extensive with the preamble, the former, if expressed in clear and unequivocal terms, will override the latter, as, in case of conflict between the preamble and the section, it is ambiguous or doubtful, the preamble may be referred to, resolve the ambiguity.

Under the Act, whenever the status of any person as the owner of a piece of immovable property of which he/she is shown to be in possession is questioned, the burden of proving that he/she is not the owner lies on the person who asserts that he is the owner.

**Deeds unstamped or insufficiently stamped**- Provisions contained in section 35 of the Indian Stamp Act, 1899 read with section 91 of the Indian Evidence Act, 1972, prohibits the use of unstamped or insufficiently stamped document for any purpose. It is the settled law that such document can not be used even for collateral purpose.

**Deeds which are not contracts**- It must be borne in mind that oral evidence is excluded by the existence of a deed only when the deed contains the terms of some contract or through it some property is disposed or when the contents of the document are required by law to be in writing. Adoption of a person is not required by law to be in writing. A deed of adoption merely records the fact that an adoption has taken place. It does not create any right. It is no more than a piece of evidence and the failure of a party to produce it does not bar him from adducing oral evidence.

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115 In re the Kerala Education Bill, ILR 1958 Ker 1167.
Statement- A statement by the trial judge as to what took place at the trial is conclusive.\textsuperscript{121} A statement of the Presiding Officer of a Tribunal is generally taken to be correct.\textsuperscript{122}

Affidavit- An affidavit is a declaration sworn or affirmed before a person competent to administer an oath.\textsuperscript{123} It is not an evidence within the meaning of section 2 of the Evidence Act, 1872.\textsuperscript{124} The only basis on which the affidavit of a living person, not called into the witness box, can be acted upon as admissible evidence is that it should be capable of being regarded as statement in writing, complying with the conditions prescribed in Section 32 of the Evidence Act, 1872.\textsuperscript{125} The Civil procedure code provides that a Court may order any fact to be proved by an affidavit. It is the practice in Courts to require an affidavit in proof of an assertion.\textsuperscript{126} But an affidavit evidence is not admissible in order to explain an order passed by a Court.\textsuperscript{127}

Registered Sale deed- Mere execution of the sale deed will not prove title of the vendor conclusively as to the length and width of a property. Registered sale deed was binding on the vendor and the purchaser but it could not adversely affect rights of third parties. Burden is on party claiming that what was described in the sale deed was correct and that the third party had no right to claim any portion of the land described in the sale deed.\textsuperscript{128}

The act is not applicable before the arbitrator. The evidence Act in its rigour is not intended to apply to proceedings before an arbitrator.\textsuperscript{129} This Act is also not applicable to proceedings under the Income Tax Act,1961. It is only in respect of certain specified matters that the income tax authorities are invested with the powers exercisable by a Civil Court and it is only for a limited purpose that proceedings before them are

\begin{itemize}
\item \textsuperscript{121} Upendranath, 19 CWN 653 (FB).
\item \textsuperscript{122} Union of India v T.R.Verma, 1957 SC882.
\item \textsuperscript{123} As to person before whom affidavits can be sworn, Section 539 and 539-aA of Cr.P.C. and Section 139 CPC.
\item \textsuperscript{124} Federal India Assurance Co. v. Anandrao Pandurangrao Dixit, 1944 N 161.
\item \textsuperscript{125} Marneedi Satyyam v. Masimukkula Venkataswami, 1949 M 689.
\item \textsuperscript{126} E.g., applications for transfer of civil cases, stay of execution proceedings or for extension of time under Section 5 of the Limitation Act should be supported by an affidavit.
\item \textsuperscript{127} Kripa Shankar Mishra v. Anunsingh Bedi, 1943 N 288.
\item \textsuperscript{128} Gangaram Rambhan Zite v. Chindhu Dagadu Tikone, 2003 (1) AIC 514 (Bom).
\item \textsuperscript{129} Haji Ebrahim Kassam Chochinwala v. Northern India Oil industries Ltd.,1951 C 230.
\end{itemize}
declared to be deemed to be judicial proceedings. Therefore, the Evidence Act does not apply to proceedings under the Income Tax Act, 1961.\textsuperscript{130}

**Court**- The definition of the word “Court” is not exhaustive,\textsuperscript{131} and is meant for the purpose of evidence act alone. A Commissioner appointed under the Civil Procedure Code or the Criminal Procedure Code is legally authorised to take evidence and is, therefore, a “Court” but an arbitrator though authorised to take evidence, is expressly excluded from the definition of ‘Court’.\textsuperscript{132}

**Document**\textsuperscript{133} - in terms of Indian Evidence Act, document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. Words printed, lithographed, photographed, a map or plan, a inscription on a metal plate or stone is document and caricature is a document.\textsuperscript{134}

The word ‘evidence’ signifies in its original in its original sense, the state of being evident, i.e. plain, apparent or notorious. But it is applied to that which tends to render evidence or generate proof. The fact sought to be proved is called the principal fact; the fact which tends to establish it, the evidentiary fact. In English Law, the world evidence’ sometimes means the word uttered and things exhibited by witness before a Court of Justice. At other times, it means, the facts provided to exist by those words or things and regarded as the ground work inference as to other facts not so proved. Again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.\textsuperscript{135} In terms of section 3 of the Evidence Act, 1872 the word ‘proof’ seems properly to mean anything which serves, immediately, to convince type mind of the truth or falsehood of a fact are generally our senses, the testimony of witnesses, documents and the like. Absolute certainty is seldom to be had in human affairs. Mathematical service alone admits of absolute proof. Hence proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a conclusion.\textsuperscript{136}

\textsuperscript{130} Seth Gurumukh Singh \textit{v} Commissioner of Income Tax, 1944 Lah353 (2).
\textsuperscript{131} E.v. Ashootosh Chukruborty, C 483, 493 (FB).
\textsuperscript{132} The Evidence Act, 1872, Section 1.
\textsuperscript{133} Section 29 of the I.P.C. (45 of 1886), and 3 (18) of the General Clauses Act 1897 (10 of 1897).
\textsuperscript{134} The General Clauses Act 1897, Section.3(65).
\textsuperscript{135} Stephen’s Introduction, pp.3,4.
\textsuperscript{136} Hawkins \textit{v}. Powells, (1911) 1 KB 988.
Not proved- It indicates a state of mind between two states of minds ‘proved and disproved,’ when one is unable to decide how the matter precisely stands. It negates both proof and disproof.\(^{137}\)

Evidence and proof- though the evidence of fact and proof of a fact are not synonymous,\(^{138}\) the term ‘proof’ is often, confounded with ‘evidence’, and applied to denote the medium of proof, whereas in strictness it marks merely the effect of evidence.\(^{139}\) When the result of evidence is assent to the proposition or event which is the subject matter of inquiry, such proposition or event is said to be proved.\(^{140}\) Evidence, therefore, differs from proof as cause from effect. Suspicion is not a legal evidence- Suspicion however grave can not take the place of positive proof.\(^{141}\) It may be a ground for shifting the evidence minutely but no judicial decision can rest on subscription or conjecture.

Objection to proof: It is the primary duty of the Court to shut inadmissible evidence (Section 136). It is also the duty of the counsel to object at once to the tendering of inadmissible evidence. An omission to object to irrelevant evidence cannot make the evidence relevant. Objection to the evidence should, as a rule, be decided by the Court at once and not reserved for future decision.\(^{142}\) Apart from any objection that may be raised to the relevancy of a fact by a party, it is the duty of the Court to see that its judgement is based on fact declared by the Act to be relevant.\(^{143}\) Several offences may form one transaction- Where several felonies are connected together and form part of the entire transaction; then one is evidence to show the character of the other.\(^{144}\)

Statement submitted under Section 6 are original evidence and not hearsay- The statements which are admissible under this section do not come under the rule against hearsay because, as has been aptly remarked, ‘in such cases it is the act that creates the hearsay, and not the hearsay the act.

\(^{138}\) Anam Swain v. State 1954 (Orissa) 33.
\(^{140}\) Wills Cir. Ev., 6th Ed., 3.
\(^{142}\) Bindeshwari Singh v. Ram Raj Singh, 1939 A 61.
\(^{143}\) The Evidence Act 1872, Section 136.
\(^{144}\) R.V.Ellis, 6 B & C 145; Reg.v. Prabhudas Amburam, 11 Bom HC 90.
There is fundamental distinction between a mere recital and an assertion. A right is not asserted simply because it is recited in a certain document. It is asserted only when the transaction concerned itself entered into in exercise of right.\textsuperscript{145} An act of transfer of interest in property necessarily involves the assertion that the transferor owns the interest transferred; it is, therefore, transaction by which right is claimed or asserted.\textsuperscript{146} A mortgager involves an assertion of title by the mortgagor; hence, it is admissible in proof of the mortgagor’s title.\textsuperscript{147} But where the mortgagors are entitled to grant of the lands, whether they hold them under a revenue-free title is recited, will not constitute an assertion of such title.\textsuperscript{148} An assertion in a deed of transfer executed by the tenant that his interest in the land is permanent is admissible against the landlord in a suit for ejectment against the tenant’s transferee.\textsuperscript{149} A recital as to the character of land made in a mortgage deed is admissible under section 13 of the Act.\textsuperscript{150} If a document records, a transaction by which aright is asserted, it is admissible under section 13, even though it is not \textit{inter partes}.\textsuperscript{151} Documents containing assertion of title to, and possession of, the property in dispute by the predecessor-in-interest of a party are admissible under section 13 on the question of title and possession.\textsuperscript{152}

\textbf{Direct evidence}- The admissibility of evidence, direct or circumstantial, to prove knowledge is governed by the principles similar to those which govern the admissibility of evidence as to intention. knowledge may be proved by direct testimony, that is, by the person whose knowledge is in question deposing in a Court that he knew the fact.\textsuperscript{153}

\textbf{Statement of deceased person regarding separation admissible}- The statements of a particular person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father would be statements made against the interest of such person and after such person is dead, they would be relevant under section 32(3) of the Evidence Act,1872.

\textsuperscript{145} \textit{Kumud Kanta Pahari v. Province of Bengal}, 1947 C 209.
\textsuperscript{146} \textit{Shankarrao DAgadujirao v. Sambhanath} 1940 PC 192.
\textsuperscript{147} \textit{Lacchmi Narayan v. Manak Chand},1938 L 846.
\textsuperscript{148} \textit{Kumud Kanta Pahari v. Province of Bengal}, 1947 C 209.
\textsuperscript{149} \textit{Jannendra Nath Dutt v. Nesea De}, 83 IC 948.
\textsuperscript{150} \textit{Kanaihya Singh v. Bhagawat Singh}, 1954 P 326.
\textsuperscript{152} \textit{Nitya Kali Dutt v. Sarat Chandra Bose}, etc., 51 IC 366.
\textsuperscript{153} \textit{Bhagwant Rao v. Champat Rao}, 81 IC 716.
The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a connected matter and an integral part of the same statement.\(^{154}\)

**Documents in defendant’s possession** - in terms of section 65 (c) of the Evidence Act, 1872 where the plaintiff alleges that the document is in the possession of the defendant and his allegation is not challenged, it is a proper case in which notice, as required under clause (a) of the Act, is to be dispensed with, and even if the document is not in the possession of the defendant also, it must be deemed to have been lost.\(^{155}\)

**Public Documents** - In terms of section 74 of the Evidence Act, 1872 a public document is a document that is made, where there is judicial or *quasi* judicial duty to inquire, for the purpose of the public making use of it and being able to refer to it.\(^{156}\) Public documents are the acts of public functionaries, in the executive, Legislative and Judicial Departments, of the Government, including under this general head the transaction which official persons are required to enter in books or registers in the course of their public duties and which occur within the circle of their own personal knowledge and observation.\(^{157}\) A document can not be said to be a public document within the meaning of section 74 of the evidence Act unless it is known to have been prepared by a public servant in the discharge of his official duty. The mere fact that it is kept in a public office does not lead to the inference that it is a public document.\(^{158}\) Translated copy of the document is not a document.\(^{159}\)

**Compromised deed** - A private document does not become a public document simply because it is filed in the Court. The compromise of private parties filed in a criminal court is not a public document (section 74-75 of the Act) and can not be proved except by a certified copy.\(^{160}\) Mutation and settlement registers are public documents.\(^{161}\) Mutation entries are relevant only so far as they indicate the nature and contents of records of revenue authorities made at the time of mutation but they do not prove

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159 Sri Thakur Krishna v. Kanaiyalal, AIR 1961 All 205.
relationship between the persons mutated and the persons in whose place he is so
mutated.162
A memorandum (section 91) wherein is recorded a description of the properties
partitioned and the modus operadi adopted to ascertain which of the properties would
be possessed by one or the other of the parties, is not a deed of partition. It is, however,
admissible as a piece of evidence to prove that partition already taken place, and to
explain the position of the parties.163 When a deed of mortgage required by law to be
registered has not been registered, though oral evidence of transaction of mortgage will
be inadmissible, the mortgagor is not precluded from proving his title to the property by
other evidence independent of the deed.164
E. The Indian Stamps Act, 1899
There is a direct link between Registration Act, 1908 and Stamp Act, 1899. Stamp duty
needs to be paid on all documents which are registered and the rate varies from State to
State. India has perhaps one of the highest levels of stamp duty. Some States even have
double stamp incidence, first on land and then on development.
In India, stamp duty was first levied with the introduction of the Indian Stamp Act, and
since then, it has been a source of revenue for State Governments. Stamp duty is a legal
tax, much similar to many other taxes. It is paid on various legal instruments, wherein
any financial obligation is created, transferred, limited, extended, extinguished or
recorded, excluding a bill of exchange, cheque, promissory note, letter of credit, and
policy of insurance.
Stamp duty is charged on the basis of the contents of the instruments as mentioned in
Schedule I of the Act and NOT on a transaction. Therefore, stamp duty is payable only
after the concerned transaction is reduced to an instrument of writing. Any document on
which stamp duty has been paid gets legal, evidentiary value in the court of law.
Documents/instruments on which applicable Stamp duty is not paid cannot be admitted
in courts of law as evidence.
All transfer Instrument/document including agreement to sale, conveyance, gift
mortgage, exchange, partition, power of attorney either general or special leave and

license, agreement, tenancy agreement, lease deeds are required to be stamped before registration. A will or original nomination in a Co-operative Housing Society is not required to be stamped. However, when a nominee transfers a flat subsequently in the name of legal heirs then it is required to be stamped as per market value or the consideration amount, whichever is higher. Stamp papers are to be purchased in the name of one of the parties to the instrument/document. It must be purchased in the name of one of the parties involved in the transaction. It is to be paid either before execution of the document or on the day of execution of the document. Stamp Duty is either paid by a purchaser or transferee or as mutually agreed in the agreement between the parties. SHCIL is appointed as Central Record-keeping Agency (CRA) and associated with stamp duty collection and not valuation. For valuation of Stamp duty you need to contact your Legal Advisor or Appointed Govt officials concerned for the same. It is type of Tax collected by the State Government. Stamp duty is a kind of Tax like Sales Tax or Income Tax. It must be paid in full and on time to the Government. In case of delay in payment of stamp duty, penalties are imposed. Important Instruments are agreements, conveyances, exchange, gift, Certificate of sale, deed of partition, Power of Attorney to sell immovable property when given for consideration, deed of settlement and transfer of lease by way of assignment, bill of exchange, bill of lading, debenture, letter of credit, policy of insurance, proxy, receipt and transfer of shares.

Stamp Duty is computed on market value or consideration amount of the property, whichever is higher. Consideration amount is the total value of funds involved in any purchase/sale transaction entered between two or more parties. Stamp Duty collected by the States can be broadly divided into two categories, viz., Stamp Duty paid under the Indian Stamp Act, 1899 and Stamps used in payment of fees under the Court-fee Act 1870. Stamps used under the Indian Stamp Act, 1899 & The Bombay Stamp Supply And Sale Rules, 1934, can be broadly divided into:-

1. Impressed stamps, including a) Labels affixed and impressed by the proper officer; b) Stamps embossed or engraved on stamped paper c) Impression by franking machine d) Impression by any such machine as the State Government may, by notification in the Official Gazette, specify
2. Adhesive stamps.
Documents on which stamp duty is required to be paid

1. Purchase of a Flat
2. Purchase of an Apartment in a Building (Commercial / Residential)
3. Purchase of a Plot of Land
4. Purchase License of Land / Apartment (Lease / Freehold)
5. Development Agreement
6. Will / Bequest Deed
7. Transfer Deed
8. Power of Attorney
9. Lease Agreement
10. Gift Deed of Property
11. Construction Agreement
12. Rent Agreement
13. Sale/ Purchase Agreement
14. Agreement to Sell
15. Deed of Mortgage of Property
16. Relinquishment Deed
17. Surrender Deed in Cooperative Housing Society
18. Mortgage Deed

Documents Relating to Intellectual Property

1. Patent and High Technology Agreements
2. Licensing and Franchise
3. Consulting and Know-How Agreements
4. Joint Development Agreements
5. Mass Market Licences like Shrink Wrap and use based licences
6. Licensing of Software and Source Code Escrow Agreements, Motion Pictures for multi media use, photographs etc.
7. Software Development Agreements
8. Agreement for Sale of Technical Know-How
9. license of use of copy right
11. Agreements relating to protection of designs/ trademarks/ patents/ and know how

**Banking Documents**

1. Bank Guarantee
2. Loan agreements / lease deeds
3. Overdraft agreements

**Documents for Export / Import**

1. Letter of Credit
2. Documents for obtaining EXIM Finance
3. Agency Agreement

Documents relating to Labour Laws and Service Laws.

Documents relating to Insurance.

Documents relating to Public Interest Litigation, Environmental Issues etc.

**Documents Relating to Private Equity Form of Funding:**

1. Business Plan
2. Term Sheet
3. Warranties and Indemnities
4. Disclosure Letter
5. Shareholders’ / Investors’ Rights/ Subscription Agreement

Documents relating to cyber law

1. Internet agreements
2. Software agreements

The power to levy stamp duty is divided between the Central Government and the State Governments:

a. As regards the instruments specified in Entry 91 of List I (Union List) of Schedule VII of the Constitution of India, i.e., bills of exchange, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, the power exclusively belongs to the Central Government and remissions and reduction on this class can be granted by it in accordance with the provisions of Section 9 of the Act.
b. In respect of documents other than those specified in the provisions of List I, the State Governments are conferred the power under Entry 63 of List II (State List) of Schedule VII of the Constitution and remissions and reductions in respect of rates of stamp duty can be granted by it in accordance with the provisions of Section 9 of the Act.

c. All matters relating to the mechanism of collection and arrangement of stamp duties in respect of both the classes of instruments, excluding the rates of stamp duty, are covered in Entry 44 of List III (Concurrent List) of Schedule VII of the Constitution.

**Payment of Stamp Duty for Immovable Property**

Payment of stamp duty is an important step while purchasing or selling an immovable property as it gives validity to a property transaction. Stamp duty needs to be paid on the conveyance document that is registered. Conveyance 165 has been defined in the Act to include “a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and not otherwise specifically provided. ‘Conveyance’ being document other than those specifically mentioned in Entry 91 of List I, the rates of stamp duty for conveyance are the subject matter of State Legislation. Hence, the structure of stamp duty on conveyances varies from State to State in India.

**Definitions under Section 2 of the Indian Stamp Act, 1899**

2(6) “Chargeable” - "Chargeable" means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed;

2(10) “Conveyance”- “Conveyance” includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I or by Schedule I-A, as the case may be;

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165 The Indian Evidence Act 1872, Section 2 (10).
2(11) “Duly stamped”- “Duly stamped”, as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount, and that such stamp has been affixed or used in accordance with the law for the time being in force in India;

2(14) “Instrument”- “Instrument” includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;

2(15) “Instrument of partition” -“Instrument of partition” means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any Revenue-authority or any civil court and award by an arbitrator directing a partition;

2(16) “Lease”-“Lease” means a lease of immovable property, and includes also:-
   a. a patta;
   b. a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for immovable property;
   c. any instrument by which tolls of any description are let;
   d. any writing on an application for a lease intended to signify that the application is granted.

2 (17) “Mortgage-deed”- “Mortgage-deed” includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property;

2(26) “Stamp”- “Stamp” means any mark, seal or endorsement by any agency or person duly authorised by the State Government, and includes an adhesive or impressed stamp, for the purposes of duty chargeable under this Act (Inserted vide Finance (No.2) Act 2004).

The rates of stamp duty on instruments relating to transfer of immovable property vary from state to state, as fixed by respective State Governments. It is charged on the consideration value mentioned in the document or the market value of the property, whichever is higher. Typically, the stamp duty rates depend on:

1. Price of the property
2. The state where the property is located
3. Type of property - residential or commercial

Section 3 (c): Instruments chargeable with duty subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty there for, respectively, that is to say that every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done in India and is received in India. Several instruments used in single transaction of sale, mortgage or settlement:-

a. Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule 4[I-A], for the conveyance, mortgage or settlement, and each of the other instruments are chargeable with a duty of 2[two rupees] instead of duty (if any) prescribed for it in that Schedule.

b. The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument:

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.166

Over the last few years, the Government of India has taken considerable steps to harmonize stamp duty across states in accordance with the National Housing and Habitat Policy. The reality is that stamp duty rates in India are very high as compared to other Asian countries. The Government has specified that under the JNURM (Jawaharlal Nehru National Urban Renewal Mission) scheme, one of the mandatory reforms to be carried out by the respective states is to gradually reduce the stamp duty.

Rationalization of Stamp Duty in India Instruments relating to several distinct matters- Any instrument comprising or relating to several distinct matters is chargeable

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166 Section 4.
with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, is chargeable under the Act.\textsuperscript{167}

**Instruments stamped with impressed stamps how to be written**- Every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument.\textsuperscript{168}

Only one instrument to be on same stamp - No second instrument chargeable with duty shall be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written.\textsuperscript{169} Provided that nothing in this section will prevent any endorsement which is duly stamped or is not chargeable with duty being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of acknowledging the receipt of any money or goods, the payment or delivery of which is secured thereby.

Instrument written contrary to Section 13 or 14 deemed unstamped - Every instrument written in contravention of Section 13 or Section 14 shall be deemed to be unstamped.\textsuperscript{170}

**Who Pays Stamp Duty in a Property Transaction?**

a. As per the provisions of the Act, in the absence of an agreement to the contrary, the expense of providing the proper stamps is to be borne.\textsuperscript{171}

b. in the case of a conveyance (including a re-conveyance of mortgaged property) by the grantee:

c. in the case of a lease or agreement to lease-by the lessee or intended lessee;

d. in the case of a counterpart of lease-by the lessor;

e. in the case of an instrument of exchange-by the parties in equal shares;

f. in the case of a certificate of sale-by the purchaser of the property to which such certificate relates; and,

\begin{itemize}
\item g. in the case of an instrument of partition by the parties thereto in proportion to their respective shares in the whole property partitioned, or when the partition is
\end{itemize}

\textsuperscript{167} Section 5.
\textsuperscript{168} Section 13.
\textsuperscript{169} Section 14.
\textsuperscript{170} Section 15.
\textsuperscript{171} Section 29.
made in execution of an order passed by a Revenue-authority or civil court or arbitrator, in such proportion as such authority, court or arbitrator directs.

The Act casts a duty on the executants to disclose and truly set forth relevant facts and circumstances effecting the chargeability of any instrument. This helps in finding out the types of transactions involved in the instruments which in turn help in the determination of proper stamp duty payable on such instruments. Duty is not payable on the title or the heading given on the top of the instrument but on the recitals as stated in the instruments.172

**When is Stamp Duty Paid?**

Stamp duty is mandatory to be paid in full and in good faith under the Act. Sections 17 and 18 of the Act state the time frame for payment of stamp duty. Generally, all the instruments executed in India shall be stamped before or at the time of execution. However, if a document is executed out of India, then the stamp duty is to be paid within six months from the date of execution. Any delay in duty payment attracts a penalty as specified in the State Stamp Act. It is significant to note that stamp duty in respect of the value of the property is payable at the time of execution of sale deed and not on the date of agreement for sale which attracts only nominal stamp duty.173

Where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or encumbrance upon the property or not, such debt, money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad valorem duty provided that nothing in this Section shall apply to any such certificate of sale as is mentioned in Article No. 18 of Schedule I, or Schedule I-A, as the case may be. In the case of a sale of property subject to a mortgage or other encumbrance, any unpaid mortgage-money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale. Provided that, where property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

172 Section 27.
173 Section 24.
Non-payment of stamp duty does not make a document void or invalid. In case a document, which is required to be stamped under the Act, is under-stamped or not duly stamped, then it becomes inadmissible as evidence before any authority, and can be impounded for enforcing payment of full stamp value due as per section 33 of the Act.

**How is Stamp Duty Paid?**

Stamp duty is usually paid through stamp papers. Stamp papers are to be purchased in the name of one of the executors, i.e., seller or buyer involved in the agreement, and these papers are valid for six months from the date of purchase, only if the duty is paid on time. If the stamp paper has been purchased in the name of an Advocate, CA, etc., then such instrument is treated as an instrument not duly stamped and is inadmissible in evidence. Where stamp papers do not bear the name of one of the executors, such instruments are not admitted in evidence, for any purpose, and are treated as not properly stamped. These instruments are liable to be impounded and sent to the Collector of Stamps for recovery of proper stamp duty under Section 33 of the Act. The stamps purchased and not used for intended purpose are entitled for refund after deduction of certain charges, if lodged for refund within six months from the date of purchase and on fulfilling the conditions stipulated in Chapter V of the Act.

The applicable stamp duty is payable in the local treasury office or the designated banks. The designated bank issues a receipt and marks the first page of the printed sale deed with the stamp duty received, which reflects that the document is duly stamped.

The Government has recently introduced e-stamping, which is an electronic and secure way of paying stamp duty. Many states like Maharashtra and Union Territories (UT) like Delhi are already using this method of paying stamp duty, and other states are also working towards adopting this method.

**The Act deals with adjudication as to proper stamps:-**

When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount not exceeding five rupees and not less than fifty naye paise as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment,
the instrument is chargeable.\textsuperscript{174} For this purpose the Collector may require to be
furnished with an abstract of the instrument, and also with such affidavit or other
evidence as he may deem necessary to prove that all the facts and circumstances
affecting the chargeability of the instrument with duty, or the amount of the duty with
which it is chargeable, are fully and truly set forth therein, and may refuse to proceed
upon any such application until such abstract and evidence have been furnished
accordingly. However, no such evidence can be used against any person in any civil
proceedings, except in an inquiry as to the duty with which the instrument to which it
relates is chargeable; and every person by whom any such evidence is furnished shall,
on payment of the full duty with which the instrument to which it relates is chargeable,
be relieved from any penalty which he may have incurred under this Act by reason of
the omission to state truly in such instrument any of the facts or circumstances
aforesaid.

\textbf{Certificate by Collector}\textsuperscript{175}

a. When an instrument brought to the Collector under Section 31 is, in his opinion,
   one of a description chargeable with duty, and-
   b. the Collector determines that it is already fully stamped, or
   c. the duty determined by the Collector under Section 31, or such a sum as, with
      the duty already paid in respect of the instrument, is equal to the duty so
determined, has been paid, the Collector shall certify by endorsement on such
instrument that the full duty (stating the amount) with which it is chargeable has
been paid.

When such instrument is, in his opinion, not chargeable with duty, the Collector shall
certify in manner aforesaid that such instrument is not so chargeable. Any instrument
upon which an endorsement has been made under this section, shall be deemed to be
duly stamped or not chargeable with duty, as the case may be; and, if chargeable with
duty, shall be receivable in evidence or otherwise, and may be acted upon and
registered as if it had been originally duly stamped. The Collector is not authorised to
endorse any instrument executed or first executed in India and brought to him after the
expiration of one month from the date of its execution or first execution, as the case

\textsuperscript{174} Section 31.
\textsuperscript{175} Section 32.
may be; any instrument executed or first executed out of India and brought to him after
the expiration of three months after it has been first received in India; or any instrument
chargeable with a duty not exceeding ten naye paise, or any bill of exchange or
promissory note, when brought to him, after the drawing or execution thereof, on paper
not duly stamped.

**Prosecution of offence against Stamp Law**
The taking of proceedings or the payment of a penalty in respect of any instrument shall
not bar the prosecution of any person who appears to have committed an offence
against the Stamp-law in respect of such instrument. Provided that no such prosecution
shall be instituted in the case of any instrument in respect of which such a penalty has
been paid, unless it appears to the Collector that the offence was committed with an
intention of evading payment of the proper duty.\(^{176}\)

**Penalty for executing, etc., instruments not duly stamped**\(^{177}\)

1. Any person
   a. drawing, making, issuing, endorsing or transferring, or signing otherwise than as
      a witness, or presenting for acceptance or payment, or accepting, paying or
      receiving payment of, or in any manner negotiating, any bill of exchange
      payable otherwise than on demand or promissory note without the same being
duly stamped; or
   b. executing or signing otherwise than as a witness any other instrument
      chargeable with duty without the same being duly stamped; or
   c. voting or attempting to vote under any proxy not duly stamped; shall for every
      such offence be punishable with fine which may extend to five hundred rupees:
      Provided that, when any penalty has been paid in respect of any instrument
      under Section 35, Section 40 or Section 61, the amount of such penalty shall be
      allowed in reduction of the fine, (if any) subsequently imposed under this
      section in respect of the same instrument upon the person who paid such
      penalty.

2. If a share-warrant is issued without being duly stamped, the company issuing the
   same, and also every person who, at the time when it is issued, is the managing

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\(^{176}\) Section 43.
\(^{177}\) S.62
director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees.

F. The Limitation Act, 1963

The ‘Law of Limitation’ prescribes the time-limit for different suits within, which an aggrieved person can approach the court for redress or justice. The suit, if filed after the expiration of time-limit, is struck by the law of limitation. It’s basically meant to protect the long and established user and to indirectly punish persons who go into a long slumber over their rights.

The statutory law was established in stages. The very first Limitation Act was enacted for all courts in India in 1859. And finally took the form of Limitation Act in 1963.

A citizen is not expected to master the various provisions which provide for limitation in different matters but certain basic knowledge in this regard is necessary. For instance, Section 12 of the Limitation Act lays down certain guidelines regarding computation of limitation period. It says that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

Further, the day on which the judgment complained of is pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed is excluded. However, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

Section 14 of the act, similarly, says that in computing the period of limitation for any suit, the time during which the plaintiff has been prosecuting in civil proceedings, whether in a court of first instance or of appeal or revision against the defendant shall be excluded where the proceedings relate to the same matter in a court which is unable to entertain it on account of defect of jurisdiction or other cause of a like nature.

A misjoinder of parties or of cause of action shall be deemed to be a cause of a like nature mentioned above. Under Section 15 of the act, the time during which an injunction or restraint order issued by a court remains in force, is to be excluded while computing the period of limitation for any suit or application for the execution of a degree. In cases, where the previous consent or sanction of the government or any other authority is required under the law, the time required for obtaining such consent or
sanction shall be excluded. Where a defendant has been absent from India, the time
during which he has been absent can be excluded from the period of limitation.
In case, the prescribed period for any suit, appeal or application expires on a day when
the court is closed, the suit, appeal or application may be instituted on the day when the
court reopens, as provided under Section 4 of the act. This is based on the principle
“actus curial neminem gravabit”, which means that an act of court shall not prejudice
any one. The court can condone the delay, if satisfied that it causes were beyond the
control of the plaintiff too.
“If time destroys the evidence of title, the laws have wisely and humanely made length
of possession a substitute for that which has been destroyed. He comes with a scythe in
one hand to mow down the muniments of our rights; but in his other hand the law-giver
has placed an hourglass, by which he metes out incessantly those portions of duration
which render needless the evidence that he has swept away.”A limitation period is a
“stated period of time, the expiry of which extinguishes a parties legal remedies and
also, in some cases, a parties legal rights”.
Albeit an innocuous and not a well known concept of law, limitations are set in statute
as there is no drop-dead limitation period known to the historic common law; hence the
alternate name, statute of limitations. However, the common law did develop a mirror
concept of laches.
Statute of limitations precludes creditors from collecting on breached contracts should
the relevant limitation period have expired before they file their claim in court. It is an
absolute defense beneficial to the debtor but the burden of proof of the statute of
limitations is with the debtor. In many jurisdictions, the limitation period is shorter for
an oral contract then it might be for a written contract.
Jurisdictions also tend to protect certain agencies like newspapers, hospitals and local
governments from protracted exposure to liability by extending to them the benefit of
shorter limitation periods. Jurisdictions typically establish set period of time in which a
legal action must be commenced, running from the time the cause of action arises,
failing which the cause of action is lost.

**Determination of limitation-** It is the duty of the Court to decide the question as to
when the limitation commences, depending upon the nature of the suit. The decision on
such question shall have to be of the Court. It can not be founded on the submission made by the Counsel for the parties. Limitation affects the jurisdiction made by the Counsel for the parties. If the suit is barred by the limitation the Court has no jurisdiction to entertain it. Therefore, as the parties can not confer jurisdiction on the Court by consent, the question of limitation as to the original cause of action can not be decided on the concession made by the parties.  

Section 5 of the Limitation Act, does not apply to the original cause of action. It is well settled that ‘sufficient cause’ has to be construed liberally so as to advance the cause of justice and not the cause of technicalities. As far as possible, a case should be decided on merits and a party should not be deprived on his right to get the case examined on merits.

Applicability of condonation of delay in registration: While ordinarily the period within which a document is to be presented for registration before the Sub-Registrar is four month from the date of its execution, in some extraordinary cases as envisaged in sec.23 of the Registration Act, the Registrar may allow a further period of four months. A total period of 8 months is, therefore, the limit for presenting a document of registration under the provisions of sec. 25 read with sec.23 of the Registration Act. It may also be noted that sec.15, where it is applicable, would apply on its terms only to suits and applications for execution of decree.

Concurrent remedies vis-a –vis limitations: Where two remedies are available for one cause and different periods of limitations are prescribed, each remedy will be governed by its own period. The expiry of limitation for one remedy would not bar the other provided remedy there for is alive. But a remedy barred by time can not be availed of on the plea that the alternative remedy is not bared by time.

Limitation bars the remedy, but does not destroy the right. The effect of section 3 of the Limitation Act is not to deprive a court of its jurisdiction. Therefore, decision of a court decreeing or allowing a suit or proceedings, which had been instituted after the period prescribed, is not vitiating for want of jurisdiction. Though section 3 is peremptory,

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suit will not lie for setting aside a decree absolute for sale merely upon the ground that application for such decree was barred by limitation.\textsuperscript{182}

**Application filed late (Section 6)** - Application seeking condonation of delay. Restoration application under Order IX, Rule 9 (CPC) delayed. Petition itself records ground that prevented party from filing application well in time. Court can not take cognizance of fact and can condone delay. There is no need of condonation of delay.\textsuperscript{183}

**Suit** - The word ‘suit’ has not been defined in the Limitation Act, but Section 2 (1) states that ‘suit’ does not include an appeal or an application. Section 2(1) only excludes appeal or an application. The word ‘suit’ as contemplated in the provisions of the Limitation Act has a wider meaning. Under the Code of Civil Procedure a ‘suit’ is proceedings which is instituted by presentation of plaint.\textsuperscript{184} It is well settled that in terms of Section 14 of the Limitation Act, 1963 where suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in Court of proper jurisdiction, the second suit can not be regarded as a continuation of the first, even though the matter in issue and the parties to the suits are identical.\textsuperscript{185} So far, purposes of limitation, the institution of the suit commences from the date on which the plaint is presented to the proper Court.\textsuperscript{186} But the plaintiff can in such cases take recourse to the Section 14 of the Limitation Act, 1963 and claim the exclusion of the time taken for prosecuted in good faith.\textsuperscript{187}

**Blockage of Limitation** - Complainant purchased mortgaged property of respondent. Time spent in DRT\textsuperscript{188} will be calculated to exclude under Section 14 or Not? Held, the time spent at DRT just watching his interest shall not be excluded vide provisions of Section 14 of the Limitation Act. Complainant did not file soon after learning that title was in doll drums, nor filed after period of two years of knowing, is barred by limitation.\textsuperscript{189}

\textsuperscript{182} Bhaiga Parida v. Gannath Khandai, AIR (1918) Pat 492.
\textsuperscript{183} Manorama Mahapatra v. Orissa State Finance Corporation, AIR 2011 NOC 106 (Ori).
\textsuperscript{184} Hayat Khan v. Mangilal, AIR 1971 MP 140.
\textsuperscript{185} Ramdutt v. E.D. Bassoon and Co., AIR 1929 PC 103.
\textsuperscript{186} Amarchand v. Union of India, AIR 1973 SC 313; Order VII, Rule 10 CPC.
\textsuperscript{187} Narendra Bhosan v. Berhampur Oil Mills, AIR 1993 Cal 914.
\textsuperscript{188} Debt Recovery Tribunal.
\textsuperscript{189} Maj. General (Retd.) V.K. Karma, AVSM Gurgaon v. Vikan Kumar, AIR 2008 (NOC) 2529 (NOC).
**Computation of Limitation**—Victim suffered of Tortuous Act, writ petition filed through current remedy was filing of suit. Some time was spent for prosecution writ petition has to be excluded while calculating period of limitation.\(^{190}\) Petition of Wakf Board file before Wakf Tribunal got rejected because petitioner could not produce evidence in spite of getting sufficient opportunity. Restoration application also dismissed because it was not maintained, because that is the reason that Wakf Board filed revision against order dismissing petition as well as restoration application with application for condonation of delay. Delay caused because petitioner was engaged in seeking remedy of restoration application. Such delay can not be excluded while calculating limitation.\(^{191}\)

**Delay not to be condoned**—Petitioner seeking delay to be condoned. The delay caused because counsel had advised petitioner to approach wrong forum where sufficient time was wasted. This ground is not satisfactory under provision of Section 14 of the Limitation Act. Hence delay can not be condoned.\(^{192}\) As provided for in section 15v of the Act burden of proving that the suit is not time barred is on the plaintiff. In other words burden upon the plaintiff to prove that the defendant has been absent from India and from territories outside India under the administration of the Central Government.\(^{193}\) On the general principal that it is the duty of the plaintiff to prove that his case is within the limitation and that a fact which is within the special knowledge of a person, is to be proved by that person in accordance with te provisions of the section 95 of the Act. Onus initially lies on the plaintiff to show that he had knowledge of the transfer within the last 12 years. If he shows this, the onus is shifted to the defendant to prove that the transfer was previous 12 years and that the plaintiff had knowledge of such transfer.\(^{194}\)

**Mortgagor and mortgagee**—The rights and obligations of a mortgagor or mortgagee co-exist, like the two sides of a coin. The mortgagor’s right of redemption is co-extensive with the mortgagee’s right of sale or foreclosure.\(^{195}\)

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\(^{190}\) *Smt. Khiradabala Nath v. Assam State Electricity Board*, Guwahati, AIR 2007 (NOC) 2517 (Gau).

\(^{191}\) *H.P.Wakf Board v. Vinod Kumar*, AIR 2008 (NOC) 1013 (HP).


\(^{194}\) *Khadi Khan v. Murad Khan*, AIR 1940 Peshawar 39.

\(^{195}\) *Prabhakaran v. M. Azhagiri Pillai* (dead) by LRs., AIR 206 SC 1567.
**Joint Mortgagor** – An acknowledgement signed by one co-mortgagor would save limitation as against that person and would be of no avail against the others. A full Bench of the Allahabad High Court in *Md. Taqui v. Rajaram*,\(^{196}\) observed that if at the time when the acknowledgement is made or the payment is made there are more than one person in existence who stand in relationship to each other as joint contractors, partners, executors or mortgagors, then any acknowledgement or payment made by one would save the limitation as against that person and would be of no avail against the others. The High Court of Bombay,\(^{197}\) and Madras\(^{198}\), have also expressed the same view.

**Co-mortgagee** - One of the other co-mortgagors can not give an acknowledgement of mortgage unless he is authorised by others to do so.\(^{199}\) Such an acknowledgement will not be sufficient even to save limitation against his share unless there was a division by metes and bounds between the shares.\(^{200}\) The Lahore High Court also expressed the same view in *Ahmad Shah v. Kartar Singh*,\(^{201}\) where in it was held that an acknowledgement of the right of redemption, in order to save limitation should be made by all the mortgagees and if it is not signed by all the mortgagees, it does not hold good even with regard to shares of those who signed it.

**Bar by Limitation** - Where there was no clause in the agreement stipulating the time for executive of sale deed being the essence of the contract, the limitation of three years for the purpose of institution of suit of such nature would be relevant and only logical conclusion as regards the period of limitation of three years would be the date from the accrual of cause of action which in the instant case should obviously be construed as the date when the notice for justice demands was served on respondent plaintiff, i.e. 19.6.81 while the suit was filed on 13.11.81 hence suit is within limitation.\(^{202}\)

**Starting point of limitation** - No issue as to whether the suit was barred by time was framed by the trial Court. Even otherwise in terms of Section 54 of the Limitation Act the starting point of limitation is three years from the date of registration of the sale

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\(^{196}\) AIR 1936 All 820.

\(^{197}\) *Dashrath Motiram v. Gajanan Keshav*, AIR 1943 Bom 38.

\(^{198}\) *Muthu Chettiar v. Muhamad Hussain*, AIR 1920 Mad 418.

\(^{199}\) *Vohra Abdulrahim v. Vohra Abdul Karim*, AIR 1983 NOC 18 (Guj).


\(^{201}\) AIR 1934 Lah 293.

As provided in Section 56 of the Act when the demand is made against the guarantor, if the claim is a live claim (if not bared by time) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/non-compliance.

**Starting point of limitation in general:** As per provisions of the Section 65 of the Act, the period of limitation begins to run when the possession of the defendant become adverse to the plaintiff, depends upon the facts and circumstances of each case, in a suit of possession of an interest in immovable property the question when the possession of the defendant becomes adverse to the plaintiff depends on the nature of the interest, particularly when it is an incorporated right. Limitation period begins from the date of denial of title of real owner for adverse possession.

**Title by adverse possession (Section 65)**: Appellants are required to prove that their possession was adverse to the true owner. The pleas of the appellants on the basis of the purported order of the Settlement Officer directing for issuance of *patta* in their favour also does not advance their case. It is not the appellants case that plaintiffs were party before the Settlement Officer. Further, it is not in dispute that no patta was issued in favour of the appellants and in fact rough patta was issued in favour of the second plaintiff. Thus, the appellants have not proved the necessary ingredients to establish their title by adverse possession. The Division Bench is absolutely right in rejecting the appellants plea of adverse possession and decreeing the plaintiff’s suit, after setting aside the judgement and decree of trial ad appellate Court.

**G. The Specific Relief Act, 1963**

Specific relief is a form of judicial redress. it belongs to the law of procedure. it is a legal redress which a plaintiff seeks through a civil court. in this kind of relief the contractual party is compelled, to do or refrained from doing an act. The Specific Relief Act is based on the English principles of equity in granting or refusing such relief. The word relief means ending or removal of pain, anxiety or help. Specific relief in specie. It is a remedy by which a party to a contract is compelled to do or omit the very acts

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203 Mst. Sugani v. Rameshwar Das, AIR 2006 SC 2172
205 Ramtal v. Lodha, AIR 1952 Pat 20.1
which he has undertaken to do or omit. According to ‘Bentham’ ‘‘The law ought to assure me every thing which is mine. without forcing me to accept equivalents, although I have no particular objections to them.”

**Possession of minor’s property** - The Mysore High Court while dealing with a question as to what is the position in law, when relation or stranger enters into possession of a property belonging to a minor; where he takes possession of the property for and on behalf of the minor or in his own right in *Hanumakka v. Narsasama*, observed as follows:

‘The law presumes that whosoever enters into possession of a property belonging to a minor does so on behalf of the minor and such possession continues with him for and on behalf of that minor. No court will ever countenance a person having entered into possession of a property on behalf of a minor setting up his own title thereto during such possession. He can not do so until, after the minor attains majority, he does something to change that possession into a wrongful one. It has been held by Lord Hardwicke in *Morgan v. Morgam*, quoted in *Vasudeo Atmaram Joshi v. Eknath Balkrishan* that where any person, whether a father or a stranger, enters upon the estate of an infant, and continues in possession, the Court will consider such person entering as a guardian to that infant.’

The Specific Relief Act is not an exhaustive code. It deals with those specific relief which fall within the domain of court of equity. The relief is ordinary available in a civil courts. the defaulting party is compelled to do or to omit the every act which he has undertaken to do or to omit. The specific relief is adjective law. The jurisdiction vested in the court for the grant of decree for specific performance is discretionary and the court is not bound to grant such relief even if it is lawful to do so. However, the discretion vested in a court of law must not be exercised arbitrarily rather on sound and convincing reasons guided by judicial principles and capable of correction by a court of appeal.

The main object of specific relief is to discourage people from taking law into their own hands. It provides summary and speedy remedy through a medium of civil court. A

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208 AIR 1962 Mys 3.
209 (1737) 1 Atk. 489.
210 AIR 1962 Mys. 3.
person any of whose rights are infringed can go to a court of law for a relief and seek a remedy if he has one.

If a person agrees to sell a house to another in case the latter pays him a certain sum and this sum is paid up as agreed upon and the owner of the house does not execute a sale deed, the aggrieved person may either prosecute the other for cheating, or he may sue for the damages and return of the amount paid, or he may ask a competent court to compel the other to perform his contract by executing the sale deed. This last prayer requiring the promisor to do or perform the very thing which he undertook to do will be prayed for as specific relief.

   a. Specific relief is granted under the principles of equity.
   b. Its basic purpose is to give a very thing to a person who is entitled for it.
   c. The defaulting party is compelled to do or to omit the very act which he has undertaken to do or to omit.

**Modes of specific performance or kinds of equitable remedies**

Under specific performance or equitable remedies relief may be given in the following ways:

Delivery of possession: By taking possession of certain property and thereby delivering it to its claimant.

Specific performance of contracts: By ordering a party to do the act which he is under an obligation to do.

Injunctions: By preventing a party from doing that which he is under an obligation not to do or to do.

Declaration of rights: By determining and declaring the rights of the parties otherwise than by an award of compensation.

Appointment of receiver: In a dispute over a business between the two parties the court may appoint a receiver who looks after the affairs the business until the case is decided by the court.

Rectification of instruments: When through fraud or a mutual mistake of the parties, a contract or the other instrument in writing does not truly express their intention, the court can issue order for its rectification on the request of the parties entitled thereto.

Recession of the contracts: If any contract in writing has been entered by the parties
which is voidable or where the contract is unlawful and the defendant is more blameable or where a decree or specific performance of sale or a contract to take a lease has been made and the purchase or the lease holder does not make payment, the court can order to rescind the contract.

Cancellation of instruments: Any person against whom a written instrument is void or voidable and the apprehension is of causing serious injury to him, he can get the cancellation of such instrument from the court.

Basis of specific relief or equitable remedies are as under:

a. He who comes to equity must come with clean hands.
b. He who seeks equity must do equity.
c. Delay defeat the equity.

The Act is only to enforce individual civil rights. A person dispossessed of immovable property without his consent (other than in due course of law) can recover possessions by a suit filed within six months from the date of dispossession. Unless the contrary is proved, in a suit for specific performance of a contract, the Court shall presume that a contract to transfer immovable property is one in which monetary compensation for its own non-performance would not afford adequate relief. The Court could also grant a permanent/mandatory injunction preventing the breach of such contract and award damages. Several kinds of suits can be filed embodying different nature of relief and several kinds of these suits have been provided under the Specific Relief Act, 1963. Such suits are:

a. Suit for recovery of possession,
b. Specific performance of contract,
c. Suit for rectification of instrument,
d. Suit for rescission of contract,
e. Suit for cancellation of instrument,
f. Declaratory decrees,
g. Suit for permanent injunction, and
h. Suit for mandatory injunction.

The opening lines of the Act reads as under:
“An Act to define and amend the law relating to certain kinds of Specific Relief”. These lines clearly state the purpose of the Act that several kinds of relief are provided in the Act, defining them and stating the law regarding them. Section 4 of the Act states that specific relief can be only granted for the purpose of enforcing individual civil rights and not for the purpose of enforcing a penal law.

**Suits for possession of immovable property**

Section 5 of the Act, says that a person entitled to the possession of specific immovable property may recover in the manner provided by Code of Civil Procedure, 1908 (C.P.C.).

Injunction is usually granted to protect the possession and there may be instances when the plaintiff has been ousted from the property e.g. when someone forcibly enters into possession, when tenant who has been inducted in the property does not vacate it after the tenancy has been determined, mortgagee not vacating the possession etc.

Section 6 gives a privilege to a person in possession of landing case he is dispossessed on his proving, first that he was in possession of immovable property, secondly that he has been dispossessed, next that the dispossession is not in accordance with law and lastly that the dispossession took place within six months of the suit. However such kind of suit cannot be brought against the government. The idea behind this section is that even a trespasser cannot be evicted by force even by a person who has a right to occupy the land. In *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Rao*,\(^{211}\) it was observed, that “persons are not permitted to take forcible possession. They must obtain such possession as they are entitled through a Court.”

A person dispossessed may bring a suit under section 6 of the Specific Relief Act, for recovery of possession irrespective of whether he has any title to the suit property or not, where however, the person dispossessed has a title to a suit property, he has the option to bring the suit either under section of the Act, or under general law, based on title. In *Mahant Sheo Puran Nath Chela Baba Puran Nath v. State of Haryana*,\(^ {212}\) it was held that section 6 does not apply to suit based on title to the property. Under this section suit is based only on possession or dispossession of property.

\(^{211}\) AIR 1924 PC 144.

\(^{212}\) 1995 (3) SCC 426.
In case dispossessed property passed on to other person, relief can be granted against the person in actual possession and not against person dispossessing. If dispossessions is done through agency of some other person who had passed on the possession to other persons, the latter being in actual possession from whom recovery could be sought, would be necessary party in a suit claiming relief under section 6. Suit filed against those who are in actual possession can be effectively decided even in absence of agents who have dispossessed the plaintiff and transmitted the possession to defendants (Dabgar Arvindkumar Keshavlal v. Shri Modh Ghanel Gnyati Samaj).\textsuperscript{213} In a suit under section 6, the right title, interest and possession of vendor or plaintiff are not relevant, though they may be relevant for decreeing a suit based on declaration of title. Proceeding under section 6 is a summary procedure and is not a regular procedure in respect of a contested suit. Plaintiff must prove his previous possession and dispossession by the defendants otherwise than in due course of law within six months of the suit. The court must not go into the nature of parties possession.

**Suits for Recovery of Specific Movable Property**

Section 7 provides for the recovery of movable property in specie, i.e. very property in itself and not its substitute or money equivalent. A person entitled to a movable property may recover it in the manner provided in C.P.C.

**Suit For Rectification of Instrument**

Parties enter into a contract which means an agreement amongst them based on there consent but fraud vitiates any such consent because if this fraud would not have been exercised upon him such a consent would not have been there. Even a mutual mistake might take place, but in such situations it does not mean that law does not provide any remedy. Section 26 of the Act provides the situations in which the instrument or deeds executed may be rectified. In *Bhabani Sarma v. Narayan Sarma*,\textsuperscript{214} a suit for rectification of sale deed was filed wherein plaintiff claimed that the sale deed in his favour describes the wrong patta numbers although boundaries were given correctly, the said sale deed contained identity of the property by sufficient particulars and boundaries given as additional description. Possession was delivered to purchaser from date of

\textsuperscript{213} AIR 1995 Guj 148.

\textsuperscript{214} AIR 2003 Gau.
agreement and continued till execution of sale deed. The vendor was ready to rectify deed patta numbers.

The legal heir of a party, who was entitled to claim the relief of rectification, under section 26 of the Act could pursue the matter only if the proceedings were initiated by the party during his lifetime. It was impermissible for the legal heirs to initiate proceedings for rectification for the first time, after the death of the party to the instrument. It conforms to logic as well as reason that when the party itself was not of the view, that there was mutual mistake or fraud, his legal heirs could not plead that the party was subjected to such fraud or mistake (*Akiraju Saraswathi V. Mohd. Jegangir Pasha*).\(^{215}\)

Section 27 provides for the circumstances when a person may sue for rescission of a termination of the contract and unlawfulness of the causes which are not afferents on the face of the contract. Whether the contact is voidable has to be seen in accordance with the provisions of Indian Contract Act, 1872, which provide for the circumstances when a contact can be avoided by the plaintiff e.g. when the contact is a result of fraud or misrepresentation.

Sub section 2 of section 27 enumerates the circumstances when the court may refuse rescission of contract:

1. where the plaintiff has expressly or impliedly ratified the contract,
2. where on account of changed circumstances the parties cannot be relegated back to the position which stood when the contract was entered,
3. where valuable rights have accrued to third party during subsistence of a contract,
4. where only part of the contract is to be rescinded which is not severable from the rest of the contract.

Under section 28, the Court which passed the decree for specific performance can rescind a contract. When the decree holder failed to pay the balance sale consideration within the time allowed by the decree, the court can order rescinding of contract. However, it is only the court which passed the decree who can order for rescinding of contract and not the executing court. Court can extend time to make payment on an

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application of a party but sufficient cause has to be shown and separate suit seeking extension is not maintainable.

The Court thus after passing the decree for specific performance does not loose control and does not cease to have jurisdiction. The court retains the control even after the decree has been passed also observed by the Supreme Court of India in *Ramakutty Guptan v. Avara*.

A prayer for rescission of contact can be made in the alternative in a suit for specific performance (section 28). The court may also require the party rescinding the contract to restore any benefit which he may have received and to pay compensation on equitable considerations as he who seeks equity must do equity.

**Suits For Cancellation of Instruments**

Chapter 5 of the Act provides for cancellation of instruments. Many times an apprehension is there that certain instruments is void or voidable against a person however if the same is left standing it may be misused and thus it becomes essential to seek cancellation of such instruments. Several such suits for cancellation of sale deeds are filed when there is collusion between the vendor as well as purchaser and person who has an interest his share is also reflected therein to have been sold. There may be instances when sale deed or any other instrument has been executed on the basis of fraud and it thus becomes essential to cancel such an instrument in order to protect ones own rights. Such a suit for cancellation of an instrument can be brought within three years of limitation from the time when such instrument has been executed or from the time of knowledge. Section 31 of the Act provides for cancellation of instruments and section 32 provides for situations when instrument may be partly cancelled when an instrument is evidence of different rights or different obligations, the Court may allow to cancel it in part and stand for the residue. Also equitable consideration may arise and the Court may order any benefits so taken under the instruments be restored and order for paying compensation.

**Declaratory Suits**

Any person entitled to any legal character, or to any right as to any property, may institute any person denying or interested to deny his title. However the proviso to

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216 AIR 1994 SC 1699.
section 34 states that no such suit shall be maintainable where a plaintiff being able to seek further relief than mere declaration of title omits to do so. In order to seek the relief of declaration plaintiff has to succeed or fail on the strength of his title that he establishes and if he fails to do so he cannot merely aver that defendant has no title to the suit property. In other words the party who lays claim must establish it affirmatively by proper legal evidence i.e. burden of proof is upon the plaintiff to prove his case. In *Ranjit Singh v. Kanwaljit Singh*,\(^\text{217}\) a suit for declaration was filed by the plaintiff claiming that he along with his father and brothers is in joint possession and he not seeking a relief of possession such a suit was held to be maintainable as the possession of one co sharer is possession on behalf of all. The declaration given in section 34 is relief in personam and not in rem and is binding only between the parties to a suit.

**Suits For Permanent Injunction**

Section 37-42 provides the law relating to injunctions. The relief of injunction is an equitable relief and the person seeking the aid of the Court must approach the Court with clean hands and cannot be granted in favour of person who has concealed material facts from the Court. He who seeks equity must do equity. Relief of injunction is a preventive relief temporary or perpetual. Temporary injunction can be granted under section 37 of the Act in consonance with the provisions of Order 39 Rule 1&2 of C.P.C. Temporary injunctions are granted for a particular period of time or till further orders of the Court and may be granted at any stage of the suit. To the contrary a perpetual injunction can only be granted after finally hearing the parties upon the merits of the suit.

Temporary injunction can be granted at two stages, one without finally disposing of the application for injunction to operate immediately till the disposal of the said application and the other granted finally disposing of the main application to ensure generally till the decision of suit and while the former is called ad interim injunction the latter is generally called temporary injunction.

In order to seek the relief of temporary injunction plaintiff has to establish that he has a prima facie case in his favour along with balance of convenience lying in his favour and if such a relief of injunction is not granted to him irreparable loss shall be caused to him.

\(^{217}\) AIR 2004 P&H 211.
which cannot be monetarily compensated. It is only when these essential ingredients are established that a relief of temporary injunction can be granted in his favour, if the plaintiff fails to establish any of these ingredients no such relief can be granted. Prima facie case means a case in which there are reasonable prospects of the suit of plaintiff being decreed, balance of convenience means equities lies in his favour and irreparable loss means one which cannot be quantified monetarily. When a loss can be compensated by a money equivalent it cannot be termed to be an irreparable loss.

Section 41 provides the grounds when the relief of injunction cannot be granted, when a suit has been filed for restraining a person from prosecuting a judicial proceeding injunction cannot be granted. No such relief can be granted for restraining a person from proceeding in a court, from instituting or prosecuting a criminal proceeding etc. When there is an equally efficacious remedy available then also no relief of injunction can be granted e.g. when plaintiff being a co sharer files a suit for permanent injunction against other co sharers claiming that the other co sharers are interfering in the use and possession of joint property no relief of injunction can be granted to him as an equally efficacious remedy of partition is available to him and such a suit filed for permanent injunction is not maintainable.

The relief of permanent injunction is not available against a true owner and this has also been observed in *Premji Ratasney Shah v. Union Of India.*\(^{218}\) However no relief of injunction can be granted to a plaintiff when no legal right of his has been infringed. The relief of injunction is an equitable relief and person seeking injunction must approach the court with clean hands and should not suppress material facts from the court.

**Suit for Mandatory Injunction**

To seek a relief of mandatory injunction temporary or permanent as has been provided under section 39 of the Act, plaintiff should be specific that there has been a breach of obligation and certain acts are necessary to restore status quo. A temporary mandatory injunction can be issued only in case of extreme hardship and compelling circumstances

\(^{218}\) 1994 (3) Civ LJ 817 SC.
and mostly in those cases when status quo existing on the date of institution of the suit is to be restored.

**Suit for Specific Performance of Contract**

A person enters into an agreement to sell however the vendor later refuses to sell the property and getting the sale deed registered, in such circumstances the vendee can file a suit for specific performance and compel the vendor to fulfill the obligation which he has undertaken. Section 16 of the act provides that in such circumstances there must be averment by the plaintiff that he has always been ready and willing to perform his part of the contract though it need not be shown by him that he has ready cash available with him. In *Faqir Chand V. Sudesh Kumari*,\textsuperscript{219} it was observed that no specific phraseology required is required to prove readiness and willingness has to be in spirit and substance and not in letter and form. In this case, vendee was present in the office of sub registrar for getting the sale deed registered and also deposited the balance sale consideration in the Court, the suit for specific performance was thus decreed. The suit for specific performance can be brought within three years from the date when the performance was agreed between the parties. The plaintiff can also claim damages in the alternative relief. The court may in its discretion considering the facts and circumstances of the case may direct the parties to perform the obligations which they have undertaken and order specific performance of the contract.

The inclusive definition of ‘obligation’ in the Act embraces every kind of duty enforceable by law. So it is not confined to a duty correlative to a proprietary *right in personam*. It may spring out of contract, quasi contract or tort or may even be created by a statute.\textsuperscript{220} Mere delivery of possession is not a transfer of interest in property.\textsuperscript{221} When there is a stipulation in a contract that certain amount should be paid by one party to another in a case of non-performance of the contract, the Common Law would enforce the stipulations in all cases. Equity court, however, in such a case considered the question whether the amount fixed was a genuine pre-estimate of the damage likely to result from the breach of the contract or was only a penalty or stipulation *in terrorem*. In the latter case the Equity Court would relieve against such terms in the nature of

\textsuperscript{219} 2007 (1) PLJ 106.

\textsuperscript{220} *Kishore Chand v. Budaun Electricity Supply Co.*, AIR 1944 All 66.

\textsuperscript{221} *Raddi Demudu v. Kannuru Demudamma*, 1994 (3) ALT 384 (AP).
penalties and grant only compensation for the actual damage sustained on account of non-performance.\footnote{222}

**Suit for recovery of possession:** Where the plaintiff was disposed from the property, applied for possession after 6 months from the date of dispossession, would not be able to cover the possession as the title of decedent is not extinguish and is subsisting in respect of suit property.\footnote{223} Where a person settled possession of the property, may be in treasurer, when dispossession forcibly by true owner, is entitled to seek restoration of its possession merely on the basis of his prior possession by filing suit under Section 6 of the Act.\footnote{224} Plaintiff has to prove that he was in possession but dispossessed wrongly within six months from the date of filing of suit.\footnote{225}

If the transaction is vitiated by fraud or coercion or by mutual mistake of a fundamental character, the sale is liable to be set aside. In the absence of fraud the conveyance can not be set aside even if there is a defect in the vendor’s title.\footnote{226}

The Transfer of Property Act, 1882 expressly provides that the omission to make the disclosures as to the property or to the title thereto required to be made by that section is to be deemed to be fraudulent. If the other party had actual notice, non-disclosure would not be treated as fraudulent.\footnote{227} When a defect in the vendor’s title is discovered after the execution of the conveyance, and there has been no fraud, the vendee cannot avoid the sale. His remedy is a suit for damages.\footnote{228}

There is no obligation on the seller to disclose a defect known to the buyer. *In Bailey v. Barnes*,\footnote{229} Lindley, C.J. observed as under:-

‘A purchaser of the property is under no obligation to investigate his vendor’s title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring knowledge of his vendor’s title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had

\footnotesize{\begin{itemize}
\item \footnote{222}{\textit{Public Water Commissioner v. Hills}, (1906) AC, 375.}
\item \footnote{223}{\textit{Tirumala Tirupati Devasthanam v. K.M. Krishnaiah}, AIR 1998 SC 1132.}
\item \footnote{224}{\textit{M.S.Baliga (dead) by L.Rs. V. Mangalore City Corporation}, AIR 1988 Kant 76.}
\item \footnote{225}{\textit{Maha Singh v. Vidya Devi}, (1998) 2 Punj LR 605.}
\item \footnote{226}{\textit{Eastern Mortgage and Agency Co.Ltd., v. Md.Fuzul Karim}, 52 Cal 914.}
\item \footnote{227}{\textit{Gondu Ramasubba Iyer v. Muthian Kone}, AIR 1925 Mad 968.}
\item \footnote{228}{\textit{Udho Das v. Mehr Baksh}, AIR 1933 Lah 262.}
\item \footnote{229}{(1894) 1 Ch.25 at 3.5}
\end{itemize}}
transacted his business in the ordinary way’. Even if the defect is constructively within the buyer’s knowledge, there is no duty to disclose it. In *Harilal v. Mulchand*, the buyer could have discovered, had he looked into the Record of rights, that the vendor was in respect of a portion of the land not the owner but a sub-mortgagee. It was held that the seller could not be charged with fraudulent omission for non-disclosure of the defect. In *Hussain Sahib v. G.V.Chettiar*, it was held that the buyer can with ordinary care discover whether the property which he is agreeing to buy was included in a Town Planning Scheme and so there is no obligation on the part of the buyer to disclose that fact even assuming that it is a matter defect in title.

### H. The Negotiable Instrument Act, 1881

The Negotiable Instrument Act, 1881 is admittedly a law made by the Parliament. The offence under section 138 of the Act relates to dishonor of cheque draw by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for discharge in whole or part of any debt or other liability. Thus the law relates to “cheque” which is matter to which executive power of the Union extends. Hence the case of a person who is convicted and sentenced for an offence under section 138, the appropriate Government for the purpose of Section 138 of the Code is the Central Government and not the State Government.

Section 138, in fact, has been introduced to prevent dishonesty on the part of drawer of negotiable instrument to draw a cheque without sufficient funds in the account maintained by him in bank and induce the payee or holder in due course to act upon it. In other words, these provisions have been introduced to give greater credibility to our trade, business, commerce and industry, which is absolutely imperative in view of the growing international trade and business.

**Object and purpose of section 138-** The object of section 138 (b) is to afford an opportunity to the person who is the drawer, which includes the company, represented by Directors before being proceeded against them to penal enactment, to make a

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230 52 Bom.883  
231 AIR, 1953 Mad.628  
232 *State of Kerala v. Soma Thomos*, 2004 (2) DCR 409 (Ker).  
233 *3 KSL & Industries Ltd. V. Mannalal Khandelwal*, 2005 (1) DCR 561 (Bom).
demand from the amount of cheque, in order to avoid the complaint of the offence or to remedy it.

It has been observed that there are hundreds of case pertaining to section 138 filed by the banks and housing finance companies on the defaulting customers which are pending with Courts for decisions. These cases are generally about payment of the housing loans dues by the borrowers. It is therefore, necessary for the general public, to understand implications of the provisions under the Negotiable Instrument Act, and the consequences those of. The bouncing of cheque may be due to various reasons. But, if the customer in regular touch/contact with the lender reporting the facts about the requisite balances/amounts to be maintained in his bank account the cheque will not be returned because the lender will first consult the borrower and then put the cheque into its bank account. In case of any problem he can inform lender to present the cheque for clearing on a later date so that the cheque is cleared/paid. But, in most of the cases it has been seen that customers deliberately, with a bad intention, do not pay dues to the lender and put themselves in trouble. Ultimately dues are required to be paid anyhow because the house along with the land/plot has been mortgaged to the lender as security. Now, it is very easy for the lender to recover the dues via SRFAEST route. The procedure has been simplified. Ultimately borrower is a looser.

It is noticed that for establishing the requirements of section 138, there is no burden on the part of the complainant to prove before a Court the entire details of the transactions resulting in issuance of the cheque. As observed by the Apex Court in Kusum Ingots and Alloys Limited v. Pennar Peterson Securities Ltd., the object of bringing section 138 on statute is to incalculate faith in the efficiency of banking operations and credibility in transacting business on negotiable instruments. Looking to the object incorporating Chapter VIII in the Act, the expression, on account maintained by him used in Section 138 of the Act, can not be interpreted to give it an artificial and unrealistic meaning. What the provisions says is that the cheque must be drawn on account, when the cheque was drawn, whether it was live or dead, is irrelevant.

Lender can file criminal complaint under section 138 of Negotiable Instrument Act, 1881 before the court against the drawer of the cheque. Further, lender also can file

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234 B.Raman v. Shasun Chemicals and Drugs Ltd., 2007 (1) DCR 717.
235 AIR 2000 SC 954.
simple money suit\textsuperscript{236} or money suit under criminal procedure code for the recovery of amount involved in the dishonoured (dishonoured, bounced) cheque. Drawer of the cheque can make the payment of the amount involved in the dishonoured (dishonoured, bounced) cheque within fifteen (15) days from the date of receipt of legal notice of demand. If the dishonoured (dishonoured, bounced) cheque amount is not paid within said fifteen days, then lender can file the criminal complaint under section 138 of Negotiable Instrument Act, 2002 before the court within thirty (30) days. That means, after fifteen days from the date of receipt of legal notice of demand by the drawer, lender have thirty days to file the said criminal complaint within three (3) years from the date mentioned in the dishonoured (dishonoured, bounced) cheque. Lender can file any one of the criminal complaint under section 138 of Negotiable Instrument Act, 1881 and simple money suit under order 37 of the C.P.C. or it can file both the cases. However, if substantial amount is involved in dishonoured (dishonoured, bounced) cheque, it is always open for the lender to file both cases. It is necessary for the home loan borrower to understand the law and difficult position thereunder:-

Under provisions of Negotiable Instruments Act, 1881 section 138 a legal notice on behalf of complainant is issued to the defaulter whose cheque is dishonoured. It is be issued within 15 days of dishonor of cheque by registered post acknowledgement due; all facts including the nature of transaction, amount of loan and or any other legally enforceable debt against which the cheque was issued and the date of deposit in bank and date of dishonour of cheque is to be mentioned in the notice.

The person who has issued cheque is directed to make the payment of amount of dishonoured cheque within 15 days. In case the said payment is made within 15 days of service of notice then the matter ends. But in case the said payment is not made within 15 days then the complainant has to file a criminal case in the court within 30 days from the expiry of notice period of 15 days. The court will hear arguments of complainant/advocate for complainant and issue process under section 138. The summons are sent and served through police station where accused is residing. In section 138 cases, police is limited to only service of summons and in case accused remains absent on court date after service of summons then only warrant is sent to police station to produce accused...

\textsuperscript{236} Order 37 of the C.P.C.
in court. But it is observed in several cases that accused persons are harassed by concerned persons who are directed to serve notice/warrant. Hence it is advisable that accused should not be afraid of the court case and regularly attend court dates so that warrant will not be issued and further unnecessary harassment will be prevented. The offence under section 138 is a bailable offence as the punishment provided for said offence is two years. Accused has to submit surety with all surety documents including ownership documents of house or land owned by surety, his address proof including ration card, election identity card, photo and address proof of surety and accused. On receiving summons from the court the accused and surety should remain present in court with all abovementioned documents and court will accept the surety and on signing bonds by accused and surety, the bail will be granted and accused will be released by court. Then the complainant will file the affidavit for his evidence with all original documents in support of his complaint. This is called examination in chief of complainant. Then accused/his advocate will cross examine the complainant. Complainant can submit additional witnesses in support of complaint. Then once witnesses of complainant are over then statement of accused is recorded under criminal procedure code. Accused will be asked to give reply to the questions and allegations against him. Then witnesses of accused to prove his innocence will be produced and the evidence will be recorded by the court. Last stage is of arguments of advocate of complainant and argument of advocate of accused. Court will pass the judgment in case accused is acquitted then matter ends. But in case accused is convicted then immediately accused should submit bail application and give surety and pray for time to appeal to sessions court. Court will direct him to deposit fine as per judgment in the court immediately then he will be released. He should appeal to sessions court within one month from the date of judgment of lower court. Criminal appeal with application for suspension of sentence and for bail will be given hearing by the district and sessions court and on furnishing surety as per directions of court including deposit of some amount towards compensation ordered as per judgement the accused will be released on bail. The dispute may go on from district and sessions court to high court and then to

237 Cr.P.C. section 313.
supreme court. The offence is made compoundable hence in case the matter is settled between the parties, then on an application in the court, the court may allow to compound the case and close the case. Banks/lenders are forcing borrowers to issue blank signed cheques in advance at the time of sanction of loan. Such blank cheques are misused by the complainants by writing false and fictitious amounts and getting those cheques dishonoured.

Dishonour of cheque for insufficiency, etc., of funds in the accounts where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both: provided that,

a. The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

b. The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and,

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

Explanation: for the purpose of this section, “debt or other liability” means a legally enforceable debt or other liability.” Thus section 138, states that when a person issues a cheque to be encashed and the cheque so issued is issued towards payment of a ‘debt’ or liability and it is returned unpaid for want of funds, the person issuing such a cheque
shall be deemed to have committed an offence. Section 138 presupposes three conditions for prosecution of an offence, they are:

a. Cheque shall be presented for payment within six months from the date of issue or before expiry of its validity.

b. The holder shall issue notice demanding payment in writing to the drawer within one month of the receipt of information of the bounced cheque, and,

c. The drawer inspite of the demand notice fails to make payment within one month of the receipt of the notice.

If the above three conditions are satisfied the holder of the cheque in due course gets the cause of action to launch prosecution against the drawer of the bounced cheque. There is a provision describing the method of lodging the complaint for the offence punishable u/s.138.238

**Cognizance of offences:** no court shall take cognizance of any offence punishable u/s.138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque, such complaint is made within one month of the date on which the cause of action arises under clause (e) of the proviso to sec.138 provided that the cognizance of the complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period. No court inferior to that of a metropolitan magistrate or a judicial magistrate of the first class shall try any offence punishable u/s.138.

The cases filed under sec.138 of the Negotiable Instrument Act are tried summarily. Thus for an offence to be made out and to set the criminal law in motion for the offence punishable u/s.138 of the Negotiable Instrument Act, 2002 lender should lodge a complaint in writing made within 30 days from the date of cause of action by the payee or holder in due course has to file a complaint before the jurisdictional court.239 If the complaint so filed is made within limitation(time) and preconditions prescribed u/s.138 are complied with, court has to take cognizance of the offence and record sworn statement, then process shall be issued to the accused. The magistrate

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238 Section 142.
239 Cr.P.C. section 200.
shall not refer the complaint to the police for investigation, u/s.156(3) of Cr.P.C. as the
offence u/s.138 of the Negotiable Instrument Act is non-cognizable offence.\footnote{Mohan v. State of Karnataka, ILR 1991 KAR 612.}
When a complaint is file under section 138 the court presumes that unless contrary is
proved, the holder of cheque received the notice and failed to make necessary payment
as referred to in sec.138 for the discharge in whole or in part any \textit{legally valid} ’debt’ or
‘liability’. So, there is presumption.

\textbf{Premature complaint}

The Supreme Court\footnote{Narshigh Das Tapadia v. Goverdhan Das Partani, AIR 2000 SC 2946.} has held that even though a complaint is presented prematurely,
the court need not dismiss it and on the other hand it should wait till maturity or it may
return the complaint to the complainant for presenting it later. The same matter again
arose in a different situation before the Hon’ble High Court of Karnataka.\footnote{Ishwar Ramagunaga v. Ramdas Anath Prabhu, ILR 2001 KAR 3866.} In that
case, after trial, the magistrate dismissed the complaint on the ground that it was
premature and acquitted the accused. Before the Hon’ble High Court, relying upon
\textit{Narasingh Das Tapadia’s} case, it was contended that the magistrate was bound to
return the complaint when it was premature. But the Hon’ble High Court did not accept
that contention and held that it was not mandatory for the magistrate to return the
complaint on the ground that it was premature and in that situation he had no alternative
except to acquit the accused.

A Division Bench of Hon’ble High Court of Karnataka\footnote{Sathyanarayana Gowda v. Rangappa, ILR 1996 KAR 1219 (2) KLJ 162.} held that till the expiry of the
period of validity i.e., 6 months a cheque could be presented any number of times, but,
however, successive notices for purposes of determining the cause of action are not
contemplated and therefore the complaint will have to be filed within one month from
the date on which the cause of action arises. Similar is the view taken by the Supreme
Court in \textit{Sadananand Bhadran v. Madhavan Sunil Kumar} case.\footnote{AIR 1998 SC 3043.} In the above case it is
held that though a cheque can be presented any number of times during the period of its
validity, the cause of action to file the complaint arises only once. However, \textit{in case of M/s Unaplas India ltd., v. State (Govt. of NCT of Delhi),} \footnote{2001 AIR SCW 2567: AIR 2001 SC 2825.} it has been distinguished
and has been held that if within 15 days, notice of dishonor is not issued by the complainant, then he can create a fresh cause of action by presenting the cheque again.

**Notice of dishonor**

It is held\(^\text{246}\) by the Hon’ble High Court of Karnataka that if the notice is not signed by the advocate, it cannot be said that it is no notice. Further, it has also been held that what is required under sec.138(b) is that the notice of dishonor of cheque should be given within 15 days from the date of receipt of information from the bank and it is not necessary that the notice also should be served on the accused within the said 15 days. The Hon’ble Supreme Court in *Suman Sethi v. Ajay K. Churiwal*\(^\text{247}\) it is held that if in the notice sent under sec.138(b) in addition to the cheque amount any other sum by way of interest, cost etc., is also claimed, it cannot be said that notice is not a valid one. Following this decision, the Hon’ble Karnataka High Court\(^\text{248}\) has taken a similar view. However, High court held that a combined notice issued on behalf of the complainants in two different cases, though the complainants are related to each other as husband and wife, in respect of separate cheques is not valid if in those notices the claim has been combined. In *United Credit Ltd., v. Aso Sales India and Others*\(^\text{249}\) the decision in Suman Sethi’s case referred to above has been followed and it has been again held that merely because in addition to the cheque amount, interest and costs are also claimed in the notice, the same is not invalid.

In the decision reported in the Hon’ble Karnataka High Court\(^\text{250}\) it was held that what is required is that a complaint is to be presented within 30 days from the date on which the cause of action arises and if at the request of the drawee the cheque is presented again and it is bounced, it cannot be contended by the accused that a fresh notice should have been issued when the cheque was dishonored again.

The Hon’ble Supreme Court\(^\text{251}\) was concerned with the question as to when the service of notice could be inferred and it was held that if there is an endorsement like “not available in the house”, “house locked”, “shop closed”, “un claimed”, the service

\(^{246}\) Y. Krishnamurthy v. Sharanappa, ILR 1998 KAR 333.
\(^{247}\) AIR 2000 SC 828.
\(^{249}\) 2001 AIR SCW 2352.
\(^{250}\) M/s Savitha Enterprises v. K. Ravindra Nath Shetty, 1997 (3) KJL 271.
should be deemed to have been effected. These decisions of the Hon’ble Supreme Court have been recently followed by the Hon’ble Karnataka High Court\textsuperscript{252} in all the decisions reported after the year 2000 in which case the notice of dishonor was returned with an endorsement that the accused was not found on all the seven dates on which it was taken for service.

**Powers and liabilities of power of attorney holder**

It was held that a complaint presented by a power of attorney holder is valid.\textsuperscript{253} It has been held by Hon’ble Karnataka High Court that a power of attorney holder of the payee or holder in due course can present a complaint under sec.138 of the Act.\textsuperscript{254} It was also held that even if a cheque is given by a person as power of attorney holder of another or for the liability of another, he is still liable to be prosecuted.\textsuperscript{255}

**Can the directors of a company be prosecuted under section 138 for dishonor of cheque**

The question whether it is permissible to prosecute all the directors of the company for an offence under sec 138 of the NI Act was considered by the Hon’ble Karnataka High Court in the decision reported in 1997.\textsuperscript{256} It has been held that to launch a prosecution against the directors of the company, there must be specific allegation in the complaint as to the part played by them in the transaction. Further, it is held that if the cheque is issued by the managing director who represents the company, then the case can be proceeded only against the company and the managing director. It is also stated that the court has to find out as to who are all the persons in-charge of and responsible for the conduct of the business of the company or firm as the case may be.

It was held that if a company could not be prosecuted for any reason, (in that case winding up proceedings had been ordered) there was no bar to proceed against the directors, but, however, in such a case the complainant had to establish that the offence was actually committed by the company. It is also held in that case that in such a case, the accused can show that the company has not committed the offence though it is not

\textsuperscript{252} A. Sathyanarayana v. C. Nagaraja, ILR 2000 KAR 1255.
\textsuperscript{255} G.M.Gurappa Reedy v. M/s. A.S. Finance & Investments, ILR 1999 KAR 1655.
\textsuperscript{256} Nucor wires ltd., & others v. H.M.T. (International) ltd.), ILR 1997 KAR 3239.
made an accused and hence the accused who has been prosecuted is not liable to be punished. It is further held that prosecution of the company is not a *sine quo non* for prosecution of the other persons.  

In one of the case one of the directors of the company had issued cheques in question and the notice was issued calling upon the company to make good the amount for which the cheques had been issued. A contention was urged that the particular director alone could not have been prosecuted. The contention was overruled by the Hon’ble Karnataka High Court and it was observed as to what was the consequence of not impleading the other directors was not a thing which could be speculated upon, at the stage of issuing process.  

The object and the ingredients under the provisions of secs. 138 & 139 of the Act cannot be ignored. Proper and smooth functioning of all business transaction, particularly, cheques as instruments, primarily depends upon the integrity and the honesty of the party. In our country, in large number of commercial transaction, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transaction was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transaction within and outside the country suffers a serious set back.  

A magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the magistrate: provided that, when the complainant is made in writing, the magistrate need not examine the complainant and the witness  

A. If a public servant acting or purporting to act in the discharge of his official duties of a court has made the complaint or  

B. If the magistrate makes over the case for enquiry or trial to another magistrate under section 192.

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257 *Anil Hada v. Indian Acrylic Ltd.*, AIR 2000 SC 145.  
259 Section 200 Cr.P.C.
Provided further that if the magistrate makes over the case to another magistrate under section 192 after examining the complainant and the witnesses the latter magistrate need not re-examine them.

In this regard the Hon’ble High Court of Karnataka in a decision reported in M. Mohan v. State of Karnataka held that police are not empowered to act upon a private complaint filed for the offence punishable u/s.138 of the Negotiable Instrument Act, 2002.

**Representative/authorized representative**

In case of Medchi Chemicals and Pharma (P) Ltd. V. MMTC the Hon’ble Supreme Court made the observations that “section 142 of the Negotiable Instruments Act provides that a complaint under section 138 can be made by the payee or the holder in due course of the said cheque. The two complaints, in question, are by the appellant company who is the payee of the two cheques. The court has as far back as, in the case of Vishwa Mitter v. O.P.Poddar held that it is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a magistrate entitled to take cognizance.

**Power of attorney**

The Hon’ble Supreme Court held that a general or special power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party.

In the case of ‘Shankar Finance Investments v. State of Andhra Pradesh and others’ the appeal was filed against the order passed by the Hon’ble Andhra Pradesh High Court in a criminal petition holding that the complaint signed by a power of attorney holder was not maintainable. The payee of the cheque is ‘Shankar Finance & investments, a proprietary concern of Shri Atmakumari Sankara Rao, represented by its power of attorney holder of Shri Thamada Satyanarayana. The Hon’ble Supreme Court observed the requirements of sec. 142 of the act are that the complaint should be in

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260 ILR 1991 KAR 612.
261 ILR 1991 KAR 612.
262 AIR 2002 sc 182.
writing and the complaint should be made by the payee or holder in due course. The payee in this case is Shanker & Finance Investments. Once the complaint is in the name of the ‘payee’ and is in writing, the requirements of sec. 142 are fulfilled.

**Death of the complainant**

It was held in Reddappa’s case, that in a proceeding under section 138 of the act, the death of the complainant does not *ipso facto* terminate the criminal proceedings not necessary that legal heirs or legal representatives only can continue the proceedings. A fit and proper person can be permitted to prosecute the petition.\(^{266}\)

In case of *Ashwin Nanubhai Vyas v. State of Maharashtra and Ors.*,\(^{267}\) in which case the court was dealing with a case under section 495 of the Code of Criminal Procedure, 1898, which is corresponding to section 302 of the code. In that case, it was laid down that upon the death of the complainant, under the provisions of section 495 of the said code, mother of the complainant could be allowed to continue the prosecution. It was further laid down that she could make the application either herself or through a pleader.

**Death of the accused**

The legal heirs cannot be prosecuted under section 138. If at all any claim is against them by the complainant, he has proceed only under the civil law for recovery of the amount against the properties in the hands of the legal heirs.

**Account-** The word ‘account’ which has been mentioned in the opening words of section 138 of the Act only relates to the fund and not the cheque and the section only recognizes a facility of discharging a debt by issuing cheque. An account holder alone will be liable to utilize that facility, if the drawer issues a cheque from the cheque book which was issued to him by the bank on the strength of the account which he had opened then it can definitely be said that the drawer perpetrated an evil design by closing the account and issuing the cheque. The section takes care of all dishonest acts likely to be committed by drawer of the cheques as the main purpose of the section being in the acceptability to the cheque.\(^{268}\)

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\(^{266}\) S. Reddappa *v.* M. Vijaya, Criminal Revn. Petn. No. 96 of 1993  High Court of Karnataka 1996.

\(^{267}\) AIR 1967 SC 983.

\(^{268}\) Hashmikarit M. Sheth *v.* State of Gujarat, 2004 (2) OCR 497.
Any debt and liability- The words “any debt and liability” would undoubtedly include a cheque drawn by any person towards a legally enforceable debt or liability of another person. The explanation makes it very clear that the debt or liability towards which the cheque is issued should be a legally enforceable debt or liability. This would have reference to the nature of the debt or liability and not to the person against whom the debt or liability could be enforced.269

Right of accused- The right given to the accused to be heard on the question of sentence has a beneficial purpose. It enables the accused to lead evidence as to circumstances relevant to the appropriate sentence and help the Court in passing just sentence having, due regard to heriosness of the crime, the humanist principle of individualizing punishment to suit the person and his circumstances, the type of criminal before it but not the crime which shall figure prominently in shaping the sentence.270

Cheque issued for discharge of debt or liability- When the complainant has filed the complaint alleging that the accused had borrowed the amount aggregating to repay the same and the cheque was issued for discharge of his own debt, the complainant can not turn around and contend that the accused is to be held liable as the security for the debt. It is not open to the complainant to give up his own case and take advantage of the defense set forth. The right of an accused unnecessarily need not be enlarged but it is the Court’s duty to duly protect his right.271 Undoubtedly, the accused has a right to pay the money within 15 days from the date of service of notice and only when he fails to pay, it is for the complainant to file case under section 138 of the Negotiable Instrument Act,202. Having being the position and in the complaint itself having not been mentioned that the notice has been served, on the assertions made in paragraph 8, the complaint itself is not maintainable.272

Personal appearance in the court- The petitioner is representated by a lawyer before the trial court whose ‘vakalatnama’ remain on record. He claims to have full instructions in the matter and submitted that personal attendance of the petitioner is not required for disposal of the application for recalling of summonsing order. Under the

270 Dilip Kulkarni v. Bahadurmal Choudhary, 2005 (2) OCR 382.
272 M/s Shakti Travel & Travel & Tours v. State of Bihar, 2002 OCR 258.
facts and circumstances of the case, the bailable warrant against the petitioner are liable to stayed. Trial Court was directed to dispose of the application of the petitioner without insisting on his personal presence.273


The Act allows banks and financial institutions to auction properties (residential and commercial) when borrowers fail to repay their loans. It enables lenders to reduce their non-performing assets (NPAs) by adopting measures for recovery or reconstruction. If a borrower defaults on repayment of his/her home loan for six months at stretch, banks/hfcs give him/her a 60-day period to regularise the repayment, that is, start repaying. On failure to do so, lenders declare the loan an NPA and auction it to recover the debt. It depends on the market value of the property. Professional valuers determine the property value based on which banks fix a reserve or minimum bid price. The valuations tend to be on the conservative side as it is a distress sale. If the price fetched exceeds the lender’s dues, the excess amount is given to the borrower. Lenders advertise such sales in at least one English and one regional newspaper, 30 days prior to the auction. Interested bidders must submit their bids in a sealed envelope to the lender. Along with the bid, they also deposit a certain percentage of the reserve price as earnest money. This amount differs across lenders and is refundable if one withdraws from the process or does not win. On the auction day, the sealed envelopes are opened in front of the bidders and the highest bid is announced. Bidders may or may not get another chance to revise their bids. If he win he has to pay up to 25 per cent of his bid amount to confirm the purchase. The lender may allow you to pay the remaining in 10-15 days. One can apply for a loan for the same. Typically, these properties are 20-30 per cent cheaper than the market price. Also, since the lender had previously lent against the property, there is clarity on property title. However, these properties are sold on an ‘as-is’ basis. There may be pending dues or even litigations. These liabilities, unless checked carefully, can get transferred automatically.

Background: With an aim to provide a structured platform to the banking and financial sector for managing its mounting NPA stocks and keep pace with international financial

institutions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 was put in place to allow banks and FIs to take possession of securities and sell them. As stated in the Act, 2002 it has “enabled banks and FIs to realise long-term assets, manage problems of liquidity, asset-liability mismatches and improve recovery by taking possession of securities, sell them and reduce non performing assets (NPAs) by adopting measures for recovery or reconstruction.” Prior to the Act, the legal framework relating to commercial transactions lagged behind the rapidly changing commercial practices and financial sector reforms, which led to slow recovery of defaulting loans and mounting levels of NPAs of banks and financial institutions. The SARFAESI Act has been largely perceived as facilitating asset recovery and reconstruction. Since Independence, the Government has adopted several ad-hoc measures to tackle sickness among financial institutions, foremost through nationalisation of banks and relief measures. Over the course of time, the Government has put in place various mechanisms for cleaning the banking system from the menace of NPAs and revival of a healthy financial and banking sector. Some of the notable measures in this regard include:

a. **Sick Industrial Companies (Special Provisions) Act, 1985 or SICA:** To examine and recommend remedy for high industrial sickness in the eighties, the Tiwari Committee was set up by the Government of India. It was to suggest a comprehensive legislation to deal with the problem of industrial sickness. The committee suggested the need for special legislation for speedy revival of sick units or winding up of unviable ones and setting up of quasi-judicial body namely; Board for Industrial and Financial Reconstruction (BIFR) and The Appellate Authority for Industrial and Financial Reconstruction (AAIRFR) and their benches. Thus in 1985, the SICA came into existence and BIFR started functioning from 1987. The objective of SICA was to proactively determine or identify the sick/potentially sick companies and enforcement of preventive, remedial or other measures with respect to these companies. Measures adopted included legal, financial restructuring as well as management overhaul. However, an assessment process was cumbersome and unmanageable to some extent. The system was not favorable for the banking sector as it provided a sort of shield to the defaulting companies.
b. Recoveries of Debts due to Banks and Financial Institutions (RDDBFI) Act, 1993: The procedure for recovery of debts to the banks and financial institutions resulted in significant portions of funds getting locked. The need for a speedy recovery mechanism through which dues to the banks and financial institutions could be realised was felt. Different committees set up to look into this, suggested formation of Special Tribunals for recovery of overdue debts of the banks and financial institutions by following a summary procedure. For the effective and speedy recovery of bad loans, the RDDBFI Act was passed suggesting a special Debt Recovery Tribunal to be set up for the recovery of NPAs. However, this Act also could not speed up the recovery of bad loans, and the stringent requirements rendered the attachment and foreclosure of the assets given as security for the loan as ineffective.

c. Corporate Debt Restructuring (CDR) System: Companies sometimes are found to be in financial troubles for factors beyond their control and also due to certain internal reasons. For the revival of such businesses, as well as, for the security of the funds lent by the banks and FIs, timely support through restructuring in genuine cases was required. With this view, a CDR system was established with the objective to ensure timely and transparent restructuring of corporate debts of viable entities facing problems, which are outside the purview of BIFR, DRT and other legal proceedings. In particular, the system aimed at preserving viable corporate/businesses that are impacted by certain internal and external factors, thus minimizing the losses to the creditors and other stakeholders. The system has addressed the problems due to the rise of NPAs. Although CDR has been effective, it largely takes care of the interest of bankers and ignores (to some extent) the interests of borrower’s stakeholders. The secured lenders like banks and FIs, through CDR merely, address the financial structure of the company by deferring the loan repayment and aligning interest rate payments to suit company’s cash flows. The banks do not go for a one time large write-off of loans in initial stages.

d. SARFAESI ACT 2002: By the late 1990s, rising level of Bank NPAs raised concerns and Committees like the Narasimham Committee II and Andhyarujina Committee which were constituted for examining banking sector reforms considered the need for changes in the legal system to address the issue of NPAs. These committees suggested a new legislation for securitisation, and empowering banks and
FIs to take possession of the securities and sell them without the intervention of the
court and without allowing borrowers to take shelter under provisions of SICA/BIFR.
Acting on these suggestions, the SARFAESI Act, was passed in 2002 to legalize
securitization and reconstruction of financial assets and enforcement of security interest.
The Act envisaged the formation of asset reconstruction companies (ARCs)/
Securitization Companies (SCs).

**Provisions of the SARFAESI Act** - The Act has made provisions for registration and
regulation of securitisation companies or reconstruction companies by the Reserve
Bank of India (RBI), facilitate securitization of financial assets of banks, empower
SCs/ARCs to raise funds by issuing security receipts to qualified institutional buyers
(QIBs), empowering banks and FIs to take possession of securities given for financial
assistance and sell or lease the same to take over management in the event of default.
The Act provides three alternative methods for recovery of NPAs, namely:

**a. Securitisation:** It means issue of security by raising of receipts or funds by
SCs/ARCs. A securitisation company or reconstruction company may raise funds from
the QIBs by forming schemes for acquiring financial assets. The SC/ARC has to keep
and maintain separate and distinct accounts in respect of each such scheme for every
financial asset acquired, out of investments made by a QIB and ensure that realizations
of such financial asset is held and applied towards redemption of investments and
payment of returns assured on such investments under the relevant scheme.

**b. Asset Reconstruction:** The SCs/ARCs for the purpose of asset reconstruction
should provide for any one or more of the following measures:

i. the proper management of the business of the borrower, by change in, or take
   over of, the management of the business of the borrower.

ii. the sale or lease of a part or whole of the business of the borrower.

iii. rescheduling of payment of debts payable by the borrower.

iv. enforcement of security interest in accordance with the provisions of this Act.

v. settlement of dues payable by the borrower.

vi. taking possession of secured assets in accordance with the provisions of this
    Act.

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274 Securitization and Assets Reconstruction Companies.
c. Exemption from registration of security receipt: The Act also provides, similar to the Registration Act, 1908, for enforcement of security without Court intervention; (a) any security receipt issued by the SC or ARC,275 as the case may be, under section 7 of the Act, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property except in so far as it entitles the holder of the security receipt to an undivided interest afforded by a registered instrument; or (b) any transfer of security receipts, shall not require compulsory registration.

d. SARFAESI Act, 2002 that no Civil Court can interfere with SARFAESI proceedings and even the High Court exercises caution in interfering SARFAESI proceedings though there can never be a complete bar on the jurisdiction of High Court under section 226 and 227 of Constitution of India with regard to the proceedings initiated by Public Sector Banks/Financial Institution. However, in view of the perceived failure of the Debt Recovery Tribunals in providing speedy and effective relief, High Courts can entertain challenge to the SARFAESI proceedings in appropriate cases as otherwise; there will not be any relief to the aggrieved even when the Bank proceeds illegally and unreasonably. Though, Civil Court’s jurisdiction is not completely barred in respect of SARFAESI proceedings in view of the scope established with Mardia Chemicals Case276 and other subsequent cases, it is highly difficult to convince any Civil Court and get the relief against the Bank. Again, aggrieved are often the part of Civil Courts in dealing with SARFAESI issues, the technicalities, the expenses and the delay involved.afraid to approach the Civil Courts in view of the lack of expertise.

As such, though section 34 of the SARFAESI Act, 2002 specifically deals with the jurisdiction of Civil Court, it is implied that no court or the forum can interfere with the proceedings initiated by the Bank under SARFAESI Act, 2002. This is established even when the liquidation proceedings are pending against a Company and the Bank will be proceeding against the ‘Secured Assets’ even when the liquidation proceedings are taking place against the Company.

275 Assets Reconstruction Company and Securitization Company.

Under SARFAESI act 2002, bank can sell property by private treaty if the bank wanted to sell the property by borrower consent then the powers under the SARFAESI Act 2002 diluted because the borrower will not give consent to such sale as his property forcefully possessed by the bank.

Under the SARFAESI Act 2002 the Rule 8(5) (A to D) are provided for the sale of immovable property. In terms of the Supreme Court’s various decisions, a bank or for that matter a financial institution should act fairly. Only if the mortgagor gives consent, the bank can go in for sale by private treaty. Otherwise, fairness requires that the bank advertises by public auction the sale of the property. If it does not get a good offer in such process, it can go in for sale by private treaty. In such an eventuality, it is expected that the bank puts the mortgagor on notice that the bank has received a better offer by private sale, and if the borrower is able to bring a serious offer higher than that, within a time stipulated, the bank will sell the property to the better offerer. Otherwise, the bank will go ahead with the offer it has received. Thus fairness which is expected of a bank will be got established. The rules are only enabling provisions. That does not mean the bank can act arbitrarily without taking into confidence the mortgagor. In a meeting called by the Central Vigilance Commission (CVC) in May 2010, and attended by CMDs of some banks, the Indian Banks Association (IBA) and CBI officials expressed the opinion that “some ARCs were found to be directly helping the defaulter in getting back the properties by paying very low amounts to banks and thereafter mark up and sell the property back to the borrower.”

It is well-known that sale of land involves considerable portion of consideration being in paid by way of unaccounted money. Yet another reason for the luke-warm relationship with ARCs is that banks which are mostly working capital lenders do not always have a charge on fixed assets and the ARCs have not been enthusiastic about selling off current assets. What is more, the banks have found that when they issue notices to borrowers under SARFAESI Act, the response is much better. The amount of recoveries done under the Act has been significantly higher comparatively speaking than under BIFR, and faster. The one major problem the banks experience in pursuing SARFAESI permitted action is that an aggrieved party, generally the borrower, can make an application to a DRT and get a stay order on sale which is not difficult to
obtain. Nevertheless, the banks have felt use of SARFAESI has been more effective than other legal provisions. The bank officials feel that by strengthening the recovery department, they can show greater success than by handing over NPAs to ARCs. All said and done, the loyal bank officials definitely have greater commitment to the health of their bank than the ARCs. The imperceptible trust deficit between the banks and the ARCs could be inferred from the fact that the State Bank of India (SBI) referred just six cases with claims of Rs.40 crore to an ARC during 2010-11 though its bad loans were about Rs40,000 crore.277

Officials of various banks in the recovery departments state that the ARCs, with their high profile directors, have become a strong lobby to advocate larger flow of business to them from the banks. Coincidentally perhaps, in May 2012, the Ministry of Finance (Department of Financial Services) directed all public sector banks to designate one or more ARCs as their “authorized officer to take up recovery of loss assets on behalf of banks on commission basis.

It would have been appropriate, say, for the RBI to have studied/ audited the financials and methods of operations of the ARCs and the reasons for the existing trust deficit between banks and ARCs before the Ministry issued this direction. Besides, the definition of authorized officer given in the SARFAESI Act does not include ARC, though it can be an agent. The distinction between the two seems to have been made purposefully in the Act and therefore it seems a bit odd that the Ministry directed the banks to designate the ARCs as authorized person instead of as agents. The role of an agent is governed by Contract Act; banks being the principal become liable for acts of omission and commission of the agent as such. There is no reason for banks to undertake such an onerous responsibility. It is difficult to escape the feeling that ARCs are perpetuating their existence with some help from the Finance Ministry.

Even as the Government was planning to introduce a bill in 2001-02 to assign the BIFR responsibilities to the National Company Law Tribunal, the RBI took a proactive measure of introducing in August 2001 “Corporate Debt Restructuring (CDR)” scheme. The objectives are, “to ensure timely and transparent mechanism for restructuring of

277 The Economic Times, 13 March 2012.
corporate debts of viable entities through an orderly and coordinated restructuring programme outside the purview of BIFR, DRT and other legal proceedings.”

CDR is a well known mechanism to tackle incipient sickness/possible delinquency of a loan and restore viability of operations adversely affected by external and internal factors in the least disruptive manner by minimizing the losses to the creditors, the concerned corporate and other stakeholders. In India this is applicable to corporates with loan exposure of Rs.10 crore or more to the banks.

**Banks Misusing Securitization Act**

The global economic meltdown began when housing financiers in the USA started indiscriminately cracking down on borrowers. This was later on named the Housing Tsunami. HDFC, the largest private housing financiers in India advertising that their Cochin office had taken over some properties for non-repayment. The majority of the cases had total outstanding balances of less than Rs. 1.75 lakhs, to read from the advertisements. Considering that even a Cent of housing property in Ernakulam district is worth more than Rs. 2 lakhs, this seemed to be over enthusiasm for some reason on the part of the lenders.

It was seen that these loans had all been taken around 2002-2003 when the interest rates were around 7 or 8%. Within a few months however, rates began to climb. HDFC charges 12.5%. The extra interest on each defaulted EMI is 18% additionally. The pathetic situation of the non-wilfully defaulting borrower can be imagined. The initial rosy interest rates offered are called Teasers; to tease the innocent public with. In the current scenario, the borrower would have to again pay at least Rs. 5000/- extra per lakh for each year of the loan, to get his title deeds back in the end even if agreed installments are regularly remitted. This is because interest has been raised to 1 ½ times arbitrarily after getting the borrower to sign for the loan at 7 to 8% interest. If it be a twenty year loan, he ends up paying Rs. 1 lakh additionally for each Rs. 1 lakh borrowed, over and above the originally agreed repayment. If three installments are defaulted, the loan becomes an NPA and within 6 months of continued default, HDFC moves in under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI], no questions asked. The RBI has laid down that a defaulting borrower should be advised in advance of the lenders’
intention of deeming him a wilful defaulter; his objections to it should be called for and heard. This is not done by the Company or for that matter, by most banks. It might be that the default is due to temporary issues like illness or loss of job. What the non-wilful defaulter receives out of the blue at the end of six months of default is a Notice telling him that his property would be taken over if he does not remit the entire dues and costs within 60 days.

Till recently, the borrower had to first remit 75% of the dues if his petition against repossessing was to be even admitted by Courts. Even now, the waiving or fixing of such remittance is left to the discretion of the Judge. While the Act requires the Notice to be issued only by an authorised officer of the financier, HDFC gets a top lawyer to issue it. The charges of Rs. 5000/- for that small notice is immediately loaded into the loan dues. At the end of the 60 day period, the Company would make a request to the Collector. The lower officials would then be properly met by the Recovery agents of the Company and assistance of the Revenue and Police officials are immediately made available for possession of the house by the lender.

This procedure at the Collectorate is merely anti-people. Housing field or elsewhere, it is known that private banks and financiers falsify their accounts. Anyone that has been taken to Court by the new generation banks about a Personal Loan knows it. Huge hidden and coercive charges are loaded into the final dues position. The amount demanded in recovery is invariably very much more than is legally eligible. Nevertheless, at the Collectorate, no questions are asked and the Police and Revenue staff is enthusiastically released to the Recovery agents.

Ideally, the Collector should make independent enquiries of each case, call up the defaulter to hear him and only then move to the final catastrophe. It is from dearly held dwellings that the eviction based only on the statements of the often fraudulent lenders is to be done! And no Keralite would ever default on a housing or gold ornament loan unless it is his suicidal only option. No middle class borrower can fight the financier in Court because of the financial might of latter to get the costliest lawyers.

RBI has instructed that if the dues are Rs. 1 lakh or less, coercive measures of recovery should not be used. Such dues are to be only settled on arbitration. To overcome this difficulty, the Company has ways of bringing the balance to above one lakh. The
intended possession of the property is advertised in all the editions of the biggest newspaper of the Company’s choice. Advertising costs come to around Rs. 50000/-. Each demand call by the Recovery officials is charged to the borrower at a minimum of Rs. 750/- per visit. Expenses of recovery procedure at the government official levels are at least Rs. 25000/- and may go up to any amount. Thus even if the loan dues is only Rs. 20000/-, the amount claimed for recovery is easily boosted to above Rs.1 lakh. There is no mechanism anywhere to check costs of such recovery procedure. Neither government nor the law comes to the poor innocent defaulter’s aid.

It might be that the Company’s Recovery officers who engage the Recovery agents etc have vested interests. The same group of buyers purchase all the property put to auction by the Company, in different names. They advise the borrower to sell the property and offer to find buyers.

At least three fourths of all the houses built in Kerala during the past ten years, especially by the middle classes and NRIs, are mortgaged to housing finance companies and new generation banks. The lender has rights to be repaid. At least in the housing sector however, a humane approach to recovery is not a sin. Lenders should be made to hear the borrowers as stipulated by RBI, before treating them as wilful defaulters. As said in the RBI’s handbook on NPAs, one is a wilful defaulter only if he has funds and yet, does not remit. The SARFAESI is not applicable to agriculture debts, dues below Rs One lakh; and to non-wilful defaulters as per the Act. This is so even for corporations with dues of Rs. 50 crores or above. An NRI or employee that loses a job or falls ill does not come under this ‘WILFUL DEFAULTER’ category. The bankers and financiers do not however, take this into account.

The procedure for treating such borrowers has also been stipulated by RBI. The lender should only re-structure such loans allowing the borrower more time or lesser installment amounts. This is at least thought of by our lenders only in the case of very big borrowers to help them. And in the case of Public Sector Banks (PSBs), a final assistance is always done to big borrowers by settling for a much lower amount than the dues. Often, the money thus given runs to crores. But not so, to middle class house owners with two or three lakh debts, trying to cling on to their only tangible asset!
Collectorates should hear the defaulter before acquiescing to the arbitrary requests of lenders to help them take over houses and evict the owners. They should if necessary, even intervene between the two parties so that emotional and other disasters do not occur. Any popular administration should do so. Unfortunately, the media that has to consider advertisement revenues from big lenders often fail to highlight this situation.

**Procedure**

- Stage I: Demand Notice
- Stage II: Taking possession
- Stage III: Sale of Security interest
- Stage IV: Issuance of sale certificate

**Stage - Demand Notice**

Demand notice can be issued by the secured creditor or authorized officer or through his counsel. It may be in English or in vernacular language. On refusal to receive it can be affixed on the outer door of building and publish in two leading newspaper one in vernacular language.

For example if a sum of Rs.5 Lakhs is given for housing finance on 01.01.2007 to purchase house and another Rs.2 Lakhs is given as additional loan on 15.09.2007 and earlier mortgage is extended. Then only one notice has to be issued. Agent has executed the security documents on behalf of the principal who is the debtor. Notice has to be issued only to the borrower. Housing Loan is availed by a doctor employed in Government hospital embracing Hinduism. During the subsistence of loan, he died in an motor accident. He is survived by his parents, wife, 6 months baby and a sister and brother. Whether notice has to be issued to all? The answer will be that notice has to be issued to I Class legal heirs who are all entitled to inherit as per Hindu Law i.e. to the mother and wife. Notice issued to borrower to his latest correct address available as per records. But it is returned unserved as “left”. In this connection, the Hon;ble Supermen Court in case of *M/s Madan & Co. v. Wazir Jaivir Chand* 278 has held as under:

“As against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the

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278 AIR 1989 SC 630.
addressee’s own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone or to deliver them to some other person authorized by him. In this situation, Court has to chose the more reasonable, effective, equitable and practical interpretation and that would be to read the words “served” as “sent by post”, correctly and properly addressed to the tenant, and the word “receipt” as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant”.

The secured creditors are outside the purview of insolvency proceedings. Lender can issue notice under section 13(2) to the borrower and no need to send the copy to official liquidator.

**Service of 13(2) notice**

1. Registered post with Acknowledgment due
2. Speed post
3. Courier
4. Certificate of posting
5. Fax message
6. E-mail service

Copy of the notice, receipt for dispatch, acknowledgement for having served should be preserved and retained safe till account is closed. By affixing a copy of the demand notice on the outer door of the secured interest and to publish the notice in two widely circulated leading regional newspapers and out of two newspapers one in vernacular language. The contents of the notice also to be in the local language. The 7 days time for replying to the objection raised by the mortgagor under See 13(3-A) is not mandatory.

**Taking Possession**

a. Obtain encumbrance certificate of the mortgaged properties.

b. Obtain valuation certificate from “approved valuers.”
c. Obtain search report from ROC if the secured asset pertains to a company.
d. Obtain particulars regarding the persons possessing and enjoying the secured assets. The names of the tenants, subsequent transferees or anybody else possessing and enjoying the property other than the mortgagor should be ascertained.
e. Ascertain the market value of the secured assets to be dealt with by marking local investigation and discreet enquiry about the same and to apprise the Central Office about the same.
f. Ascertain about the statutory liabilities payable by the borrowers/guarantors.
g. Ascertain about the arrears of salary/wages payable to workmen of a company which the bank purpose to take-over.
h. Ascertain about the possibility to dispose of the secured asset to be possessed with the consent of the borrower/guarantor as the case may be.
i. Ascertain about the profitability of industry which the bank proposes to take over.
j. Ascertain about the marketability of the secured assets to be possessed and find out prospective purchasers for the same and to apprise the Central office about the same.
k. Ensure that the secured assets both movables and immovables are duly insure against ALL risks till disposal of the same.
l. Ascertain about the availability of hypothecation (Movables) at the borrower’s business premises. If the hypothecation is learnt to have been shifted to some other place other than the place already disclosed, the address of the new place and the availability of hypothecation in terms of the hypothecation agreement entered into by the borrower with the bank should be ascertained.

Procedure for taking Possession

1. Symbolic possession
2. Actual possession
It is the fact that the dichotomy between symbolic and physical possession doesn’t find place in SARFAESI, the authorized officer under Rule has greater powers than court receiver as security interest is already created and such interest created should be protected. The authorized officer has to take a decision whether he can take actual possession at the 1st instance. He has to find out whether the secured interest is in possession of the mortgagor or tenancy is created. If tenancy is created whether before or after mortgage. On taking actual possession whether the property could be preserved. If on request possession is not delivered and apprehends resistance then he can seek assistance by filing an application before District Collector or Chief Judicial Magistrate. Otherwise he can prefer to take symbolic possession.

**Step I:** Required to issue possession notice in the form as near to as possible prescribed in appendix IV of the rules.

**Step II:** Deliver a copy to the borrower.

**Step III:** Affix the notice on the outer door or some conspicuous place of the property and publish.

**Step IV:** Publish in two leading regional newspapers one in vernacular language within days from the date of taken possession

**Step V:** Display a board in the property disclosing that the property is in possession of the secured creditor.

**Step VI:** If actual possession is taken, take care of the property as the owner of ordinary prudence would care.

**Step VII:** Preserve the property till sold or account is settled.

**Stage VIII:** Sale of security Interest:

**i) Valuation**

After getting valuation done by an approved valuer, authorized officer has to fix the reserve price in consultation with the controlling authority. He may take steps to sell in whole or any part of the property by the under mentioned mode.

**ii) Mode of sale of property**

   (a) By obtaining quotation from the person dealing with the similar secured asset or interested in buying such asset.
(b) By inviting tenders from the public.

(c) By holding public auction.

(d) By Private treaty after getting the terms settled between the parties in writing i.e. to say with the full consent of mortgagor.

iii) Steps to be followed

1. To get valuation from approved valuer in consultation with secured creditor,

2. Shall serve sale notice to the borrower as per Sub Rule 5 of Rule 8.

3. Shall cause public notice in two leading newspaper one in vernacular language having sufficient circulation in that locality by giving all the details
   i. Description of immovable property
   ii. Encumbrance within the knowledge of the mortgagee
   iii. Secured debts for recovery of which property is to be sold.
   iv. Reserve price
   v. Time and place of auction
   vi. Earnest money to be deposited.
   vii. Other details material for auction purchaser to know in order to judge the nature and value of the property.

4. To affix a copy of the sale notice on the conspicuous part of the property and if necessary to put on the website.

5. Sale shall be conducted on the expiry of 30 days from the date of publication in newspaper or sale notice served on the borrower.

6. Sale shall be confirmed by the authorized officer who has offered highest price subject to the following viz.,
   i. Approval/confirmation by the secured creditor.
   ii. Offer is not less than the reserve price.

7. Authorized officer shall obtain a price higher than the reserve price with the consent of the borrower and secured creditor.

8. The purchaser has to deposit immediately 25% of the sale amount to the authorized officer and in such default the property is sold again.
9. The balance 75% of the amount shall be paid to the authorized officer on or before 15th day of confirmation sale or As such extended period by the authorized officer agreed upon in writing between auction purchaser and secured creditor.

10. In default of the sale amount deposit amount shall be forfeited.

11. The property shall be resold.

12. On confirmation of the sale by secured creditor in terms of having received the entire payment he shall issue a certificate of sale.

**Stage IV-Issuance of Sale Certificate**

The mortgagor has got right to redeem the property, if it tenders the dues, cost, charges and expenses before the date fixed for sale. On confirmation of sale by the secured creditor and having received the payment, authorized officer shall deliver certificate of sale.