

BUSINESS LAW
(DBBL31)
(BACHELOR OF BUSINESS
ADMINISTRATION)



ACHARYA NAGARJUNA UNIVERSITY

CENTRE FOR DISTANCE EDUCATION

NAGARJUNA NAGAR,

GUNTUR

ANDHRA PRADESH

Lesson - 1

INDUSTRIAL DISPUTES ACT – 1947

1.0 OBJECTIVES :

On the completion of this lesson, we should be able to understand :

- Scope and objectives, Definitions.
- Main features of the Act- Scope of the Act
- History of the Industrial disputes.
- Definitions of appropriate government Average pay, award, industry, Industrial dispute

STRUCTURE :

- 1.1 Introduction
- 1.2 History of the Law of Industrial Disputes
- 1.3 Features of Act (objectives)
- 1.4 Definitions
- 1.5 Provisions of Government
- 1.6 Summary
- 1.7 Technical Terms
- 1.8 Self – Assessment Questions
- 1.9 Reference Books.

1.1 INTRODUCTION :

Economic progress of a country is vitally found up with industrial peace. The National (Commission on Labour observed that the concept of “Industrial Peace”, is some what negative and restrictive . It emphasises absence of strife and struggle. The Commission, therefore, preferred to describe approach in quest of Industrial harmony’ to ‘Industrial peace’.

The Trade Disputes Act, 1929 emerged with two objects,

1. To provide compulsory adjudication of industrial disputes.
2. To prohibit strikes or lock - outs in public utility concerns. This Industrial Disputes Act, 1947 was passed with a view to removing certain defects found in the working to Trade Disputes Act. This Act extends to the whole of India with effect from 1 -4-

1947. The Act has been amended from time to time. The main objective of this Act are:

- (i) To secure industrial peace and
- (ii) To ameliorate the condition of workmen in industry.

1.2 HISTORY OF THE LAW OF INDUSTRIAL DISPUTES :

The first enactment dealing with the settlement of industrial disputes was the Employers' and Workmen's Disputes Act, 1860. This Act weighed much against the workers and was therefore replaced by the Trade Disputes Act, 1929. The Act of 1929 contained special provisions regarding strikes in public utility services and general strikes affecting the community as a whole. The main purpose of the Act, however, was to provide a conciliation machinery to bring about peaceful settlement of industrial disputes. The Whitely Commission made in this regard the perceptive observation that the attempt to deal with unrest must begin rather with the creation on an atmosphere unfavourable to disputes than with machinery for their settlement.

The next stage in the development of industrial law in this country was taken under the stress of emergency caused by the Second World War. Rule 81-A of the Defence of India rules was intended to provide speedy remedies for industrial disputes by referring them compulsorily to conciliation or adjudication, by making the awards legally binding on the parties and by prohibiting strikes or lock - outs during the pendency of conciliation or a adjudication proceedings and for two months thereafter, This rule also put a blanket ban on strikes which did not arise out of genuine trade disputes.

With the termination of the Second World War, Rule 81-A was about to lapse on 1st October, 1946, but it was kept alive by issuing an ordinance in the exercise of the, Governments Emergency Powers. Then followed the Industrial Disputes Act, 1947. The provisions of this Act, as amended from time to time, have furnished the basis on which industrial Jurisprudence in this country is founded. This Act was passed with on view to removing certain short comings found in the working of the Trade Disputes Act of 1929.

The Act has been amended from time to time. The latest amendment to the act was made in August, 1984.

1.3 MAIN FEATURES OF THE ACT :

- 1 The act extends to the whole of India including the state of Jammu and Kashmir.
- 2 It is applicable to industries and certain categories of industrial workers. It is interesting to observe that whereas other labour laws are restricted in their application to factories or establishment employing a certain minimum number of employees, this Act does not impose any such restrictions.
3. It lays down comprehensive machinery for the prevention and settlement of industrial disputes.
4. The main emphasis of the Act is on compulsory adjudication besides conciliation and voluntary arbitration of industrial disputes.
5. The Act empowers the government to take a reference of the dispute to an appropriate authority viz. Labour Court, Industrial Tribunal, and National Tribunal, depending upon

the nature of the disputes besides making a reference by the government on the request of the parties.

6. An award shall be binding on both the parties to the disputes for the specified period not exceeding one year. It shall be normally enforced by the government.
7. The right to strike by the workers and lock-out by the employers has been subjected to restrictions as laid down in the act and such rights are not absolute rights.
8. A model grievance redressal procedure has been incorporated in the Act.
9. Certain practices on the part of employers and workmen have been declared as unfair labour practices. Provisions has been made for penalties for those indulging in such practices.

1.4 DEFINITIONS:

1. Appropriate Government [Sec.2 (a)] : The Central Government as well as the State Government are vested with various powers and the duties in relation to matters dealt with in this Act. In relation to some industrial disputes, the Central Government and in relation to some others, the State Government concerned are the appropriate government to deal with such disputes.

The Central Government is the appropriate government in respect of industrial disputes arising in the following industries:-

1. Any industry carried on by or under the authority of the central government.
2. Any industry carried on by a railway company;
3. Such controlled industry as may be specified by the central government.
4. Dock Labour Board.
5. The Industrial Finance Corporation of India Ltd;
6. The Employees State Insurance Corporation;
7. The Indian Airlines and Air India Corporation;
8. The Life Insurance Corporation of India;
9. Oil and Natural Gas Corporation Limited;
10. Central Warehousing Corporation ;
11. The Unit Trust of India ;
12. Food Corporation of India ;
13. Airport Authority of India;
14. A Banking Company ;
15. An Insurance Company ;
16. A Major Port, etc;

In relation to any industrial dispute other than those specified above, the appropriate government would be the State Government. The general rule is that an industrial dispute arising between an employer and his employees, would be referred for adjudication by the state government except in the cases mentioned above.

2. Average Pay [sec.2 (aaa)] : This clause lays down the manner of calculating the average pay for the purpose of payment of compensation at the time of retrenchment of a workman. The determination of average pay is to be made in a different way in the case of

- ii) monthly paid workmen,
- iii) Weekly paid workmen and
- iv) Daily paid workmen.

The average pay is calculated in the following manner of the different categories of workers.

- i) In the case of monthly paid workmen, the average of the wages paid for three complete calendar months.
- ii) In the case of monthly paid workmen, the average of the wages paid for four complete weeks.
- iii) In the case of daily paid workmen, the average of the wages paid for twelve full working days.

The period of three months, four weeks or twelve days as specified above must precede the day on which the average pay becomes payable. In case a workman has not worked for the period specified above, the average pay shall be calculated as the average of wages paid to the workman for the period he actually worked.

3. Award [Section 2 (b)] : A award is –

- a) an interim or final determination.
- b) of an industrial dispute or any question relating there to ; and
- c) by a Labour Court, Industrial Tribunal, National Industrial Tribunal or an Arbitrator under section 10-A

Interim award means a provisional or temporary relief. Determination implies decision one way or the other. An order of Labour Court, Industrial Tribunal or National Industrial Tribunal granting or refusing to grant any of the relief's which have been asked for would fall within the term 'award'.

4. Industry [Section 2(i)]: The definition of 'Industry' has been the subject of much discussion from time to time culminating ultimately in Bangalore Water Supply and Sewerage Board Vs Rajappa. The judgment of the Supreme Court in this case paved the ground for amending the definition of industry. The Industrial Disputes Act, 1947, was amended in 1982 and the new definition was incorporated. It means any systematic activity carried on by co - operation between an employer and his workmen whether such workmen are employed by such employer directly or by or through any agency including a contractor for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely

spiritual or religions in nature), whether or not -

- i) any capital has been invested for the purpose of carrying on such activity or
- ii) such activity is carried on with a motive to make any gain or profit, and includes-
 - a) any activity of the Dock Labour Board established under ^Section 5A of the Dock Workers (Regulation of Employment) Act, 1948.
 - b) any activity relating to the promotion of sales or business or both carried on by an establishment, but does not include.
 - 1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing processions of this clause) and such other activity is the predominant one; or
 - 2) hospitals or dispensaries ; or
 - 3) Educational, Scientific, research or training institutions, or
 - 4) Institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or
 - 5) khadi or village industries ; or
 - 6) any domestic service, etc.

5. Industrial Dispute [Section 2 (k)] : It means any dispute or difference between employers and employees, between employer and workmen or between workmen and workmen which is connected with employment or non -employment or the terms of employment or with the conditions of labour of any person.

The definition of industrial disputes given above can be divided into the following parts :

- 1) There must be some difference or dispute.
- 2) The difference or dispute must be between -
 - a) employers and employees ; or
 - b) employers and workmen ; or
 - c) Workmen and Workmen.
- 3) The dispute should be connected with -
 - a)The employment or non - employment; or
 - b)The terms of employment; or
 - c)The conditions of labours of each person.

4) The dispute should relate to an ' Industry ' as defined in section 2 (i)

The industrial disputes may be -

- (I) Individual dispute ; or
- (II) Collective disputes.

I) Individual Disputes : Where the dispute or difference between work men and his employer arise out of his discharge, dismissal, retrenchment or termination by the employer shall be deemed to be an industrial dispute even if no other workmen nor any union of workmen is a party to the dispute.

II) Collective Disputes : All Collective disputes are industrial disputes. They are as follows :

- 1) Wages, bonus, profit-sharing, gratuity, compensatory or other allowance or
- 2) Hours of work, leave with wages, holidays or
- 3) Rules of discipline, retrenchment of workmen, relionatisation, closure of establishment.

Employer's failure to keep his verbal assurance and claim for compensation for loss of business or not held to be industrial disputes.

1.5 PROVISIONS OF GOVERNMENT :

one of the main objective of the Industrial Dispute Act is to secure industrial peace by preventing industrial dispute. The act provides an elaborate and effection machinery for investigating and setting industrial disputes. The following are various authorities and provisions of the Act.

- a. Works Committee.
- b. Conciliation officers.
- c. Board of Conciliation
- d. Courts of Enquiry
- e. Labour Courts.
- f. Industrial Tribunals.
- g. National Tribunals.

Section 10 – (A) the act makes provisions for voluntary reference of disputes to arbitration. A part from the above, provision has also been made for the constitution of a Grievance Settlement Authority.

The detail description would be learn in forthing lessons.

1.6 SUMMARY :

The economic progress of a country is vitally bound up with industrial peace. The National

commission on Labour observed that the concept of 'Industrial Peace' is somewhat negative and restrictive. It emphasises absence of strife and struggle. The commission, therefore, preferred to describe its approach in quest of industrial harmony to industrial peace.

The Industrial Disputes Act lays down comprehensive machinery for the prevention and settlement of industrial disputes. The main emphasis of the act is on compulsory adjudication besides conciliation and voluntary arbitration of industrial disputes. And therefore, certain practices on the part of employers and workmen have been declared as unfair labour practices. Provisions have been made for penalties for those indulging in such practices.

1.7 TECHNICAL TERMS :

- Conciliation = Make less hostile or angry
Industrial = A strike or similar protest.
Dispute = Arge, debate, disagreements.

1.8 SELF – ASSESSMENT QUESTIONS :

1. Discuss the object and scope of Industrial Dispute Act, 1947.
2. Explain the main features of the Industrial Dispute Act, 1947.
3. Define the term 'Industrial Dispute' as defined in Industrial Dispute Act, 1947.
4. Define the following terms -
 - a) Wages
 - b) Industrial Dispute
 - c) Award.
 - d) Average Pay
 - e) Appropriate Government

1.9 REFERENCE BOOKS :

1. K.C. Garg and Others - *Mercantile Law*, Kalyani Publishers, New Delhi, 2005
2. N.D. Kapoor - *Hand Book of Industrial Law*, Sultan Chand & Sons, 2001.

Dr. D. NAGESWARA RAO

Lesson - 2

STRIKE - LOCK OUT, LAY OFF AND RETRENCHMENT

2.0. OBJECTIVES :

On the completion of this lesson the student should be able to understand -

- purpose, meaning of Strike and Lock-out.
- prohibition of Strikes and Lock- Out.
- general prohibition of Strikes and Lock –Out.
- Illegal strikes and Lock-Out.
- provisions of Lay - Off and Retrenchment.
- duties of employer in connection with a Lay - Off
- procedure for retrenchment.
- special provisions relating to Lay - Off & Retrenchment.

STRUCTURE :

- 2.1 Introduction
- 2.2 Strike – Meaning, Concept, Legal and Illegal Strike.
- 2.3 Lock - out - Meaning, Concept, Legal & Illegal Lock out.
- 2.4 Prohibition of Strikes and Lock -Outs.
- 2.5 General Prohibition of Strike or Lock-Outs
- 2.6 Illegal Strikes and Lock - Outs.
- 2.7 Penalty for Illegal Strikes and Lock –Outs
- 2.8 Lay - off - Meaning, Features, Scope.
- 2.9 Retrenchment – Meaning, Penalty.
- 2.10 Summary.
- 2.11 Technical Terms.
- 2.12 Self – Assessment Questions.
- 2.13 Reference Books.

2.1 INTRODUCTION :

Strikes and Lock - Outs are the tools in the hands of labour and employer in the process of collecting. The Act does not intend to take away these rights. In fact, these rights have been recognised by the Act. However, with a view to achieve the object of the Act, namely, peaceful investigation and settlement of the industrial disputes, the rights of strikes and lockouts have been restricted. The Act has prohibited the resort to strikes and lock-outs in certain circumstances. The prohibition is based on public policy.

The provisions of Chapter V -A of the Industrial Disputes Act, 1947, relating to lay-off and retrenchment compensation do not apply to all industrial establishments. According to the provision of Section 25 -A, three types of industrial establishments have been exempted from the application of the provision of Section 25 (C) to 25 (E)

2.2. STRIKE [Sec. 2 (Q)] :

Strike is a legitimate weapon in the hands of the workmen to be used by them for asserting their bargaining power. The right to strike is an inherent right of every worker. But it is to be used as a last resort when all other avenues for settlement of industrial disputes have proved futile-

Definition : It means "A Cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment.

Essential Features : The following are the essential features of a ' strike ' are per the above definition:-

1. There should be cessation of work.
2. Such cessation of work should be by a body of persons employed in any industry acting in combination, or.
3. There should be a concerted refusal or a refusal under common understanding and
4. The persons refusing should be those who are or have employed and the object of such refusal should not to continue the work or to accept employment.

There can be no strike within the meaning of this Act unless the establishment in which the striking persons are employed is an " Industry ". There can be non ' strike' after an industry has been closed. Cessation or discontinuance of work in combination is an essential requirement of the definition of strike. More absence from work will not amount to cessation or refusal to work. Once it is proved that the result of concerted action on the part of the workers or acting in combination under a common understanding such a stoppage even for a short period must fall within the definition of 'strike'. The fact that the duration of strike was for a few minutes for or a few hours is irrelevant.

Strike does not by itself terminate the relationship of employer and employee. The employer has no right to dismiss a workman simply because he has gone on strike.

2.3. LOCK - OUT [Sec. 2 (L)] :

Definition: It means temporary closing of a place of employment or the suspension of work or the refusal by an employer to continue to employ any number of persons employed by him.

Under the present definition, two alternative acts of the employer constitute a Lock-Out.

1. Temporary closing of a place of employment or suspension of work.

It may be described as the withholding of work by an employer from his employees in order to gain a concession from them. In a Lock - out the employer closes his place of employment temporarily without formally discharging his employees.

2. Refusal by the employer to continue to employ any number of persons employed by him. These words do not mean discharge of the workmen. It means a refusal or an intention not to pay. It will not be a lock - out if the employer pays the workmen but does not give them any work.

A Lock - out indicates the temporary closure of the place of business and not closure of the business itself. It is adopted with the primary intention of the employer that the workers are forced to come to terms with him. It is an instrument of coercion exerted by an employer. It is intended to re - commence business as soon as the objective of the employer is fulfilled.

Strike is a weapon in the hands of the labour to force the management to accept their demands. Similarly, lock - out is a weapon available to the employer to force the employers to see his point of view and to accept his demands. Strike is the counterpart of the lockout. Strike is a weapon of workers while lock - out is that of the employer. Just as the strike does not involve the termination of the relation of the employer and employee, so also a lock - out does not sever the relationship. The relationship is suspended temporarily and revives afterwards when the settlement is arrived at.

In case of lock - out the workmen are asked by the employer to keep away from work, and therefore they are not under any obligation to present themselves for work. The question whether the lock - out by the employer is justified would be an industrial dispute under the Act and therefore, the payment of wages during the period of a lock - out would also be an industrial dispute. Where the manager was violently attacked and other members of the staff were threatened the lock - out was fully justified.

The following do not amount to lock - out.

- i) Where a company closes down its business and terminates the services of its workmen.
- ii) Retrenchment of some workmen on the ground of rationalisation of work,
- iii) Refusal by an employer to allow latecomers on a day to work on that day.

2.4 PROHIBITION OF STRIKES AND LOCK - OUTS (Sec - 22) :

Section -22 of the Act lays down restrictions on the right of strike and lock - out in public utility services. The intention of the legislature in enacting this section was that there should be

enough safeguards in matters of public utility services, as otherwise it would result in great inconvenience to the general public and society. The employer or the workmen is not restrained from declaring lock-out or from going on strike but it is required of them to fulfill certain conditions.

According to Section - 22 (i) a person employed in a public utility service is prohibited from going on strike in breach of contract -

- a) with outgiving notice to the employer in the manner prescribed, with in six weeks before striking. In other words, a notice of strike will not be effective after six weeks from the date it is given to the employer, and strike must be affected within that period. After the expiry of six weeks as fresh notice will again become necessary.
- b) with fourteen days of such notice it follows there from that the strike can take place only during the last four weeks of the six weeks mentioned in the preceeding clause.
- c) before the expiry of the date of strike specified in such notice. This would mean that if the notice states that if the strike is to be commenced on a certain date, it should not be commenced on that date but on the next day.
- d) during the pendency of conciliation proceedings before a conciliation officer and seven days thereafter.

Reading the above provisions together it means that a person employed in the public utility service may go on strike giving notice to the employer of strike provided -

- (a) The strike takes place within six weeks of the giving of notice and.
- (b) 14 days have expired after such notice.

The intention of giving 14 days notice before the strike can commence is to give to the employer and the government reasonable time to explore the possibility of averting the strike and to find out some compromise formula.

Thus, if the workmen propose to go on strike on 15th may, 1992 the notice of strike should be given on any date not earlier than 1st April, 1992 and until 1st May 1992 specifying therein that the strike will be resorted to on 14th May, 1992.

Any strike commenced with in the prohibited period is illegal and such action as permitted under the Act can be taken against the deflating workmen.

Section 22 (2) prohibits an employer carrying on any public utility service from declaring lock -out -

- 1) with out giving to the workmen notice of lock - out in the prescribed manner with in six weeks before locking - out. It means notice is effective only for six weeks, and any lock - out in pursuance of such a notice must take place within that period.
- 2) within fourteen days of such notice. It means lock - out can take place only

during the lost four weeks of the period of six weeks mentioned in the proceeding clause.

- 3) Before the expiry of the date of lock - out specified in such notice.
- 4) During the pendency of any conciliation proceeding before a conciliation officer and seven days thereafter.

On receipt of notice of strike or on giving notice of lock - out the employer is required to report within five days, information as regards notices received or given to the appropriate government or to the prescribed authority.

2.5 GENERAL PROHIBITION OF STRIKES OR LOCK - OUTS (Sec - 23):

This section proceeds for a general prohibition against strikes and lock - outs in all industrial establishments including public services in the following circumstances.

- (a) during the pendency of proceeding before a board of conciliation and seven days after the conclusion of the proceedings.
- (b) during the pendency of proceedings before a Labour Court, Tribunal, National Tribunal or Arbitrator (where a notification has been issued under section 10-A (3-A) and two months after the conclusion of such proceedings.
- (c) in breach of contract.
- (d) during the period of operation of a settlement or award in respect of any of the matters covered by the settlement or award.

The, main objective of section 23 seems to be that the proceedings before Board of Conciliation, Labour Court, Tribunal or (National Tribunal should be carried in an atmosphere of peace and cooperation.

2.6 ILLEGAL STRIKES AND LOCK - OUTS (Sec - 24) :

Section 24 lays down the circumstances when a strike or lock - out shall be considered to be legal or illegal.

A strike or lock - out shall be illegal if it is -

- 1) Commenced or declared in contravention of Sec, 22 in a public utility service or
- 2) Commenced or declared in contravention Sec, 23 in any industrial establishment, or
- 3) Continued in contravention of an order under Sec, 10(3)
- 4) Continued in contravention of an order made under Sec 10 -A (4 -A).

Section 10(3) provides that where an industrial dispute is referred and an order prohibiting any strike or lock - out has been made by the appropriate government, the strike or lock - out shall be illegal if it is continued after the order has been made. Similarly Sec, 10-A (4-A) provides that

the appropriate government may be order prohibit the continuance at any strike or lock - out in connection with any dispute which has been referred to arbitration and a notification has been issued under sub section dispute which has been referred to arbitration and a notification has been issued under sub - section (3 - A)

A Strike or lock - out shall not be regarded illegal if;

- 1) A strike is at its commencement not in violation of the provisions of this Act, or
- 2) Its continuance has not be prohibited by the appropriate government under Sec -10 (3) or
- 3) A lock-out is declared in consequence of an illegal strike or a strike is declared in consequence of an illegal lock - out.

Every strike in India is not illegal, because the workers enjoy a fundamental right to go on strike. They become illegal only when they fall within the mischief of Section - 24 of the Act. A strike which is not illegal under Sec - 24 can never be treated as illegal under the Act. It is a different question whether the strike is justified or not.

2.7 PENALTY FOR ILLEGAL STRIKES OR LOCK - OUTS (Sec - 26) :

Sec, 26 provides for Penalty, for any workman or employer who commences, continues or otherwise acts in furtherance of an illegal strike or lock - out as the case may be In such a case the workman shall be punishable with imprisonment which may extend to rupees fifty or with both. In case of illegal lock - out the employer shall be punishable with imprisonment which may extend to one month or with fine which may extend to rupees one thousand or with both.

Penalty for Instigation : [Sec 27] : Sec, 27 provides for penalty to any person who instigates or incites others to take part in an illegal strike or lock - out who otherwise acts in furtherance of the same. The punishment in such cases is imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

Penalty for giving financial aid to illegal strikes or lock – outs (Sec- 28) : Financial aid to illegal strikes or lock - outs is prohibited under Sec - 25 of the act. This Sec, makes it an offence. Penalty provided is imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

2.8 LAY - OFF [Sec - 2 (kkk)] :

It means the failure, refusal or inability of an employer on account of the shortage of coal, power, or raw materials, or the accumulation of stocks or the break down of machinery or natural calamity or for any other connected reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched.

The above definition may be considered under the following three heads -

- 1) There must be failure, refusal or inability on the part of the employer to give work to the workman.

- 2) The failure, refusal or inability of the employer to give work to a workman must be on account of -
 - a) Shortage of coal , power or raw material or accumulation of stock, or break down of machinery, or natural calamity.
 - b) Any other connected reason.
 - c) The workmen laid off must be on the muster roll of the establishment on the day of lay - off and must not have been retrenched.

Even if a workman has not been in continuous service for a period of one year, he shall still, be deemed to be a in continuous service for the period of one year, if he satisfies the following two conditions:

- I. he was in employment for twelve calendar months proceeding the date with reference to which calculation is to be made, and
- II. during such twelve calendar months, he actually worked for not less than
 - a) One hundred and ninety days in the case of employment below ground in a mine
 - b) Two hundred and forty days in any other case.

Similarly, a person shall be deemed to be in continuous service for a period of six months if he has actually worked under the employer for not less than -

- a) Ninety five days in the case of employment below ground in a mine, or
- b) one hundred and twenty days in any other case.

In computing the number of days in which a workman has actually worked under the employers.

Duties of employer in connection with a Lay – Off : The following duties are laid down for the employer in connection with a Lay – Off

- 1) The employer must maintain a muster roll of workmen and to provide for the making of entries therein by workmen who may present themselves for work at the establishment at the appointed time during normal working hours not with standing that workmen in any industrial establishment have been laid off (Sec -25 D)
- 2) The lay - off must be for the reasons specified in Section - 2(KKK).
- 3) The period of detention of workmen if stoppage occurs during working hours should not exceed two hours after the commencement of the stoppage.
- 4) The compensation for lay - off must be at the rate and for the period specified in Section - 25 (c) of the Industrial Disputes Act.

Prohibition of lay-off (Sec- 25 M) : This section places certain restrictions on the right of the employer to Lay - Off workers. It lays no workman, whose name is borne on the muster rolls of an industrial establishment to which this section applies shall be laid off by his employer unless such lay - off is due to shortage of power or to natural calamity, and in the case of a mine, such lay-off is due also to fire, flood, excess of inflammable gas or explosion. He can lay - off the workman only with the prior permission, of the appropriate government of such authority as may be specified by that government obtained on an application made in this behalf [Amended by the Industrial Disputes (Amendment) Act, 1984].

An application for permission shall be made by the employer in the prescribed manner (f) stating clearly the reasons for the intended Lay-Off. A copy such application shall also be served simultaneously on the workmen concerned.

2.9. RETRENCHMENT [Sec - 2 (oo)] :

It means the discharge of surplus labour or staff by the employer for any reason what so ever other wise than as a punishment inflicted by way of disciplinary action. It does not include the following -

1. Voluntary retirement.
2. Retirement of workman on reaching the age of superannuation.
3. Termination of service of the workman as a result of non renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein, or
4. continued ill - health.

Thus, ' Retrenchment ' means, discharge of surplus labour or staff. It may be due to a variety of reasons, namely for economy, rationalisation in industry, installation of a new labour saving machinery etc. It means the termination by the employer of the services of a workman who is 'workman' employed in an industry. Industry means a continuing or running industry and not a closed one. Termination of the service of workmen when the business ceases to exist is not included within the meaning of the definition.

Section 25 F of industrial disputes Act lays down the conditions precedent for effecting a valid Retrenchment.

In the following cases termination of services amounted to Retrenchment.

- 1) Discharge of a workman on the ground of his failure to pass confirmation test (santosh Gupta V, State Bank of Patiala (1980) 3 S.C.C 340).
- 2) Termination of services of probationer for unsuitability (Karnataka S.R.T.C Vs M.Boralah(1984) I.S.C.C. 244).
- 3) Compulsory retirement of a workman amounting to termination of services (Mohabir Vs D.K. Mital 1980 Lab IC 119)

In the following cases there was non retrenchment :

- 1) Termination of service for loss of confidence in workman (Ramlesh Kumars Vs Central Government Industrial Tribunal, Bombay 1980 Lab IC 1116)
- 2) Discharge due to ill health (Workmen Vs Bangalore woollen, cotton & silk mills AIR 1962 SC. 1363).
- 3) Termination of services owing to genuine closure or take over of the undertaking by another employer (Barsi Rly. Co. Vs.K. N . Jaglekar AIR 1957 SC 121).

Re - employment of Retrenchment workmen (Sec - 25H) : This section give preference to a retrenched workman in the matter of re - employment. If the employer wants to re-employ any person, he is under an obligation to give a first preference to the person who has been retrenchment. The option to accept re -employment is on the workman. The relief of re- employment is only available to citizens of India.

The benefit of preferential re- employment can be claimed only by a retrenchment workman and not by a work man who has been dismissed, discharged or superannuated. But this section does not confer any right to a workman to secure employment on his previous terms and conditions of service.

Penalty for Retrenchment without previous permission [Section 25 - Q] :

Any employer who contravenes the provisions of Section 25-N shall be punishable with imprisonment for a term which may extend to one month or with fine which may extend to one thousand rupees or with both.

2.10 SUMMARY :

The object of the Industrial Disputes Act is to make provision for the investigation and settlement of industrial disputes and for certain other purposes. The Act is primarily meant for regulating the relations of employers and workmen, past, present and future. The principal aim of the Act is to encourage collective bargaining and to maintain industrial peace by preventing illegal strikes and Lock - Outs and to provide Lay - Off and retrenchment compensation.

2.11 TECHNICAL TERMS :

1. Strike : a concerted refusal to continue to work or to accept employment by any number of employers.
2. Lock out : Closing of a place of employment
3. Lay-off : failure, refusal or inability of an employer to give employment, to workmen
4. Retrenchment : The termination of the service of a workman for any reason other than on disciplinary grounds by the employer

2.12 SELF – ASSESSMENT QUESTIONS :

1. Give the meaning of the term 'strike' and lock – out. State the circumstances in which strikes and lock - outs are prohibited and become illegal.
2. Examine the meaning of the term 'lay - off' and retrenchment. Discuss the circumstances when compensation is not payable to a workman who has been laid -off.
3. Distinguish between the following :
 - a) legal and illegal strike.
 - b) lock - out and lay - off.
 - c) lay - off and retrenchment.
4. Define lay off and distinguish it from lock - out and closure.

2.13 REFERENCE BOOKS :

1. K.C. Garg and Others: *Mercantile Law*, Kalyani Publishers, New Delhi, 2005
2. N.D. Kapoor ; *Hand Book of Industrial Law*, Sultan Chand & Sons, 2001.

- Dr. D.NAGESWARA RAO.

Lesson - 3

PREVENTION AND SETTLEMENT OF INDUSTRIAL DISPUTES

3.0. OBJECTIVES :

After completion of this lesson, we should be able to understand-

- Industrial disputes-causes.
- Modes of settlement of Industrial Disputes.
- Voluntary settlement and conciliation (Authorities under the Act)
- Adjudication (with the help of courts)
- Arbitration (with the help of third parties)

STRUCTURE :

3.1 Introduction

3.2 Modes of settlement of Industrial Disputes

3.3 Voluntary settlement

3.3.1 Works committee

3.3.2 Conciliation Officers.

3.3.3 Board of Conciliation

3.3.4 Court of Inquiry

3.4 Adjudication (with help of courts)

3.4.1 Labour Courts.

3.4.2 Tribunals.

3.4.3 National Tribunals.

3.4.4 Grievance Settlement Authorities.

3.5 Arbitration,

3.6 Summary

3.7 Technical Terms

3.8 Self – Assessment Questions

3.9 Reference Books.

3.1 INTRODUCTION :

The Industrial Disputes Act, 1947. This is the principal central legislation which provides a machinery for the settlement of Industrial disputes. In addition, the Code of Discipline (1958) and the Industrial Truce Resolution (1962) also help in the promotion and maintenance of good industrial relations.

The main objects of Industrial Disputes Act 1947 are to secure industrial peace by preventing and settling industrial disputes between the employers and workmen through and internal works committee or an external machinery of conciliation officers. (Boards of conciliation and courts of inquiry) consisting of Industrial Tribunals, National Tribunals and Labour courts) and through voluntary arbitration. The Act also protects the service conditions of the employees during pendency of proceedings in respect of an industrial dispute.

3.2 MODES OF SETTLEMENT OF INDUSTRIAL DISPUTES :

The main object of Industrial Disputes Act is investigation and settlement of industrial disputes. With that object in view various authorities have been created under the Act. The Act provides for the following modes of settlement of industrial disputes.

- I. Voluntary settlement and conciliation (Authority under the Act).
- II. Adjudication [with help of courts] and
- III. Arbitration [with the help of third parties].

The adjudication of industrial disputes has at the first instance been kept out at the jurisdiction of the courts so that efforts may be made for settlement of such dispute, through some other agencies. The works committee, conciliation officer, board of conciliation and courts of inquiry endeavour to settle the difference before it may be adjudicated upon by Labour Court, or the Industrial Tribunal.

Section 10-A of the act makes provision for voluntary reference of disputes to arbitration. A part from the above, provision has also been made for the constitution of a Grievance Settlement Authority.

A brief description of the constitution, powers and duties of the various authorities is as follows -

3.3 VOLUNTARY SETTLEMENT IN CONCILIATION AUTHORITIES UNDER THE ACT :

3.3.1 Works Committee: The works committee as an instrument for peaceful settlement of industrial disputes has been introduced in India for the first time under the industrial disputes Act 1947.

Constitution : Section 3 of the act empowers the appropriate government to constitute works committee by a general or special order in a manner which may be prescribed. There are two conditions which must be satisfied before a works committee can be constituted-

- 1) The establishment must be an industrial establishment.
- 2) One hundred or more workman should either be presently employed or should have been employed on any day in the preceding twelve months. The works committees must be composed of the representatives of the employers and the workmen engaged in the industrial establishment and must be equal in number. It is further provided that the representatives of the workmen shall be chosen in the prescribed manner and in consultation with the registered trade union, if any.

Functions and Duties : The works committee are required to promote measures for securing and preserving good relations between the employer and his workmen. The works committee shall meet and discuss matters of common interest and make efforts to settle differences in the respect of such matters. The works committee are normally concerned with the problems arising in the day-to-day working of the establishment, the instances, matters concerning their welfare, training, wages hours of work, bonus, holidays with pay etc. The decisions of the works committees, though carry great weight are not binding either on the employer or workmen.

Works committees are not intended to be substitute for trade unions. The success of such committees lies in the efforts of both the parties. They are viewed as a prevention which is better than cure.

3.3.2 Conciliation Officers :

Constitution : A ' Conciliation Officer ' means a conciliation officer appointed under the Industrial Disputes Act, 1947. The duty of conciliation officers is to mediate and promote the settlement of industrial disputes.

Appointment: It is discretionary on the part of appropriate government to appoint conciliation officer. Section 4 empowers the appropriate government to appoint such number of persons, as it thinks fit, as conciliation officers. A Conciliation officer may be appointed for a specified area or for specified industries either permanently or for a limited period.

The act makes conciliation compulsory in all disputes in public utility services and optional in other industrial establishments. Conciliation or mediation is a procedure which endeavours to settle a controversy by assisting parties to reach a voluntary agreement and the ultimate decision is made by the parties themselves. The task of conciliation officer is to find a solution acceptable to both parties rather than to determine the rights and wrongs of a problem.

A conciliation officer is an independent agency created under the Industrial Disputes Act, with a view to promote industrial peace by making available governmental facilities in the process of Collective Bargaining.

Duties of Conciliation Officer :

Sec 12 deals with the duties of the Conciliation Officer.

- 1) The duty of a Conciliation Officer is not judicial but administrative.
- 2) He has to investigate the dispute and do all such things as he thinks fit for the purpose of inducing the parties to arrive at a fair and amicable settlement of the dispute.

- 3) His main task is to go from one camp to the other and to find out the greatest common measure of agreement.
- 4) Where a conciliation officer reported under Sec 12 (4) that no settlement could be arrived at he will not be debarred from making further efforts to bring about settlement between the management and the workmen.
- 5) The Conciliation Officer must submit the report with in fourteen days of the conciliation proceedings or within such shorter period as may be fixed by the appropriate government. The period for submission of the report can be extended by the agreement of the parties subject to the approval of Conciliation Officer.

3.3.3. Board of Conciliation :

Constitution: The word 'Board' means a Board of Conciliation constituted under this Act. Sec 5 empowers the appropriate government to constitute a Board of Conciliation by notification in official gazette. The Board is appointed for promoting the settlement of industrial disputes.

The Board shall consists of a Chairman and two or four other members, as the appropriate Government thinks fit. The Chairman shall be an independent person. The other members shall be persons appointed in equal number to represent the parties to the dispute.

A Board is appointed as and when a dispute arises which means that a Board of Conciliation is not a permanent body.

Reference of Dispute : Where the appropriate government is of the opinion that any industrial dispute exists or is apprehended it may at any time by order in writing refer the dispute to a board for promoting a settlement thereof.

Where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately for a reference of the dispute to a Board, the appropriate government if satisfied that the persons applying represent the majority of each party shall make the reference accordingly.

Where an industrial dispute has been referred to a Board the appropriate government may be order prohibit the continuance of any strike or lock - out in connection with such dispute which may be in existence on the dote of the reference.

Duties of the Board of Conciliation :

1. To bring about a settlement of the dispute : Where a dispute has been referred to a Board of Conciliation, it shall be the duty of the Board to endeavour to bring about a settlement of the same. It shall, without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof.

2. To send a report and memorandum of settlement to the appropriate government: If a settlement of the dispute is arrived at in the course of conciliation proceedings, the board shall send a report thereof to the appropriate government together with a memorandum of the statement, signed by the parties to the disputes.

3. To send a full report to the appropriate government setting forth the steps taken by the board in

case no settlement is arrived at.

4. To communicate reasons to the parties if no further reference made-
5. To submit report within two months report of the Board to be in writing and to be signed and its publication.

Powers : [Sec 11]

1. Power to enter premises : A member of a Board may for the purpose of inquiry into an existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates.

2. Power of Civil Courts : A Board shall have the same powers as are vested in a Civil Court under the code of civil procedure, 1908, when trying a suit in respect of the following matters, namely,

- a) enforcing the attendance of any person and examining him on Oath;
- b) compelling, the production of documents and material objects;
- c) issuing commissions for the examination of witnesses;
- d) in respect of such other matters as may be prescribed.

3.4 COURT OF INQUIRY (SEC.6):

Constitution: Sec, 6 empowers the appropriate government to constitute a court of inquiry for enquiring into any matter appearing to be connected with or relevant to an industrial dispute. The court of inquiry may be constituted as and when occasion arises which means that it is not a permanent body. The constitution of a court of inquiry is required to be notified in the official gazette. A court of inquiry may consist of one or more independent persons. If the number is more than one, one of them shall be appointed as Chairman.

The quorum for the court of inquiry is prescribed under the rules. If there is quorum the absence of any members or chairman is immaterial except when it is notified by government that services of the chairman have ceased to be available, in that case the court shall not function until a chairman has been appointed.

Duties:

1. Sec, 14 deals with the duties of the court of inquiry. The first duty of the court is to enquire into the matter referred to it.
2. The second duty of the court is to make a report to the appropriate government on the inquiry held by it on the matters referred to it. This report is ordinarily required to be submitted within a period of six months, from the commencement of the inquiry. The word "ordinarily" appears to indicate that the period can be extended - The report of the court of inquiry is required to be published by the appropriate government under Sec,17.

A Board of Conciliation and the Court of Inquiry differ in one respect. The object of the board is to promote the settlement of an industrial dispute by persuading the parties to come

around and through out their differences in an amicable atmosphere. On the other hand the object of the court is to inquire into and reveal the causes of an industrial disputes. It no more than a fact finding machinery.

3.4 ADJUDICATION (WITH THE HELP OF COURTS) :

3.4.a Labour Courts :

Constitution : The appropriate government is given the power under section 7 to constitute one or more labour courts. The Central Government may constitute labour courts in any state for the adjudication of the matters in respect of which it is the appropriate government. Like wise, a State Government may constitute labour courts in its territories for the adjudication of the matters in relation to which it is the appropriate government. The constitution of the labour court is to be notified in the official gazette.

Functions : The functions of labour courts are -

- (1) to adjudicate the industrial disputes relating to matters specified in the second schedule of the act.
- (2) to perform such other functions as many be assigned to them under this Act.

Adjudication means a mandatory or compulsory settlement of industrial disputes by Labour Courts or Industrial Tribunals or National Tribunals under the Industrial Disputes Act.

Jurisdiction : The second schedule provides for the matters relating to industrial disputes, which shall be adjudicated by the labour courts. But the first provision to Section 10(1) lays down that where the dispute relates to a matter specified in the third schedule, if it is not likely to affect more than hundred workmen, it can be referred to a labour court, Any reference by the government to the labour court of any matter covered by third schedule and affecting more than hundred workmen would be bad in law and the award of the labour court void.

The Second Schedule : The matters specified in the second schedule are –

- 1) The propriety of legality of an order passed by an employer under the standing order,
- 2) The application and interpretation of standing orders;
- 3) Withdrawal of any customary concession or privilege.
- 4) Illegality or otherwise of a strike or lock -out; and.
- 5) All matters other than those specified in the third schedule.

Presiding Officer and his Qualifications :

Sec, 7(3) lays down that a person shall not be qualified for appointment as the presiding officer of a labour court unless-

- a) he is , or has been a judge of a high court; or
- b) he has for a period of not less than three years,
- c) he has held any judicial office in India if least for seven years (continue)

3.4.b : Tribunals :

Constitutions: Section 7-A empowers the appropriate government to constitute one or more, Industrial Tribunals. Its appointment has to be notified official gazette. The appropriate government has wide powers under this section to appoint tribunals for any limited time or for a particular case or a number of cases or for a particular area.

Functions : Industrial tribunals are constituted for the adjudication of industrial disputes relating to any matter specified in the second schedule or the third schedule. These tribunals shall perform such other functions as may be assigned to them under this act.

Whereas a labour court can adjudicate an industrial dispute relating to matters in Schedule II, the industrial tribunal can adjudicate disputes relating to matter contained in both schedules II and III. Thus there is concurrent jurisdiction of the labour court and the industrial tribunal in respect of any matter included in the second schedule. However, the first provision to Section 10(1) lays down that where the dispute relates to a matters specified in the third schedule, and is not likely to affect more than one hundred workmen the appropriate government may make reference to a labour court.

However, it may be noted that before an industrial tribunal can take cognizance of any dispute, there must be a reference of the dispute to that tribunal under Section 1a without such reference the jurisdiction of the tribunal does not spring to life except where otherwise provided in the Act.

The Third Schedule :

Matters within the jurisdiction of industrial tribunals -

1. wages including the period and mode of payment,
2. compensatory and other allowances;
3. hours of work and rest intervals;
4. leave with wages and holidays;
5. bonus, profit-sharing, provident fund and gratuity;
6. shift working otherwise than in accordance with standing orders;
7. classification by grades;
8. rules of discipline;
9. rationalisation;
10. retrenchment;
11. any other matter that may be prescribed.

Presiding officer and his qualifications :

An industrial tribunal shall consist of one person only to be appointed by the appropriate government. He shall be designated as the 'presiding officer' of the tribunal. A person shall not be qualified for appointment as the presiding officer of a tribunal unless.

- I. He is, or has been a Judge of High Court; or
- II. He has been a District Judge or an Additional District Judge for a period of not less than three years.

The appropriate government may, if it so thinks fit, appoint two persons as assessors to advise the tribunal in the proceeding before it.

3.4.c National Tribunals :

Constitution: Sec,7B provides for the constitution of national industrial tribunals. The Central Government is empowered to constitute one or more national tribunals by notification in the Official Gazette. A national tribunal can be constituted only for the adjudication of industrial disputes involving questions of national importance or industrial disputes affecting industrial establishments situated in more one state. The reference to national tribunal can be made only by the central government. The Jurisdiction of a national tribunal is very wide and exclusive. Where a reference has been made to a national tribunal, then no labour court or tribunal shall have jurisdiction to adjudicate upon that matter.

Presiding officers and his qualifications: The national tribunal shall consist of one person only to be appointed as its presiding officer of the national tribunal unless he is or has been a judge of the high court.

The central government may, If it so thinks fit, appoint two persons as assessors to advise the national tribunal in the proceeding before it.

Disqualifications for the Presiding Officers of Labour Courts, Tribunals and National Tribunals: Sec,7-C enumerates the disqualifications which would disentitle a person to hold a post of the presiding officer of labour court, tribunal or national tribunal. No person can be appointed or continue in the office of the presiding officer if he has attained the age of sixty- five years, or is not an independent person '.

Thus if a person ceases to be an independent person within the meaning of the act, he no longer remains competent to hold the office of the presiding officer of a labour court, industrial tribunal or national industrial tribunal. In the same way a person cannot hold the office of presiding officer, after he has attained the age of 65 years.

Notice of Change : The object of Section 9-A is to prohibit an employer from making any change in the conditions of service applicable to his workmen in respect of any matter specified in the forth schedule unless he has complied with the following conditions -

1. A notice in prescribe manner of the nature of the change proposed to be effected must be given to the workman likely to be affected by such change; and
2. A period of twenty one days from the date of notice must have expired.

Section 9-A further enumerates the following cases where there is no need to give a notice:

- a) where the change is effected in pursuance of any settlement or award.
- b) where the workmen likely to be affected by the change are persons to whom the following rules apply.
 - I. Fundamental and supplementary rules.
 - II. Civil services (Classification, Control and Appeal); Rules.
 - III. Civil services (Temporary service) rule.
 - IV. Revised Leave Rules.
 - V. Civil Service Regulations.
 - VI. Civilians in Defence Service (classification, control and appeal) rules
 - VII. The Indian Railway Establishment code.

The appropriate government has the power to include any other rules or regulations in this category by a notification in its Official Gazette.

The Fourth Schedule :

The matters in respect of which notice is required are enumerated in the Fourth Schedule to the Act and are as follows -

- 1) Wages including the period and mode of payment.
- 2) Contribution paid or payable by the employer to any Provident Fund or Pension Fund.
- 3) Compensatory and other allowances.
- 4) Hours of work and rest intervals.
- 5) Leave with wages and holidays.
- 6) Starting, alteration or discontinuance of shift working otherwise than in accordance with standing orders.
- 7) Classification by grades.
- 8) Withdrawal of any customary concession or privilege or change in usage.
- 9) Introduction of new rules of discipline or alteration of existing rules except in so far as they are provided in standing orders.

Punishment: Sec 31 (2) of the Act makes the contravention of section 9 -A punishable with the fine which may extend to one hundred rupees.

3.4.d. Grievance Settlement Authorities : The Industrial Disputes (Amendment) Act 1982 has

inserted new chapter in the Act for the setting up of grievance settlement authorities and reference of individual disputes to such authority.

The employer in relation to every industrial establishment in which fifty or more workmen are employed or have been employed on any day in the preceding twelve months, shall setup, in accordance with the rules made in this behalf in this Act, a grievance settlement authority for the settlement of industrial disputes connected with an individual workman employed in the establishment.

3.5. ARBITRATION (WITH THE HELP OF THIRD PARTIES) :

A-Voluntary reference of disputes to Arbitration :

Section 10 -A authorizes the employer and his workmen to refer the disputes to arbitration at any time before the dispute has been referred under Section 10. The object of this section is to enable the employers and employees to refer their dispute voluntarily to arbitration. The essential requirements, before a dispute can be referred to arbitration, are as under.

1. There should be an existing or apprehend industrial dispute.
2. The reference to arbitration should be by a written agreement.
3. The reference should be made before the dispute had been referred under sec, 10 to a labour court, or tribunal or national tribunal.
4. The names of the person or persons to act as arbitrator or arbitrators must be specified in the agreement. Such persons may be presiding officers of labour court tribunal or national tribunal.

3.6. SUMMARY :

One of the paramount objective of the Industrial Disputes Act 1947, is to secure industrial peace by preventing industrial disputes. The Act provides an elaborate and effective machinery for investigating and settlement of industrial disputes. The following are the authorities under the Act.

1. Voluntary settlement in Conciliation :

- a) Works Committee.
- b) Conciliation Officers.
- c) Board of Conciliation
- d) Courts of Enquiry

2. Adjudication :

- e) Labour Courts.
- f) Tribunals

- g) National Tribunal
- h) Grievance Settlement Authorities

3. Arbitration :

- i) Arbitrator

Thus, the above methods are settle the industrial disputes between the employee and employes.

3.7 TECHNICAL TERMS :

- Arbitration = act as an impartial and settle civil disputes.
- Adjudication = act as Judge.
- Grievance = Cause for complaint.
- Conciliation = Make less angry.

3.8 SELF – ASSESSMENT QUESTION :

1. What are methods of settlement of disputes under the Industrial Disputes Act – 1947.
2. What is the importance of industrial disputes legislation ? Give in brief the history of industrial disputes legislation in India till today.
3. What are the duties and powers of Conciliation Officers, Works Committees, and Board of Conciliation in settlement of Industrial Disputes? How are they appointed.
4. How can the industrial disputes be prevented and settled under the Industrial Disputes Act, 1947 ?
5. Write short notes on any three
 - a) Arbitration
 - b) Machinery for Conciliation
 - c) Works Committee
 - d) Conciliation
 - e) Industrial Dispute.

3.9 REFERENCE BOOKS :

1. K.C. Garg and Others : *Mercantile Law*, Kalyani Publishers, New Delhi, 2005
2. N.D. Kapoor : *Hand Book of Industrial Law*, Sultan Chand & Sons, 2004.

Dr. D. NAGESWARA RAO

Lesson - 4

FACTORIES ACT-1948

4.0 OBJECTIVES :

After completion of this lesson, we should be able to understand :

- objectives and scope of the Act.
- Definitions
- Administration of the Act.
- Measures in regard to Health
- Measures in regard to Safety
- Measures in regard to Welfare

STRUCTURE :

- 4.1 Introduction
- 4.2 Objectives & Scope
- 4.3 Definitions
- 4.4 Administration
- 4.5 Measures in regard to Health.
- 4.6 Measures in regard to Safety
- 4.7 Measures in regard to Welfare
- 4.8 Summary
- 4.9 Technical terms
- 4.10 Self – Assessment Questions
- 4.11 Reference Books.

4.1. INTRODUCTION :

The industrial labour ever since the industrial revolution has been often exploited. Their conditions were so depleted that it was considered indispensable to protect them against industrial and occupational hazards.

In 1881, First Factories Act was passed in India. This Act provided for health and safety measures and primarily protected child labour in factories. The Factories Act, 1881, which was found inadequate to meet the growing industrial complex was replaced by Acts of 1889 and 1911.

In order to remove its inherent weakness and to keep pace with changing needs of working class the Act has been amended several times. The Factories Act, 1934 replaced all the previous legislation in regard to factories and thoroughly overhauled the Act of 1911 in the light of the recommendations of the Royal Commission of Labour. The experience of the working of the Act of 1934 had increasingly revealed the need for wholesale revision with a view to extend its protective provisions to the larger number of smaller industrial establishments. An entirely new Act to consolidate and amend the law relating to labour in factories was, therefore, passed by the Constituent Assembly on 28th August 1948, which came into force on 1st April, 1949.

The Factories Act, 1948 is a comprehensive piece of legislation covering all aspects regarding the factories, namely ; approval, licensing and registration of factories, the inspecting authorities health, safety, welfare, working hours, employment of adult and young children, annual leave and penalties.

4.2. OBJECTIVES AND SCOPE OF THE ACT :

The main objective of Factories Act are :

- (i) to regulate working conditions in factories.
- (ii) to ensure that basic minimum requirements for safety. Health and welfare of factory workers are provided.

The Object of Act is to protect human beings from being subject to unduly long hours of bodily strain or manual labour. It also provides that employees should work in healthy and sanitary conditions so far as the manufacturing process with allow and that precautions should be taken for their safety and for the prevention of accidents. In order to obtain the information necessary to ensure that its objects are carried out the local governments are empowered to appoint inspectors to call for returns and to see that the prescribed registers are duly kept.

The object of passing the Factories Act was to consolidate and amend the law regulating labour in factories. The act was enacted primarily to protect workers employed in factories against industrial and occupational hazards. The Factories Act tries to secure for the workers employment in conditions conducive to their health and safety. The Supreme Court of India declared that the Factories Act is a social enactment of achieve social reform.

Scope of the Act : The Act extends to the whole of India. The provisions of the Act are applicable to all factories including factories belonging to Central or any State Government unless otherwise excluded and the benefits of this Act are available to persons who may be covered with in the meaning of the term 'worker' as defined in the Act.

4.3 DEFINITIONS :

1. ' Adult ' means 'a person who has completed his eighteenth year' .

2. 'Adolescent' means 'a person who has completed his fifteenth year of age but has not completed his 18th year'. That is to say, a person who is neither an adult nor a child.
3. 'Child' means 'a person who has not completed his fifteenth year of age'.
 - 3.a** Competent person. The term 'competent person' or an institution recognised as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to-
 - (i) the qualifications and experience of the person and facilities available at his disposal;
 - (ii) the qualifications and experience of the person employed in such institution and facilities available therein, with regard to the conduct of such tests, examinations and inspections, and more than one person or institution, can be recognised as a competent person in relation to a factory. [inserted by the Factories (Amendment) Act, 1987].
4. 'Young person' means 'a person who is either a child or an adolescent, i.e., a person who is under the age of 18 years'
5. 'Calendar Year' means 'the period of twelve months beginning with the first day of January in any year'.
6. 'Day' means 'a period of twenty four hours beginning at midnight, i.e. 24 hours from midnight to midnight.
7. 'Week' means 'a period of seven days beginning at midnight on Saturday'. However, the Chief Inspector of Factories may approve of in writing any night other than Saturday night for a particular area.
8. 'Power' means 'electrical energy or any form of energy which is mechanically transmitted and is not generated by human or animal agency'.
9. 'Prime Mover' is 'an appliance which generates or otherwise provides power'.
10. Machinery includes prime movers, transmission machinery and all other appliances where by power is generated, transformed, transmitted or applied.
11. 'Manufacturing Process' means any process for :-
 - (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up demolishing, or otherwise treating or adopting any article or substance with a view to its use, sale, transport, delivery or disposal; or
 - (ii) pumping oil, water or sewage or any other substance ; or
 - (iii) generating, transforming power, or transmitting power; or
 - (iv) composing types for printing, printing by letter-press, lithography, or

photogravure, or other similar process or book binding; or

- (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels: or
- (vi) preserving or storing any article in cold storage.

12. 'Worker' means " a person employed directly or by or through any agency (including a contractor) without the knowledge of the principle employer, Whether for remuneration or not in any manufacturing process or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to or connected with the manufacturing process or the subject of the manufacturing process but does not include any member of the armed forces of the Union."

A person is regarded as a worker within the meaning of Section 2(1) of the Act, provided the following four conditions are fulfilled

- 1) The person must be employed by the owner or occupier of the factory.
- 2) The person must be employed in the establishment either directly or by or through an agency (including a contractor, or without the knowledge of the principal employer]
- 3) The person must be employed in the factory for wages or without wages.
- 4) The person must be employed in any manufacturing process or in cleaning any part of the machinery, premises used for manufacturing process or in any other kind of work incidental to or connected with the manufacturing process or the subject of the manufacturing process.

But the term worker does not include any member of the armed forces of the Union.

13. Factory : According to Section 2 (m) factory means any premises including the precincts thereof -

- i) Where on ten or more workers are working or were working on anyday of the preceding twelve months, and in any part of which a manufacturing process being carried on with the aid of power or is ordinarily so carried on or
- ii) Where in twenty or more workers are working or were working on anyday of the preceding 12 months and in any part of which a manufacturing process in being carried on without the aid of power or is ordinarily so carried on.

Factory does not include a mine, a mobile unit belong to the armed forces 1of the Union, a railway running shed or a hotel, restaurant, or eating place.

For computing the number of workers for the purposes of this clause all the workers in different groups and relays in a day shall be taken into account.

4.4: ADMINISTRATION [THE INSPECTING STAFF] :

The State Government, has the power, under the Factories Act, to appoint the below mentioned persons as inspecting staff of the factory.

- 1) Chief Inspector
- 2) Additional Chief Inspector
- 3) Joint Chief Inspector
- 4) Deputy Chief Inspector
- 5) Inspector
- 6) Certifying Surgeons

4.4.1: Chief Inspector : The State Govt. may by notification in the Official Gazette appoint any person as a chief Inspector. He shall enjoy all the powers of an inspector in addition to the specific powers conferred by the Act upon a Chief Inspector. The Chief Inspector is fully competent to lodge a complaint by an Inspector. A person cannot be appointed a Chief Inspector or having been so appointed shall not continue to hold office as soon as he becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected there with. Every Chief Inspector is deemed to be a public servant within the meaning of Indian Penal Code.

4.4.2: Additional Chief Inspector, Joint Chief Inspector and Deputy Chief Inspector: According to the Factories (amendment) Act, 1976, the State Government is authorised to appoint as may Additional Chief Inspectors, Joint Chief Inspector, and the Deputy Chief Inspector, as it thinks fit to assist the Chief Inspector. Their appointment must be notified in the Official Gazette. Every Additional Chief Inspector, Joint Chief Inspector and Deputy Chief Inspector shall, in addition to the powers of a chief Inspector, specified in the notification by which he is appointed, exercise the powers of an Inspector through out the state. Every Additional Chief Inspector, Joint Chief Inspector and Deputy Chief Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code.

4.4.3: Inspector: The State Govt. may by notification in the Official Gazette, appoint inspectors for the purposes of this Act. Only such persons who possess the prescribed qualifications may be appointed inspectors. The State Government may assign to the Inspector such local limits as it think fit. The State Government has direction in assigning local areas to an inspector It may or may not do it. The transfer of an inspector to an area in one form of assigning that area to him, such assignment need not be by a notification in the Official Gazette [State of Mysore V.R.D Campbell (1962) 2. Cri L. J. 703] .A person cannot be appointed to act as an Inspector if he is directly or indirectly interested in a factory or in any process or business carried or there in or in any patent or machinery connected there with. Every District Magistrate shall be an Inspector for his district. The act of a District Magistrate as an inspector is an executive act and not a judicial act [Gajadhar Lakshmiram Vs Emperor AIR 1948 Nag 277] .

Every Inspector like a Chief Inspector shall be deemed to be a public servant within the meaning of Indian Penal Code.

Powers of Inspectors : According to Section 9 of the Act, an Inspector has the following powers within the local limits for which he is appointed :

- a) He may enter any place which is used or he has reason to believe is used as a factory. He may be accompanied by such assistants who are in the service of the Govt. or any other local or public authority or with an expert.
- b) Make examination of the premises, plant, machinery article or substance.
- c) Inquire into any accident or dangerous occurrence whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry.
- d) Require the production of any prescribed register or any document relating to the factory. An inspector has no power to demand production of registers outside the factory premises and therefore non-compliance with such a demand does not render the proprietor liable to punishment under section 92. [State V. Pitambar Savjibhai AIR 1953 Sav. 174 (D.B)]
- e) Seize, or take copies of any register, record or other document or any portion thereof, as he may consider necessary in respect of any offence under this Act, which has reason to believe, has been committed.
- f) Direct the occupier that any premises or any part thereof, or anything lying therein, shall be left undisturbed (whether generally or in particular respects) for so long as is necessary for the purposes of any examination.
- g) Take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination taking with him any necessary instrument or equipment.
- h) In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is , in the circumstances necessary, for carrying out the purposes of this Act), and take possession of any such article or substance or a part thereof, and detain it for so long as is necessary for such examination.
- i) Exercise such other powers as may be prescribed. NO person shall be compelled by an inspector to answer any question or give any evidence tending to incriminate himself.

Penalty for obstructing inspectors (Sec.95) :

Whoever wilfully obstructs an inspector :

- 1) in the exercise of any power conferred on him by or under the Act, or.
- 2) fails to produce on demand by an inspector any registers or other documents in his custody's, or

- 3) Conceals or prevents any worker in a factory from appearing before, or being examined by an inspector.

Shall be punishable with imprisonment for the term which may extend to 6 months, or fine which may extend to Rs. 10,000/- or with both.

Restriction on disclosure of information [Sec.118] : It is a statutory duty of an Inspector not to disclose any information relating to a factory which he obtains in the course of his duties whether he is in service or out of service.

4.4.4: Certifying Surgeons :

Section 10 lays down that the State Government is empowered to appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act. They will be appointed within such local limits or such factory or class of factories as the State Government may think fit. A certifying surgeon is authorised to nominate any qualified medical practitioner to exercise any of his powers under the Act for specific period. But no person shall be appointed a certifying surgeon if he is, or becomes the occupier of factory or is or becomes directly or indirectly interested therein, or is otherwise in the employment of the factory [Sec 10 (3)]. However, the State Govt. may by order in writing and subject to such conditions as may be specified in the order, exempt any person or class of persons from the provisions of Sec 10 (3) in respect of any factory or class or description of factories.

Duties : The certifying surgeon shall carry out such duties as may be prescribed in connection with.

- a) the examination and certification of young persons under this Act.
- b) the examination of persons engaged in factories in such dangerous occupations or processes as may be prescribed.
- c) the exercising the medical supervision for any factory in respect of-
 1. illness that has occurred due to the nature of manufacturing process.
 2. injury that is likely to be caused to the health of workers by reason of the adoption of any new manufacturing process,
 3. injury that is likely to occur to the health of young persons.

4.5 MEASURES IN REGARD TO HEALTH :

The efficient working process requires the sound health of the persons engaged therein. Unless the workers are physically and mentally healthy they cannot perform their duties effectively, properly and smoothly. The environment of the factory where workers are working must be clean and free from infection, insanitation, dust and fume, artificial humidification, overcrowding and other conditions injurious to the health of the workers.

Section 11 to 20 contained in the Factories Act, 1948, deal with the health of workers in a factory. The basic purpose of these provisions is to ensure that working conditions in the factories

under which the work is carried out, do not effect the health of workers adversely. These provisions have been incorporated to protect the health of workers. These provisions are in keeping with the object of the Act, as also with article 42 of the Indian Constitution which requires that the State should make provision for securing just and human conditions of work. These provisions are as under.

1. Cleanliness
2. Disposal of wastes and effluents
3. Ventilation and temperature
4. Dust and fume
5. Artificial humidification
6. Overcrowding
7. Lighting
8. Drinking water
9. Latrines and Urinals
10. Spittoons

4.5.1 Cleanliness (Sec-11): Every factory shall be kept clean and free from affluent arising from drainage or dust. The floor of every work room shall be cleaned at least once in every week by washing or using disinfectant effective means of drainage shall be provided where a floor is liable to be come wet during manufacturing process.

4.5.2 Disposal of Wastes and Effluents (Sec-12): Effective arrangements shall be made for the treatment of wastes and effluent arising from the manufacturing process. The State Govt. may make rules prescribing the arrangements in this regard.

4.5.3 Ventilation and Temperature (Sec - 13): Effective and suitable provision shall be made for securing and maintaining good ventilation. So every work room should be provided with adequate ventilation by circulation of fresh air and temperature should be maintained at reasonable level to prevent injury to health of the workers. The State Government may prescribe a standard adequate ventilation and reasonable temperature. It may direct that a thermometer be maintained and kept in a specified place.

4.5.4 Dust and Fumes (Sec- 14): Effective measures should betaken to remove the dust, fume or impurity formed in any manufacturing process by applying an exhaust appliances. Dust and Fume arise usually in textile, jute, cotton, giving manufacturing processes.

4.5.5. Artificial Humidification(Sec - 15): The State Govt. may prescribe the standards of humidification in those factories where the humidity of the air is to be increased artificially. The Govt. may also makes rules. The methods used for artificial humidification shall be properly purified before it is so used.

4.5.6 Over Crowding (Sec- 16) : There should not be over crowding in any room of the factory which causes injury to the health of the workers. There shall be at least 350 cubic feet (for the factories in existence before the commencement of the Factories Act) and 500 cubic feet (for the factories built after the commencement of the factories Act) of space for every worker. The feet above the level of the floor of the room should not be taken into account while calculating the space.

4.5.7 Lighting (Sec - 17) : Sufficient and suitable lighting, natural or artificial or both must be provided in every part of the factory where workers are working or passing. Effective arrangements must be made for the prevention of glare and the formation of shadows which may cause eye strain or the risk of accident to any worker.

4.5.8 Drinking water (Sec- 18) : Effective arrangements shall be made to provide and maintain drinking water distribution at convenient places for all workers. Arrangement of cooling water during hot weather shall be made where the number of workers employed in a factory is more than 250.

4.5.9. Latrines and urinals (Sec – 19) : Separate closed door latrines and urinals both for male and female workers shall be provided. They shall be conveniently situated and accessible for workers at all times and they shall be maintained clean with adequate lighting and ventilation, sweepers shall be employed for keeping clean latrines, urinals and washing places and cleaning must be done once in every 7 days with detergents or disinfections.

4.5.10 Spittoons (Sec - 20): Sufficient number of spittoons should be provided in convenient places and should be maintained cleanly. No person is allowed to spit in the premises except in spittoons. If any one spits at side the spittoon, he shall be punishable with a fine not exceeding Rs.5/-.

4.6. MEASURES IN REGARD TO SAFETY :

Safety is a basic and primary requirement in a factory. Unless the life of workers is secure, smooth and proper working cannot be ensured in any factory.

Sections 21 to 41 of the Act contain the provisions relating to the safety of the workers. The basic purpose of these provisions is to provide security to the workers while they are on work in a factory against accidents & hazardous jobs resulting in injury to the workers. These provisions are absolute in character and it is the duty of the occupier of every factory to comply with them. They are summarised as under :

- 1) Fencing of Machinery
- 2) Work on or near machinery in motion
- 3) Employment of young persons on dangerous machines
- 4) Striking gear and devices for cutting of power
- 5) Self acting machines
- 6) Casing of new machinery
- 7) Prohibition of employment of women and children near cotton openers.
- 8) Hoists and lifts

- 9) Lifting machines, chains etc.
- 10) Revolving machinery
- 11) Pressure plant
- 12) Floors, stairs and w
- 13) Pits, sumps, openings in floors etc.
- 14) Excessive weighs
- 15) Protection of eyes
- 16) Precautions against dangerous fumes
- 17) Precautions regarding the use of portable electronic light
- 18) Precautions against explosive or inflammable gas etc.
- 19) Precautions in case of fire
- 20) Power to require specifications of detective parts or tests of stability.
- 21) Safety of building and machinery
- 22) Maintenance of building
- 23) Safety officers
- 24) Safety and occupational surveys.
- 25) Power to make rules.

4.6.1. Fencing of machinery (Sec - 21): In every factory every dangerous part of machinery should be securely fenced to protect the workers from accidents. The State Government may prescribe some more precautions as it consider necessary in case of any particular machinery or part of it.

4.6.2 Work on near machinery in motion (Sec - 22) : Of any examination of any machinery is to be made while it is in motion, it should be made only by a specially trained adult male worker wearing light fitting clothing. No woman or young person should be allowed to clean or lubricate or adjust the machinery in motion if there is any risk of injury from any moving part.

4.6.3 Employment of young persons on dangerous machines (Sec - 23) : Young persons should not be allowed to work on any machine without –

1. the instructions regarding dangers and precautions to be observed, and
2. giving sufficient training and
3. the supervision of an experienced and trained person. The State Govt. may prescribe the machines on which the persons ought not to work.

4.6.4 Striking gear and devices for cutting of power (Sec - 24) : Suitable or other efficient mechanical appliance should be provided and maintained and used to more driving belts. Similarly, suitable devices for cutting off power in emergencies should be provided and maintained in every work room.

4.6.5 Self acting machines (Sec - 25): Any traversing part of self acting machine and no material carried there on should be allowed to run on its out ward or inward traverse with a distance of 18 inches from any fixed structure which is not part of the machinery.

4.6.6. Casing of new machinery (Sec - 26) : All machinery driven by power and installed after the commencement of the Factories Act should be completely encased or otherwise effectively guarded as to prevent danger, A person should be punishable with imprisonment upto 3 months or with fine upto Rs. 500/- or with both, when he sells or lets any machinery not complying with the provisions of Section-26.

4.6.7. Prohibition of employment of women and children near cotton openers [Sec-27] : Women or children should not be employed in any part of a factory for pressing cotton in which a cotton opener is at work. However, they may be employed where the feed end of cotton opener is in a room separated from the delivery end.

4.6.8 Hoists and Lifts [Sec -28] : Hoists and Lifts should be of good mechanical construction and sufficiently protected by enclosures fitted with gates. They should be properly maintained and thoroughly examined by competent persons atleast once in every 6 months. A register shall be kept to record the particulars of examination.

4.6.9. Lifting Machines, Chains etc. [Sec - 29]: Cranes and other lifting machinery shall be of good construction and properly maintained. They shall be thoroughly examined by a competent person atleast once in every 12 months. A register shall be kept to record the particulars of examination effective measures shall be taken to see that the above mentioned machinery shall be does not approach within 20 feet of that place where any person is employed or working.

4.6.10 Revolving Machinery [Sec - 30] : Effective measures shall be taken to ensure the safe working peripheral speed of ever revolving vessel cage, fly wheel or similar appliances driven by power and is not exceeded. The maximum peripheral speed of such machinery must be indicated by a notice by the side of it.

4.6.11 Pressure Plant [Sec - 31]: Effective measures shall be taken to ensure that the safe, working pressure of any part of the plant or machinery is not exceeded when it is operated above atmospheric pressure. The State Government may make rules regarding the examination and testing of any such plant or machinery and also providing for additional safety measures.

4.6.12 Floors, Stairs, and Ways [Sec – 32]: All floors, stairs, steps, passages and gang ways shall be of sound construction and properly maintained to avoid accidents.

4.6.13 Pits, Sumps, Openings in Floors etc [Sec - 33] : Every sump tank, pit or fixed vessel in the ground or in a floor shall be properly covered or fenced.

4.6.14 Excessive Weight [Sec - 34] : No person shall be employed to lift, carry or move any heavy load which may likely to cause him injury,

4.6.15 Protection of Eyes [Sec - 35] : Screens or suitable goggles must be provided for the protection of workers eyes when there is risk of injury to the eyes from the particles or fragments thrown off in the course of process or by exposure to excessive light.

4.6.16 Precautions against Dangerous Fumes [Sec - 36] : No person shall enter or be permitted to enter any tank, pipe or other confined space in , which dangerous fumes are likely to be present. Similarly, no person shall be permitted to enter any boiler, furnace tank or other confined space unless it is made sufficiently cool by appropriate method.

4.6.17 Precautions regarding the use of portable electronic light [Sec. 36-A] : No portable electronic light or any other electric appliance of voltage exceeding 24 volts / shall be permitted inside any chamber tank, pit, pipe or other confined space. If any inflammable ' gas, fume is likely to be present there no lamp or light other than flame - proof shall be permitted to be used.

4.6.18 Precautions against explosive or inflammable gas etc [Sec 37] : Where any manufacturing process produces gas, fume or vapour which is likely to explode on ignition, all practicable measures shall be taken to prevent any such explosion. And if a plant or machinery contains explosive or inflammable material under more than atmospheric pressure, that part shall not be opened unless special measures prescribed for that are taken.

4.6.19 Precaution in case of fire [Sec-38] : Every factory shall be provided with such means and ways of escape in case of fire. A free passage, way giving access to means of escape shall be maintained in every room of the factory. Similarly, the workers shall be given adequate training and familiar with the means of escape in case their number is more than 20 and employed above and the ground floor or where explosive materials are used to stored.

4.6.20 Power to require specifications of defective parts or tests of stability (Sec - 39) : The Inspector may demand the occupier or manager of the factory to furnish drawings, specifications and to carry out the tests in the specified manner, when he feels that any building or part of building , or plant or machinery in a factory is dangerous to human life or safety.

4.6.21 Safety of Building and Machinery(Sec – 40): If any building or part of a building or plant or machinery in a factory is dangerous to human life or safety, the Inspector may serve an order, specifying the measures to be carried out before a specified date on the occupier or manager or both. The inspector may also prohibit the use of any such building, Machinery etc., Until it has been properly repaired or altered.

4.6. 22 Maintenance of Building (Sec - 40-A) : The Inspector may serve a written order specifying the measures to be taken on the occupier or manager or both, when it appears that any building or part of a building is not properly maintained and likely to lead determinate to the health and welfare of the workers.

4.6.23 Safety Officers (Sec- 40-B) : The State Government by notification in the Official Gazette, insist the occupier to employ such number of safety officers as may be notified. It also prescribe the duties, qualifications and conditions of service of such officers. Safety officers are employed where the number of workers is more than 1000 or the manufacturing process involves any risk of danger to the safety and health of the workers.

4.6.24 Safety and Occupational Health Surveys (Sec – 91A): Section 91A inserted by Factories (Amendment) Act, 1976 provides for safety and occupational health surveys. The Chief Inspector, or Director General of Factory Advice Service and Labour Institutes, or the Director General of Health Services to the Government of India, or such other officer as may be authorised in this behalf by the State Government or the Chief Inspector or the Director General of Factor Advice

Service and Labour Institutes or the Director General of Health Services may, at any time during the normal working hours of a factory, or at any other time as in found by him to be necessary, after giving notice in writing to the occupier or manager of the factory or any other person who for the time being purports to be in charge of the factory, undertake safety and Occupational Health Surveys. Such occupier or manager or other person shall afford all facilities for such survey, including facilities for such survey, including facilities for the examination and testing of plant and machinery and collection of samples and other data relevant to the survey.

For the purpose of facilitating such surveys every worker, shall if so required by the person conducting the survey present himself to undergo such medical examination as may be considered necessary by such person and furnish all information in his possession and relevant to the survey.

Any time spent by a worker for undergoing medical examination or furnishing such information shall for the purpose of calculation wages and extra wages for overtime work, be deemed to be time during which such worker worked in the factory. For the purposes of this section, the report if any, submitted to the State Government by the person conducting survey shall be deemed to be a report submitted by in Inspector under this Act.

4.6.25 Power to make rules [Sec- 41] : The State government has the power to make rules to supplement the provisions relating to safety contained in Factories Act. The rules will tend to provide further devices and measures for securing the safety of persons employed in any factory.

4.7 MEASURES REGARDING WELFARE OF WORKERS :

The need for adoption of welfare measures as a means to increase the workers productive efficiency, to keep up their morale, and for the maintenance of industrial peace has been realised by all sections of the society. The main objective of these provisions is to provide basic welfare amenities to the workers, while working in the factories. Provisions relating to welfare of the factory workers have been made in Sections 42-50 in Chapter -V of the Factories Act, 1948. which are as under -

1. Washing facilities
2. Facilities for storing and drying clothing
3. Facilities for sitting
4. First - aid appliances
5. Canteens
6. Shelters, restrooms and lunch rooms
7. Creches
8. Welfare Officers

4.7.1. Washing Facilities (Sec - 42): Separate adequate and suitable facilities shall be provided and maintained for the use of male and female workers. All such facilities be conveniently accessible and kept clean.

4.7.2. Facilities for storing and drying clothing [Sec - 43] : The Sate government may make rules requiring any factory or class of factories the provision of suitable place for the workers to keep their clothing not worn during the working hours and for the drying of wet clothing.

4.7.3 Facilities for fitting [Sec - 44] : Suitable sitting arrangements shall be provided so that the standing workers can sit when ever they get opportunity for rest incourse of their work. If the workers are rule to work efficiently in a sitting position. The Chief Inspector may require the occupier of the factory to provide such seating arrangements.

4.7.4 First - aid appliances [Sec - 45] : First aid boxes or cupboards with prescribed contents must be provided and maintained in every factory. They must be readily accessible during all working hours. There must be one such box or cupboard for every 150 workers. An Ambulance room with necessary equipment and medical staff must be provided and maintained in every factory where the number of workers employed is more than 500.

4.7.5 Canteens [Sec - 46] : A canteen shall be provided and maintained by the occupier of the factory where the number of workers employed is more than 250, Such canteen shall provide food stuffs to the workers shall run as per the rules of the State Govt.

4.8.5 Shelters, restrooms and lunch rooms (Sec 47) : Shelters, restrooms and lunch room with drinking water facility shall be provided and maintained in every factory where more than 150 workers are ordinarily employed. If canteen is - maintained, it shall be regarded as the lunch room. The shelters, rest rooms or lunch rooms shall be sufficiently ventilated and lighted and maintained cleanly.

4.7.7 Crèches [Sec – 48] : Where more than 30 women workers are employed in a factory, a suitable room, or rooms must be provided and maintained for the use of children below 9 years age of such women, such rooms shall be maintained cleanly and shall be under the care of trained woman. The shall be adequately lighted and ventilated. The State Government make many rules for additional facilities such as free milk, or refreshment for the children and facility for washing and changing their clothing etc.

4.8.8 Welfare Officers [Sec - 49] : The occupier of the factory shall employ the prescribed number of welfare officers where 500 or more are ordinarily employed. The State Govt. may prescribe the duties, qualifications and conditions of service of such officers.

4.8 SUMMARY :

The International Labour Conference has adopted several recommendations relating to factory legislation in general. The First Labour Legislation in India was the Indian Factories Act – 1881, which provided the some health, safety and welfare measures to the employes who are working the factory. The present Factories Act was enacted in India in 1948, and it was forced on 1-4- 1949 and this Act is applicable entire India including Jammu and Kashmir.

4.9. TECHNICAL TERMS :

1. Factory : building where things are manufactured.
2. Occupier ; A person who has ultimate control over the affairs of the factory.

4.10 SELF – ASSESSMENT QUESTIONS :

1. State briefly the different provisions of the Factories Act n 948 for the welfare of the workers in a factory.

2. Discuss the provisions of the Factories Act -1948 with regard to health, safety and welfare of workers.
3. State the provisions of the Factories Act, 1948 with regard to safety and welfare of the workers.
4. What are the legal provisions relating to safety and welfare of workers under Factories Act – 1948
5. Define Factories Act? Explain its objectives and administration.

4.11. REFERENCE BOOKS :

1. K.C. Garg and Others : *Mercantile Law*, Kalyani Publishers, New Delhi, 2005

Dr. D. NAGESWARA RAO

Lesson - 5

EMPLOYMENT OF WOMEN AND YOUNG PERSON

5.0 OBJECTIVES :

After completion of this lesson we should be able to understand :

- object of Factories Act.
- scope of the Act.
- Employment of women.
- Employment of Young Person.
- Working hours for children.

STRUCTURE :

5.1 Introduction

5.2 Employment of Women

5.3 Employment of Young Person

5.4 Prohibition of Employment of Young Children

5.5 Certificate of fitness

5.6 Effect of certificate of fitness granted to Adolescent

5.7 Working hours for children

5.8 Power to require medical examination

5.9 Summary

5.10 Self Assessment Questions.

5.11 Reference Books

5.1 INTRODUCTION :

The main objectives of Factories Act are.

- i) to regulate working conditions in factories
- ii) to ensure that basic minimum requirements for Safety, Health and Welfare.

The object of passing the Factories Act was to consolidate and amend the law regulating labour in factories. The Act was enacted primarily to protect women and young persons.

This Act extends to whole of India. The provisions of the Act are applicable to all factories including factories belonging to central or any state government.

5.2 EMPLOYMENT OF WOMEN :

The factories act makes numerous provisions for the protection of women workers. The provision of the Factories Act are Applicable both of male and female adult workers but a few special provisions relating to adult female workers have been incorporated in the Act. These provisions are as under :

1. Work on or near machinery in motion [Sec 22] : No woman shall be allowed to clean, lubricate or adjust any part of machinery while it is in motion if it is likely to expose her to the risk of injury from any moving part.

2. Prohibition of employment of women near cotton - openers [Sec 27] : No woman shall be employed in any part of a factory for pressing cotton in which a cotton - opener is at work. The prohibition may be relaxed in certain cases.

3. Creches [Sec 48] : In every factory where in more than 30 women workers are ordinarily employed, there shall be provided and maintained a suitable room or rooms for the use of children under the age of six years of such women. Facilities shall be given for the mothers of such children to feed them at the necessary intervals.

4. Restriction on employment of women [Sec 66] : Section 66 provides for the following further restrictions in regard to employment of women -

- a) No women worker shall be exempted from the provisions of section 54. In other words, no woman worker shall be required or allowed to work in any factory for more than 48 hours in any week or nine hours on any day.
- b) No woman shall be required or allowed to work in any factory except between the hour of 6 a.m. and 7 p.m. But the State Govt. may be notification in the Official Gazette vary the limits for any factory or group or class or description of factories. But such variation must not authorize the employment of any woman between the hours off 10 p.m. to 5 a.m. The State Government may, however, authorise the employment of women workers during the night in fish canning and fish curing factories. The inspector has no right to issue a general prohibition against the employment of women at night without going into the question whether the staff is sufficient. Here it may be noted that an owner of a factory can employ women for night work only if the inspector deems it fit.
- c) There shall be no change of shifts for women workers except after a weekly holiday or any other holiday.

The main arguments in favour of fixing the maximum hours for women at lower level than those prescribed for men are that women have domestic duties to perform and that they find long hours a greater strain [Report of Royal Commission on Labour].

5. Dangerous Operation [sec 87] : Where the State Government declares any manufacturing process or operation in any factory as dangerous or injurious to the health of women it may made rules prohibiting or restricting the employment of women in that operation.

5.3 EMPLOYMENT OF YOUNG PERSONS :

Article 24 of the Constitution of India lays down that 'no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment'. Factory Act provides for various restrictions on the employment of young persons in the factories. These are based on the principle that the state owes a duty to the future generations of workers to see that the childhood is not wasted in the dark corners of factories and workshops, instead of being educated in schools.

A young person means a person who is either a child or an adolescent. A child means a person who has not completed the age of 15 years. An adolescent means a person who has completed his 15th year of age but had not completed his 18th year. In other words, young person means a person who has not completed his 18th year of age.

The various provisions relating to the employment of young persons in factories are as under :-

5.4 PROHIBITION OF EMPLOYMENT OF YOUNG CHILDREN [Sec 67]:

A child who has not completed his 14th year is prohibited from working in any factory. Under any circumstance, what so ever, no exemption even in case of emergency can be allowed to overcome the provisions of this section.

This is an absolute prohibition and admits of no exception. It is the duty of the employer to ascertain the age of the children whom he allows to work in any factory. He cannot depend on the statement of the applicant,

A child is a person who has not completed his 15th year of age. As this section applies only to children below 14 years, it has obviously no application to children between the age of 14 and 15.

Non - adult workers to carry tokens [Sec 68] : A child who has completed his 14th year or an adolescent shall not be required or allowed to work in any factory unless he is given a certificate of fitness by a competent certifying surgeon. Such a certificate shall be in the custody of the manager of the factory. The young person shall carry while he is at work a token giving a reference to such a certificate.

The object of sec. 68 is to prevent the exploitation of the young labour force.

5.5 CERTIFICATE OF FITNESS [Sec 69] :

The certificate of fitness is granted by a certifying surgeon on the application of young person or a guardian. The application must be accompanied by a document signed by a manager of a factory that the young person will be employed therein if certified to be fit for work in a factory. The application for the grant of the certificate of fitness can also be made by the manager of the factory in which the young person wishes to work. The certifying surgeon shall examine the young

person and ascertain his fitness for work in a factory. If the certifying surgeon is satisfied, he may grant or renew to such young person in the prescribed form.

- a) a certificate of fitness to work in factory as a child, provided he has completed his fourteenth year, has attained the prescribed physical standards and is fit for such work .
- b) a certificate of fitness to work, in a factory as an adult, provided he has completed his 15th year and is fit for a full days work in a factory.

The certificate of fitness is valid only for a period of 12 months. It may be granted subject to such conditions as regard the nature of the work involved and periodical re - examination. The certificate may be revoked by a certifying surgeon if the holder of the certificate is no longer fit to work. Where a certifying surgeon refuses to grant or renew a certificate or revokes a certificate, he shall state his reasons in writing for so doing.

Any fee payable for a certificate under this section shall be paid by the occupier and shall not be recovered from the young person, his parent and guardian.

5.6 EFFECT OF CERTIFICATE OF FITNESS GRANTED TO ADOLESCENT [Sec 70]:

An adolescent, who has been granted a certificate of fitness to work as an adult, would be deemed to be an adult and all the provisions of the Factories Act relating to adult workers would apply to him.

No female adolescent or a male adolescent who has not attained the age of seventeen years but who has been granted a certificate of fitness to work in a factory as an adult, shall be required or allowed to work in any factory except between 6 a.m. and 7 p.m. provided that the State Govt. may by notification in the Official Gazette, in respect of any factory or group or class or description of factories.

- i) Vary the limits laid down in this sub- section so however, that no such section shall authorise the employment of any female adolescent between 10 p.m. and 5.a.m.
- ii) Grant exemption from the provisions of this sub- section in case of serious emergency where national interest is involved.

An adolescent who has not been granted a certificate of fitness to work in the factory as an adult shall be deemed to be a child for the purposes of the Act.

5.7 WORKING HOURS FOR CHILDREN [Sec 71] :

No child can be employed or permitted to work in any factory -

1. for more than four and a half hours in any day.
2. during the night i.e., a period of atleast twelve consecutive hours including the interval between 10 p.m. and 6 a.m.

3. of any day on which he has already been working in any other factory.

The period of work of all children employed in a factory shall be limited to two shifts. Such shifts shall not overlap or spread over more than five hours. Each child must be employed in only one of the relays which must be employed in only one of the relays which must not be changed more frequently than once in thirty days, except with the previous permission in writing of the Chief Inspector. Provision relating to weekly holidays for adults under Sec.52 will also apply to child workers. No child can be required or allowed to work in any factory on any day on which he has already been working in another factory.

No female child shall be required or allowed to work in any factory except between 8a.m. and 7p.m.

Notice of periods of work for children [Sec. 72] : Every factory must display and correctly maintain a notice of periods of work for children. Such notice should show clearly the periods during which children may be required or allowed to work. The periods shown in the notice shall be fixed before hand, as per Sec. 61 regarding period of work for adults, but there shall be contravention of the provisions of Sec. 71.

Register of child workers [Sec 73]: The manager of every factory in which children are employed shall maintain a register of child workers showing -

- a) the name of each child worker in the factory.
- b) the nature of his work.
- c) the group in which he is included.
- d) where his group works on shifts, the relay to which he is allotted , and
- e) the number of his certificate of fitness.

No child worker shall be required or allowed to work in any factory unless his name and other particulars have been entered in the register of child workers [Sec 73(1-A)]

This register must be made available to the Inspector at all times during working hours or when any work is being carried on in a factory.

The State Govt. may prescribe the form of the register of child workers, the manner in which it shall be maintained and the period for which it shall be preserved. -

Hours to work to correspond with notice under Sec. 72 and register under Sec 73 [Sec.74]

No child shall be employed in any factory otherwise than in accordance with the notice of periods of work for children displayed in the factory and the entries made before hand against his name in the register of child workers of the factory.

5.8 POWER TO REQUIRE MEDICAL EXAMINATION [SEC 75] :

An Inspector has power to serve a notice on the manager of the factory asking him for the medical examination of the young person who works in a factory either without a certificate of

fitness, or with a certificate of fitness but is no longer fit to work in that capacity. Such a young person, shall not, if the Inspector so directs, be employed or permitted to work in any factory until he has been granted a certificate of fitness or fresh certificate of fitness as the case may be or has been certified by the certifying surgeon examining him not to be a young person.

Power to make rules [Sec.76]:

This section authorises the State Govt. to make rules -

- a) Prescribing the forms of certificates of fitness to be granted to young persons and the procedure for their issue,
- b) Prescribing the physical standards to be attained by children and adolescents working in factories.
- c) Regulating the procedure of certifying surgeons.
- d) Specifying other duties which the certifying surgeons may be required to perform in connection with the employment of young persons in factories.

Provisions relating to safety of young persons : The provisions relating to the safety of young persons are scattered through the Act, but for the convenience of the readers are summarised as under:

- 1) No young person shall be allowed to clean, lubricate, or adjust any part of the machinery while it is motion if it is likely to expose him to risk of injury from any moving part. (Sec 22).
- 2) No young person shall work at any dangerous machine unless -
 - a) he has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed, and
 - b) he has received sufficient training in work at the machine or is under adequate supervision by a person who has through knowledge and experience of the machine (Sec 23)
- 3) No child shall be employed in any part of a factory for pressing cotton in which a cotton opener is at work. This prohibition may be relaxed in certain cases. (Sec.27)
- 4) Where the State Govt. declares any manufacturing process or operation in any factory as the dangerous or injurious to the health of young person, it may make rules prohibiting or restricting the employment of young persons in that operation. (Sec 87).

5.9 SUMMARY :

The factories Act makes numerous provisions for the protection of women and young persons. The act provide some important provisions to women workers. Those are –

- (I) 1. Work on or near machinery in motion.
2. Prohibition of employment of women near cotton - openers.

3. Creches.
4. Some important provisions and restrictions on employment of women workers.
 - a) a woman worker in any factory for more than 48 hours in any week or nine hours on any day.
 - b) There shall be no change of shifts for women workers except after a weekly holidays or any other holiday.
5. Restriction to work near dangerous operations.

(II) Prohibition of Employment of young children :

1. A child who has not completed his fourteenth year is prohibited from working in any factory.
2. certificate of fitness.
3. working hours for children.
 - a) no child can be employed or permitted to work in any factory.
 - b) during the night i.e., a period of atleast twelve consecutive hours including the interval between 10 p.m. and 6 a.m.

5.10 SELF –ASSESSMENT QUESTIONS :

1. What are the restrictions on the employment in factories of women and young persons under the Factories Act, 1948.
2. What are the major considerations in employment of women ? How can they be provided with necessary conditions of work ?

5.11 REFERENCE BOOKS :

1. K.C. Garg and Others : *Mercantile Law*, Kalyani Publishers, New Delhi, 2005

Dr. D. NAGESWARA RAO

Lesson - 6

FACTORIES ACT - 1948 - EMPLOYEES LEAVE RULES- WAGES - PENALTIES AND PROCEDURE

6.0 OBJECTIVES :

After completion of this lesson, we should be able to understand -

- object of Act
- working hours for adults
- weekly holidays-compensatory holidays
- extra wages for overtime
- register of adult workers
- annual leave with wages- Rules
- penalties and procedure.

STRUCTURE :

- 6.1 Introduction
- 6.2 Working Hours for Adults
- 6.3 Weekly holidays
- 6.4 Extra wages for overtime
- 6.5 Notice of periods of Work of Adults
- 6.6 Register of Adult Workers
- 6.7 Annual leave with Wages
- 6.8 Rules Regarding Annual Leave with Wages.
- 6.9 Penalties and Procedures
- 6.10 Summary
- 6.11 Self – Assessment Questions.
- 6.12 Reference Books.

6.1 INTRODUCTION :

The object of Factories Act is to protect human beings from being subject to unduly long hours of bodily strain manual labour. It also provides that employees should work in health and sanitary conditions so far as the manufacturing process will allow and that precautions should be taken for their safety and for the prevention of accidents. The Act provides special provisions for leave, wages and penalties and procedure to the adult and child workers.

6.2 WORKING HOURS FOR ADULTS :

The following are the rules as to the regulation of hours of work of adults in the factories.

Weekly hours of work [Sec 51] :

Section 51 of the Act lays down that no adult worker shall be required or allowed to work in a factory for more than 48 hours in any week.

Daily hours of work [Sec 54]:

Section 54 further restricts the daily hours of work to nine. But the daily maximum working hours specified in the section can be exceeded with a view to facilitating the change of shifts by the previous approval of the Chief Inspector. The management has power to vary the working hours within the prescribed limits. There is nothing in the Act which imposes an obligation on the management to changes the working hours subject to the maximum limits prescribed by law with the consent of the workers.

The above restriction is applicable to ' workers ' only as defined in the Act. There is no prohibition requiring an employee working forty two hours a week to work forty eight hours after a departmental transfer and he cannot claim overtime wages for those additional six hours put in by him.

The above provisions cannot be changed by mutual agreement between management and workers.

Interval during daily hours of work [Sec 55]:

According to Sec.55the period of work shall be so fixed that no adult worker is required to work for a period exceeding five hours without an interval for rest of at least half and hour. This section permits six hours work at a stretch without any interval when the total number of hours to be worked on any day in a shift does not exceed six. This can be done by the State Govt. or by the Chief Inspector by an order in writing. However, the mere presence of the persons in the factory during rest period is no offence.

In order to be regarded as an interval of rest, a period should be one in which the worker is, neither, called upon to work nor expected to work, and should not be a period, where such absence of activity is on account of the fact that no work is provided or available.

Spread over Period [Sec – 56] :

Section 56 provides for spread - over of work. The periods of work including such intervals

for rest shall be so arranged that they shall not spread over more than ten and a half hour in one day. But the Chief Inspector may increase the spread/over up to twelve hours for reasons to be specified by him in writing.

6.3 WEEKLY HOLIDAYS [SEC. 52] :

An adult worker shall have a holiday on the first day of the week, i.e., Sunday. Weekly holidays are necessary for the workers to recover energy for the work they are doing in the factories. It saves their health. But if he is required to work on a Sunday, he must have another whole day as holiday which should fall within three days before or after the first day of the week. A previous notice of this desire of manager to employ a worker on Sunday has to be communicated to the Inspector before the worker is made to work. Such notice must also be displayed in the factory. But the substitution should not result in the worker working for more than ten days consecutively without a holiday for a whole day.

The notice referred to above given to an Inspector may be cancelled by a fresh notice to the Inspector and the same must be displayed in the factory.

Where any worker works on the first day of the week, and has had a holiday on any of the three days immediately before it, that first day of the week, shall for the purpose of calculating his weekly hours of work, be included in the preceding work.

No general permission can be granted for altering the day of weekly holiday so as to cover all the workmen, whenever workers are required or permitted to work on a weekly holiday, the specific permission of the Chief Inspector in respect of each and every worker who is required to work on such a day should be obtained.

Compensatory Holidays [Section 53] :

Compensatory holiday is a holiday which is allowed to a worker in lieu of some due holiday on which the worker worked.

Where a worker is deprived of any of the weekly holidays consequent upon an order or rule made under the provisions of this Act. He must be allowed compensatory holidays of the equal number to the holidays so lost within the month in which the holidays were due to him or within two months immediately follow that month. The State Government has been empowered to prescribe the manner in which such compensatory holidays may be allowed.

Night Shifts [Sec 57] : Where a worker in a factory works on a shift which extends beyond midnight, a holiday for him will mean a period of 24 hours beginning when his shift ends and the following day is deemed to be the period of 24 hours beginning when such shift ends and the hours he had worked after mid - night should be counted in the previous day.

Prohibition of Overlapping Shifts [Sec - 58] : Sec 58 provides that work shall not be carried on in any factory by means of a system of shifts so arranged that more than one relay of workers is engaged in work of the same kind at the same time. The Government or the Chief Inspector may grant any factor exemption from this rule by a written order.

6.4 EXTRA WAGES FOR OVERTIME [Sec. 59]:

When a workers works in a factory for more than nine hours in a day or for more than forty-eight hours in a week, he is entitled to extra wages in respect of overtime work. The extra wages shall be paid at the rate of twice his ordinary rate of wages.

'Ordinary rate of Wages' means the basic wages plus such allowances including the cash equivalent of the advantage occurring through the concessional sale to workers of foodgrain and other articles, as the worker is for time being entitled to, but does not include a bonus and wages for overtime work.

Where workers in a factory are paid on a piece rate basis, the time rate shall be deemed to be equivalent to the daily average of their full time earnings for the days on which they actually worked on the same or identical job during the month immediately preceding the calendar month during which the overtime work was done and such time shall be deemed to be the ordinary rates of wages of those workers.

In the case of a worker who has not worked in the immediately preceding calendar month on the same or identical job, the time rate shall be deemed to be equivalent to the daily average of the earning of the worker for the days on which he actually worked in the week in which the overtime work was done.

The expression 'Cash equivalent of the advantage' is computed on the basis of the maximum quantity of food grains and other articles admissible to a standard family.

The State Government is empowered to prescribe rules governing the computation of such cash equivalent and the maintenance in a factory of the necessary registers for purpose of securing compliance with the provisions of this section.

The overtime payment constitutes an implied term of contract between the employer and employee. Where the conditions of service require 39 hours in a week, work beyond such hours shall be paid at overtime rates, otherwise the same would be tent amount to an indirect increase in hours of work and therefore an alteration in service conditions.

Overtime wages are payable only when the work is done on the factory premises. In other words, no claim for overtime wages will be entertained if the work is done out side the factory premises.

Restriction on Double Employment [Sec - 60]: No adult worker shall be required or allowed to work in any factory on any day on which he has already worked in any other factory, except in the circumstances as may be laid down.

6.5 NOTICE OF PERIODS OF WORK OF ADULTS [Sec.61] :

There shall be displayed and correctly maintained in every factory a notice of periods of work for adults, showing clearly for every day the periods during which adult workers would be required to work. The notice shall be in English language and in a language understood by a majority of the workers. It shall be displayed at some conspicuous and convenient place at or near the main entrance to the factory.

The periods shown in the notice shall be fixed before hand in accordance with the following provisions and shall be such that workers working for those periods would not be working in contravention of any of the above provisions:

- I. Where all the adult workers in a factory are required to work during the same periods, the manager of the factory shall fix those periods for such workers generally.
- II. Where all the adult workers in a factory are not required to work during the same periods, the manager of the factory shall classify them into groups according to the nature of their work indicating the number of workers in each group.
- III. For each group which is not required to work on a system of shifts, the manager of the factory shall fix the periods during which the group may be required to work.
- IV. Where any group is required to work on a system of shifts and the relays are not to be subject to predetermined periodical changes of shifts, the manager of the factory shall fix the periods during which each relay of the group may be required to work.
- V. Where any group is to work on a system of shifts and the relays are to be subject to predetermined periodical changes of shifts, the manager of the factory shall draw up a scheme of shifts, where under the periods during which any relay of the group may be required to work and the relay which will be working at anytime of the day shall be ascertained for any day.
- VI. In the case of a factory beginning work after the commencement of this Act, a copy of the notice shall be sent in duplicate to the inspector before the day on which work is begun in the factory.
- VII. Any proposed change in the system of work in any factory which will necessitate a change in the notice shall be notified to the inspector in duplicate before the change is made. Except with the previous sanction of the inspector, no such change shall be made until one week has elapsed since the last change.
- VIII. The State Government may prescribe forms of the notice of periods of work for adults and the manner in which it shall be maintained.

Displaying wrong notice of period of work for adult is equal to not displaying notice.

Sections 61 is intended to protect against sudden or casual alterations at one's discretion or caprice of the hours of employment.

It is entirely at the discretion of the manager of a factory to change the working hours. But a change can't be exercised by the manager after the factory begins working for the period scheduled in advance. This is because hours of employment should be fixed and should not be an object of sudden variation or casual alteration.

6.6 REGISTER OF ADULT WORKERS [Sec.62] :

The manager of every factory shall maintain a register of adult worker showing-

- a) the name of each adult worker in the factory.

- b) the nature of his work,
- c) the group, if any, in which he is included,
- d) where his group works on shifts, the relay to which he is allotted.
- e) such other particulars as may be prescribed.

No adult worker shall be required or allowed to work in any factory unless his name and other particulars have been entered in the register of adult workers.

This register should be produced immediately on demand by the Inspector during working hours. At all times means that it should be produced on demand. If manager is absent he should make proper arrangements to comply with the orders of the Inspectors. [Shiv Bilari Vs State AIR [(954) All 255]. The State Government may prescribe the form of the register of adult workers, the manner in which it shall be maintained and the period for which it shall be preserved.

The failure to maintain registers as required by this section is an offence punishable under Section 92 of the Act. The obligation to maintain the registers is imposed upon a manager and not on occupier. An occupier cannot therefore be held liable for the failure of the manager to comply with the requirements of Sec. 62.

Entry of the name of a person in the attendance register maintained under Sec.62 of the Act raises a presumption that the person is a worker.

No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory and the entries made before hand against his name in the register of adult workers of the factory (Sec.63).

The actual hours of work of adult workers must be strictly in accordance with the notice of work and the previously made entries in the register of adult workers. There must not be any variance in the actual work and the notice of period of work of adult workers and the entries made in the register of adult workers.

The language of Sec. 63 is clear enough to indicate that the occupier and the manager of factory commit as many defaults as the number of workers found working in the factory otherwise than in accordance with the notice. Thus where the manager of a factory employed 18 workers beyond permitted hours, it was held that in 18 prosecutions brought against him, he could properly be convicted and sentenced on each offence.

Exemptions: By Sections 64 & 65. the State Govt. has been given power to exempt for limited periods certain factories from compliance with some of the provisions relating to hours of work and employment.

6.7 ANNUAL LEAVE WITH WAGES :

Provisions relating to annual leave with wages are contained in Sec.78 to 84 and 78 provides shall not operate to the prejudice of any right to which a worker may be entitled under any other Law, or under the terms of any award, agreement (including settlement) or contract of service. But when such award, agreement (including settlement) or contract of service provides for longer annual leave with wages than provided in this chapter, the worker shall be entitled to such longer

leave. This provision is intended give better terms of service to the workers engaged in the factories. The provisions of this chapter shall not apply to workers in any factory of any Railway Administered by Government.

6.8 RULES REGARDING ANNUAL LEAVE WITH WAGES [Sec.79] :

Following are the rules regarding annual leave with wages under the Factories Act, 1948:

1) Number of Working days :

Every worker who has worked for a period of 240 days or more in a factory during a calendar year shall be allowed during the subsequent calendar year, annual leave with wages calculated as follows :

- a) In case of an adult worker, one day for every 20 days worked during the previous calendar year.
- b) In case of a child worker, one day for every 15 days worked during the previous calendar year.

While calculating the leave period, fraction of leave of half a day or more shall be treated as one full days leave, and fraction of less than half shall not be considered.

2. Computation of number of days :

- i) While counting 240 days, the following days are included in the days worked:
 - a) Days of lay - off,
 - b) Maternity leave up to 12 weeks granted to female worker,
 - c) Leave Earned in the previous year.

But he shall not earn leave for these days while calculating the number of leave days for that year.

- ii) Where a worker has started his service on a day other than 1st day of January, he shall be entitled to leave with wages only if he has worked for 2/3rd number of days in the remaining days of that number.
- ii) Where a worker was wrongfully suspended, his days of suspension shall be counted towards computing 240 days.

3. Discharge, Dismissal, Termination or Leaving of Employment : Where a worker is discharge or dismissed from service or leaves his employment or retires or dies in service, he or his heir shall be entitled to wages of lieu of annual leave to which he was entitled, even if he had not worked for the 240 days required to make him eligible. .

The payment shall be made :

- a) Before the expiry of the second working day. Where the worker is discharged or dismissed or quits employment.

b) Before the expiry of Two Months : Where the workers is retired or dies in service.

4. Carry forward of Leaves : Where a worker does not avail his whole of the annual leave earned by him, can carry forward his un - availed leave to the following year which shall be added in the leave of the following year subject to the following limits :

- a) 30 days in case of the adult workers, and
- b) 40 days in case of the child workers.

But a worker can carry forward his leave without any limit, if he is not allowed to avail his leave due to operation of any scheme.

5. Procedure to avail Annual Leave : When a worker want to avail his annual leave, he should give an application in writing to the manager, not less than 15 days before the date of commencement of leave. In case of public utility services, he should apply 30 days before commencement of leave.

A worker cannot avail this leave more than three times in a year.

But where a worker becomes ill and want to avail his annual leave with wages during his illness, leave shall be granted even if the application is not made with in such period.

6. Scheme for Annual leave : Due to continuity of work, the manager of a factory may, in agreement with the representatives of the workers, formulate a scheme for regulating the grant of annual leave to his workers in a planned manner to ensure continuing work on one hand and welfare of the workers on the other hand. A copy of the scheme shall be displayed at the notice board of the workers and a copy shall be submitted with the Chief Inspector.

Where a scheme is in operation, the leave application of the worker according to the agreed scheme shall not be refused.

The scheme shall remain in operation for a period of 12 months from the date of the day it comes into operation.

7. Payment in the Lieu of Leave : If the employment of a worker, who is entitled to leave, is terminated by the occupier before he has taken the entire leave to which he is entitled, or if having applied for and having not been granted such leave, the worker quits his employment before he has taken the leave, the occupier of the factory shall pay him the amount payable in respect of leave not taken. Such payment shall be made where the employment of the worker is terminated by the occupier, before the expiry of the second working day after such termination. Where a worker who quits his employment, such payment shall be made on or before the next pay day.

8. Unavailed leave and notice of discharge and dismissal : In computing the period of any notice required to be given before discharge or dismissal the unavailed leave of the worker shall not betaken into consideration.

9. Wages during leave period [Sec. 80] : Section 80 lays down the method according to which a worker shall be entitled to wages for the leave allowed to him under Section 78 or 79 of the Act. Wages for the leave period are payable at a rate equal of the daily average of his total full - time

earnings for days on which he actually worked during the months immediately preceding his leave. For the purpose of calculation wages will exclude any overtime and bonus but include any dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the worker of food grains and other articles.

Provided that in the case of a worker who has not worked on any day during the calendar month immediately preceding his leave, he shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the last calendar month preceding his leave in which he actually worked exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale of the workers of food grains and other articles.

10. Payment in advance in certain cases [Sec.81] : Provision is made for the payment of leave salary in advance. A worker will be paid advance wages provided the leave allowed is not less than 4 days in the case of an adult and not less than five days in the case of a child.

11. Made of recovery of unpaid wages [Sec.82] : Any sum required to be paid by an employer under the Factories Act but not paid by him are recoverable as delayed wages under the provisions of Payment of wages Act, 1936.

12. Power of exempt factories [Sec.84] : The State Govt. has the power to exempt a factory from the provisions of the Act. If it is satisfied that the leave rules applicable to the workers in the factory provide benefits which in its opinion are not less favourable than the statutory leave rules. The exemption may be made by a written order and subject to such conditions as may be specified in the order.

The section further provides that in order to decide whether or not the benefits which are provided for by any leave rules are the less favourable than those for which this section makes provision. The totality of the benefits shall be taken into account.

6.9 PENALTIES AND PROCEDURE :

The provisions of the factories Act should be properly enforced for the protection of workers. Section 92 to 105 contained in the Factories Act, provide for penalties for various offences committed under the Act. Some of the offences for which penalties have been prescribed are given under.

1. General penalty for offences [Sec.92] : Penalties have been laid down in this section for violation of any provision of the Act, or of any rules made thereunder or of any order in writing given under the provisions of this Act. In such cases the occupier and the manager of factory shall each be guilty of the offence and punishable with imprisonment for a maximum term of two years or with fine not exceeding one lakh rupees or with both. Where the offence continues even after conviction, the penalty is further fine which may extend to one thousand rupees per day for day the offence continues.

Where contravention of any of the provisions of Factories Act or any rule made there under or under Sec.87 has resulted in an accident, causing death or serious bodily injury, the fine shall not be less than twenty five thousand rupees in the case of an accident causing death and five thousand rupees in the case of an accident causing serious bodily injury.

2. Enhanced penalty after Previous Conviction [Sec.94] : This section provides for enhanced penalty for repeated offences, Where a person has already been convicted of an offence punishable under Sec.92 and commits a further violation of the same provision of the Act, he is punishable with imprisonment which may extend to three years or fine which shall not be less than ten thousand rupees but which may extend to two lakh rupees or with both. But the court may, for any adequate and special reasons to be mentioned in the judgment impose a fine of less than rupees ten thousand.

However, when contravention of any of the Provision of factories Act or any rule made there under or under Sec.87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than thirty five thousand rupees in the case of an accident causing death and ten thousand rupees in the case of an accident causing serious bodily injury.

However, no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

3. Penalty for obstructing Inspector [Sec. 95] : Whoever willfully obstructs an Inspector in the exercise of any power conferred on him, shall be punishable with imprisonment upto six months or fine upto rupees ten thousand or both.

4. Penalty for contravention of the provisions of Section 41 B, 41 C and 41 H : Who ever fails to comply with or contravenes any of the provisions of Sections 41B,41C or 41H or the rules made there under, shall, in respect of such failure or contravention, be punishable with imprisonment for a term which may extend to seven years & with fine which may extend to two lakh rupees, and incase the failure or contravention continues with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.

If the failure or contravention continues beyond a period of one year after the date of conviction the offender shall be punishable with imprisonment for a term which may extend to ten years.

5. Offence by workers [Sec.97] : A worker like occupier and manager is punishable for contravening the provisions of this Act or any rules or orders made there under where by any duty or liability is imposed on a worker. The maximum penalty which can be imposed upon such a defaulting worker is rupees five hundred.

6. Penalty for permitting double employment of a child [Sec.99] : The parent, guardian or other person having custody of or control over the child or obtaining direct benefit from the wages of a child who works on any day in more than one factory shall be punishable with fine which may extend to rupees one thousand. However, no such punishment can be awarded where it appears to the court that child so worked without the consent or connivance of such person.

7. Penalty for using false certificate of fitness [Sec.98] : Whoever knowingly uses or attempts to use or knowingly allows it to be used by another person, a false certificate of fitness shall be punishable with imprisonment for a term which may extend to two months or with fine which may extend to one thousand rupees or with both.

8. Presumption as to employment [Sec.103] : If a person is found in a factory at any time, except during intervals for meals or rest, when work is going on such person shall be presumed to be a person employed in a factory until contrary is provided.

9. Onus of proving limits of what is practicable etc. [Stec.104A] : In a proceeding for any offence for the contravention of any provisions of this Act of rules made thereunder consisting of a failure to comply with a duty or requirement to do something, it shall be for the persons who is alleged to have failed to comply with such duty or requirement, to prove that it was not reasonably practicable or as the case may be all practicable measures were taken to satisfy the duty or requirement.

10. Cognizance of offence [Sec.105] : No court shall taken cognizance of any offence under this Act except on complaint by or with previous sanction in writing of an Inspector.

11. Limitation of prosecutions [Sec.106]: The section requires that a complaint must be made within three months of the date on which the alleged commission of the offence came to the knowledge of the Inspector, complaint there of may be made within six months of the date on which the offence is alleged to have been committed.

12. Jurisdiction of a court for entertaining proceeding, etc. for offence [Sec.106-A]: For the purposes of conferring jurisdiction on any court in relation to an offence under this Act or the rules made thereunder in connection with the operation of any plant, the place where the plant is for the time being situated shall be deemed to be the place where such offence has been committed.

6.10 SUMMARY :

According to the Factories Act - 1948, it provides some important provisions, those who are appointed permanently and their name are registered and mentioned in the attendance register. Therefore, these workers provided the some provisions regarding to leaves, wages, penalty and procedures.

6.11 SELF – ASSESSMENT QUESTIONS :

1. State the provisions of the Factories Act regarding hours of work and leave with pay
2. Give a summary of the provisions of the Factories Act, 1948, relating to regulation of hours of work.
3. State the provisions of the Factories Act, relating to mode of recovery of unpaid wages in connection with annual leave granted to the worker.
4. State the provisions of the Factories Act, relating to penalties and procedures.

6.12. REFERENCE BOOKS :

1. K.C. Garg and Others: *Mercantile Law*, Kalyani Publishers, New Delhi, 2005

Dr. D. NAGESWARA RAO

Lesson : 7

THE EMPLOYEES STATE INSURANCE ACT -1948

7.0 OBJECTIVES :

After completion of this lesson we should be able to understand -

- objectives of the Act.
- applicability of Act.
- definitions.
- administration.
- powers of E.S.I. Corporation.
- six important benefits.
 - A. sickness benefits.
 - B. maternity benefits.
 - C. disablement benefits.
 - D. dependant's benefits.
 - E. medical benefits.
 - F. funeral benefits.

STRUCTURE :

- 7.1 Introduction**
- 7.2 Workmen's compensation Act, 1923 and E.S.I. Act, 1948.**
- 7.3 Applicability to the Act.**
- 7.4 Definitions.**
- 7.5 Administration of the Schemes**
- 7.6 Powers of the E.S.I. Corporation.**
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 - 7.8.A. Sickness benefits.**
 - 7.8.B. Maternity benefits.**
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 - 7.8.D. Dependants benefits**

7.8.E. Medical benefits**7.8.F. Funeral expenses****7.9 Summary****7.10 Technical terms.****7.11 Self Assessment Questions.****7.12 Reference Books.****7.1 INTRODUCTION :**

The aim of all social security legislations is to provide an environment where there is freedom from economic fear. An ideal welfare state must provide every citizen the opportunity of earning his living and freedom from fear-fear especially of economic ruin. It is the duty of the community as a whole to protect by common endeavours any individual member there of from the physical distress consequent on illness and from the economic distress inevitable on reduction or loss of earnings due to illness, disablement, maternity, old age, unemployment, or death of the working member. The Employees State Insurance Act is a significant step in this direction.

The Act is a piece of social security legislation conceived as a means of extinction of the evils of society, namely, want, disease, dirt, ignorance and indigence. The Act confers benefit on employees against sickness, maternity and other disabilities. The provisions of the Act should not therefore, be construed in technical, narrow or restricted sense [E.S.I. Corpn, Bangalore V.M.B. Nagraj, (1982) Lab. I.C. 375].

The Act is a landmark in the history of social security in India. Its object is to introduce social insurance by providing for certain benefits to employees in case of sickness, maternity and employment injury and for certain other matters in relation there to. The Act is one of compulsory state insurance providing for certain benefits. These benefits are secured by financial contributions to the scheme both by employers and employees.

7.2. WORKMEN'S COMPENSATION ACT, 1923 AND E.S.I ACT, 1948 :

The scope of coverage under the Employees State Insurance Act, 1948 is much wider than under the W.C. Act, 1923. Under the W.C. Act, 1923 only manual workers falling within the definition of 'workman' [sec 2(n) of the W.C. Act, 1923] are entitled to compensation where as under the Employees State Insurance Act, 1948, all persons employed for wages in or in connection with the work for a factory or establishment (irrespective of the fact whether they are manual, supervisory or salaried employees) are entitled to disablement benefit provided their remuneration does not exceed Rs.3,000 per month [Sec. 2(9) of the E.S.I. Act 1948].

Further, the benefits provided under the E.S.I Act, 1948 are much more liberal than those available to a workman under the W.C. Act, 1923.

The W.C. Act, 1923 is sometimes described as a dying legislation because it is being replaced by the E.S.I. Act, 1948 as the benefits provided under the latter Act are much more liberal. Further Sec. 53 of the E.S.I. Act, 1948 specially puts a bar against receiving or recovery of compensation or damages under the W.C. Act, 1923 or any other law for the time being in force in

respect of an employment injury sustained by the injured person as an employee under the E.S.I. Act, 1948.

Reference to sections and Rules : Unless otherwise indicated, reference to sections and rules in this chapter is to the E.S.I. Act, 1948 and the Employees State Insurance (central) rules, 1950 respectively.

7.3 APPLICABILITY OF THE ACT [Sec – 1] :

The Act extends to the whole of India including the state of Jammu and Kashmir.

The Act shall come into force on such date or dates as the central govt. may appoint and different dates may be appointed for different provisions of the Act and for different states or different parts there of.

Act to apply to factories. The Act shall apply, in the first instance, to all factories (including factories belonging to the Govt.) other than seasonal factories. It shall not however apply to a factory or establishment belonging to or under the control of the Govt. whose employees are other wise in receipt of benefits substantially similar or superior of the benefits provided under this Act.

7.4 DEFINITIONS [Sec – 2] :

7.4.1. Appropriate Government [sec.2 (1)] : It means, in respect of establishments under the control of the central Govt. or a railway administration or a major port or a mine or oil field, the central Govt. In all other cases, it means the State Government.

7.4.2. Benefit period : It means period corresponding to the contribution period. It must not exceed 6 consecutive months corresponding to the contribution period, as may be specified in the regulations. [Rule 2 (1-c)].

Sec.2. (2) which earlier defined the term ‘benefit period’ has been omitted by the Amendment Act, 1989.

7.4.3. Contribution [Sec-2 (4)] : It means the sum of money payable to the E.S.I. Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act.

7.4.4. Dependant [Sec – 2 (6-A)] : Dependant means any of the following relatives of a deceased insured person, namely :

- 1) A widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter.
- 2) A widowed mother,
- 3) If wholly or in part dependent on the earnings of the insured person at the time of his death -
 - a) A person other than a widowed mother,
 - b) A minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor,

- c) A minor brother or an unmarried sister or a widowed sister, if a minor.
 - d) A widowed daughter-in-law,
 - e) A minor child of a pre - deceased son,
 - f) A minor child of pre - deceased daughter where no parent of the child is alive, or.
 - g) A paternal grand parent if no parent of the insured person is alive.
- 4) If wholly dependent on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of 18 years and is infirm.

The relations in groups (1) and (2) will be entitled to claim the benefits under the Act by the virtue of their relationship with the insured person.

The relations in groups (3) and (4) will have to prove their dependence on the insured workman in order to claim the benefits under the Act.

This definition of the term 'dependant' is similar to the definition of the term 'dependant' under the W.C. Act. For detailed discussion refer to previous chapter.

7.6 ADMINISTRATION OF THE SCHEME (Chapter II, Sec. 3 to 25) :

The Employees State Insurance Scheme is being administered by the E.S.I. Corporation which has been setup by the Central Govt. under the Act (Sec.3). A standing committee has been constituted from among the members of the E.S.I. Corporation to act as an executive body for the administration of the scheme under the general superintendence and control of the E.S.I. Corporation (Sec.8 and 18). A Medical Benefit Council has been set up to advise the E.S.I. Corporation on medical questions (Sec.10 and 22). Further the E.S.I. Corporation has been empowered to appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such areas and in such manner, and delegate to them such powers and functions as may be provided by the regulations (Sec.25). Further the E.S.I. Corporation may appoint Inspectors for the purposes of the Act (Sec.45).

Employees State Insurance Corporation : Establishment of Employee's State Insurance Corp. (Sec.3). A statutory body known as the E.S.I. Corp. has been created under the Act to administer and execute the E.S.I. Scheme. The E.S.I Corporation is a body corporate having perpetual succession and a common seal.

The effect of declaring the E.S.I. Corp. as a body corporate is that it becomes a legal entity like an individual and any one who trusts it, trusts that legal person and must look to its assets for any claim against it. A decree or award made against the corporate body (i.e. the E.S.I. Corporation) is not enforceable against the individual members but only against the assets of the corporate body [Jhansi Co.Op. Oil Mills Vs Makhanl .A.I.R.(1975)All 492].

7.6. POWERS OF THE E.S.I. CORPORATION :

1. **Employment of staff [Sec -17]** : It may employ the necessary staff for the efficient transaction of its business.
2. **Promotion of measures of health (Sec-19)**: It may, in addition to the scheme of benefits specified in the Act, promote measure for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured. It may incur in respect of such measures expenditure from its funds within such limits as may be prescribed by the Central Govt.
3. **Holding of property, etc. (Sec-9) :**
 - a) It can acquire, hold and sell or otherwise transfer any movable and immovable property.
 - b) It can, from time to time, invest any moneys which are not immediately required.
 - c) It may, with the previous sanction of the Central Govt. raise loans and take measures for discharging such loans.
 - d) It may constitute for the benefit of its staff provident or other benefit fund.
4. **Appointment of Inspectors [Sec- 45]**: It may appoint such persons as inspectors, as it thinks fit, for the purposes of The Act, within such local limits as it may assign to them.
5. **Determination of Contribution [Sec - 45-A]** : it may, on the basis of information available to it, by order, determine the amount of contribution payable in respect of employees of a factory or establishment in respect of which no particulars registers or records are submitted, furnished or maintained.

7.7 DUTIES OF THE E.S.I. CORPORATION :

1. **Budget estimates (Sec-32)**: it shall in each year frame a budget showing probable receipts and expenditure which it proposes to incur during the following year, it shall submit a copy of the budget for the approval of the Central Govt. before a specified date.
2. **Accounts (Sec.33)**: it shall maintain correct accounts of its income and expenditure in such form and in such manners as may be prescribed by the Central Government.
Audit (Sec-34) : The Accounts shall be duly audited by auditors appointed by the Central Govt.
3. **Annual Report (Sec-35)** : It shall submit to the Central Govt. an annual report of its work and activities.
4. **Valuation of assets and liabilities (Sec-37)** :It shall, at intervals of 5 years, have a valuation of its and liabilities made by a valuer appointed with the approval of the central government.
5. **Placement before Parliament (Sec -36)** : The annual report, the audited accounts of the E.S.I Corporation, together with the auditor's report thereon and the budget as finally adopted by it shall be placed before parliament and published in the Official Gazette.

7.8 BENEFITS :

Freedom from economic fear is the basis of all social security legislation. The various benefits conferred by the Act attack this fear and seek to remove it.

The Act provides for 6 types of benefits to which the insured persons, the dependants or certain other persons are entitled. These benefits are as follows :

- a) Sickness benefit,
- b) Maternity benefit,
- c) Disablement benefit,
- d) Dependants benefit,
- e) Medical benefit,
- f) Funeral expenses

7.8. A) Sickness benefit [Sec.46(1) (a) and 49 and Rule 55]: When a person eligible to claim sickness benefit. A person shall be qualified to claim sickness benefit for sickness.

- a) if it occurs during any benefit period, and
- b) if the contributions in respect of him were payable for not less than half the number of days of the corresponding contribution period.

Sickness to be certified : An insured person shall be entitled to sickness benefit only if his sickness is certified by a duly appointed medical practitioner or by any person possessing such qualifications and experience as the E.S.I. Corporation may specify in this behalf.

Sickness Benefit (Sec[49]): The qualification of a person to claim sickness benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the central government.

Daily rate of sickness benefit : The daily rate of sickness benefit, in respect of the insured person during any benefit period, shall be the standard benefit rate corresponding to the average daily wages of that person during the corresponding contribution period. The daily rate of benefit (referred to as the standard benefit rate) in respect of the group of employees specified in the first column of the table given on page 157 shall -

Example : An employee earns between Rs. 16 and Rs.24 daily. The standard benefit rate in his case is Rs. 10/- per day. The daily rate of sickness benefit will also be Rs. 10/-.

The insured person shall not, however, be entitled to sickness benefit for an initial waiting period of 2 days. But if the spell of sickness recurs within 15 days he shall be entitled to recover the benefit even for the first 2 days in the second or subsequent spell. The sickness benefit is also not to be paid to any person for more than 91 days in any 2 consecutive benefit periods.

Evidence of sickness and temporary disablement : Every insured person, claiming benefit or disablement benefit for temporary disablement, shall furnish evidence of sickness or temporary disablement in respect of the days of his sickness or temporary disablement by means of a medical

certificate given by an Insurance Medical Officer in accordance with the regulations in the form appropriate to the circumstances of the case [Regulation 53 of the E.S.I, (General) Regulations.

7.8. B) Maternity benefit [Sec-46 (1) (b) and 50 and Rule - 56] : When an insured woman entitled to maternity benefit. An insured woman shall be entitled to maternity benefit in case of

- I. Confinement, or
- II. Miscarriage, or
- III. Sickness arising out of pregnancy, confinement, premature birth of a child or miscarriage.

Before an insured woman is entitled to maternity benefit she must be certified to be eligible for such payment by an authority specified in this behalf [Sec. 46 (1) (b)].

Maternity benefit (Sec-50) : The qualification of an insured woman to claim maternity benefit the conditions subject to which such benefit may be given, and the rates and period thereof shall be such as may be prescribed by the Central Government.

- a) The insured woman who is qualified to claim maternity benefit shall be entitled to receive it at the daily rate for all days on which she does not work remuneration during a period of 12 weeks of which not more than 6 shall precede the expected date of confinement.
- b) If the insured woman dies during her confinement or within 6 weeks there after leaving behind the child, maternity benefit shall be paid for the whole of that period.
- c) If the child also dies during the said period, maternity benefit shall be paid for the days up to and including the day of the death of the child. In cases (b) and (c) maternity benefit shall be paid to the person nominated by the woman for the purpose.
- d) If there is no such nominee, the maternity benefit shall be paid to her legal representative.

The provisions of Rule - 56 are as follows :

Claim: An insured woman shall be qualified to claim maternity benefit for a confinement occurring or expected to occur in a benefit period, if the contributions in respect of her were payable for not less than 80 days in the immediately preceding 2 consecutive contribution periods.

To obtain maternity benefit, the insured woman must get certificates of pregnancy, of the expected date of confinement and of actual confinement and send them to the local office to which she is attached.

Rate and Amount : The daily rate of maternity benefit shall be equal to twice the standard benefit rate corresponding to the average daily wages in respect of the insured woman in the wage group of Rs. 6 to Rs. 8 will get Rs.7 daily as maternity benefit. The payment of maternity benefit is subject to the following rules : -

Miscarriage : An insured woman shall, incase of miscarriage or medical termination of pregnancy, be entitled to maternity benefit if-

- a) She is qualified to claim maternity benefit, and

- b) She produces such proof of miscarriage or medical termination of pregnancy as may be required under the regulations. If these conditions are satisfied, the insured woman shall be entitled to maternity benefit for all days on which she does not work for remuneration during a period of 6 weeks immediately following the date of her miscarriage or medical termination of pregnancy.

Sickness confinement, premature birth, etc : An insured woman shall be entitled to maternity benefit for an additional period not exceed 1 month for all days she does not work for remuneration in case of -

- a) Sickness arising out of pregnancy,
- b) Confinement,
- c) Premature birth of child, or
- d) Miscarriage.

The following conditions must however be fulfilled before the insured woman can claim maternity benefit :

- 1) She must be qualified to claim the maternity benefit, and
- 2) She must be produce such proof as may be required under the regulations in support other claim.

7.8. C) Disablement Benefit [Secs. 46 (1)(c), 51,51 -A to 51 -D, 52-A, 53 to 55 and Rule 57] :

Disablement benefit shall be payable to an insured person suffering form disablement as a result of an employment injury sustained as an employee if he is certified to be eligible for such payment by an authority specified as an authority specified in this behalf [Sec. 46 (1) (c)].

Presumption as to accident arising in course of employment (Sec. 51-A): For the purposes of this Act, an accident arising in the course of an insured persons employment shall be presumed, in the absence of evidence to the contrary, also to have arisen out of that employment.

In cases coming under the Employees State Insurance Act, on establishing that the accident arose in the course of one's employment under Sec.51-A a rebuttable presumption arises that the accident arose also out of that employment. Hence, a claimant for the benefits conferred by the Act need in the first instance establish only this requirement, namely, the accident arose in the course of that employment [E.S.L Corpn. Trichur Vs Lakshmi, (1979) Lab, I.C. 167 (Ker).

Accident happening while acting in breach of regulations etc. (sec 51 -B) : An accident shall be deemed to arise out of and in the course of an insured person's employment even if he is at the time of the accident acting in breach of regulations or in contravention of any law applicable to him or he is acting without instructions from his employer, if –

- a) the accident would have been deemed so to have arisen had the act not been done in contravention as afore said or without instruction from his employer as the case may be, and

- b) the act is done for the purpose of and in connection with employer's trade or business.

The above accidents come within the term 'employment injury'.

Accidents happening while traveling in employer's transport (Sec. 51-c) : An accident happening while an insured person is, with the express or implied permission of his employer, traveling as a passenger by any vehicle to or from his place of work shall be deemed to arise out of and in the course of his employment, if

- a) the accident would have been deemed so to have arisen had been under such obligation, and
- b) at the time of the accident, the vehicle or imperiled, or to avert or to minimise serious damage to property.

Occupational disease (Sec. 52- A) : The term 'Occupational Disease' is not defined in the Act. Occupational diseases (along with the employments peculiar to them) have, however, been specified in the Third schedule to the Act. This schedule corresponds exactly with the third schedule to the Workmen's Compensation Act, 1923. Schedule HI is divided into 3 parts in relation to the liability of employer to pay compensation in case of occupational diseases.

The contracting of any occupational disease specified in the Third Schedule to the Act, shall, unless the contrary is proved, be deemed to be an ' employment injuring ' arising out of and in the course of employment –

- a) if an employee employed in any employment specified in part – A of the third schedule contracts any disease specified therein. as an occupational disease peculiar to that employment, or
- b) if an employee employed in the employment specified in a part-B of that schedule for a continuous period of not less than 6 months contracts any disease specified therein as an occupational disease peculiar to that employment, or.
- c) if any employee employed in any employment specified in part-C of that schedule for such continuous period as the E.S.I. Corporation may specify in respect of each such employment, contracts any disease specified therein as an occupational disease peculiar to that employment.

For occupational diseases mentioned in part A, no period of employment is necessary. In case of any disease mentioned in part B the insured person must have served in the employment peculiar to that disease for a period of not less than 6 months. In case of an occupational disease specified in part C, the period of employment is such as is specified by the E.S.I, Corporation in respect of that employment.

Where the Central Government or a State Government as the case may be, adds any description of employment to the employments specified in the third schedule to the Workmen's, Compensation Act, 1923, the said description of employment and the occupational diseases as peculiar to that description of employment shall be deemed to form also part of the Third Schedule to this Act. Without prejudice to this provision the E.S.I. Corporation after giving, by notification in

the Official Gazette, not less than 3 months notice of its intention so to do, may, by a like notification, add any description of employment to the employments specified in the Third Schedule. It shall specify in the case of employments so added the diseases which shall be deemed for the purposes of Sec.52-A to be occupational diseases peculiar to those employments respectively. There upon the provisions of the Employees State Insurance Act shall apply, as if such diseases had been declared by this act to be occupational diseases peculiar to those employments.

No benefit shall be payable to an employee in respect of any disease unless the disease is directly attributable to specific injury by accident arising out of and in the course of his employment.

The provisions of Sec.51-A do not, apply to the cases to which Sec. 52-A applies.

Rates of Disablement Benefit (Sec-51). An insured person who sustains temporary disablement for not less than 3 days (excluding the day of accident) or permanent disablement, whether total or partial, shall be entitled to periodical payment at such rates and for such periods and subject to such conditions as may be prescribed by the Central Government. Where permanent disablement, whether total or partial, has been assessed provisionally for a limited period or finally, the benefit shall be payable for that limited period, or as the case may be, for life. The liability under Sec.51 follows simply because that disablement has occurred and the consideration whether that disablement has affected the working or earning capacity of the employee becomes immaterial [Bhiwat Textile Mills y E.S.I. Corpn., 1971 feun.LR.807]

Rule 57 : The daily rate of disablement benefit (and also dependants benefit) shall be 40 percent more than the standard benefit rate rounded to the next higher multiple of 5 paise. This rate is known as ' full rate '. It corresponds to the average daily wages in the contribution period corresponding to the benefit period in which the employment injury occurs. For example, Rs.5 is the standard benefit rate for workers in the wage group of Rs. 8 to 12. Full rate of disablement I benefit, for this group will come to Rs.7 (being 40% more than the standard benefit rate).

The disablement benefit shall be payable to the insured person as follows :

- a) for temporary disablement, at the full rate, I ,C
- b) for permanent total disablement, at the full rate,
- c) for permanent partial disablement resulting from an injury specified in part II of the second schedule, at such percentage of the full rate as is proportionate to the loss of earning capacity caused by that injury,
- d) for permanent partial disablement resulting from an injury not specified in part II of the second schedule, at such percentage of the full rate payable in the case of permanent total disablement as is proportionate to the loss of earning capacity caused by that injury.

Where more injuries than one are caused by the same accident, the rate of benefit payable under clauses (c) and (d) shall be aggregated but in no case shall exceed the full rate.

- e) in other cases of disablement [i.e., disablement not covered by clauses (a), (b),(c) and (d)], at such rate not exceeding the full rate, as may be provided in the regulations.

Disablement benefit is payable from the first day of disablement. In case of permanent disablement, whether total or partial, the payment of disablement benefit continues for life. In case of temporary disablement, it continues during the period of disablement. No prior contribution is needed for claiming disablement benefit.

Disablement Question (Sec-54):

Any question relating to any of the following matters shall be determined by a medical board constituted in accordance with the provisions of the regulations –

- a) Whether the relevant accident has resulted in permanent disablement,
- b) Whether the extent of loss of earning capacity can be assessed provisionally or finally, or
- c) Whether the assessment of the proportion of the loss of earning capacity is provisional or final, or
- d) In the case of provisional assessment, as to the period for which such assessment shall hold good.

Any such question referred to above shall be referred to as the 'disablement question'.

Reference to Medical Boards (Sec 54-A) :The E.S.I. Corporation shall refer the case of any insured person for permanent disablement benefit to a medical board for determination of the disablement question. If, on that or any subsequent reference, the extent of loss of earning capacity of the insured person is provisionally assessed, the E.S.I. Corporation shall again refer the case to the medical board not later than the end of the period taken into account by the provisional assessment.

If the insured person or the E.S.I. Corporation is not satisfied with the decision of the medical board, the insured person or the E.S.I. Corporation may appeal to –

- 1) the medical appeal tribunal (constituted in accordance with the provisions of the regulations) with a further right of appeal to the Employees Insurance Court, or
- 2) the Employees Insurance Court directly : The appeal shall be made by the insured person in the prescribed manner and within the prescribed time. No appeal shall lie.
- 3) if the insured person appeals for commutation of disablement benefit on the basis of the decision of the medical board and receives the commuted value of such benefit.
- 4) if the E.S.I. Corporation pays the commuted value of the disablement benefit on the basis of decision of the medical board.

Review of Decisions (Sec-55) : Any decision under the Act of a medical board or a medical appeal tribunal, as the case may be. The decision will be reviewed if the medical board or the medical appeal tribunal is satisfied by fresh evidence that the decision was given in consequence of the non-disclosure or misrepresentation by the employee or any other person of a material fact. It makes no difference whether the non - disclosure or misrepresentation was or was not fraudulent.

Any assessment of the extent of the disablement resulting from the relevant employment injury may also be reviewed by a medical board if -

- a) it is satisfied that since the making of the assessment there has been a substantial and unforeseen aggravation of the results of the relevant injury, and
- b) it is of opinion that having regard to the period taken into account by the assessment and the probable duration of the aggravation afore said, substantial injustice will be done by not reviewing it.

If an application for review is made less than 5 years, or in the case of a provisional assessment, 6 months from the date of the provisional assessment, the assessment shall not be reviewed except with the leave of a medical appeal tribunal. On a review of the assessment the period to be taken into account by any revised assessment shall not include any period before the date of the application.

The medical board may –

- a) deal with a case of review in any manner in which it could deal with on an original reference to it, and.
- b) in particular make a provisional assessment notwithstanding that the assessment under review was final.

Further provisions of Sec.51-A shall apply-

- a) to an application for review under Sec.55
- b) to a decision of a medical board in connection with such application as they apply to a case for disablement benefit under Sec. 54-A.
- c) to a decision of the medical board in connection with such case.

7.8. D) Dependant's Benefit [Secs- 46(1) (d), 52 and 55-A & 58] : If an insured person dies as a result of an employment injury sustained as an employee his dependants who are entitled to compensation under the Act, shall be entitled to periodical payments referred to as dependants, benefit [Sec. 46 (1) (d)].

Dependant's Benefit (Sec.52) whether or not the insured person was in receipt of any periodical payment for temporary disablement in respect of the injury, dependant's benefit shall be payable to his dependants at such rates and for such periods and subject to such conditions as may be prescribed by the Central Government.

In case the insured person dies without leaving behind him the dependants as aforesaid, the dependant's benefit shall be paid to the other dependants of the deceased at such rates and for such periods and subject to such conditions as may be prescribed by the Central Government.

Scale of dependant's benefit (Rule 58) : In the case of death of the insured person, the dependant's benefit shall be payable to his widow and children as follows :

- a) To the widow during life or until remarriage, an amount equivalent to 3/5ths of the full rate (as already explained). If there are 2 or more widows, the amount shall be divided equally between the widows.

- b) To each legitimate or adopted son, an amount equivalent to $\frac{2}{5}$ ths of the full rate until he attains 18 years of age.

In the case of a legitimate son, who is infirm and who is wholly dependent on the earnings of the insured person at the time of his death, dependant's benefit shall continue to be paid while the infirmity lasts.

- c) To each legitimate or adopted unmarried daughter, an amount equivalent to $\frac{2}{5}$ ths of the full rate until she attains 18 years of age or until marriage, whichever ever is earlier.

In the case of a legitimate or adopted unmarried daughter who is infirm and is wholly dependent on the earnings of the insured person at the time of his death, dependant's benefit shall continue to be paid while the infirmity lasts and she continues to be unmarried.

Some times the total of the dependant's benefit distributed among the widow or widows and legitimate or adopted children of the deceased person as aforesaid may exceed at any time the full rate. In such a case, the share of each of the dependants is proportionately reduced, so that the total amount payable to them does not exceed the amount of dependants benefit at the full rate.

In case the deceased person does not leave a widow or legitimate or adopted child, dependant's benefit shall be payable to the other dependants as follows :

- a) to a parent or grand parent, for life at an amount equivalent to $\frac{3}{10}$ ths of the full rate and if there are 2 or more parents or grand parents, the amount payable to them is equally divided between them.
- b) to any other –
- i) male dependant, until he attains 18 years of age ,
- ii) female dependant, until she attains 18 years of age or remarriage, whichever is earlier.

An amount equivalent to $\frac{2}{1}$ ths of the full rate. But if there are more than 1 female dependants under this clause, the amount payable shall be equally divided them.

The daily rate of dependant's benefit shall be 40 percent more than the standard benefit rate rounded to the next higher multiple of 5 paise. This rate is known as " full rate " .

Review of dependant's Benefit (Sec 55 - A): Any decision awarding dependant's benefits may be reviewed at any time by the E.S.I. Corporation. But the E.S.I. Corporation will review the decision if it is satisfied by fresh evidence that-

- 1) the decision was given in consequence of non - disclosure or misrepresentation by the claimant or any other person of a material fact. It makes no difference whether the non disclosure or misrepresentation was or was not fraudulent, or

- 2) the decision is no longer in accordance with the Act due to any birth or death or due to marriage, remarriage or cesser of infirmity, or attainment of the age of 18 years by a claimant.

on a review, the E.S.I. Corporation may direct that the dependant's benefit be continued, increased reduced or discontinued.

7.8.E Medical Benefit [Secs. 46 (1)(e), 46(2), and 56 to 59 and Rules 60 and 61]:

An insured person and or a member of his family (where such medical benefit has been extended to family) whose conditions requires medical treatment and attendance shall be entitled to receive medical treatment for and attendance on insured persons (here in after referred to as medical benefit] [Sec/46 (1) (e) Sec. 46 (2) empowers the E.S.I. Corporation at the request of the appropriate Government, and subject to such conditions as may be laid down in the regulations, to extend the medical benefits to the family of an insured person.

Medical Benefit (Sec- 56) : The medical benefit may be given either in the form of out -patient treatment and attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the insured person or treatment as in-patient in a hospital or other institutions.

Eligibility for medical benefit: A person shall be entitled to medical benefit during any period for which contributions are payable in respect of him or in which he is qualified to claim sickness benefit or maternity benefit or is in receipt of such disablement benefit as does not disentitle him to medical benefit under the regulations.

An insured person in respect of whom contribution ceases to be payable under, the Act may be allowed medical benefit for such period and of such nature as may be provided under the regulations made under the Act.

Sometimes an insured person may cease to be in insurable employment on account of permanent disablement. In such a case he shall continue to receive medical benefit till the date on which he would have vacated the employment on attaining the age of superannuation had he not sustained such permanent disablement. This is, however, subject to payment of contribution and such other conditions as may be prescribed by the Central Government. Likewise an insured person, who has attained the age of superannuation, and his spouse shall be eligible to receive medical benefit subject to payment of contribution and such other conditions as may be prescribed by the Central Government, ' Superannuation' means the attainment by the insured person of such age as is fixed in the contract or conditions of service as the age on the attainment of which he shall vacate the insurable employment or the age of 60 years where no such age is fixed and the person is no more in the insurable employment.

Provision of medical treatment by State Government (Sec 58). Arrangement for medical treatment in a particular state is the administrative responsibility of the state govt. This is because health is a state subject. As such the State Government shall provide for insured persons and their families (where such benefit is extended to their families) in the state reasonable medical, surgical and obstetric treatment. It may, with the approval of the E.S.I. Corporation, arrange for medical treatment at clinics of medical practitioners on such scale and subject to such terms and conditions as may be agreed upon.

Where the incidence of sickness benefit payment to insured persons in any state is found

to exceed the all - India average, the amount of such excess shall be shared between the E.S.I. Corporation and the State Government in such proportion as may be fixed by agreement between them. But the E.S.I. Corporation may in any case waive the recovery of the whole or any part of the share which is to be borne by the State Government.

The E.S.I. Corporation may enter into an agreement with a State Government in regard to

- a) the nature and scale of the medical treatment that should be provided to insured persons and their families,
- b) provisions of buildings, equipment, medicines and staff,
- c) the sharing of the cost of (a) and (b).
- d) the sharing of any amount spent in excess of the all - India average.

In default of agreement between the E.S.I. Corporation and any State Government as afore said, the matters and dispute shall be determined by an arbitrator (who shall be or shall have been a judge of the High Court of a state) appointed by the chief justice of India. The award of the arbitrator shall be binding on the E.S.I. Corporation and the State Government.

Scale of medical benefit (Sec – 57) : An insured person and his family (where such medical benefit is extended to his family) shall be entitled to receive medical benefit only of such kind and on such scale as may be provided by the state government or the E.S.I Corporation. They shall have no right to claim any medical treatment except such as is provided by the dispensary, hospital, clinic or other institution to which they are allotted. Further they shall not be entitled to claim reimbursement from the E.S.I. Corporation of any expenses incurred in respect of any medical treatment, except as may be provided by the regulations.

Establishment and maintenance of hospitals, etc, by E.S.I. Corporation (Sec - 59) : Sec-59 makes provision for the establishment and maintenance of hospitals, dispensaries and other medical and surgical services by the E.S.I. Corporation, with the approval of the State Government, for the benefit of insured persons and his family (where such medical benefit is extended to their families). Provision of medical treatment and attendance may be made by the E.S.I. Corporation in any area by agreement with any local authority, private body or individual in regard to these services and sharing of cost thereof.

Provision of medical benefit by the E.S.I. Corporation in lieu of State Government (Sec-59–A) : Sec-59-A makes provision of medical benefit for insured persons and their families (where such benefit is extended to their families) by the E.S.I. Corporation in lieu of the state government. The E.S.I. Corporation may however undertake to provide medical benefit in consultation with the State Government. The cost of the medical benefit is to be shared by the state government in the agreed proportion.

Medical benefits to insured persons who cease to be in an insurable employment on account of permanent disablement (Rule 60) : An insured person who ceases to be in an insurable employment on account of permanent disablement caused due to and employment injury shall be eligible to receive medical benefits for himself and his spouse. These benefits are available till the age of superannuation subject to –

- a) the production of proof by the insured person of permanent disablement ; and
- b) the payment of contribution at the rate of Rs. 10 per month in lump-sum for one year at a time in advance.

Medical benefits to retired insured persons (Rule 61) : An insured person who leaves the insurable employment on attaining the age of superannuation shall be eligible to receive medical benefits for himself and his spouse subject to the following conditions:

- a) He must have been insured for not less than 5 years before superannuation.
- b) He produces the proof of his superannuation and insurance for a minimum of 5 years before superannuation.
- c) He pays contribution at the rate of Rs.10 per month in lump - sum for one year at a time in advance.

7.8. F : Funeral Expenses [Sec-6 (1) (f) and Rule)59] : In the case the insured person dies, the expenditure on his funeral known as 'funeral expense', shall be payable to the eldest surviving member of the family. Where the deceased person did not have a family or was not living with his family at the time of his death, the funeral expense shall be payable to the person who actually incurs the expenditure on the funeral of the deceased insured person. The amount of such payment shall not exceed the amount as may be prescribed by the Central Government- The amount prescribed with effect from 22nd January, 1991 is Rs. 1,000/-. The claim for such payment shall be made with in 3 months of the death of the insured person or within such extended period as the E.S.I- Corporation or any officer or authority authorised by it in this behalf may allow.

The Amendment Act of 1989 has substituted the term, 'funeral expense' for the absurd term 'funeral benefit'.

7.9 SUMMARY :

Social security is one of the fundamental needs of the day. Freedom from want and security against economic rights is the minimum that must be secured in under developed countries as early as possible. The earning power of the workers may be affected by sickness, maternity, invalidity, employment, injury, old age and death. It is not possible for workman individually to make an adequate provision against these risks. Hence, they suffer from economic insecurity. The system of social insurance has been developed to eliminate the economic insecurity of the working classes. The main objective of the Employee's State insurance Act, 1948, is to provide to the workers medical relief, sickness cash benefits, maternity benefits to women workers, pension to the dependents of deceased workers and compensation for total and other employment injuries including occupational diseases, in an integrated form through a contributory fund. Where a workman is covered under E.S.I scheme, no compensation could be claimed from his employer under the Workmen's Compensation Act in respect of employment injury sustained by him.

It is a legislation, which aims at bringing about social economic justice to the labour class of the country. The Act is a land mark in the history of social security in India. It is one of compulsory state insurance providing for certain benefits. These benefits are secured by financial contributions to the scheme both by the employers and employees. Further, the benefits provided under the Employees State Insurance Act are much more liberal than those available to a workman under the Workmen's Compensation Act, 1923.

Application of the Act : The Employee's State Insurance Act extends to the whole of India including the state of Jammu and Kashmir. The Central Government may fix the date or dates on which the Act shall come into force. Different dates may be fixed for different provisions of the act and for different states or for different parts of the state. The dates on which the various provisions of the Act shall come into force shall be notified by publication in Official Gazette. Thus, the Act permits the implementation of the scheme by stages.

The Act applies in the first instance to all factories other than seasonal factories (including factories belonging to the Govt.) Section 1 (4). But it shall not apply to a factory or establishment benefits substantially similar or superior to the benefits provided under this act. It covers all employees whether in manual or non - manual capacity on a remuneration not exceeding Rs. 1,0000/- a, month but excludes members of the armed forces. The appropriate Governments are authorised to extend the provisions of this Act, partially or wholly, to any establishment or class of establishment whether they may be industrial, commercial, agricultural, or otherwise.

7.10 TECHNICAL TERMS :

Dependent = one for whose maintenance another is responsible.

Disablement = Incapacitate.

7.11 SELF – ASSESSMENT QUESTIONS :

1. Explain briefly the various benefits provided by the Employees State Insurance Act 1948 to the insured employees.
2. What are the main features of the E.S.I. Act?
3. Elucidate the history of E.S.I. Act. What led to the passing of the E.S.I. (Amendment) Act 1984.
4. What are the benefits under E.S.I - Act, 1948?
5. What are the major benefits available under E.S.I. Act 1948? To which category of employees are they applicable ?

7.12 REFERENCE BOOKS :

1. N.D. Kapoor : *Handbook of industrial Law*, Sultan Chand & Sons, 2001.
2. K.C Garg and Others : *Mercantile Law*, Kalyani Publishers, New Delhi, 2005.

Dr.D. Nageswara Rao

Lesson - 8

THE CONSUMER PROTECTION ACT 1986

8.0 OBJECTIVES :

After studying this chapter, you should be able to -

- Introduction
- Consumer rights
- The objectives and functions of Consumer Protection Councils.
- Understand the meaning of certain important terms associated with the Consumers Protection Act.
- Important questions.

STRUCTURE :

8.1 Introduction

8.2 Consumer Rights

8.3 Consumer Protection Councils

8.4 Key Terms

8.5 Self - Assessment Questions

8.6 Reference Books.

8.1 INTRODUCTION :

India is a vast country where a majority of consumer are poor, helpless and disorganised. Further the market in India is generally a seller market and it is very easy to dupe the innocent consumers. It is now realised that a common consumer is neither knowledgeable nor well informed. He needs support and protection from unscrupulous seller. A common consumer is not in a position to approach Civil Court. Quick, cheap and speedy justice to his complaints is required. The biggest help in this direction has come from the government. The Central Government enacted a law in the year 1986 for the protection of consumers known as "The Consumer Protection Act 1986".

When the Consumer Protection Act (COPRA) was legislated in 1986 it was hailed as the Magna Carta consumers. For, it not only recognised consumer rights but also established a redress system, unique in the world.

8.2 CONSUMER RIGHTS :

The Consumer Protection Act is no doubt a revolutionary piece of legislation which can grown into an important tool for development. The act seeks to provide for better protection of the

interests of consumers. For this purpose, it makes provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes. The Consumer Protection Act recognises six consumer rights. These rights are :-

- a) The right to be protected against marketing of goods which are hazardous of life and property.
- b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices.
- c) The right to be assured, wherever possible access to a variety of goods at competitive prices.
- d) The right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums.
- e) The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers
- f) The right to consumer education.

The Act provides a more accessible and speedily legal avenue for consumer - no fees, no lawyers, judgment to be delivered in 90 days. A redressal machinery is provided for in the Act for the enforcement of the rights of the consumer.

Extent, commencement and application : The Consumer Protection Act extends to the whole of India except the state of Jammu and Kashmir. The Act received the presidents assent on 24-12-86. However, all the provisions of the Act except those relating to establishment, composition and jurisdiction of the consumer disputes redressal agencies came into force on 15-4-87. This act shall apply to all goods and services. It covers all sectors whether private, public or Co- operative. The provisions of the Act are compensatory in nature.

Amendment : The Consumer Protection Act was last amended in the year 1993. These amendments were quite drastic and comprehensive in nature. The Amendment Act of 1993 gave more teeth to the consumer counts and widened their scope. The main highlights of the amended Consumer Protection Act are-

1. Restrictive trade practices brought within the ambit of the Act.
2. Class action suits allowed
3. Goods bought by self-employed persons for earning their livelihood not covered under definition of 'commercial use '.
4. Housing construction specifically brought within Act.
5. Complaints can also be made about deficiency in goods or services which have been agreed to be bought or availed of.
6. Monetary jurisdiction of consumer courts increased.

How to file a complaint : Procedures for filing complaints and seeking redressal are simple and speedy. There is no fee for filing a complaint before the District Forum, the State Commission or the National Commission.

- The complainant or his authorised agent can present the complaint in person.
- The complaint can be sent by post to the appropriate Forum / Commission.
- A complaint should contain the following information -
 - a) The name, description and the address of the complainant.
 - b) The name, description and address of the opposite party or parties, as far as they can be ascertained.
 - c) The facts relating to complaint and when and where it arose.
 - d) Documents, if any, in support of the allegations contained in the complaint.
 - e) The relief which the complainant is seeking
 - f) The complaint should be signed by the complainant or his authorised agent.

Relief available in consumers : Depending on the nature of relief sought by the consumer and facts, the redressal forums may give orders for one or more of the following relief's,

- a) Removal of defects from the goods.
- b) Replacement of the goods.
- c) Refund of the price paid or
- d) Award of compensation for the loss or injury suffered.

8.3 CONSUMER PROTECTION COUNCILS :

The interests of consumers are sought to be promoted and protected under the Act by establishment of consumer protection councils at the central and state levels. These councils are advisory bodies.

Central Consumer Protection Council : Section 4 provides that the central government may by notification establish a council to be known as the central consumer protection council which shall consist of the following members viz.

- a) The Minister In - charge of consumer affairs who shall be its Chairman.
- b) Such number of other official or non - official members representing such interests as may be prescribed.

Section 6 states the objects of the central council as being promotion and protection of the rights of the consumers. These rights are -

- a) The right to be protected against the marketing of goods which are hazardous to life and property.
- b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to protect the consumer against unfair trade practices.
- c) The right to be assured, wherever possible, access to a variety of goods at competitive price-
- d) The right to be heard and to be assured that consumers interests will receive due consideration of appropriate forums.
- e) The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers, and
- f) The right to consumer education.

State Consumer Protection Council :

Section 7 provides for the establishment of state consumer protection councils by any state government to be known as consumer protection council for the state. The state council shall consist of a Minister In -charge of consumer affairs in the State Government who shall be its Chairman and such number of other official or non - official members representing such interests as may be prescribed by the State Government.

Where to file a complaint ? : In the case of the goods and services and compensation asked for, is less than rupee five lakhs, then the complaint can be filed in the District Forum which has been notified by the State Government for the District where the cause of action has arisen or where the opposite party resides.

In the cost of the goods or services and compensation for is more than rupees five lakhs but less than rupees twenty lakhs, the complaint can be filed before the state commission notified by the state government or the union territory concerned. If the cost of goods or services and compensation asked for, exceeds rupees twenty lakhs, the complaint can be filed before the National Commission at New Delhi.

8.4 KEY WORDS :

1. Complaint : any allegation in writing made by a complainant that –

- a) an unfair trade practice or a restrictive trade practice has been adopted by any trader.
- b) the goods bought by him or agreed to be bought by him suffer from one or more defects
- c) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.

2. Defect : It means, any fault, imperfection or short coming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or as is claimed by the trader in any manner what so ever in relation to any goods. Sec 2 (1) (f)

3. Person :

The term 'Person' includes.

- a) a firm whether registered or not.
- b) a Hindu undivided family.
- c) a Co-operative society.
- d) every other association of persons whether registered under the Societies Registration Act 1860 or not (Sec 2(1) (m)).

4. Service : It means, service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, but does not includes the rendering of any service free of charge or under a contract of personal service (sec 2(1) (o)).

5. Trader: Trader in relation to any goods for sale and includes the manufactures thereof and where such goods are sold or distributed in package form, includes the packer thereof [Sec(1)(q)].

6. Restrictive Trade Practices : Restrictive Trade Practices means, any trade practice which requires a consumer to buy, hire or avail of any goods, or as the case may be services as a condition precedent for buying, hiring or availing of other goods or services.

7. Unfair Trade Practices : Un fair trade practice means, a trade practice which for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.

8.5 SELF – ASSESSMENT QUESTIONS :

1. Explain the provisions of the Consumer protection Act regarding establishment, objectives and meetings of the Central and State Consumer dispute redressal agencies established under the Consumer Protection Act 1986.
2. Write short notes on the following as per the provisions of the Consumer Protection Act :
 - a) Consumer
 - b) Restrive Trade practices.
 - c) Complainant
 - d) Penalties.

8.6 REFERENCE BOOKS :

1. Gulshan S.S & Kappoor GK : A Hand Book of Business Law.
2. R.C. Chawla & K.C. Garg : Industrial Law.

Dr. M. VIJAYA LAKSHMI

Lesson - 9

REDRESSAL MACHINERY UNDER THE CONSUMER PROTECTION ACT 1986

9.0 OBJECTIVES :

After studying this chapter you should be able to understand :

- introduction
- the objectives and functions of Consumer Protection Councils - District Forum.
- State Commission.
- National Commission... etc.,

STRUCTURE :

- 9.1 Introduction.
- 9.2 District Forum.
- 9.3 State Commission
- 9.4 National Commission
- 9.5 Key Terms
- 9.6 Self – Assessment Questions.
- 9.7 Reference Books.

9.1 INTRODUCTION :

The Consumer Protection Act is designed to give relief to the consumer who is not in a position to go to the regular courts to fight his cases because of the high cost of litigation and that he should be given a forum where justice is cheap and quick. To meet this objective the Act provides for a three tier Quasi - Judicial redressal machinery at the District, State and National levels for redressal of consumer disputes and grievances.

These Quasi judicial bodies will observe the principles of natural justice and have been empowered to give relief's of a specific nature and to award, wherever appropriate compensation to consumers. Penalties for non - compliance of the orders given by the Quasi -judicial bodies have also been provided.

9.2 DISTRICT FORUM :

Section 9 of the Act inter alia provides for the establishment of a District Forum by the State Government in each district of the State by notification. The State Government may establish more than one District Forum in a district if it deems fit to do so.

Section 10 (1) provides that each District Judge Forum shall consist of -

- a) a person who is, or who has been or is qualified to be, a District Judge who shall be its President.
- b) two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law commerce, accountancy, industry, public affairs or administration, one of whom shall be woman.

Every appointment to District Forum shall be made by the State Government on the recommendation of a Selection Committee consisting of the President of the State Commission, the Secretary law department of the State and the Secretary incharge of Consumer Affairs in the State.

Every member of the District Forum shall hold office, for a term of five years or up to the age of 65 years which ever is earlier and shall not be eligible for re - appointment.

A member may resign his office in writing under his hand addressed to the State Government and on such resignation being accepted, his office shall become vacant and may be filled by the appointment of a person possessing any of the qualifications mentioned above in relation to the category of the member who has resigned.

The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of District Forum shall be such as may be prescribed by the State Government.

Jurisdiction of the District Forum :

Section II provides for the Jurisdiction of the District Forum under two criteria,

- Pecuniary
- Territorial

Pecuniary Limits :

According to Sec II (2) the District Forum can entertain complaints where the value of goods or services and the compensation, if any claimed is less than rupees five lakhs.

Territorial Limits:

Under Sec II (2) the a complaint shall be instituted in a District Forum within the local limits of whose jurisdiction-

- a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or
- b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally work for gain, provided that in such case either the permission of

the District Forum is given, or the opposite parties who do not reside or carry on business or have a branch office, or personally work for gain, as the case may be, acquire in such institution,

- c) The cause of action, wholly or in part arises.

9.3 STATE COMMISSION :

The Act provides for the establishment of the State Consumer Disputes Redressal Commission by State Government in the State by notification.

Section 16(1) provides that each state commission shall consist of -

- a) a person who is or has been a judge of a High Court appointed by the State Government who shall be its President.
- b) two other members who shall be persons of ability integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration one of whom shall be a woman.

The provision to their clause states that every appointment made under this clause shall be made by the State Government on the recommendation of a Selection Committee consisting of the president of the State Commission Secretary - Law Department of the State and Secretary in charge of consumer Affairs in the State.

Under Section 16(2) the State Government has the power to decide on the salary or honorarium and other allowances payable to the members of the State Commission and the other terms and conditions of service.

Every member of the State Commission shall hold office for a term of five years or up to the age of sixty seven years, whichever is earlier and shall not be eligible for reappointment.

Jurisdiction : Section 17 of the Act provides that the State Commission shall have jurisdiction to entertain.

- a) complaints where the value of the goods and services and compensation if any, claimed exceeds rupees five lakhs but does not exceed rupees twenty lakhs.
- b) appeals against the orders of any District Forum within the State and
- c) to call for the records and pass appropriate orders in any consumer dispute, which is pending before or has been decided by any District Forum within the state, where appears to the State Commission that such District Forum has exercised an jurisdiction not vested in it by law, or has failed to exercise a jurisdiction not vested or has acted to exercise of its jurisdiction illegally or with material irregularity.

9.4 NATIONAL COMMISSION :

Section 9 provides for establishment of the National Consumer Disputes Redressal Commission by the Central Government by notification in the official gazette.

Section 20 (1) Provides that the National Commission shall consists of -

- a) a person who is or has been a judge of the Supreme Court, to be appointed by the Central Government (in consultation with the Chief Justice of India) who shall be its President.
- b) four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems, relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

Every appointment made under their clause by the Central Government shall be made on the recommendation of a Selection Committee consisting of a judge of the Supreme Court to be nominated by the Chief Justice of India, the Secretary in the department of Legal Affairs and the Secretary incharge of Consumer Affairs in the Government of India.

Section 20 (2) gives power to the Central Government to fix the salary honorarium and other allowances payable to the members as well as the other terms and conditions of their service. Every member of the Rational Commission shall hold office for a term of five year or upto seventh years of age, which ever is earlier and shall not be eligible for reappointment.

Jurisdiction :

Section 21 provides that the National Commission shall have jurisdiction -

- a) to entertain complaints where value of the goods or services and the compensation if any, claimed exceeds rupees twenty lakhs.
- b) 7° entertain appeals against the orders of any State Commission, and
- c) to call for the records and pass appropriate orders in any consumer dispute which is pending before, or has been decided by the state commission where it appear to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Complaints before the District Forum and State Commission :

Section 12 provides that a complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filled with the District forum by -

- a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided
- b) any recognised consumer association, whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided, is a member of such association or not, or
- c) one or more consumers, where there are numerous consumers having the same interest with the permission of the District Forum, on behalf of, or for the benefit of all consumers so interested, or.

d) The Central or the State Government.

The explanation thereto provides that a 'recognised consumer association means any voluntary consumer association registered under the Companies Act 1956 or any other law for the time being in force.

Limitation period for filing of complaint:

Section 24 A of the Consumer Protection Act provides that the District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

However, where the complainant satisfies the Forum Commission as the case may be that he had sufficient cause for not filing the complaint within two years, such complaint may be entertained by it after recording the reasons for condoning the delay.

9.5 KEY WORDS :

1. Consumer dispute :

Sec (1) (e) it means a dispute where the person against whom a complaint has been made, denies, or disputes the allegations contained in the complaint.

2. District Forum :

Sec (2) (1) (h), It means a Consumer Disputes Redressal Forum established under Sec.9.

3. State Commission :

Sec 2 (1) (d) it means a Consumer Disputes Redressal Commission established under Sec.9.

4. National Commission :

Sec (2) (k) it means the National Consumer Disputes Redressal Commission established under of Sec .9.

9.6 SELF – ASSESSMENT QUESTIONS :

1. What is the jurisdiction of the various Forums Commission for the purpose of the Consumer Protection Act 1986 ?
2. Explain the provisions of the Consumer Protection Act regarding establishment, objectives of the Central and State Consumer Protection Councils.

9.7 REFERENCE BOOKS :

1. Elements of Mercantile Laws : N.D.Kapoor.
2. Industrial Laws : R.C. Chawla & K.C. Garg.

Dr. M. VIJAYA LAKSHMI

Lesson - 10

ENVIRONMENT AND POLLUTION CONTROL ACT

10.0 OBJECTIVES :

A careful study of this chapter will enable you to -

- understand the concept of Environment.
- scope of the Act.
- powers of the Central Government.
- the water pollution Act - 1974 - Central and State Boards.
- air pollution Act 1981 -Central and State Boards.
- explain the meaning of certain key term.
- important questions.

STRUCTURE :

- 10.1 Introduction
- 10.2 Scope of the Act
- 10.3 Powers of the Central Government
- 10.4 The Water Pollution Control Act 1974
- 10.5 Air Pollution Control Act 1981
- 10.6 Key Terms
- 10.7 Self – Assessment Questions
- 10.8 References Books.

10.1 INTRODUCTION :

Environmental pollution knows no boundaries, and is no more and regional or a national problem. Hence a global administrative approval for the preservation of environment was a natural . thinking. It was therefore the United Nations General Assembly decided to convene a global conference on Human Environment in StockHolm in 1972. StockHolm conference which took place on 5th and 6th June, 1972 declared man's fundamental right to live in pollution, free atmosphere and his responsibility to protect and improve the environment.

In the wake of the Bhopal Tragedy. the Government of India enacted the Environment

(protection) Act 1986 under Article 253 of the constitution. The Act is an umbrella legislation designed to provide a framework for Central Government co-ordination of the activities of various central and state authorities established laws such as the Water Act and the Air Act. Although various existing legislations dealt with served environmental matter, their focus was either on specific type of pollution or on specific Kaligories of hazardous substance and some major environmental hazards were not covered by these enactments.

Objectives of the Act: -

1. To co- ordinate the activities of the various regulatory agencies already in existence.
2. Creation of an authority or authorities with adequate powers for environmental protection.
3. Regulation of discharge of environmental pollutants and handling of hazardous substances and
4. Speedy response in the event of accidents threatening environmental and deterrent punishment to those who endanger human environment safety and health.

10.2 SCOPE OF THE ACT:

The Act come into force on 19-11-1986 and extends to the whole of India. The Central Government has been granted general powers under the Act for taking all necessary measures for protecting the quality of environment, for laying down standards for the emission or discharge of environmental pollutants for laying down safeguards for prevention of accidents and in respect of handling hazardous substances, requiring persons to furnish certain information, issuing directions to persons, planning nation wide pollution control programs and co-ordination of the actions of various agencies and authorities under the Act etc. The Central Government may also notify rules, orders, directions guidelines etc under the Act.

10.3 POWERS OF THE CENTRAL GOVERNMENT :

The Central Government has been granted general powers under section 3 of the Act to take all such measures for protecting and improving the quality of the environment and for preventing, controlling and abating environmental pollution which may include measures with respect to all or any one of the following matters.

1. Planning and execution of a nationwide program for the prevention, control and abatement of environment pollution.
2. Laying down standards for the quality of environment in its various aspects.
3. Restriction of areas in which any industries operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.
4. Laying down procedures and safeguards for the Prevention of accidents which may cause environmental pollution and remedial measures for such accidents.

5. Laying down procedures and safeguards for the handling of hazardous substances
6. Examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution.
7. Carrying out and sponsoring investigation and research relating to problems of environmental pollution.
8. Establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act.
9. Collection and dissemination of information in respect of matters relating to environmental pollution.
10. Preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution.
11. Such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

Penalties : Who ever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or directions issued there under, shall, respect of each such failure or contravention, be punishable with imprisonment for a term which may extend to five years or with five which may extend to one lakh rupees or with both.

In case the failure or contravention continues, with additional five which may extend to five thousand rupees for everyday during which such failure or contravention continues after the conviction for the first such failure or contravention.

10.4 THE WATER POLLUTION CONTROL ACT – 1974 :

Water, the essence of life, is a wonderful gift of nature. Yet man in his lust for materialistic gains has been callously unmindful of the devastation caused to the very essence of life. The Central Pollution Control Board status report on ground water quality had revealed that 70% of total drinking water in sixteen states of the country is polluted. The common water pollutants are the industrial effluents, municipal waste, pesticides, oil, spills etc. It is estimated that on account of pollution of fresh and ground water resources more than 60% of the diseases are water borne diseases in India which result in a loss of nearly 73 million working days. As such it is necessary to ensure that there is sufficient check against pollution of water.

The object of the Act is to prevent and control water pollution and maintain or restore wholesomeness of water. The Act provides for the establishment of Boards for the prevention and control of water pollution and for conferring and assigning to such boards powers and functions relating there to.

Constitution of the Central Board : Section 3 of the Act empowers the Central Government to constitute a Central Pollution Control Board to exercise such powers and functions as may be conferred upon it. Central board shall be a body corporate having a perpetual succession and a common seal. It shall have the power to acquire hold and dispose of property and enter into contract. It can sue or be sued in its own name.

The Central Board shall consist of the following members namely :

1. A full time chairman being a person having special knowledge or practical experience in respect of matters relating to environmental protection, to be nominated by the Central Government.
2. Such number of officials not exceeding five to be nominated by the Central Government to represent that Government.
3. Such number of non- officials not exceeding three to be nominated by the Central Government, to represent the interest of agriculture, fishery or industry or trade.
4. Two persons to represent the companies or corporations owned, controlled or managed by the Central Government to be nominated by that Government.
5. A full time member secretary possessing qualifications, knowledge and experience of scientific, engineering or management aspects of pollution control, to be appointed by the Central Government.

Functions of Central Board : Section 16 provides generally that the central boards shall have the main functions of promoting cleanliness of streams and wells in different areas of the state.

- a) Advise the Central Government on any matter concerning the prevention and control of water pollution
- b) Co-ordinate the activities of the state board and resolve disputes among them.
- c) Provide technical assistance and guidance to the state board, carry out and sponsor investigations and research relating to problems of water pollution and prevention control or abatement of water pollution.
- d) Organise through mass media a comprehensive programme regarding the prevention and control of water pollution.
- e) Plan and organise the training of persons engaged in programmes for the prevention control or abatement of water pollution on such terms and conditions as the central board may specify.
- f) Lay down, modify or annul, in consultation with the State Government concerned, the standards for a stream or well.
- g) Plan and cause to be executed a nationwide programme for the prevention, control or abatement of water pollution.
- h) Perform such other functions as may be prescribed from time to time, be entrusted to it by the central board.

Constitution of State Boards : Under Section 4 of the Act, the State Governments shall also by notification in the official Gazette constitute a State Pollution Control Board. The State Boards shall consist of the following members.

- a) a Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection, provided that the chairman may be either whole time or part time as the state government may think fit.
- b) Such number of officials not exceeding five to be nominated by the State Government to represent that Govt.
- c) Such number of non - officials not exceeding three to be nominated by the central government, to represent the interest of agriculture, fishers or industry or trade or any other interest which in the opinion of the state government, ought to be represented.
- d) Two persons to represent the companies or corporations owned, controlled or managed by the central government to be nominated by that govt.
- e) A full time member secretary possessing qualification, knowledge and experience of scientific, engineering or management aspects of pollution control, to be appointed by the State Government.

Functions of State Board : Section 17 enumerates the following functions of State Board.

- a) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the state and to secure the execution thereof.
- b) To advice the state government on any matter concerning the prevention, control or abatement of water pollution.
- c) To collect and disseminate information relating to water pollution and the prevention, control or abatement thereof.
- d) To encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution.
- e) To collaborate with the central board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control of water pollution and to organise mass education programmes relating thereto.
- f) To evolve methods of utilisation of sewage and suitable trade effluents in agriculture.
- g) To lay down annual effluent standards for the sewage and trade effluents and for the quality of receiving water resulting from the discharge of effluents and to classify water of the state.

Penalties and Procedure : Under Section 41 failure to comply with the directions given under section 20 (2), 20 (3) within the time specified in the direction, would on conviction, be punishable with imprisonment for three months or with five upto Rs. 10,000 or with both. Where the failure continues a fine of Rs.5000 for each such day of continuance is also Levyable.

10.5 AIR POLLUTION CONTROL ACT 1981 :

Rapid economic development and industrialisation has given us better products, better comforts and of course a better living. The world's scientists and specialists in many fields are coming to agree on one of the processing paradox of modern age." As societies grow richer, their environments grow poorer. Air, water, solid waste and noise pollution is increasing at an alarming rate. If pollution is unchecked, qualities of life will deteriorate and earth may soon become un-inhabitable. This has been internationally recognised and decisions to protect and improve environment were taken at the United Nations Conference on Human Environment at Stockholm in June 1972.

The object of the Act is to provide for the prevention control and abatement of act pollution, for the establishment with a view to carrying out the aforesaid purpose, of boards, for conferring an and assigning to such boards powers and functions relating thereto and for matters connected there with.

Stockholm conference decided to take appropriate steps for the prevention of the natural resources of the earth which among other things, included the preservation of the quality of air and Control of air pollution. In order to implement the decision taken thereat, the parliament enacted Air Pollution Act, 1981.

Central Pollution Control Board : Section 3 of the Act provides for the central pollution control board for prevention and control of air pollution. Accordingly the central pollution control board constituted under Section 3 of the Water Pollution Act 1974 shall exercise the power and perform the functions of the central pollution Control board for the prevention and control of air pollution under the Act. The Board has office at Delhi.

Functions of the Central Board : According to Section 16, the main functions of the central board shall be to improve the quality of the air and to prevent control or abate air pollution in the country the central board may.

- a) advice the central government on any matter concerning the improvement of the quality of air and prevention, control or abatement of air pollution.
- b) plan and cause to be executed a nation - wide programme for the prevention, control or abatement of air - pollution.
- c) co - ordinate the activities of the state boards and resolve disputes among them.
- d) provide technical assistance and guidance to the state boards, carry out and sponsor investigations and research relating to problems of air pollution and prevention, control of air pollution.
- e) plan and organise the training of persons engaged or to be engaged in programmes for the prevention control and abatement of air pollution on such terms and abatement of air pollution on such terms and conditions as the central board may specify.
- f) organise through mass media, a comprehensive programme regarding the prevention, control or abatement of air pollution.

- g) collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control and prepare manuals, codes or guides relating to prevention, control or abatement of air pollution.

State Pollution Control Board : Every state government shall constitute a state board for prevention and control of air pollution in the state, under Section 4 or 5 of the Act. Where in any state there is no such state pollution control board the state govt. shall constitute a state board for prevention and control of air pollution.

Functions of State Boards : Section 17 of the Act deals with the functions of the state boards -

- a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof.
- b) to advise the state government on any matter concerning the prevention, control of air pollution.
- c) to collect and disseminate information relating to air pollution.
- d) to inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air therein and take steps for the control of pollution.
- e) to advise the state government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution
- f) to establish laboratories to enable it to perform its functions efficiently.

Penalties and Procedure : -

Under Section 37, failure to comply with the provisions of Section 21 or Section 22 or directions issued under Section 31A are punishable with imprisonment for a minimum period of eighteen months but it can be extended upto six years and with fine. In case of offence continuing even after punishment, an additional fine upto Rs. 5,000 per day till the date of continuance of offence can be levied. Where the above offence continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term shall not be less than two years but which may extend to seven years and with fine.

10.6 KEY TERMS :

Definitions :

1. " Environment pollutant " means any solid, liquid or gaseous substance present in such concentration as may be or tend to be, injurious to environment.
2. " Occupier" in relation to any factory or premises, means the person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.

3. "Stream" includes
 - a) river
 - b) Water course (whether flowing or for the time being dry)
 - c) Inland water (whether natural or artificial)
 - d) Sub -terranean waters
4. "Trade Effluent" includes any liquid, gaseous, solid substance which is discharged from any premises used for carrying on any industry, operation or process or treatment and disposal system other than domestic sewage.

10.7 SELF – ASSESSMENT QUESTIONS :

1. What is the objective of the Environment Protection Act 1986.
2. Enumerate the powers of the central government under the Environment Protection Act 1986.
3. Discuss the functions and powers of the central board under the Water Pollution Control Act 1974.
4. Write a short note on prevention and control of Water Pollution.
4. Explain the powers and functions of central board and state boards under the Air Pollution Control Act 1981.

10.8 REFERENCES BOOKS :

- Mercantile and Industrial Laws : R.C. Chawla & K.C. Garg.
Business Laws : Dr. S.N. Maheswari
Commercial and Industrial Laws : Sen Mitra.

Dr. M. VIJAYA LAKSHMI

Lesson - 11

THE ESSENTIAL SERVICES MAINTENANCE ACT - 1955

11.0 OBJECTIVES

After studying this lesson, you should be able to understand

- the definition of the term “essential commodity”.
- Identify the powers of the central Government regarding control of production and distribution of essential commodities.
- confiscation of essential commodities.
- define the penalties in case of contravention of the provision of the Act and
- explain the powers available to the court under the act.
- key terms
- important questions

Structure

11.1 Introduction

11.2 Powers of Central Government

I. General power of making order

II. Power to fix prices

III. Power to appoint authorised controller

IV. Power of Central Government to recover certain amounts as areas of land reference

11.3 Confiscation of Essential Commodities

11.4 Penalties

11.5 Powers of the Court

11.6 Key terms

11.7 Self Assessment Questions

11.8 Reference books

11.1 INTRODUCTION

The Essential Commodities Act 1955 has been enacted to provide, in the interest of the general public for the control of production, supply and distribution of and trade and commerce in certain commodities. The act has come into effect from 1-4-1955 and extends to the whole of India.

The main purpose of the Essential Commodities Act is to ensure that the common man gets the supply of the essential commodities without hindrance of the part of the trade. The act seeks to achieve the following objectives.

1. To control the production, supply and distribution of essential commodities.
2. To check the inflationary trends in price.
3. To ensure equitable distribution of essential commodities.

For this purpose essential commodities are divided into two categories, namely the items of industrial consumption and the items of general consumption. The first type consists of coal, textile, iron and steel etc. and the second type consists of food stuffs, cattle fodder and others.

The distribution of the term 'essential commodity' as given in the Act is inclusive, it includes certain items of commodities as mentioned in Section 2(a).

The following commodities are essential commodities as per the definition.

1. Cattle fodder, including oil cakes and other concentrates.
2. Coal including coke and other derivatives.
3. Component parts and accessories of automobiles
4. Cotton and Woollen textiles
5. Drugs
6. Food stuffs including edible oil seeds and oils
7. Iron and steel including manufactured products of iron and steel.
8. Paper including newsprint, paper board and straw board.
9. Petroleum and petroleum products.
10. Raw cotton, whether ginned and unginned and cotton seed.
11. Raw jute
12. any other class of commodity which the Central Government may, by notified order, declare to be an essential commodity for the purpose of the Act, being a commodity with respect to which parliament has power to make laws by virtue of entry 33 in list III in the seventh schedule to the Constitution. Cement has been notified by the Central Government under the powers as an essential commodity.

11.2 POWERS OF CENTRAL GOVERNMENT

As stated earlier, the object of the Essential Commodities Act, is to control the production, supply and distribution of essential commodities. The central government is responsible for achieving the objectives of the Act. For this purpose, the Central Government is given wide powers. These powers can be discussed under the following heads.

1. General power of making order
2. Power to fix prices
3. Power to appoint controller
4. Power to recover certain accounts as areas of Land revenue.

I. General power fo making order: Section (1) of the Act empowers the Central Government to issue orders providing for regulating or prohibiting the production, supply and distribution of any essential commodity and trade and commerce therein under one or more of the following circumstances.

1. Where the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or increasing supply of any essential commodity.
2. For securing their equitable distribution and availability at fair prices.
3. For securing any essential commodity for the defence of india or for the efficient conduct of military operations.

Nature of orders: Section 3 (2) enumerates the nature of orders which the central government is empowered to make without prejudice to the generality of the powers conferred by Section 3 (1).

The Central Government may make an order which may provide for the following.

1. for regulating by licences, permits or otherwise the production or manufacture of any essential commodity.
2. for controlling the price at which any essential commodity may be bought or sold.
3. for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition use or consumption of any essential commodity.
4. for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale.
5. for requiring any person (whether a stockist, producer, or dealer) to sell to the Government or its agent or to a Government Corporation or to any other person whole or part of the quantity held in stock or produced or received or which is likely to be produced or received.
6. for requiring persons engaged in the production supply or distribution of or trade and commerce in any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information as may be specified in the order.

II. Power to fix prices:

(a) Fixing of prices of essential commodities being sold to Government: Where the Government orders the sale of essential commodity to central or State Government or its agent or any person, the price to be paid to the seller will be decided on the following basis.

1. Agreed Price: The price can be agreed upon by the Government and the seller, consistently with the controlled price, if any fixed under this section, the agreed price is to be paid.

2. Controlled Price: Where no agreement as to the Price is reached, the price calculated with reference to the controlled price is to be paid.

3. Market Price: Where there is neither an agreed price nor a controlled price, the price calculated at the prevailing market rate is to be paid.

(b) Fixing of prices of essential commodities for sale to the general public: Sometimes the central Government is faced with the specific situation of rising prices or hoarding in any of the food - stuffs in any locality which has tended to create some kind of an artificial scarcity in the locality, there by depriving the residents of the advantage of a free supply of the commodities for prices at reasonable market rates.

(c) Fixing of prices of food grains and edible oils: The procurement price should be fixed by the State Government with the previous approval of the Central Government after considering.

(a) controlled price of that item, if any

(b) the general crop prospects

(c) the need for making such items available at reasonable prices to the consumers particularly the vulnerable sections of the consumers and

(d) the recommendation, if any, of the Agricultural price commission.

(d) Fixing fair price of sugar for the producer:

Section 3 (3-c) makes special provisions for the determination of price of sugar to be paid to the producer who is required by an order of the Government or to any Officer or Agent of such Government or to any other person or class of persons. Such a producer will be paid a price which will be fixed by the central Government having regard to

- (a) the minimum price, if any fixed for sugarcane by the central Government
- (b) the manufacturing cost of sugar
- (c) the duty or tax if any paid or payable there on
- (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar.

Different prices may be fixed from time to time for different areas, or for different factories or for different kinds of sugar.

The objective behind enacting Section 3 (3-c) is four fold -

- a. to provide an incentive to increase production of sugar
- b. to encourage expansion of the industry
- c. to secure to the consumer distribution of at least a reasonable quantity of sugar at a fair price.

III Power to appoint authorised controller:

The Central Government is empowered to authorise any person to exercise with respect to any undertaking engaged in the production and supply of essential commodity, such functions of control as may be provided by the order and which are necessary for maintaining or increasing the production and supply of the commodity. Such a person shall be called the authorised controller.

IV Power of Central Government to recover certain amounts as arrears of land revenue. (Section 7 - A)

Section 7 - A inserted by the Amendment Act 1988 empowers the Central Government to recover certain amounts as arrears of land revenue. It provides that where any person liable to:

- 1. pay any amount in pursuance of any order made under Section 3, or
- 2. deposit any amount to the credit of any Account or Fund constituted by or in pursuance of any order made under that section.

11.3 CONFISCATION OF ESSENTIAL COMMODITIES

Section 6 - A provides that where any essential commodity is seized by the Government in exercise of its powers to control production, supply or distribution etc of essential commodities under Section 3 of the Act, the matter will be reported without any unreasonable delay to the Collector of the District or of the Presidency Town in which the seizure took place. Collector has been empowered to direct that the essential commodity so seized would be produced for inspection before him.

No Confiscation: No order of confiscation under this section shall be made if the seized essential commodity has been produced by the producer.

Sale of confiscated commodity: Section 6 - A (2) dispenses with the physical production of the seized commodities before the Collector. The Collector has also been empowered in order the distribution of the seized food grains through fair price shops at the price fixed by the Government.

Show cause notice before order of confiscation: A Collector has to take some essential preliminary steps which are in the nature of condition precedent before making an order of confiscation. These are

1. He has to give a notice in writing to the owner of the essential commodity in question or the person from whom it is seized informing him of the grounds on which it is proposed to confiscate.
2. The owner of the commodity or vehicle is given an opportunity for making a representation in writing against the grounds of confiscation.
3. The owner of the commodity or vehicle is given a reasonable opportunity of being heard in the matter.

11.4 PENALTIES

Section 7 provide for the imposition of penalties where any provisions of the Act. These penalties are as follows.

Imprisonment and fine: Section 7 lays down that if any person contravenes any order under section 3 (2) (h), and section 3(2) (1), he shall be punishable with imprisonment for a term which may extend to one year and shall also be liable to fine.

Forfeiture of property: If any person contravenes any order made under Section 3 any property in respect of which the order has been contravened shall be forfeited to the Government. Similarly, any package, covering or receptacle in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the property shall also be forfeited to the Government.

Non - compliance with the directions: Where any person to whom a direction is given under Sec 3 (4) (b) fails to comply with the directions, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine provided that the court may for any adequate or special reasons impose a sentence of imprisonment for a term of less than three months.

Repetition of offence: If any person convicted of an offence under this Act, is again convicted of an offence under the same provision he shall be punishable with imprisonment for the second and for every subsequent offence for a term which shall not be less than six months but which may extend to seven years, and shall also be liable to fine.

Punishment for false statement: It lays down that if any person wilfully makes any false statement or furnishes any false information in matters relating to the control of production, supply or distribution of essential commodities he shall be punishable with imprisonment for a term upto 5 years or with fine or with both.

11.5 POWERS OF THE COURT

Sections 10 B to 15 of the Act contains provision regarding powers of the court under the Act. The relevant provisions are being summarised below.

1. Power of court to publish name, place or business of companies convicted under the Act (Sec - 10 B): The court has been given following powers regarding publishing name, place or business etc of companies convicted under the Essential Commodities Act.

a. Where any company is convicted under their Act, it shall be competent for the court convicting the company to cause the name and place of business of the company, nature of the contravention the fact that the company has been so convicted and such other particular as the court may consider to be appropriate in the circumstances of the case, to be published at the expense of the company in such newspapers or in such other manner as the court may direct.

b. The expenses of any publication under clause (a) above shall be recoverable from the company as if it were a fine imposed by the court.

2. Grant of injunction (Sec - 12 B): No civil court shall grant injunction or make any order for any other relief, against the Central Government or any State Government or a public officer, in respect of any act done or supposed to be done by such Government, or such officer in his official capacity, under this act or any order made thereunder, until after notice of the application for such injunction or other relief has been given to such Government or officer.

3. Presumption as to orders Sec - 13: Where an order purports to have been made and signed by an authority in exercise of any power conferred by or under this Act, a court shall presume that such order was so made by that authority within the meaning of the Indian Evidence Act 1872.

4. Prosecution of Public Servants Sec - 15 (A): Where any person who is a public servant is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his duty in pursuance of an order made under Section 3 no court shall take cognizance of such offence except with the previous sanction -

a. of the Central Government in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the union.

b. of the State Government, in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the state.

11.6 KEY TERMS:

1. Food Crops: Food Crops include Crops of Sugar cane.

2. Sugar: Sugar means

(a) any form of sugar containing more than ninety percent of sugarcane, including sugar candy,

(b) khandsari Sugar or burasugar, or crushed sugar or any sugar in crystalline or powdered form or

(c) Sugar in process in vacuum pan sugar factory or raw sugar produced there.

11.7 SELF ASSESSMENT QUESTIONS

- 1) Explain the powers of the Central Government to control production, supply, distribution etc of essential commodities under the Essential Commodities Act 1955.
- 2) Write short note on 'offences and penalties under the Act.
- 3) Discuss the authorities responsible to administer the provisions of the Essential Commodities Act 1955.

11.8 REFERENCE BOOKS

- | | | |
|-------------------------------------|---|-------------------------------|
| 1) The Law of Essential Commodities | - | Central & A.P. Control orders |
| 2) Mercantile Industrial Law | - | R.C. Chawla and K.C. Garg |

- Dr. M. VIJAYA LAKSHMI

Lesson - 12

COMPANY ACT

12.0 OBJECTIVES

After studying this chapter, you should be able to introduction

- * define the term Company
- * explain the different kinds of Companies.
- * explain the advantages and disadvantages of a company
- * differentiate between a Public Company and a Private Company.
- * state the privileges of a Private Company,
- * explain the meaning of certain key terms.

Structure

- 12.1 Introduction
- 12.2 Company - Its meaning
- 12.3 The following chart gives the classification of companies into various categories
- 12.4 Distinction between a public company and a private company
- 12.6 Key terms
- 12.7 Self Assessment Questions
- 12.8 References books

12.1 INTRODUCTION

Joint Stock Companies represent the third stage in the evolution of forms of business organisation. Unlike sole proprietorship and partnership firms, a company enjoys a separate legal status. The ownership is here divorced from the management. The shareholders contribute towards the finances of the company but all of them do not and cannot participate in the management of the company. The company is managed by a Board of Directors elected by share holders.

Companies in our country are governed by the provision of the Companies Act - 1956. The Act came into effect from 15th April 1956. The Act came into effect from 15th April 1956. The Companies Act has been amended several times. Some of the important amendments have been in 1960, 1966, 1969, 1974, 1977, 1985, 1988, 2000 and 2001.

12.2 COMPANY - ITS MEANING

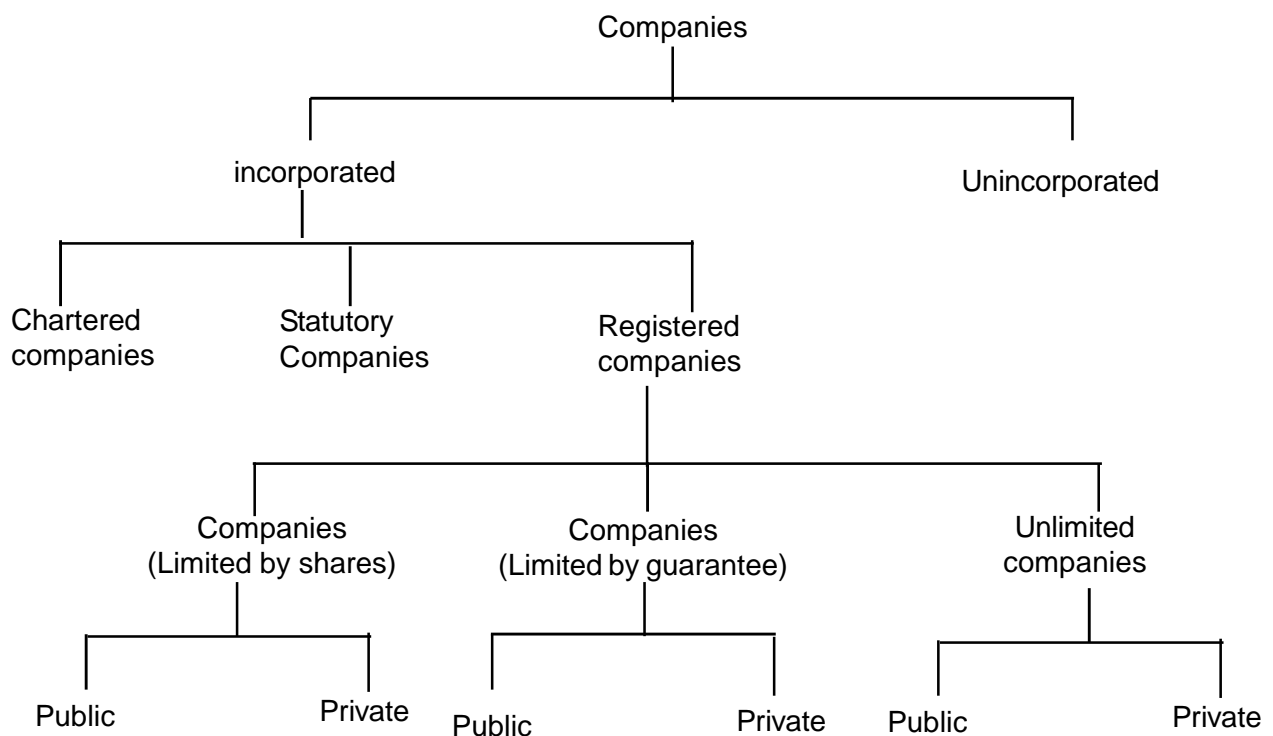
“A company is an association of many persons who contribute money or moneys worth to a common stock and employ it for a common purpose. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute to it or to whom it belongs are its members. The proportion of capital to which each member is entitled in his share”.- **Justice Lindley**

“A person, artificial, invisible, intangible and existing only in the eyes of the Law. Being a mere creature of Law, it possesses only those properties which the charter of its creation confers upon it, either expressly or an incidental to its very existence”. - **Former Chief justice Marstal of U.S.A.**

“A company formed and registered under this Act or an existing company”. - **Sec 3 (1) (1) of the Companies Act**

In common parlance company means an association of persons formed for some common object such as the economic gain of its members. In Law, any association of persons for any common object can be registered as a company. The object need not be the economic gain of its members e.g. a company can be formed for purposes such as charity, research, advancement of knowledge etc.

12.3 THE FOLLOWING CHART GIVES THE CLASSIFICATION OF COMPANIES INTO VARIOUS CATEGORIES



Chartered companies:

‘The Crown’ in the exercise of the royal prerogative has power to create a corporation by the grant of a charter to persons assenting to be incorporated. Examples of this type of companies are Bank of England, East India company. Charters are mainly issued to non trading corporations. After the country attained independence, these type of companies do not exist in India.

Statutory companies:

A company may be incorporated by means of a special Act of the parliament or any state Legislature. Such companies are called Statutory Companies. Such companies are generally formed to carry out some special public undertaking, for example railway, water works, gas, electric generations etc. Instances of statutory companies in India are Reserve Bank of India, the Life Insurance Corporation of India, the Food Corporation of India, Unit Trust of India, State Trading Corporation etc.

Statutory companies are governed by the Acts creating them. They are not required to have any memorandum or articles of association.

Registered companies:

Companies registered under the companies Act 1956, or the earlier companies Act are called Registered Companies. Such companies come into existence when they are registered under the companies Act and a certificate of incorporation is granted to them by the Registrar. Section 12 (2) provides that company registered under the Act may be

- (a) a company limited by shares
- (b) a company limited by guarantee
- (c) an unlimited company

(a) Companies Limited by Shares: The vast majority of registered companies are companies limited by shares. They are so numerous that the word 'company' has come to mean a Company Limited by Shares. Such companies must have share capital whereas companies limited by guarantee and unlimited companies may or may not have a share capital. The liability can be enforced during existence of the company as well as during the winding up.

(b) Companies Limited by guarantee: A company Limited by guarantee may or may not have a share capital. If it has a share capital, the liability of the members is two fold, (a) Liability to pay the share amount (b) The amount guaranteed

A guarantee company may not be suitable for ordinary business purposes. Clubs, trade associations, research associations and societies for promoting various objects are the examples of guarantee companies. Every company Limited by guarantee must have its memorandum and articles of association. Where a company limited by guarantee has no share capital, the memorandum and articles must be in the form set in Table C in Schedule I. If such a company has a share capital, the memorandum and articles must be in the form set out in Table D in schedule I.

(c) Unlimited Companies: A company not having any limit on the liability of its members is termed as unlimited company. In such a company the liability of each member extends to the whole amount of the company's debts and liabilities, but he will be entitled to claim contribution from other members. An unlimited company can get itself re-registered as limited liability company under Section 32 of the Act.

Holding Company and Subsidiary Company: A company which controls another company is known as the 'holding company' and the company so controlled is termed as 'subsidiary company'.

Section 4 of the Companies Act 1956 provides that a holding company is one, if it

- (I) controls the composition of board of directors of another company or
- (II) holds more than half of the nominal value of equity share capital of another company, or
- (III) is a subsidiary of any company which is in turn a subsidiary of another company.

The following illustration will make the definition of holding and subsidiary company clear.

A company (say X) is a subsidiary of another company 'Y' and 'Y' is 'X' s holding company if

1. 'Y' is a member of X and controls the composition of X's Board of Directors; or
2. Y holds more than half of X's equity share capital (or)
3. 'X' is a subsidiary of a third company 'Z' which is itself a subsidiary of 'Y'

Private and Public Company:

Private Company: Its means a company which by its articles

- a. restricts the right to transfer its shares
- b. limits the number of its members to fifty
- c. prohibits any invitation to the public to subscribe for any shares or debentures of the company. A private limited company is required to add the words 'private limited' at the end of its name.

Public Company: A public company means a company which is not a private company.

Advantages and Disadvantages of a Company:

The company form of business organisation offers the following benefits:

(1) Financial strength: A public limited company can accumulate huge financial resources. Its capital is divided into shares of small denomination so that people with limited mean can be attracted to buy them. There is no limit on the number of members.

(2) Economies of scale: With continuous expansion and large financial resources at its command, a joint stock company can fully obtain the economies of large scale operations.

(3) Limited liability: The personal assets of a member are safe and he knows well in advance the extent of his liability. This encourages people to invest money in the shares and debentures of a company.

(4) Efficient Management: A company can employ specialists in different areas of business. Centralisation of management helps in ensuring unity of action and continuity of policy.

(5) Stability: A joint stock company enjoys perpetual existence. Changes in its ownership and management do not affect the continuity of business.

(6) Transferability of Interest: Shares of a public limited company are freely transferable. Promotion of investment habit facilitates capital formation and industrial development of the country.

(7) Diffused Risk: In a company the risk of loss is spread over a large number of share holders. Ownership is also diffused.

(8) Tax reciept: A company is required to pay income tax at a flat rate. At higher levels of income, the tax liability is comparatively low. Several tax incentives are available for export promotion, development of backward areas etc.

(9) Good will: Due to strict statutory control and wide publicity of affaris, a joint stock company enjoys reputation and prestige in the society.

Disadvantages of Company:

(1) Legal formalities: Formation of a company is a difficult, time consumed and expensive process. Several legal formalities, a large number of documents have to be prepared and filed with the Registrar.

(2) Lack of personal interest: A company is managed by directors and paid officials who cannot be expected to take personal interest in business. There is no direct link between effort and reward. There is lack of personal touch with customers and employees.

(3) Corrupt management: There is scope for fraudulent management in a company. The frequent securities scams are glaring examples of how corrupt officials can exploit a company for selfish gains.

(4) Delay in decisions: There appears a lack of flexibility and prompt decisions in a joint stock company. All important decisions require the convening of meetings and passing of resolutions. As a result decisions may be delayed. Due to red tapism and bureaucratic procedures, there is little scope for individual initiative.

(5) Unhealthy speculation: The shares of a public company are dealt on stock exchange. Directors and officials are tempted to manipulate share prices to make easy personal gains.

(6) Conflict of Interest: There are chances of conflicts between the various interest groups i.e. equity share holders, preference share holders etc. continuous conflict may affect the efficiency of management and the moral of employee.

(7) Oligarchy: Company management is the worst example of oligarchy i.e. rule by a few. Share holders of a company are scattered and disunited. They do not take much interest in company meetings.

12.4 DISTINCTION BETWEEN A PUBLIC COMPANY AND A PRIVATE COMPANY

(1) Minimum number of members: The minimum number of persons required to form a public company is seven, whereas in a private company it is only two.

(2) Maximum number of members: There is no limit on the maximum number of members of a company, but a private company cannot have more than fifty members excluding past and present employees.

(3) Restriction on Name: The name of public company must end with the word 'Limited'. But a private company must add the words 'Private Limited' at the end of its name.

(4) Commencement of Business: A private company can commence its business as soon as it is incorporated. But a public company shall not commence its business immediately unless it has been granted the certificate of commencement of business.

(5) Invitation to Public: A public company by issuing a prospectus may invite public to subscribe to its shares whereas a private company cannot extend such invitation to the public.

(6) Transferability of Shares: There is no restriction on the transfer of shares in the case of a public company whereas a private company by its articles must restrict the right of members to transfer the shares.

(7) Issue of Share Warrants: A public company can issue share warrants but such a right is denied to a private company.

(8) Further issue of Capital: A public company proposing further issue of shares must offer them to the existing members. A private company is free to allot new issue to outsiders.

(9) Number of Directors: A public company must have at least three directors whereas a private company may have two directors.

(10) Statutory Meeting: A public company must hold a statutory meeting and file with Registrar a statutory report. But a private company has no such obligations.

(11) Quorum: If the articles of a company do not otherwise provide the Quorum is five members personally present in the case of public company. The Quorum in the case of private companies is two members personally present.

(12) Restrictions on the appointment of Directors: A director of a public company shall file with the register consent to act as such. He shall sign the memorandum and enter into a contract for qualification shares. He cannot vote or take part in the discussion on a contract in which he is interested. Two thirds of the directors of a public company must retire by rotation. These restrictions do not apply to a private company.

(13) Managerial Remuneration: Total managerial remuneration in the case of a public company cannot exceed 11% of net profits, but in the case of inadequacy of profits a minimum of Rs. 50,000 can be paid. These restrictions do not apply to a private company.

Privileges of Private Company:

The special exemptions and privilege enjoyed by a private company are as follows:

- (1) A private company can be formed only by two members
- (2) It needs to have two directors.
- (3) It can commence its business immediately after incorporation i.e. it is not necessary to obtain the certificate of commencement of business.
- (4) There is no restriction on the allotment of shares of a Private Limited Company.
- (5) A private company is not required to issue or file a prospectus or statement in lieu of prospectus with Registrar of Companies.
- (6) I can appoint the first directors without any public notification.
- (7) It can grant loans to its directors without the permission of the Central Government.
- (8) The directors of a private company need not retire by rotation.
- (9) There are no restrictions on the number and appointment of directors.
- (10) Only two persons can constitute the Quorum for the meetings of a private company.
- (11) It can issue deferred shares.
- (12) It may provide financial assistance for purchase of its own shares.

Government Companies: Sec-617 of the Companies Act defines a 'Government Company' as a company in which not less than fifty one percent of the paidup share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments. Shares held by municipal and other local authorities or

public corporations are not to be taken into consideration. For example, State Trading Corporation of India Limited and Minerals and Metal Trading Corporation of India Ltd. are Government companies.

Certain special provisions have been laid down in the Act regarding Government Companies.

- (1) The auditor of a Government company shall be appointed or re-appointed by the Central Government on the advice of the Controller and Auditor General of India.
- (2) The auditor will submit a copy of a report to the Controller and Auditor General of India who may comment upon or supplement the audit report in such manner as he may think fit.
- (3) Where the Central Government is a member of the Government Company it shall cause an annual report on the working and affairs of the company to be prepared and laid before both houses of Parliament along with the audit report and the comments if any of the Controller and Auditor General of India.

Foreign Company: It means a company incorporated outside India and having a place of business in India. A Foreign Company may be a private company or public company. A company will be regarded as an Indian company when it is incorporated in India by promoters of foreign nationality.

The Companies (Amendment) Act 1974, provides that where not less than 50% of the share capital is held by Indian citizens and or companies incorporated in India it shall have to comply with such of the provisions of the Act as may be prescribed as if it were a company incorporated in India.

One-man Companies or Family Companies: A private company can be formed with two members and a public company with seven. A man may take only one other person with him to constitute the minimum number required in a private company or six other so as to constitute the required seven in a public company. He may keep with himself a substantial number of shares so as to have controlling power over the company. Such a company may be regarded as one-man company. Sometimes, a company may be formed by a person by involving other family members such a company can be regarded as a 'Family Company' . Even in such cases the company will be regarded to have a separate entity as distinct from the majority shareholders. (Saloman Vs Saloman & Co. Ltd.).

Multinational Companies: Multinational corporations refers to an organisation which is having its headquarters in one country and have business operations in other countries. This means, this type of organisation will have business across many countries. Some suggest that a multinational organisation should be atleast operating in six countries with minimum of 20% of its business in those countries. For our purpose we will consider a company with business in more than one country as a multinational company. For example, Sandoz India Limited, Hindustan Lever, Ranbaxy etc can be called as Multinational Organisations.

12.6 KEY TERMS

1. Company: An association of persons formed and registered under the Companies Act.

2. Government Company: A company of which not less than 51% of the paidup share capital is held by the Central government or by the State Government or by any two or more of them together.

3. Holding & Subsidiary Company: A company which controls another company is known as holding company and the company so controlled is termed as subsidiary company.

12.7 SELF ASSESSMENT QUESTIONS :

1. Define a joint stock company, List the different types of joint stock companies.
2. Narrate advantages and disadvantages of a joint stock company.
3. Discuss the exemptions and privileges enjoyed by a private company.
4. What is a joint stock company? Distinguish between a public limited company and a private limited company.
5. Write short notes on
 - a) Government company
 - b) Holding & subsidiary company
 - c) Foreign company
 - d) Multinational companies.

12.8 REFERENCE BOOKS

Commercial and Industrial Law	-	Sen Mitra
Mercantile and Industrial Law	-	R.C. Chawla and K.C. Garg
Elements of Mercantile Law	-	N.D. Kapoor

- Dr. M. VIJAYA LAKSHMI

Lesson – 13

BOARD OF COMPANY LAW ADMINISTRATION

13.0 OBJECTIVES

After studying this lesson, you shall be able to know

- * Introduction
- * Company Law Administration
- * The authorities concerned with the administration of the Act.
 - * Central Government
 - * Law Board
 - * The Public Trustee
 - * The Official Liquidator
 - * Advisory Committee
- * Powers of the Company Law Board

Structure

13.1 Introduction

13.2 Company Law Administration

13.3 The authorities concerned with the administration of the act are as follows

13.4 Key Terms .

13.5 Self – Assessment Questions

13.6 Reference Books

13.1. INTRODUCTION

The first Indian Act, regarding companies was the Joint Companies Act 1850. This act was based on the English companies Act of 1844. This recognised the company was a distinct legal entity, but did not grant to it the privilege of limited liability. 1850 Joint Companies Act was replaced by 1857, Joint Stock Companies Act. In 1857 Act was principle of limited liability was introduced for first time in India. Later various amending acts was passed. It was extensively amended in 1986 introducing several changes.

After the end of World War II, the need for a further revision of the Company Law was felt the Government of India, therefore, appointed on 25th October 1950, a committee of 12 members representing various interests under the Chairmanship of Mr. M.O. Bhabha to suggest how the company law can be reformed. It submitted its report in April 1952. On the recommendations of the Bhabha Committee, the Companies Act 1956 was passed. It is a landmark in the history of company legislation. The Companies Act 1956 has been amended in 1960, 1963, 1965, 1969, 1971, 1974, 1977 and 1985.

The Government of India appointed a high powered expert committee headed by Justice Rajender Sachoor in June 1977 to review the Companies Act 1956. The committee submitted its report in August 1978. In the recommendations of Sachoor committees report and experience gained by the

Government in the administration of the companies Act 1955 the government has introduced Companies (Amendment) Bill in 1987.

13.2 COMPANY LAW ADMINISTRATION

Prior to the enactment of the Companies Act 1955, the administration of Company Law was entrusted to the State Government the Company Law Committee (1955) known as the Bhabha Committee, observed that the State Government were not playing an effective role. It therefore recommended the setting up of a statutory authority for the administration of company law in India. But the Central Government did not accept this recommendation. Instead it created a separate department of Company Law Administration, now renamed as Department of Company Affairs which forms part of the Ministry of Law justice and company affairs. It discharges the functions delegated to it by the Central Government. The Company Law Board consists of such number of members not exceeding nine. The Central Government has over all responsibility for the administration of the Companies Act.

13.3 THE AUTHORITIES CONCERNED WITH THE ADMINISTRATION OF THE ACT ARE AS FOLLOWS

1. The Central Government
2. The Board of Company Law Administration
3. The Public Trustee
4. The Official Liquidatory
5. The Company Law Advisory Committee

1. The Central Government: The Central Government is the supreme authority responsible for the administration of company law. It acts through the Department of Company Affairs. It is however not possible for the Central Government to directly look after the day-to-day administration of company law. It has therefore, delegated its powers to the Company Law Board according to Sec - 637.

2. Company Law Board: The Company Law Board was set up in February 1964 by the Central Government for the better and convenient administration of the Companies Act. This was in pursuance of Sec 10-E introduced by the companies (Amendment Act of 1963).

The board shall consist of such number of members not exceeding nine, one of whom shall be the Chairman. The Central Government nominate the members. The Board exercises and discharges such powers and function conferred on the Central Government or delegated to it by the Central Government. It can form one or more benches from among its members with to previous approval of central government.

Every bench shall have the powers of court under the code of Civil Procedures, 1908, and every proceeding before it shall be deemed to be a Judicial Proceeding (Sec 10-E (4D)).

The Company Law Board consists of a three tier organisation.

1. The central office situated at New Delhi.
2. Four Regional offices, headed by Regional Directors, at Bombay, Calcutta, Madras and Kanpur.
3. Field officers under Registrar in every State.

The Central Office: In addition to the overall administration of the company law in the country, the central office deals with matters as varies as the making of the rules, the giving of advice on the interpretation of the Act, investigations, prosecutions, licences and miscellaneous matters in which the advisory committee constituted under sec 410 is required to be consulted by the Central Government.

Regional Office: The entire country has been divided into four regions for the purpose of administration of company law. Each region is placed under the charge of Regional Director. He is responsible for administration of company law in his region. The Regional Directors functions under the Company Law Board. They have to exercise the powers of the Central Government which have been delegated to them in their respective regions. They are

1. To supervise and co-ordinate the activities of the registrar in their regions.
2. To advise and guide registrars on technical and administrative matters.
3. To look after progress of investigations instituted by the board.
4. To report to the government on important events and trends in the zone.
5. To function as a link between the Central Government and the State Government in their respective zones.

Registrar of Companies: They are the field officers who occupy the lowest tier in the organisational set-up of the board. They are recognised as statutory authority under the Act.

There is a Registrar of Companies in each state of India. He is appointed by the Central Government. He is responsible for the administration of the company law in that state. His main function is to registrar companies and issue certification of incorporation and certificates of commencement.

3. Public Trustee: Sec 153-A which was introduced by the Company (Amendment) Act of 1963 empowers the Central Government to appoint a public trustee to discharge the functions and exercise the rights and powers of shareholders and debenture-holders in respect of shares and debentures held by trustees in any company under certain circumstances. The object is to safeguard the interests of the shareholders and debenture holders and to prevent the use of voting rights attached to such shares by trustees in the personal interest of the donors.

4. Official Liquidator: For the purpose of winding of companies by the Court, a liquidator is attached to each High Court. He is appointed by the Central Government. He is partly under the control of the High Court and partly under the Company Law Board.

5. Advisory Committee: Sec 410 provides for the appointment of an Advisory committee. The main function of the committee is to advise the Central Government and the Company Law Board on such matters relating to administration of the Act.

Powers of the Company Law Board:

The powers of the Company Law Board are very wide. It "may make any order for the regulation of the conduct of the company's affairs upon such terms and conditions as may, in the opinion of the Court, be just and equitable in all the circumstances of the case".

According to Section 402, Company Law Board can provide for:-

- a) The regulation of the conduct of company's affairs in future.
- b) The purchase of the shares or interests of any members of the company by other members thereof or by the company.
- c) In case of the purchase of its shares by the company as aforesaid, the consequent reduction of its share capital.
- d) The termination, setting aside or modification of any agreement, how so ever arrived at between the company on the one hand and any of the following persons on the other, namely
 - 1) The Managing Director
 - 2) Any other Director
 - 3) The Manager
- e) The termination, setting aside or modification of any agreement between the company and any other person not referred to in clause (d) after due notice to and getting the consent of party concerned.
- f) The setting aside of any transaction entered by the company within three months before the presentation of application which in case of an individual's insolvency be deemed as fraudulent preference.
- g) Any other matter for which in the opinion of the Company Law Board it is just and equitable to make provision.

Sec - 403 empowers the Company Law Board to make an interim order on an application of any party to the proceedings on such terms and conditions as appear to be just and equitable.

Sec - 404 provides that where the Company Law Board order makes any alteration in the memorandum or articles of the company, the company shall not make any alteration in its memorandum or articles which is inconsistent with the Court's order, without the permission of the Court.

Sec - 407, where the Company Law Board order terminates, sets aside or modifies any agreement with the managerial personnel or any other person.

13.4 KEY TERMS

1. **Oppression:** Unjust or unfair conduct which is likely to result in some type of harsh or burden upon the aggrieved shareholders.
2. **Official Liquidator:** The liquidator is the official who helps the Court in the completion of the winding up proceedings. The Court has no power to appoint any private person as liquidator (Sec - 449)

13.5 SELF ASSESSMENT QUESTIONS

1. What are the powers of the Company Law Board to prevent mismanagement under the Companies Act - 1956.
2. What are the powers of the Company Law Board.
3. What are the authorities concerned with the administration of the Company Act - 1956.

13.6 REFERENCE BOOKS

Business Law	-	Dr. S.N. Maheswari
Industrial Law	-	R.C. Chawla & K.C. Garg
Commercial and Industrial Law	-	Sen Mitra

- DR. M. VIJAYA LAKSHMI

Lesson – 14

INCORPORATION OF A COMPANY

14.0 OBJECTIVES

This lesson is intended to discuss the steps involved in incorporation of a company.

Structure

- 14.1 Introduction
- 14.2 Incorporation of Company
- 14.3 Documents to be filed with Registrar of Companies
- 14.4 Certificate of Incorporation
- 14.5 Conclusiveness of Certificate of Incorporation
- 14.6 Effects of Registration
- 14.7 Promoters
- 14.8 Functions of a Promoter
- 14.9 Legal status of Promoters
- 14.10 Precautions to be taken by a promoter when he sells his own property.
- 14.11 Consequences of non-disclosure of interest or profit
- 14.12 Duty of promoter as regards to prospectus
- 14.13 Remuneration of Promoters
- 14.14 Summary
- 14.15 Self – Assessment Questions
- 14.16 Referred Books

14.1 INTRODUCTION

Before a company is formed certain preliminary steps are necessary, eg: whether it should be a private or public company, what its capital should be and whether it is worth while forming a new company or taking over the business of an already established concern. All these steps are taken by certain persons known as promoters. They do all the necessary preliminary work incidental to the formation of a company.

14.2. INCORPORATION OF COMPANY

Any seven or more persons two or more in case of a private company associated for any lawful purpose may form into an incorporated company with or without limited liability. They shall subscribe their names to a Memorandum of Association. (Sec - 12).

14.2.1. Lawful purpose: The purpose for which a company is proposed to be established must be lawful.

14.2.2 Subscribing their names: The expression subscribing their names to a memorandum of association means signing the memorandum.

14.3 DOCUMENTS TO BE FILED WITH THE REGISTRAR OF COMPANIES

Before a company is registered, it is desirable to ascertain from the Registrar of Companies, the proposed name of the company. Then the following documents duly stamped together with the necessary fee are to be filed with the Registrar.

1. The Memorandum of association duly signed by the subscribers (Sec - 33(1) (a))
2. The Articles of Association, signed by the subscribers to be memorandum of association (Sec - 33 (1) (b)).
3. A list of the directors who have agreed to become the first directors of the company (If it is a public company) and their written consent to act as directors and take up qualification shares (Sec - 266)
4. A declaration stating that all the requirements of the companies act and other formalities relating to registration have been complied with such declaration should be signed by [Sec - 33(2)]
 - a. an advocate of the supreme court or a High Court.
 - b. a pleader entitled to appear before a High Court.
 - c. chartered accountant practicing in India who is engaged in the formation of the company.
 - d. a person named in the articles as a director, manager or secretary of the company.

Within thirty days of the date of incorporation of the company, a notice of the situation of the registered office of the company shall be given to the Registrar who shall record the same [Sec 146(2)]

14.4 CERTIFICATE OF INCORPORATION

When the requisite documents are filed with the Registrar the Registrar should satisfy himself that the statutory requirements regarding registration have been complied with, according to Sec 33(1) and (2) [Methodist – Church Vs Union of India, 1985].

If the registrar is satisfied as to the compliance of statutory requirements he retains and registers the memorandum and articles and other documents filed with him and issues a Certificate of Incorporation [Sec 33(3)].

A company comes into existence as a legal person upon the issue of the Certificate of Incorporation [Sec 34(1)]

14.5 CONCLUSIVENESS OF CERTIFICATE OF INCORPORATION [SEC -35]

A Certificate of Incorporation given by the Registrar in respect of a company is conclusive evidence that all the requirements of the Companies Act have been complied with in respect of registration. [Barned's Banking Co; Re peels' case 1867].

The Certificate of Incorporation has been held to be conclusive on the following points.

(1) That requirements of the act in respect of registration of matters precedent and incidental have been complied with. If after the receipt of Certificate of Incorporation by a company, it is discovered that there were certain irregularities with regard to its registration, these will not affect the validity of the company. [Jubilee Cotton Mills Ltd. Vs Lewis (1920)].

On 6th January the necessary documents were delivered to the Registrar for registration. Two days after, he issued the certificate of Incorporation but dated it 6th January instead of 8th. On 6th January some shares were allotted to £ before the Certificate of Incorporation was issued. The question arose whether the allotment was void. Held. The Certificate of Incorporation as conclusive evidence of all that it contains. Therefore in law the company was formed on 6th January and therefore, the allotment of shares was valid.

Mooso Goolam Ariff Vs Ebrahim Goolam Ariff (1913)

A company was issued the Certificate of Incorporation by the Registrar on the basis of the Memorandum of Association which was signed by two adult persons and by a guardian of the other five members who were minors at that time. The guardian signed separately for all the five minors. The plaintiff contended that the certificate of incorporation should be declared void. Held, the Certificate of Incorporation was valid.

5.2 That the association is a company authorised to be registered under the Act and has been duly registered.

5.3 That the date borne by the Certificate of Incorporation is the date of birth of the company [Bowman Vs Secular society Ltd. 1917].

Even though the Certificate of Incorporation is conclusive, it does not make an illegal object a legal one. But the position is firmly established that if a company is born, the only method to put an end to it is by resorting to the provisions of the Companies Act which provide for the windingup of the companies. T.V. Krishna Vs Andhra Prabha (Pvt) Ltd (1960)

14.6 EFFECTS OF REGISTRATION

[Sec 34] deals with effects of registration.

When a company is registered and a Certificate of Incorporation is issued by the registrar, three important consequences follow.

- (1) The company becomes a **distinct legal entity**. Its life commences from the date mentioned in the Certificate of Incorporation.
- (2) It acquires a **perpetual succession** the members may come and go but it goes on for ever, unless it is wound up.
- (3) **Its property is not the property of the shareholders:** The shareholders have a right to share in the profits of the company. Similarly any liability of the company is not the liability of the individual shareholders.

14.7 PROMOTER

The promoter is a person who does the necessary preliminary work incidental to the formation of a company, chronologically the first persons who control a company's affairs are its promoters. It is they who conceive the idea of forming the company who take the necessary steps to incorporate it (Twycross Vs Grant), provide it with share and loan capital and acquire the business or property

which it is to manage when these things have been done, they hand over the control of the company to its directors who are often the promoters themselves under a different name.

14.8 FUNCTIONS OF A PROMOTER

He settles the company's name and ascertain that it will be accepted by the Registrar of companies. He also settles the details of the companies. Memorandum and Articles, the nomination of Directors, Solicitors, Banicers, Auditors and Secretary and the Registered Office of the company. He arranges for the printing of the memorandum and articles registration of the company, issue of prospectus where a public issue is necessary. He is infact, responsible for bringing the company into existence for the object which he has in view.

14.9 LEGAL STATUS OF A PROMOTER

As to the exact legal status of a promoter, the statutory provisions are silent in most part, except for a couple of sections in the Specific Relief Act 1963. The promoter is neither an agent not a trustee of the company under incorporation but certain fiduciary duties have been imposed on him under the companies act 1956. He is not an agent because there is no principal born by that time and he is not a trustee because there is no cestuique trust in existence. Hence he occupied the peculiar position of a Quasi Trustee. **Vali Pattabhi Rama Rao Vs Sri Ramanuja Ginning & Rice Factory Pvt. Ltd. 1986.**

Fiduciary Position of a Promoter: A promoter stands in a fiduciary relation to the company which he promotes. [Erlanger Vs New sonbrero Phosphate Co (1878)].

The fiduciary position of a promoter may be summed up as follows.

(1) Not to make any profit at the expenses of the company: The promoter must not make either directly or indirectly any profit at the expense of the company which is being promoted unless the company itself has full knowledge if the facts and given its consent. If any secret profit is make in violation of this rule. The company may on discovering it, compel him to account for and surrender such profit. [Cape Breton Co. (1885)]. If he sells to the company, stock or shares of his own at prices in excess of their market value, he may be liable for damages for the excess of the prices received by him over the market value.

(2) To give benefit of negotiations to the company: The promoter must, when once he has begun to act in the promotion of a company give to the company the benefit of any negotiations or contracts into which he enters in respect of the company. Thus where he purchases some property for the company, he cannot rightfully sell that property to the company at a price higher than he gave for it. If he does so, the company may cancel the contract and recover the purchase money.

Erlanger Vs New Sombrero Phosphate Co. (1878): A syndicate of which E was the head, purchased an Island said to contain valuable minerals. E sold the Island to a company newly formed for the purpose of buying it. A contract was entered into between X, a nominee of the syndicate, and the company for purchase at double the price actually paid by E. Held, as there had been no disclosure by the promoters of the profit they were making. The company was entitled to cancel the contract and recover the purchase money from E and other members of the syndicate.

The right of cancellation is lost if the parties cannot be relegated to their original position. This happens, for example,

1. where the character of the property has been altered [Lagunas Nitrate Company Vs Lagnas Nitrate Syndicate (1899)]
2. where third parties have acquired valuable rights [leeds & Hanley Theatre of Varieties Ltd. (1902)].

14.10 PRECAUTIONS TO BE TAKEN BY A PROMOTER WHEN HE SELLS HIS OWN PROPERTY

When a promoter sells or wants to sell his own property to the company he should either,

1. see that there is a Board of Independent persons appointed as directors of the new company.
2. disclose his interest in the property to the intended members or to the public by means of a prospectus [Erlanger Vs New Sombrero Phosphate Company (1878)].

14.11 CONSEQUENCES OF NON-DISCLOSURE OF INTEREST OR PROFIT

If the promoter fails to make full disclosure of the profit that he is making the company may sue him for damages for breach of 'fiduciary duty' and recover from him any secret profit made.

Gluckstein Vs Barnes(1900): A syndicate bought certain charges on a property at a discount. Later on it bought the property on which it held charges for Rs. £ 1,40,000 with a view to form a company and reselling the property to it for £ 1,80,000. As a result of this they made a profit of £ 40,000 on the property and an other £ 20,000 on the charges which were paid off in full. A prospectus was issued disclosing the profit of £ 40,000 but not that of £ 20,000. Held, £ 20,000 was a secret profit made by the syndicate as promoters of the company and it was bound to pay it to the company.

(1) Not to make unfair use of position: The promoter must not make an unfair use of his position and must take care to avoid anything which has the appearance of undue influence or fraud.

14.12 DUTY OF PROMOTER AS REGARDS PROSPECTUS

The promoter must see in connection with the prospectus the following.

1. contains necessary particulars.
2. does not contain any undue or misleading statement or does not omit any material fact.

If the promoter fails to perform this duty

- a. allotment of shares may be set aside.
- b. he may be sued for compensation for misrepresentation under Sec 62(1) (c) of the Act.
- c. he may be sued for damages.
- d. he may be sued for damages by shareholders who have suffered.
- e. he may become liable to criminal proceedings.

14.13 REMUNERATION OF PROMOTERS

A promoter has no right to get compensation from the company for his services in promoting the company unless here is a contract to that effect.

Clintons Claim (1908): A syndicate which promoted a company incurred certain expenses in respect of fee and stamp duty incidental to the formation of the company. The company was later wound up. Held, the syndicate was not entitled to recover the expenses incurred by it.

In practice the promoter takes remuneration for his services in one of the following ways.

1. He may sell his own property for cash or fully paid shares at a profit provided he makes a disclosure of this profit.
2. He may be given an option to buy a certain number of shares in the company at par.
3. He may take a commission on the shares sold.
4. He may be paid a lumpsum by the company

Any remuneration paid to the promoters must be disclosed in the prospects if it is paid within the preceding two years from the date of prospects.

14.14 SUMMARY

Before a company is formed certain preliminary steps are necessary. Memorandum and Articles and other documents should be submitted to the Registrar. After examining these documents, if the registrar satisfied with the contents, then he enters the name of the company in the register and issue an Incorporation Certificate. The day on which the incorporation issued is treated as birthday of the company. The person who does these preliminary work for incorporation of a company is known as promoter. Promoter stands in a fiduciary relation to the company which he promotes. He cannot get any profit in promoting the company. If the promoter fails, the company may sue him for damages for breach of 'fiduciary duty'.

14.15 SELF – ASSESSMENT QUESTIONS

1. Define promoter? What are main stages for the promotion of the company?
2. Explain the procedure for registration and explain the effects of Registration.
3. How is a company formed under the Companies Act 1956. Enumerate the various documents to be filed with the Registrar.

14.16 REFERENCE BOOKS

- | | | |
|--------------------------------|---|-------------------------------|
| 1. Sen Mitra | - | Commercial and Industrial Law |
| 2. Gulshan S.S. & Kapoor, G.K. | - | A Handbook of Business Law |
| 3. M.P. Vijay Kumar | - | Business & Corporate Laws |

- Dr. CH. SURAVINDA

Lesson - 15

MEMORANDUM OF ASSOCIATION - ITS ALTERATION

15.0 OBJECTIVES

The first step in the formation of a company is to prepare Memorandum of Association. This lesson is intended to discuss the content of this document and also the procedure which should be followed to alter its contents under Companies Act - 1956.

Structure

- 15.1 Introduction
- 15.2 Definition
- 15.3 Purpose of Memorandum
- 15.4 Printing, Stamping and Signing of Memorandum
- 15.5 Form of Memorandum
- 15.6 Contents of Memorandum
- 15.7 Detail description of different clauses of Memorandum
- 15.8 Alteration of Memorandum
- 15.9 Summary
- 15.10 Self - Assessment Questions
- 15.11 Reference Books

15.1 INTRODUCTION

The first step in the formation of company is to prepare memorandum of association. The Memorandum of association of a company is a fundamental document of the company. It contains the fundamental conditions upon which alone the company is allowed to be incorporated. Guinness Vs Land Corporation of Ireland (1882).

15.2 DEFINITION [Sec - 2 (28)]

'Memorandum' means 'the memorandum' of association, as originally framed or altered from time to time in pursuance of any previous companies law or of this act'.

Memorandum is the charter of the company. It lays down the area of operation of the company. It also regulates the external affairs of the company in relation to outsiders. Its purpose is to enable shareholders and those who deal with the company to know what its permitted range of operations.

15.3 PURPOSE OF MEMORANDUM

The purpose of Memorandum can be listed as follows:

1. The prospective shareholders know the field in, or the purpose for, which their money is going to be used by the company and what risk they are undertaking in making the investment.
2. The outsiders dealing with the company know with certainty as to what are the objects of the company and whether their contracts with the company are within the objects of the company. [Cotman Vs Broughan (1918)].

15.4 PRINTING, STAMPING AND SIGNING OF MEMORANDUM [Sec - 15]

The Memorandum of Association of a company shall be (a) printed (b). divided into paragraphs, numbered consecutively, (c) stamped in accordance with the stamp laws prevalent in the state where the registered office of the company is to be situated (d) signed by seven subscribers (two in case of private company).

Each subscriber shall sign and add his address, description and occupation, if any, in the presence of atleast one witness who shall attest the signature.

15.5 FORM OF MEMORANDUM [Sec - 14]

The Memorandum of Association of a company shall be in such one of the forms in Table B,C,D and E in Schedule I of the Companies Act.

Table B relates to Memorandum of Association of a company 'limited by shares'.

Table C relates to Memorandum and Articles of association of a company 'limited by guarantee' and not having a share capital.

Table D relates to Memorandum and Articles of association of a company 'limited by guarantee' and having a share capital.

Table E relates to Memorandum and Articles of association of an 'unlimited company'.

15.6 CONTENTS OF MEMORANDUM (Sec - 13)

The Memorandum of every company shall contain the following clauses.

15.6.1 Name Clause: The name of the company with 'Limited' as its last word in the case of a public company, and 'private Limited' as its last words in the case of a private company.

15.6.2 Sitaution Clause: The state in which the registered office of the company is to be situated.

In the case of companies other than trading corporations with objects not confined to one state, the states to whose territories the objects extend.

15.6.3 Objects Clause: The objects of the company which shall be classified as:

- (a) The main objects of the company to be pursued by the company on its incorporation.
- (b) The objects incidental or ancillary to the attainment of the main objects.
- (c) The other objects of the company not included in clause (a) above.

15.6.4 Liability clause: The declaration that the liability of members is limited, in the case of a company limited by shares or limited by guarantee. The memorandum of a company limited by guarantee shall also state that each member undertakes to contribute to the assets of the company, such amount, not exceeding a specified amount as any be required in the event of it being wound up while he is a member or within one year after he ceases to be a member for payment of the debts and liabilities of the company.

15.6.5 Capital Clause: In the case of company limited by shares the amount of the share capital with which the company is to be registered, divided into shares of fixed amount. In the cas eof a company limited by guarantee, it states the liability of each member to contribute specified amount to the assets of the company in the event of winding up, for payment of the liabilities of the company.

In addition to the above clauses which are required by law to be included in the memorandum, other clauses may also be included in it where this is considered desirable. It shall conclude with an 'Association Clause'.

15.6.6 Association Clause: In this clause the persons subscribing to the memorandum declare their desire to form a company and agree to take the shares indicated opposite to their respective names. No subscriber shall take less than one share.

15.7 DETAIL DESCRIPTION OF DIFFERENT CLAUSES OF MEMORANDUM

We have already seen the different clauses of memorandum. Now we will go through the rules of the law regarding those clauses.

1. The Name Clause: The first clause of the memorandum shall state the name of the proposed company.

1.1 Rules regarding name: A company may, subject to the following rules, select any suitable name.

1. Undesirable name to be avoided: A company cannot be registered by a name which, in the opinion of the central government is undesirable [Sec 20(1)]

a. Too similar to the name of another company. The name should not create an impression that company is carrying on the business of some other existing company.

Huntley & Palmer Vs Reading Biscuit Co (1842)

b. Misleading, i.e. suggesting that the company is connected with a particular business or that it is an association of a particular type when this is not the case.

c. Injunction if identical name adopted: If a company gets registered with a name which resembles the name of an existing company, the other company can apply to the court for an injunction to restrain the new company from adopting the identical name.

Ewing Vs Butter Cup Margarine Co. Ltd. (1917): 'E' carried on business under the name of the Butter. Cup Dairy Company as a wholesale and retail provision merchant. The defendant company was incorporated with the main object of manufacturing and selling margarine in wholesale under the name Butter Cup Margarine Company Limited. E sought an injunction restraining the use of the name which the defendant company had adopted for its incorporation on the ground that it was contended to deceive the public into thinking that the two businesses were one or were closely connected. The court of appeal granted the injunction.

3. 'Limited' or 'private limited' as the last word or words of the name. Omission of the word limited makes the name incorrect. If the company makes a contract without the use of the word 'limited', the officers of the company who make the contract would be deemed to be personally liable.

Atkins & Co Ltd Vs Wardle (1889): A, B and C directors of the South Shield Salt Water Baths Company Ltd. acting on behalf of the company accepted a bill of exchange as 'directors of South Shield Salt Water Baths Co', Held, having omitted the word 'Ltd.', from the company's name the directors who signed the bill were personally liable.

The omission to use the word 'Limited' as part of the name of a company must have been deliberate and not merely accidental.

Dermatine Co. Ltd. Ashworth (1905): A bill of exchange drawn upon a limited company in its proper name was duly accepted by two directors of the company. The rubber stamp by which the words of acceptance were impressed on the bill. The stamp was longer than the paper of the bill and hence the word 'Limited' was missed. Held, the company was liable to pay and the directors were not personally liable.

4. Prohibition of use of certain names: The Emblems and Names Prevention and Improper Use Act 1950 prohibits, except with the previous permission of the Central Government, the use of or registration of a company or firm with any name or emblem specified in the schedule to the Act. Eg: The name, emblem or official seal of the U.N.O, W.H.O, the name and pictorial representation of Mahatma Gandhi and Prime Minister of India etc.

2. The Situation Clause: Every company shall have a registered office from the day on which it begins to carry on business. All communications and notices are to be addressed to that registered office [Sec 146(1)]. Notice of the situation of the registered office and every change shall be given to the Registrar within thirty days after the date of incorporation of the company or after the date of change [Sec 146(2)]. In default every officer who is in default shall be punishable with fine which may extend to Rs. 50/- for every day during which the default continues [Sec 146(4)].

3. The objects clause: The objects of a company shall be clearly set forth in the Memorandum. The objects clause defines and confines scope of the company's powers and once registered, it can only be altered as provided by the act.

Lord Cran worth L. C. observed in *Eastern countries Rly Co Vs. Hawkes (1855)* that "the legal personality of a company exists only for the particular purposes of incorporation as defined in the objects clause".

The statement of objects in a memorandum is intended to serve a double purpose. In the first place it gives protection to the subscribers who learn from it the purpose to which their money can be applied. In the second place, it gives protection to persons who deal with the company and who can infer from it the extent of the companies powers.

The powers specified in the Memorandum must not be constructed strictly. The company may do anything which is fairly incidental to these powers.

Evans Vs Brunner Mond & Co. (1921): A company engaged in manufacture of chemicals, proposed to devote a substantial sum of money to the encouragement of scientific education. It was proved that this act would ultimately benefit the company; but a shareholder objected on the ground that it was beyond the powers of the company. Held, the proposal was fairly incidental to the Companies objects.

After the Companies (Amendment) Act 1965, the objects clause in the Memorandum of every company has to state,

1. Main objects of the company to be pursued by the company on its incorporation.
2. Other objects: of the company not included in the above clause.
3. The objects incidental or ancillary to the attainment of the main objects.

For Eg: A steel manufacturing company would have:

1. Main object to be pursued on incorporation - Manufacturing of steel.
2. Incidental/ancillary objects - Acquisition of iron ore mines, borrowing, creation of security etc.
3. Other objects to be pursued later - manufacture of alloys.

5. The capital clause: A company having a share capital shall state the amount of the share capital with which the company is to be registered and the division thereof into shares of a fixed amount in the Memorandum. The capital with which a company is registered is called authorised capital. A company can not issue more shares than authorised by the memorandum. The shares issued by a public company can only be equity shares or preference shares. A private company which is not a subsidiary of a public company may issue shares of any kind [Sec - 90].

6. The Liability clause: The memorandum of a company limited by shares or by guarantee shall also state that the liability of its members is limited [Sec - 13(2)].

7. The Association Clause: In this clause it is to be stated by the subscribers to the memorandum that they are willing to form a joint stock company to carry out the objects set out in the memorandum. Every subscriber to the memorandum must take atleast one share each. He should write the number of shares to be taken by him against his name. They must sign the memorandum in the presence of atleast one witness.

15.8 ALTERATION OF MEMORANDUM

For the purpose of alteration the provisions of the memorandum can be divided into two categories.

1. Conditions: These are the provisions which must be included in the memorandum (6 clauses). These conditions can not be altered except in the cases, in the mode, and to the extent for which express provision is made in Companies Act [Sec 16(1)].

2. Other Provisions: Such provisions including those relating to the appointment of managing directors or managers may be altered by a special resolution [Sec - 16(3)].

(1) Alteration of Name Clause: A company can change its name at any time in the course of its business by a special resolution and with the approval of the Company Law Board [Sec - 21]. If a company is registered with a name which is identical with or closely resembles the name of the existing company, it may change its name by ordinary resolution and with the previous approval of Company Law Board [Sec - 22]. The Company Law Board can also direct a company to change its name. When the Company Law Board is directed, to change its name, the company must change its name within 3 months. If the name is not changed, the company law board may apply to the court to have the name removed from the register of companies.

No approval of the Central Government is required in case of addition or deletion of the word 'private' when a public company is converted into a private company or vice-versa.

When the name is validly changed, it must be notified to the registrar. The registrar shall enter the name in the register and shall issue a fresh Certificate of Incorporation. The registrar shall also make the necessary alteration in the Memorandum of Association of the company. The change of name shall be complete and effective only on the issue of fresh Certificate of Incorporation [Sec - 23(1)]. Change of name does not affect the rights and obligations of the company.

(2) Alteration of situation clause: This may be (a) change of registered office from one place to another place in the same city or town or village. A company can change its registered office from one locality to another locality in the same city or town. For this, the Board of Directors should pass a special resolution [Sec -146]. The notice of change should be given to the Registrar within 30 days of the change. A public notice must also be given regarding the change of registered office.

b. Change of registered office from one state to another state: Extraordinary general meeting must be convened and a special resolution must be passed approving the change of registered office. A copy of the special resolution must be filed with the registrar within 30 days from the date of passing the resolution. The conformation of the Central Government should be obtained. A copy of the conformation order obtained from the Central Government together with a printed copy of the altered memorandum must be filed with the registrar of both the states within 3 months of the order. The registrar of the state from which the registered office is transferred send all the documents relating to the company in his office to the registrar of the other state. Notice of the new address is to be given informing the public about the change of registered office.

(3) Alteration of objects clause [Sec 17(1)]: The objects of a company may be altered by special resolution, so as to enable the company (a) to carry on its business more economically or efficiently, governments stock investment company (1892).

A company was formed to invest its funds in the securities of British and Foreign Governments, local authorities and public undertakings. It wanted to alter its memorandum so as to acquire power to invest in the debentures of commercial and industrial companies and to create a security in favour of debenture-stock holders. Held, the company could alter the memorandum.

(b) to obtain its main purpose by new means.

(c) to enlarge or change the local area of its operation.

Indian Mechanical Gold Extracting Company (1891): The memorandum of a company requires it to confine its business to the 'Empire of India'. It wanted to change its memorandum so as to enlarge the area of its operation. Held, it could do so provided it dropped the word 'Indian' from its name.

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the objects specified in the memorandum.

Mutual Property Insurance Company Ltd. (1934): A company which has the power to carry on any kind of insurance business except life insurance wanted to add life insurance to its objects. Held, the company could do so provided it included the words 'and life' in its name.

The Company Law Board generally allow any kind of alteration of the financial position of the company is sound and the alteration is not objected by the shareholders and creditors.

(e) to sell or dispose of the whole or any part of the undertaking.

(f) to amalgamate with any other company.

(4) Procedure

1. A special resolution shall be passed to alter the objects clause [Sec - 17(1)].

2. The alteration shall be confirmed by the Company Law Board on petition [Sec - 17(2)].

3. Notice must be given to all persons whose interests will be affected by the change [Sec - 17(2)].
4. Notice must be given to the registrar of companies so that he can appear before the Company Law Board and state the objections and suggestions, if any [Sec - 17(4)]
5. After the board has confirmed the alterations, a certified copy of the boards order together with a printed copy of the memorandum as altered shall be filed with the registrar within three months from the date of order.

(5) Change in liability clause: A company limited by shares or guarantee can not change its memorandum so as to impose any additional liability on the members or to compel them to buy additional shares of the company unless all the members agree in writing to such change either before or after the change [Sec - 38].

(6) Change in Capital Clause: [Sec - 94] of the Act provides that a company if so authorised by the articles alter its share capital. A copy of the resolution should be filed with registrar of companies within 30 days of passing of the resolution. The Registrar of companies shall record the notice and make an alteration as may be necessary in the Memorandum and Articles.

15.9 SUMMARY

Memorandum is the charter of the company. through the memorandum the prospective, shareholders and outsiders dealing with the company can know how best their funds are used by the company. This should be printed and divided into paragraphs, numbered consecutively. Each paragraph is known as a clause. In alteration of these clauses, the company must follow the provisions of the company law.

15.10 SELF - ASSESSMENT QUESTIONS

1. What is meant by memorandum of association? What are the clauses in the memorandum? How to alter the clauses in the memorandum of association under companies act - 1956.
2. What is the procedure for changing the registered office of the company and also explain the grounds on which registered office from one state to another permissible.
3. What is Memorandum of Association? What are its contents? When and how may it be altered?

15.11 REFERENCE BOOKS

- 1) Sen Mitra - Commercial and Industrial Law
- 2) Gulshan. S.S. & Kapoor. G.K. - A. Hand Book of Business Law
- 3) M.P. Vijay Kumar - Business and Corporate Laws.

- Dr. CH. SURAVINDA

Lesson - 16

ARTICLES OF ASSOCIATION

16.0 OBJECTIVES

Before incorporation of a company, the promoters have to submit certain documents of the Registrar of Companies. Among those documents Articles of Association is the second one. This lesson is intended to see the contents of the articles and the procedure for their change.

Structure

- 16.1 Introduction**
- 16.2 Definition**
- 16.3 Contents of the Articles**
- 16.4 Companies which must have their own articles**
- 16.5 Form of Articles**
- 16.6 Form and Signature**
- 16.7 Alteration of Articles**
- 16.8 Procedure for Alteration**
- 16.9 Limitations of Alteration**
- 16.10 Difference between Memorandum & Articles of Association**
- 16.11 Doctrine of ultravires**
- 16.12 Effect of ultravires transactions**
- 16.13 Doctrine of constructive notice**
- 16.14 Doctrine of Indore Management**
- 16.15 Exceptions to Doctrine of Indore Management**
- 16.16 Summary**
- 16.17 Self Assessment Questions**
- 16.18 Reference Books**

16.1 INTRODUCTION

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

16.2 DEFINITION [SEC 2 (2)]

“Articles means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this act.”

The Articles of Association are the rules regulations and bye-laws for the internal management of the affairs of the company. they are framed with the object of carrying out the objects as set out in the Memorandum of Association. The articles should not contain anything which is inconsistent with either the provisions of the Memorandum of Association or of the Companies Act.

16.3 CONTENTS OF ARTICLES

Articles usually contain provisions relating to the following matters.

1. Share capital, rights of shareholders.
2. Lien on shares
3. Calls on shares
4. Transfer of shares
5. Transmission of shares
6. Forfeiture of shares
7. Conversion of shares into stock
8. Share warrants
9. Alteration of capital
10. General meetings and proceedings
11. Voting rights of members, voting and proxy.
12. Directors, their appointment, remuneration, qualifications, powers and proceedings of Board of Directors.
13. Managers
14. Secretary
15. Dividends and reserves
16. Accounts, audit and borrowing powers
17. Capitalisation of profits
18. Winding-up.

In framing the articles of company care must be taken to see that regulations framed do not get beyond the powers of the company itself as contemplated by the Memorandum of Association. They should not also violate any of the provisions of the companies act. For ex: according to [Sec 205], dividend can not be paid by a company except out of profits. Any provision in the articles, contrary to this provision of the companies act is void.

Peveril Gold Mines Ltd. (1898)

The articles of the company provided that no petition for a winding up could be presented unless

- a) two directors consented in writing
- b) a resolution to wind-up was passed at a general meeting and
- c) the petitioner held one-fifty of the issued share capital.

None of these conditions were fulfilled. Held; the restrictions were invalid and a petition could be presented. These restrictions violated the provision of Sec 224 of the English Companies Act of 1948. [Sec 439 of the Companies Act 1956 corresponds to this section].

16.4 COMPANIES WHICH MUST HAVE THEIR OWN ARTICLES (SEC 26)

The following companies shall have their own Articles, namely,

- a. Unlimited company
- b. Companies limited by guarantee
- c. Private companies limited by shares.

The articles shall be signed by the subscribers of the memorandum and registered along with the memorandum.

16.5 FORM OF ARTICLES

The following table shows the form of articles of different types of companies.

Type of Company	Form of Articles
Company limited by shares [sec28]	(a) Adopt talbe A of Schedule 1 is full (b) Own articles to the exclusion of table A (c) Own articles and adopt table A is part
Company limited by guarantee and not having share capital (Sec 29)	Own articles in a form as in Table C
Company limited by gurantee and having share capital (Sec 29)	Own Articles in a form as in Table D
Company with unlimited liability (Sec 29)	Own Articles in a form as in Table E

16.6 FORM AND SIGNATURE (SEC 30)

Articles shall be printed divided into paragraphs and signed by each subscriber to the Memorandum, stating his name, address, description and occupation, if any, in teh presence of atleast one witness who shall the signature and likewise add his address, description and occupation, if any.

16.7 ALTERATION OF ARTICLES

Companies have been given very wide powers to alter their Articles [Sec 31]. It is a statutory power and any provision in the Articles making the Articles unalterable is regarded as bad in law. If for example, the Articles of a company contain any restriction that the company should not alter its Articles, it will be contrary to the companies Act and therefore inoperative.

16.8 PROCEDURE FOR ALTERNION

A company may, by passing a special resolution, alter, regulations contained in its Articles any time. A copy of every special resolution altering the Articles shall be filed with the registrar within thirty days of its passing and attached to every copy of the Articles issued thereafter [Secs 40 and 192 (1) (2)].

16.9 LIMITATIONS TO ALTERATION

16.9.1 Must not be inconsistent with the Act:

The Alteration of the Articles must not be inconsistent with or go beyond, the provisions of the company's Act [Sec 31 (1)]. For example, the Articles can not be alatered so as to give power to the company to purchase its own shares.

Madhav Ramchandra kamath Vs Canara Banking corporation Limited

A company passed a resolution expelling as member and authorising the directions to register the transfer of his shares without an intimation of transfer. Held; the resolution was invalid as being against the Act.

16.9.2 Must not conflict with the Memorandum:

The alteration of the Articles must not conflict with the provisions of the Memorandum (Sec 31 (1)). In case of conflict between the Articles and the Memorandum, The memorandum shall prevail.

16.9.3 Must not sanction anything illegal:

The alteration must not purpose to sanction anything which is illegal. But if it is legal and it is not clearly prohibited by the memorandum, it may be held to be valid even where it alters the whole structure of the company.

Andrews Vs Gass Meter Company Ltd (1897)

The Memorandum of a company provided that the nominal capital of the company was £ 60000 dividend into 600 shares of 100 each. The memorandum and the Articles did not contain any express provision as to issue of preference shares. The company by a special resolution, altered its Articles, so as to give itself power to issue preference shares and then issued them. Held, the issue was valid.

16.9.4 Must be for the benefit of the company:

The alteration must be for the benefit of the company.

Shuttle work Vs Cox Bros & Co Ltd (1927)

The Articles of a company provided that I and four others should be permanent directors of the company unless they were disqualified by any of the six specific events. I failed to account for the company's money on twenty two occasssions within twelve months. The Articles were accordingly altered and a seventh event disqualifying a director was added. The event added was that if a director was so requested in writing by all the other directors he should resign. I was so requested to resign. Held, the alteration was bonafide for the benefit of the company as a whole and was valid.

16.9.6 Alteration should not defraud the minority shareholders:

Brown Vs British abrasive wheel company Ltd: (1919)

A company was in financial difficulties and the majority of the shareholders were willing to provide more capital if the remaining shareholders, amounting to about two percent of the whole would sell them their shares. The majority then passed a special resolution altering the Articles so as to enable nine-tenths of the shareholders. Held, the alteration of the Articles could be restrained as it was designed to allow the majority to do compulsorily what they could not do by agreement and it was not for the benefit of the company as a whole.

16.9.7 Must not increase liability of Members:

The alteration must not in any way increase the liability of the existing members to contribute to the share capital of, or otherwise pay money to the company unless they agree in writing before or after the alteration is made (Sec - 38).

16.9.8 Approval of central government when a public company is converted into a private company:

The Alteration in the Articles which has the effect of converting a public company into a private company can be made only if it is approved by the central government [Sec - 31(1)]

16.9.9 Must not cause breach of contract:

The alteration should not cause a breach of contract with an outsider.

British Murac Syndicate Ltd Vs Alperton Rubber Company Ltd (1915):

Company A entered into a contract with company B whereby it was agreed that so long as A held 5000 of company B's shares, company A should have the right to nominate two of the directors. It was also agreed that a clause in the Articles providing for this right of nomination should not be altered by company B. Company B disapproved the nominees of company A and a notice was given of a meeting at which it was proposed to pass a resolution altering the Articles and depriving company A of the right to nominate, Held, the court could issue an injunction restraining company B from altering the Articles.

16.9.10 No power to the court to amend Articles:

The court has no power to amend or rectify the Articles even where there is a mistake or drafting error which the court would rectify in the case of any other contract the court can only declare some clause to be ultra vires.

16.9.11 Alteration may be with retrospective effect:

The Articles may be altered with retrospective effect.

16.10 DIFFERENCE BETWEEN MEMORANDUM & ARTICLES OF ASSOCIATION

Memorandum of Associations	Articles of Association
1. It is a primary document.	1. It is a secondary document
2. It is subordinate to the Act.	2. It is subordinate to Memorandum and the Act.
3. It is the character of the company and defines the fundamental conditions and objects.	3. It contains the rules and regulations.
4. For alteration the Central Government and court approval is required.	4. For alteration, the approval of the members is required.
5. It defines the relation between the company and outsiders.	5. It defines the relation between the company and members (Internal Management)
6. Acts which are ultravires the Memorandum cannot be ratified by the members.	6. Acts ultravires the Articles can be ratified by the members.
7. Every company must have its own memorandum	7. A public company limited by shares need not have articles of its own. In such a case, Table A applies.

16.11 DOCTRINE OF ULTRAVIRES

Ultra means 'beyond', vires means 'powers'

Ultravires a company means an act done beyond the legal power and authority of the company. An act ultravires the companies Act is illegal and void. An act ultravires the company (memorandum) is void.

As act ultravires the Directors, but intravire the company can be ratified by the shareholders by a resolution in a general meeting. An act ultravires the articles can be ratified by a special resolution at a general meeting.

Ashburg Railway Carriage & Iron Co. Ltd Vs Riche.

A Railway company was formed with the object of making and selling railway wagons and carriages. The company entered into a contract with Riche to finance the construction of a railway line in Belgium. The company later repudiated the contract as one being ultra vires. Riche brought an action for damages for breach of contract. The House of Lords held that the contract was ultravires and therefore null and void.

Lakshmana swamy Mudaliar Vs Life Insurance Corporation of India:

Directors of a company were authorised to make payments towards any charitable purpose or for any object useful for general public. The Directors paid a Rs. 2,00,000 to the trust formed for the purpose of promoting technical and business knowledge. The supreme court held the payment as ultravires.

The purpose of Doctrine of ultravires is to protect the shareholders and to safeguard the interest of the creditors.

16.12 EFFECT OF ULTRAVIRES TRANSACTIONS

The impact of doctrine of ultravires is that a company can neither be sued on an ultravires transaction, nor can it sue. Since the memorandum is a 'public document' it is open to public inspection. When one deals with a company, he is deemed to know about the powers of the company. In spite of this, a person enters into a transaction which is ultravires the company, then he cannot enforce it against the company.

16.12.1 Injunction:

Whenever an ultra-vires Act been or is about to be undertaken, any member of the company can get an injunction to restrain the company from proceeding with it.

London Country Council Vs Attorney General:

The council had power to run trams. It ran omnibuses to feed trams. Held, that the running of omnibuses was ultra vires and the council was restrained from running omnibuses.

16.12.2 Personal liability of Directors / Agents:

Any member of a company can maintain an action against the Directors of the company to compel them to restore to the company the funds of the company that have been employed by them in an ultravires transaction.

16.12.3 Property acquired under ultra-vires acts:

If a company's money has been spent ultravires in purchasing some property, the company's right over that property must be held secure since the amount though wrongly acquired, represents the company's capital.

16.12.4 Ultravires contracts:

Contracts ultravire the company are void and cannot become intravires the company for reason of estoppel or lapse of time or ratification. The company may however alter the objects clause for the future, but such alteration will not validate the past ultravires acts done.

16.12.5 Ultravires torts (Civil wrongs):

The company is not liable for civil wrong done by Directors / Agent in the course of ultravires transaction. The company would be liable for torts only if:

- (a) The action is within the scope of memorandum of association.
- (b) The act was committed within the course of employment.

16.12.5.b. Exceptions:

- (a) If an act is ultravires the Directors of the company but intravires the company the shareholders may ratify it.
- (b) If an act is ultravires the Articles of the company, the Articles may be altered to include the act within the powers of the company.
- (c) If an act is intravires the company but is irregularly done, the shareholders may ratify it.
- (d) The company can sue a person who borrows money from the company under a contract which is ultravires, for the recovery of the money.
- (e) If an act is ultravires the company the rights arising independently thereon are not affected. Further, the rights over the property acquired by ultravires expenditure are protected.
- (f) If a company has purchased some property from a third party under ultravires contract or has taken an ultravires loan, the third party has the right to follow its property or money if it exists in specie. He may also obtain an injunction from the court restraining the company from parting with that property or money. But he must act before the identity of the property is lost or the money is spent.
- (g) If a company takes an ultravires loan and uses it to pay off intravires debts, the lender who has lent money under ultravires contract is substituted in the place of the creditor who has been paid off and he can recover the money.
- (h) If the company has taken an ultravires loan through misrepresentation of fact by the Directors, the lender has the right to make the Directors, personally liable on the ground of breach of implied warranty of authority.
- (i) If a Director of a company makes an ultravires payment, the amount, the company can compel him to refund the amount. The Director however has the right to be indemnified by the person receiving the money provided he knew the transaction to be ultravires the company.

16.13 DOCTRINE OF CONSTRUCTIVE NOTICE

The memorandum of Association and Articles of Association of every company are registered with registrar of companies. The office of the registrar is a public office and consequently they are public

documents open and accessible to all. Any person dealing with the company is presumed to have read the memorandum and Articles irrespective of whether he actually reads it or not. This kind of presumed notice is called as 'Doctrine of constructive notice'. The legal effect of its doctrine is that if a person deals with the company and the transaction is inconsistent with the provisions of memorandum and Articles, he cannot plead ignorance of the provision of these documents.

Kotla Venkataswamy Vs Ram Murthy

The Articles required that all deeds should be signed by the managing Director, the secretary and a working Director on behalf of the company. The plaintiff accepted the deed of mortgage signed by the secretary and a working Director. Held that the plaintiff could not claim under this deed.

This doctrine is not a positive one but a negative doctrine. It operates in the company's favour and against the person who failed the enquiry.

16.14 DOCTRINE OF INDOOR MANAGEMENT

This doctrine is an exception to the doctrine of constructive notice.

According to this doctrine, persons dealing with the company are presumed to have read the registered documents and to see that the proposed dealing is not inconsistent therewith, but they are not bound to do more; they need not enquire into the regularity of internal proceedings as required by memorandum and Articles. They can presume that all this is being done regularly.

The doctrine has its origin in the case of Royal British Bank Vs Turquand.

The Directors were authorised by the Articles to borrow such sums of money, by obtaining approval of the shareholders by way of a resolution in a general meeting. The Directors gave a bond to 'T' without authority of such a resolution. Held, that 'T' could sue the company on the strength of the bond, as he was entitled to assume that necessary resolution has been passed. Hence this doctrine is also referred to as the rule in Turquand's case.

16.15 EXCEPTIONS TO THE DOCTRINE IN INDOOR MANAGEMENT

16.15.1 Knowledge of irregularity:

Where a person dealing with the company has notice of the irregularity as regards internal management, he cannot claim benefit under the rule of indoor management. Thus a director of a company cannot normally claim the benefit of this rule, because he is also acting for the company in the transaction.

Howard Vs Patent Ivory Co.

The Directors of the company, under the Articles, had no power to borrow more than 1000 pounds without the resolution of the company in the general meeting. Without such a resolution, the Directors borrowed 2500 pounds from themselves and took debentures. It was held that the Directors had the notice of internal regularity and hence the company was liable to them only to the extent of 1000 pounds.

Devi Ditta Mal Vs Standard Band of India:

A transfer of shares in a company was approved by two Directors. One of these Directors was not validly appointed. The other was disqualified by reason of being the transferee himself. These facts were not known to the transferor. Held the transfer was ineffective.

16.15.2 Negligence:

Where a person dealing with the company could discover the irregularity i.e. transactions which are unusual or not in ordinary course of business, if he had made proper enquiries then he cannot claim protection under this rule. Likewise, a person who deals with the company may be put upon enquiry by reason of unusual magnitude of the transactions having regard to the position of the agent who is acting for the company.

Underwood Vs Bank of Liverpool:

The Articles of a company provided that the business of the company was to be managed by the Directors. The Director and the principal shareholder of the company advised the Bank to credit the cheques in favour of the company into his own account. The bank accordingly credited the cheque in favour of the company into his own account. An action was brought against the bank by the company on behalf of the debenture holders. The Bank defended that it has acted on the Directors instructions and that as a Bank it was not necessary to see whether the internal proceedings for the Director's communication was appropriate or not. The court held that considering the peculiar nature of instruction, the bank should have in the ordinary course suspected irregularity. The court held the bank liable to compensate the company for cheques credited to directors personal account.

16.15.3 Forgery:

The rule cannot be applied to forgery which must be regarded as nullity. In the case of forgeries, the acts done in the name of the company are void ab initio. A company can never be held bound by forgeries committed by its officers.

Ruben Vs Great Fingall Consolidated Co.

The plaintiff was the transferee of a share certificate issued under the seal of the defendant company. The certificate was issued by the company's secretary who had affixed the seal of the company and forged the signatures of two Directors. The certificate was held to be void.

16.15.4 Void acts:

Where the acts done in the name of the company are void ab initio, the doctrine of indoor management does not apply.

16.15.5 Lack of authority:

If an officer of a company makes a contract with a third party and if the act of the officer falls outside his ordinary authority, the company is not bound.

Credit Bank Cassel Vs Schenkers Ltd:

A Branch manager of the company drew a bill of exchange and also endorsed bills on behalf of the company although he had no authority for these acts from the company. Held, the company was not bound.

Anand Biharilal Vs Binshaw & Co.

The plaintiff accepted a transfer of the company's property from its accountant since such transaction is apparently beyond the scope of an Accountant's authority, it was held void.

16.15.6 No Knowledge of Articles:

The protection under the rule of Indoor Management, would be available only if the person had knowledge of the Articles. So, if a person had knowledge of the Articles. He cannot claim protection under the rule of indoor management.

16.16 SUMMARY

The Articles of Association are the rules, regulations and bye-laws for the internal management of the affairs of a company. Companies have been given very wide powers to alter their Articles. But it must not be inconsistent with the Act. It must not conflict with the memorandum. An act beyond the legal power and authority of company is known as doctrine of ultravires.

16.17 SELF ASSESSMENT QUESTIONS

1. Distinguish between Memorandum of Association and Articles of Association
2. Write notes on
 - a. Constructive notice of memorandum and Articles of Association
 - b. Doctrine of Indoor Management
3. Doctrine of Ultra-vires. Discuss.

16.18 REFERENCE BOOKS

- | | | |
|--------------------------------|---|-------------------------------|
| 1. Sen Mitra | - | Commercial and Industrial Law |
| 2. Gulshan, S.S & Kapoor, G.K. | - | A Handbook of Business Law |
| 3. M.P. Vijay Kumar | - | Business and Corporate Laws |

- Dr. CH. SURAVINDA

Lesson – 17

PROSPECTUS

17.0 OBJECTIVES

In order to finance its activities a company need capital. This is raised by a public company by the issue of a prospectus. This lesson is intended to discuss the contents and significance of a prospectus.

Structure

- 17.1 Introduction**
- 17.2 Definition**
- 17.3 Features**
- 17.4 Requirements as to issue of prospectus**
- 17.5 Penalty for non-registration of prospectus**
- 17.6 Objects of registration of prospectus**
- 17.7 Contents of prospectus**
- 17.8 Mis-statements in prospectus and their consequences**
- 17.9 Civil liability**
- 17.10 Remedies against the company**
- 17.11 Minimum subscription**
- 17.12 Summary**
- 17.13 Self – Assessment Questions**
- 17.14 Reference Books**

17.1 INTRODUCTION

In order to finance its activities a company need capital. This is raised by a public company by the issue of prospectus inviting deposits from the public. The prospectus is the basis on which the prospective investors form their opinion and take decisions as the worth and prospects of the company. Any document inviting deposits from the public for the subscription of shares or debentures of a company is a prospectus.

17.2 DEFINITION [Sec - 2 (36)]

It means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in or debentures of a body corporation.

17.3 FEATURES

Depending upon the above definition the features of a prospectus can be listed as follows.

1. It is a document in writing. An oral invitation is not a prospectus.
2. It must be for the subscription or purchase of any shares in or debentures of a body corporate.

3. It is an invitation to the public. An offer is not to be treated as invitation to public if
 - it is directed to a specific person or a group of persons.
 - It is not calculated to result in the shares or debentures becoming available to others.
4. Whether shares are issued to the public is a matter of fact and depends on the circumstances of the case, the test is not who receives the offer or invitation but who can accept it.

Pramanath Sanyal Vs Kali Kumar Dutt:

An advertisement in the newspaper stating some shares are still available for sale, according to the terms of the prospectus, which may be obtained on application was held to be a prospectus.

5. A single private communication does not satisfy the word "issue".

Nath Vs Lynde:

In this case several copies of a document marked "strictly confidential" and containing particulars of a proposed issue of shares were sent accompanied by application form by the Managing Director of the company to a co-director who passed it to a relation. Thus the document was passed on privately through a small circle of friends of the Director. It was held that there had been no issue to the public.

A circular issued by a company to the shareholders of other companies to acquire shares in these companies and issue its own shares in exchange of those shares does not amount to prospectus as there is no public issue.

6. Public is a general word and includes a section of the public Sec 67(1). It is not necessary that prospectus should be issued by a company. It may be issued on behalf of the company by its agents like an issuing house.

17.4 REQUIREMENT AS TO ISSUE OF PROSPECTUS

17.4.1 Dating and signature of prospectus [Sec -55]:

A prospectus issued by or in relation to an intended company must be dated and that date is taken as the date of publication of the prospectus. In case the prospectus is issued by an intended company it has to be signed by the proposed directors of company. In case of existing company the prospectus has to be signed by every person who is named there as director of the company.

17.4.2 Registration of prospectus [Sec - 60]:

A prospectus must not be issued by or on behalf of a company unless a copy thereof has been delivered to the registrar for registration. The copy must be accompanied with the following documents.

- Consent of the experts to the issued [Sec - 60(1) (a)]
- A copy of every contract appointing or fixing the remuneration of a Managing Director or Manager [Sec - 60 (1) (b & c)]
- A copy of every material contract entered with third parties.
- The consent in writing of a person if any named in the prospectus as the auditor. Legal adviser banker or broker of the company to act in that capacity [Sec -60(3)].

The prospectus must be issued within 90 days of the day on which a copy thereof is delivered for registration.

17.5 PENALTY FOR NON-REGISTRATION OF PROSPECTUS [Sec - 60(5)]

If a prospectus is issued without a copy thereof being delivered to the registrar for registration shall be punishable with a fine which may extend to Rs. 5,000/-

17.6 OBJECTS OF REGISTRATION OF PROSPECTUS

1. To keep an authenticated report of the terms and conditions of issue of shares and debentures.
2. To pinpoint the responsibility of the persons issuing the prospectus for statements made by them in the prospectus.

17.7 CONTENTS OF PROSPECTUS [Sec - 56]

Prospectus is the window through which an investor can look into the soundness of a company's venture. The investor must, therefore be given a complete picture of the company's intended activities and its position. This is done through prospectus which must secure the fullest disclosure of all material and essential particulars.

Sec -56 lays down that every prospectus issued shall:

1. State the matters specified in part I of Schedule II. Those are
 - (a) Main objects of the company and particulars of signatories to the memorandum.
 - (b) Number and classes of shares.
 - (c) Number of redeemable preference shares intended to be issued with the date of redemption.
 - (d) Qualification shares
 - (e) Particulars about Directors and Managing Directors.
 - (f) Minimum subscription
 - (g) The time of the opening of subscription list.
 - (h) The amount payable on application and allotment on each share.
 - (i) Particulars of any option to subscribe for shares.
 - (j) Shares issued for consideration other than cash
 - (k) Premium on shares
 - (l) The name of underwriter
 - (m) The particulars of vendors of property
 - (n) Underwriting commission
 - (o) Preliminary expenses
 - (p) Amount of benefit given to promoters
 - (q) Particulars of contracts
 - (r) Particulars of auditors
 - (s) Nature of interest of every director or promoter
 - (t) Voting and dividend rights
 - (u) Length of time of business
 - (v) Capitalisation of profits and surplus from revaluation of assets.

- (w) Inspection of balance sheet and P&L a/c. reasonable time and place at which copies of all balance sheets and P&L a/cs may be inspected.
2. Set out the report specified in part II of schedule II. Those are:
- a. Report by the auditor
 - b. Report by the accountants

17.8 MIS-STATEMENTS IN PROSPECTUS AND THEIR CONSEQUENCES

A prospectus is a document which holds out to the public as to what a company is what its prospectus are. It invites deposits from the public to subscribe to the share capital and debentures of the company. It is therefore all material facts should be disclosed. Misstatement and non-disclosure of material facts in a prospectus are fatal to the contract for the purchase of shares and debentures. As such the greatest care is necessary in its preparation.

A prospectus as a whole must not give a misleading impression even though on analysing the statement separately a true sense could be made out.

Clark Vs Urquart (1930):

A prospectus issued by a company stated that the value of the company's assets was a certain sum. It however did not had that this sum was the estimated cost of replacing them. Held, the statement was ambiguous and misleading as anyone who read the prospectus would understand the value of the assets to mean the amount which might be realised if the company's business was sold as a going concern.

Greenwood Vs Leather shoot wheats Co (1900):

A company formed to manufacture leather tyred wheels for troleys issued a prospectus stating in large type orders have already been received from 'House of Commons' to be followed by large orders later. In fact, all orders received were trial orders and no customer had yet expressed any intention to buy on a large scale. Held, the prospectus was misleading.

If there is any misstatement of a material fact in a prospectus the persons responsible for such are both civil or criminally liable.

17.9 CIVIL LIABILITY

A person who has been induced to subscribe for shares on the faith of a statement in a prospectus i.e. untrue has remedies against the company and the directors, promoters and experts.

17.10 REMEDIES AGAINST THE COMPANY

If there is a mis-statement in a prospectus and if it has induced any share holder to purchase shares i) he can rescind the contract and ii) claim damages from the company.

17.10.1 Rescission of the contract:

Any person who takes shares on the faith of statement of fact contained in a prospectus can apply to the court for the rescission of the contract. He may however apply for the rescission within a reasonable line and before the company goes into liquidation. But he will Shiromani sugar Mills Ltd Vs Debi

Prasad (1950) Have to surrender to the company the shares allotted to him. His name is then removed from the register of members and he gets back the money paid by him to the company along with interest. The contract can be rescinded if the following conditions are satisfied.

17.10.1.1 The statement must be material representation of fact:

City of Edinburgh Brewer Co Ltd Vs Gribsons Trustee (1869)

A prospectus issued by a company stated that a large number of gentlemen in the trade and others have become shareholders. In fact, out of 55 shareholders 10 to 12 were connected with the trade. Held, there was no sufficient material representation to entitle a shareholder who had taken shares on the faith of the prospectus to have his name deleted from the registrar.

17.10.1.2 It must have induced the shareholder to take the shares:

Jennings Vs Broughton (1833):

A subscriber for share in a mining company offered by a prospectus which is accurately described the capacity of the company's mine. He inspected the mine himself. Held, he was not entitled to rescind the contract to take shares as he has inspected the mine himself and must have therefore relied on his own observations and not on the contents.

17.10.1.3 It must be untrue:

A statement included in a prospectus is deemed to be untrue if it is a misleading in the form and context in which it is included Sec - 65(00)

Rex Vs Lord Kylsant (1923):

A prospectus was issued by a company stating that the company had paid a dividend every year between 1921 and 1927 (years of depression). Thus giving the impression of a financially stable company however the company had in each of those years incurred considerable financial losses in trading a/c and was able to pay dividend only out of reserves accumulated in previous years. This fact was suppressed. Held, the prospectus was false in material particulars. In that it conveyed a false impression. A statement could be false not only because of what was said but also because of what was concealed, omitted or implied.

17.10.1.4 The shareholders must have relied on the statement in the prospectus in applying for shares. If a person purchase the shares in the open market the prospectus ceases to be operative. He cannot therefore sue for rescission on the ground of untrue statement in the prospectus.

Peek Vs Gurney (1873):

A company issued a prospectus containing false statements. 'A' relying on the prospectus applied for and allotted shares. Later he sold these shares to P. The company was wound up and had to pay nearly £ 1,00,000 as a contributory P sought an indemnity for his loss from the directors at the time of the issue of prospectus. Held, the directors were not laible to P.

17.10.1.5 The ommission of a material fact must be misleading before rescission is granted.

Cales Vs White city greyhaund Association Ltd (1929):

A prospectus described land as eminently suitable for greyhaund racing. However before any building such channels or stands for the public could be constructed, local authorities approval was necessary. As a result of a town planning resolution the local authority refused approval. Held, the description of land was misleading and rescission was granted.

17.10.1.6 The proceeding for rescission must be started as soon as the allottee comes to know of a misleading statement in the prospectus on the faith of which he has subscribed for shares and before the company goes into liquidation.

17.10.1.7 Notice not enough:

Where an allottee elects to rescind a contract on the ground of fraudulent misrepresentation, a mere notice to the company to this effect is not enough. He must take effective steps for the rectification of register of members and removal of his name there from.

First National Reinsurance company Vs Green field (1921):

17.10.1.8 Loss of right of rescission:

The right to rescind a contract induced by misrepresentation is lost in following cases.

17.10.1.8.1 Affirmation:

Where a shareholder after discovering that he has a right to rescind treats the contract as subsisting, he cannot afterwards rescind it.

For Ex: He loses the right to rescind.

1. where he attempts to resell
2. executed a transfer
3. pays calls or received dividend
4. attends and votes at a general body meeting of a company in person or by proxy.

8.2 Unreasonable delay:

The shareholder must rescind the contract promptly i.e. within reasonable time. Where there is an unreasonable delay by a shareholder after his coming to know of the circumstances entitling him to apply for rescission, he loses the right to rescind.

Christen Ville Rubber Estates Ltd (1911):

A shareholder was allotted shares in a company on the faith of a prospectus containing some false statements he can put in enquiries in June but he took no steps to make investigation until November. Held, the delay prevented him from rescinding the contract.

8.3 Impossibility:

Where rescission becomes impossible because the parties cannot be relegated to their original position, where the winding up of the company has commenced and the rights of the creditors started.

17.10.9 Damages for deceit:

Any person induced by a fraudulent statement in a prospectus to take shares is entitled to sue the company for damages. He can both retain the shares and get damages against the company.

The persons who are liable to pay compensation for any loss or damage to subscribers for any shares or debentures on the faith of a prospectus containing untrue statements are

1. The directors at the time of the issue of the prospectus.
2. Persons who have authorised themselves to be named as directors in the prospectus
3. Promoters
4. Persons who have authorised the issue of prospectus. Their liability may be as follows:
 - Liability for damages for mis-statement in prospectus (Sec -62)
 - Criminal liability

Every person authorising the issue of a prospectus containing false or untrue statements is punishable with imprisonment upto 2 years or with a fine upto Rs. 5,000/- or both [Sec -63(1)]

Sec -68 of the act lays down that a person who induce others by making false or misleading statement to enter into an agreement for the acquisition of shares for securing profits from the yield of share is punishable with an imprisonment for a term extending upto 5 years or a fine of Rs. 10,000/- or both.

17.10.10 Statement in Lieu of prospectus [Sec - 70]:

Where a public company does not inviting public to subscribe for its shares, but arranges to get money from private sources, it need not issue a prospectus to the public. In such a case the promoters are required to prepare a draft prospectus known as statement in lieu of prospectus, which should contain the information required to be disclosed by the schedule III of the act.

It should be dated and signed by every person who is named there in as director or proposed director. It will constitute the basis of the contract between the company and shareholders. It must disclose all material facts relating to the company.

Where a shareholder has applied for shares on the basis of a prospectus which is altered in material particulars before the allotment of the shares, he is entitled to revoke his application for shares.

Raja Gopal Iyer Vs The South Indian Works Ltd (1942):

The plaintiff applied for shares in a company on the basis of a prospectus which contained the names of directors before the shares were allotted, some directors had retired. Held the plaintiff could revoke his application.

17.10.11. Deemed Prospectus [Sec -64]:

It is also known as prospectus by implication. A public company offer its shares or debentures to be public by issue of prospectus. Any document, circular, notice, advertisement containing the offer for sale of share or debentures is known as prospectus.

17.11 MINIMUM SUBSCRIPTION

Minimum subscription is the amount stated in a prospectus as the minimum amount which, in the opinion of the Board of Directors, shall be raised by the issue of share capital in order to provide for the matters specified below.

- (a) The purchase price of any property purchased or to be purchased.
- (b) The preliminary expenses payable by the company.
- (c) The repayment of any money borrowed by the company in respect of any one of the following.
- (d) Working capital
- (e) Any other expenditure.

No allotment of shares can be made unless the amount stated in the prospectus as the minimum subscription has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company.

17.11.1 Underwriting commission and Brokerage [Sec -76]:

17.11.1.1 Underwriting Commission:

A public company which invites the public to subscribe for its shares or debentures must ensure that the whole issue is taken up. As such, it is willing to pay any one a certain commission on all shares or debentures offered to the public if he guarantees that if any of these are not taken up by the public, he will take them up. The commission so paid is known as under writers commission for the risks this expose themselves to in placing the shares or debentures before the public.

Sec -76 deals with the power of a company to pay underwriting commission. According to it a company can pay commission to any person if the following conditions were fulfilled.

1. The payment of commission shall be authorised by the Articles of Association.
2. It should not exceed 5% of the issue price of the shares.
The commission may be paid both out of capital or out of profits.
3. The rate of commission paid or agreed to be paid should be indicated in prospectus.
4. The number of shares or debentures which the under writers agreed shall also be disclosed in prospectus.
5. A copy of the contract for the payment of commission shall be delivered to the registrar.

If default is made in complying with the above provisions the company and every officer of the company who is in default shall be punishable with fine which may extend to Rs. 500/-

17.11.2 Brokerage:

Sec 76(3) permits a company to pay such brokerage which is lawful for the company to pay. This means that a company can pay only such brokerage as has been recognised by law i.e. persons who deal in shares and whose business includes the procuring of subscription for shares. They are professional men such as stock-brokers, bankers and the like who exhibit prospectus and send them to their customers and by whose mediation the customers are induced to subscribe.

Brokerage must be payable to a broker for services as a broker and not to a person who had casually induced others to subscribe for shares or debentures.

Andereae Vs Zinc Mines of Great Britain Ltd. Supra:

A company agreed to pay A, a lady, ten percent commission on any capital of the company as a result of an introduction by her. She was not carrying on any business as a broker. Held, she could not recover the agreed sum. She was in no sense a broker. She did not carry on business as a broker, and it was a mere accident that she came into the company's office and was consulted in this matter.

17.12 SUMMARY

In order to raise finance the public companies have to issue prospectus to the public. Any invitation to subscribe in the shares and debentures of the company is known as prospectus. A copy of prospectus should be registered with the registrar before issue to the public. It must disclose all material facts. Mis-statement and non-disclosure of material facts in a prospectus is an offence. Where a public company does not inviting public to subscribe for its shares have to prepare a draft prospectus known as statement in lieu of prospectus.

17.13 SELF - ASSESSMENT QUESTIONS

1. What is a prospectus? What are its contents? Who are liable for mis-statements in a prospectus?
2. Write about
 - a) Statement in lieu of prospectus
 - b) Underwriting commission
 - c) Brokerage

17.14 REFERENCE BOOKS

- | | | |
|-------------------------------|---|-------------------------------|
| 1. Sen Mitra | - | Commercial and Industrial Law |
| 2. Gulshan S.S. & Kapoor G.K. | - | A Handbook of Business Law |
| 3. M.P. Vijay Kumar | - | Business & Corporate Laws |

- Dr. CH. SURAVINDA

Lesson – 18

DIRECTORS – APPOINTMENT

18.0 OBJECTIVES

Companies are managed by the Board of Directors. This lesson is intended to learn the provisions of company's Act regarding their appointment, qualifications, powers and duties.

Structure

- 18.1 Introduction**
- 18.2 Definition**
- 18.3 Number of Directors**
- 18.4 Appointment of Directors**
- 18.5 Qualifications of Directors**
- 18.6 Dis-qualifications of Directors**
- 18.7 Remuneration of Directors**
- 18.8 Removal of Directors**
- 18.9 Powers of the Directors**
- 18.10 Rights of Directors**
- 18.11 Liabilities of Directors**
- 18.12 Summary**
- 18.13 Self – Assessment Questions**
- 18.14 Reference Books**

18.1 INTRODUCTION

A Company, though a legal entity in the eyes of the law, is an artificial person. It has no physical existence. As such, it cannot act in its own person. It can do so only through some human agency. The persons who are incharge of the management of the affairs of a Company are termed as Directors. They are collectively known as Board of Directors or the Board [Sec 252(3)].

18.2 DEFINITION

The Directors are the brain of a Company [Sec - 2(13)] defines a 'Director', as any person occupying the position of Director by whatever name called. A director may be defined as a person having control over the direction, conduct, management or superintendence of the affairs of a company.

Nobody corporate, association of firm can be appointed director of a company. Only an individual can be appointed.

18.3 NUMBER OF DIRECTORS

Every public company shall have atleast three directors and every other company atleast two directors, subject to this statutory minimum limit, the articles of a company may prescribe the maximum and minimum number of directors for its Board of Directors. The number so fixed may be increased or

reduced within the limits prescribed by the articles by an ordinary resolution of the company in a general meeting [Sec - 258].

Any increase in number of directors beyond the maximum permitted by the articles shall be approved by the Central Government. But where the increase in number does not make the total number of directors more than twelve, no approval of the Central Government shall be needed [Sec -259].

18.4 APPOINTMENT OF DIRECTORS [Sec - 254]

According to [Sec - 254] of the Company's Act, the articles of a company usually name the first directors by their respective names or prescribe the method of appointing them. If the directors are not named in the articles, the number of directors and the names of the directors shall be determined in writing by the subscribers of the memorandum or the subscribers of the memorandum who are individuals shall be deemed to be the directors of the company.

They shall hold office until directors are duly appointed in the first annual general meeting. Subsequent directors shall be appointed in accordance with the provisions of Sec -255. Directors must be appointed by a company in a general meeting.

In the case of a public company or a private company which is a subsidiary of a public company atleast two thirds of the total number of directors shall be liable to retire by rotation. This means only one third of the total number of directors can be permanent directors. The remaining directors shall be appointed in a general meeting [Sec - 255(2)].

The appointment or re-appointment of directors by a company in a general meeting is governed by the following provisions.

18.4.1 First appointment:

At the first annual general meeting of a public company the first directors are appointed and at every subsequent annual general meeting, one third of them should be retired by rotation from the office. The directors to retire by rotation at every annual general meeting shall be those who have been longest in the office since their last appointment. And such a vacancy may be filled by the company by appointing the retiring director or some other person.

18.4.2 Re-appointment:

If the vacancy of the retiring was not filled in the general body meeting,

- (a) The retiring director shall be deemed to have been re-appointed unless the retiring director in writing given his unwillingness ot be re-appointed to the company or to the board,
- (b) Where a resolution for the re-appointment of such director is put to the meeting and is lost,
- (c) Where he is not qualified or is disqualified for appointment.

18.4.3 Appointment of additional directors by Board [Sec -260]:

The board of directors can appoint additional directors subject to the maximum number, fixed by the articles of the company. These additional directors are entitled to be in the office only upto the date of the next annual general meeting.

18.4.4 Appointment of Directors by the Central Government [Sec - 408]:

The central government has the power to appoint such number of persons as it deems fit as additional directors for a period of not more than three years to effectively safeguard the interests of the company. They are not liable for retirement. They are not required to hold any qualification shares. The government may appoint the directors on its own or on the application of 100 members, holding 10 percent or more of the voting power.

18.4.5 Appointment of directors by third parties:

The articles under certain circumstances given power to debenture holders or other creditors. Eg. Banks financial institutions who have advanced loans to the company to appoint their nominees to the board. The number of such directors should not exceed one third of the total number of directors. These directors are not required to retire by rotation.

18.4.6 Appointment of alternate directors:

The Board of Directors may, if authroised by the Articles of Association or by a resolution passed by the company in a general meeting appoint an alternate director. He is to act for a director during his absence for a period of not less than 3 months from the state in which the board meeting are ordinarily held. The alternate directors must vacate office when the original directors returns to the state in which meeting of the board are generally held.

18.4.7 Filling up the casual vacancy:

When the office of a director falls vacant prematurity, the casual vacancy thus created may be filled up according to the provisions of the articles. If articles are silent the board of directors may fill up such a vacancy. The person appointed in this way will hold office until the expiry of the period for which the outgoing director would have been in the office.

A person shall not act as a director for more than 20 public limited companies [sec 275 and 276]. Persons having less than 65 years alone are eligible for appointment of directors in public limited company's. The age restriction does not apply to a private company.

18.5 QUALIFICATION OF A DIRECTOR: [Sec -270]

The company's act does not prescribe any qualifications for a director. The articles of association usually contains the minimum number of shares to be possessed by a shareholder to qualify himself to the post of director. The minimum number of shares to be possessed by a shareholder is known as qualification shares.

Sec 270 lays down that a director unless already qualified must obtain the qualification shares within two months from the date of his election. The nominal value of these qualification shares must not exceed Rs. 5,000/- or the nominal value of one share where it exceeds Rs. 5,000/-. The bearer of the share warrants shall not be deemed holder of shares for the purpose of qualification shares.

If a director fails to acquire his qualification shares within two months from the date of his appointment, shall have to vacate his office. If he acts as director after the expiry of two months without taking qualification shares, he is liable to pay upto Rs. 50 for every day until he stops acting as director.

The above provisions apply only to public limited company.

18.6 DISQUALIFICATIONS OF A DIRECTOR [Sec - 274]

The following persons cannot be appointed as directors of a company.

1. An undischarged insolvent
2. An adjusted lunatic
3. A person who has applied to be adjudicated as an insolvent and his application is pending.
4. A person convicted of an offence involving moral turpitude and sentenced to at least six months imprisonment and five years have not elapsed from the date of the expiry of the sentence.
5. A person whose calls are in arrears for six months.
6. A person who has been convicted of an offence in connection with the promotion, formation or management.
7. A person who is disqualified by the court.

The central government may by notification in the official gazette can remove the disqualifications as regards the payment of call money and sentence of imprisonment before six months.

18.7 REMUNERATION OF DIRECTORS

Directors are not entitled to any remuneration as a matter of right. If the articles permits a company may pay remuneration to the directors. When directors attended the board meeting they will be paid setting fee. A whole time director can be paid remuneration either by way of monthly payment or at a specified percentage of the net profits of the company. According to Sec -198 of the act, a public limited company cannot pay more than 11% of its profits by way of managerial remuneration. When a company makes inadequate profits in any financial year, it may with the approval of central government pay a sum not exceeding Rs. 50,000 to its directors.

No whole time director or a managing director who is in receipt of any commission from the company can receive any commission from any subsidiary of the company. With the approval of central government the remuneration of any director may be increased.

18.8 REMOVAL OF DIRECTORS [Sec - 284]

Directors may be removed by shareholders, the central government or the court. The rules regarding the removal of directors are furnished below.

18.8.1 Removal by shareholders:

Sec - 284 of the act provides that the members of a company by ordinary resolution remove a director before the expiry of his period of office.

The following directors cannot be removed from office under this section.

- Those directors appointed by the central government under Sec - 408 to prevent mismanagement.
- A director of a private company holding office for life on April 1, 1952.
- Director appointed according to proportional representation under Sec -265. Special notice is required under this section to remove a director or to appoint some body in his place. A copy of such notice must be given to the director concerned. A statement relating to the matter may

be sent by the director concerned to the company. Such statement shall be circulated among the members if received in time or read out in the meeting.

18.8.2 Removal by Central Government:

The central government can make a reference to High Court to remove managerial personnel including directors under the following circumstances.

- When any person is guilty of fraud misfeasance, persistent negligence or default etc.
- When the business of a company is not following sound business principle or prudent commercial practices or both.
- When the business of the company is causing damage to the interest of the trade industry or business pertaining to it.
- When any person of the company is trying to defraud creditors, members etc.

The Company's Act empowers the central government to remove managerial personnel from the office on the recommendation of the High Court.

18.8.3 Removal by Court:

When an application has been made to the court against the directors of oppression and mismanagement of a company affairs, the court may, if satisfied order for the termination of the director. The court can remove the directors under the following circumstances.

- conduct prejudicial to the public interest.
- A material change in the management or control of the company.
- The court is of opinion that the circumstances do not justify the winding of the company under the just and equitable clause.

When the court is terminated or set a side the appointment of managerial personnel, he cannot sue the company for damages or compensation or loss of office.

18.9 POWERS OF THE DIRECTORS

A company is an artificial person created by law. Hence it cannot act on its own. It has neither a mind nor a body of its own. It has to function only through human agency. Since the number of shareholders are innumerable and scattered throughout the country, it is not possible for them to look after day to day management of the company. Therefore the shareholders delegate their powers to a few persons elected by them known as Directors.

18.9.1 Powers of the Directors:

Directors conduct, control, manage and supervise the affairs of the company. Directors derive their powers and authority from two sources namely,

- the articles of association of the company
- the company's act

The articles generally contain a list of the powers which may be exercised. The articles also contain a list of those matters which are to be decided by the members.

The powers to be exercised by the Board of Directors may be broadly grouped into three categories, namely,

- powers to be exercised at the board meeting
- Powers to be exercised with the consent of general meeting.
- Powers to be exercised with the approval of the central government.

18.9.1 (a) Powers to be exercised at the Board Meeting: [Sec -292]:

The Board of Directors may exercise the following powers as per Sec -292 only at the board meetings.

1. to make calls on shares
2. to issue debentures
3. to borrow money otherwise than debentures
4. to invest funds of the company
5. to take loans
6. to delegate powers to others
7. to fill up casual vacancy
8. to sanction a contract in which a director is interested

18.9.1(b) Powers to be exercised with the consent of general meeting: [Sec -293]:

The Board of Directors may exercise the following powers as per Sec -293 with the consent of the company in general meeting.

1. to sell, lease the whole or part of the undertaking.
2. to grant remission or to give time for repayment of a debt due by a director
3. to invest other than trust securities, the sale proceeds of any of its undertaking, premises or properties.
4. to borrow money in excess of paidup capital and the free reserves of the company.
5. to contribute the charitable trusts or other funds in excess of Rs. 50,000/- in any financial year or 5% of the average net profits of the three preceding financial years which ever is greater.

Sec -293(A) imposes a restriction on the powers of the Board of Directors to contribute funds to any political party or for any political purpose to any individual or an organisation.

18.9.1.3 Powers to be exercised with the approval of Central Government:

1. To amend any provision relating to appointment or re-appointment of managing director.
2. To appoint a managing director for the first time.
3. To increase the remuneration of the managing director.
4. To invest the funds of the company in any other company in excess of statutory limit.

18.9.2 Duties of Directors:

Duties of Directors depend on the nature of the business, provisions in the articles and other regulations. They may also depend upon the division of work between them and the officials. Apart from general duties, the directors have to discharge certain duties under the Company's Act. The duties of the

directors are summarised as follows:

- Directors must not honestly and diligently in the interest of the company.
- They must see that proper books and accounts are kept to record all transactions and final accounts are placed before the company in general meeting.
- They must see that annual general meeting is held within 18 months from the date of incorporation as per the provisions of the act.
- They must see that all the registers are maintained according to the provisions of the act.
- They have to submit a report on the company's affairs.
- They must arrange the delivery of share certificates and share warrants.
- They must keep a register of mortgages and charges.
- They have to file documents and returns with the registrar as required under law.
- They must prepare prospectus and file with the Registrar. Further they must see that the statement included in the prospectus is not misleading.
- They must appoint bankers and officers of the company.
- They must enter contracts on behalf of the company.
- They must deposit share application amount in the Scheduled Bank till the receipt of certificate of commencement of Business.
- They must submit a statement of affairs at the time of liquidation of the company.
- They must disclose their interest in any contract proposed to be entered by the company.
- They must sign the bills of exchange and cheque arising in course of business.
- Every director must obtain qualification shares.
- They must file return of allotment with the Registrar.
- Every director must pay their call amount when called by the Board of Directors.

If a director fails to perform his duties as explained above he is guilty of negligence. If an account of such negligence, the company suffers any loss the directors must compensate the company.

18.10 RIGHTS OF DIRECTORS

Every director who is validly appointed has a right to attend meetings of the Board. He has a right to participate in the affairs of the company. He is entitled to receive the remuneration fixed by the Articles subject to the provisions of the Act. A whole time director and Managing Director is entitled for compensation in case of premature termination of services.

18.11 LIABILITIES OF DIRECTORS

The directors may under certain circumstances, liable to pay compensation to the company and outsiders. The liabilities of directors may be limited or unlimited liabilities of directors may be studied under two heads namely civil liability and criminal liability.

8.11.1 Civil liability

As agent of the company, the directors are not liable on contracts made on behalf of the company. If they act without authority they will be held liable for damage for breach of implied warranty of authority.

The company is not liable on ultravires contracts and the directors too are not liable because outsiders are deemed to have notice of the powers of the company.

When outsiders subscribed for shares on the basis of statements in a prospectus the directors are liable for them.

The liabilities of directors towards company arises under the following circumstances.

18.11.1(a) Liability for ultravires acts:

The directors are liable to the company for ultra-vires acts. For ex: if dividend is paid out of capital, the directors are bound to refund the money to the company out of their own pockets.

18.11.2 Liabilities for Negligence:

Directors are liable to pay damages to the company if they are negligent in discharging their duties.

18.11.3 Liability for breach of trust:

The directors also liable to the company for misappropriation of funds of the company. They are also liable for any act amounting to a breach of trust relating to the properties of the company. Directors are also liable for all secret profits made by them in - connection with the affairs of the company.

11.2 Criminal liability:

The directors are liable to pay penalty for not complying some provisions of the Company's Act.

- omission to keep a register of members [Sec -150]
- untrue statement in the prospectus [Sec – 63]
- Falsification of books and reports.
- Omission to file return of allotment one month [sec 75]
- For default I holding Annual General Meeting.
- Default in issuing share certificates and share warrants within the time prescribed by the provisions of the Act.

18.12 SUMMARY

Company is an artificial person. It has no physical existence. As such it needs a human agency. The persons who are in charge of the Management of the affairs of a company are termed as directors the first Director is named in the Articles of Association. The subsequent Directors are appointed n general Meeting. Their retirement is on rotation basis.

18.13 SELF – ASSESSMENT QUESTIONS

1. Explain the procedure for the appointment and removal of Directors
2. Discuss the provisions of the company Act in regard to qualification and disqualification of directors.
3. Directors are not only agents but are also in some sense trustees of the company. Discuss.

18.14 REFERENCE BOOKS

1. Sen Mitra – Commercial and Industrial Law
2. Gulshan, S.S. & Kapoor, G.K. – A Hand Book of Business Law
3. M.P. Vijay Kumar – Business & Corporate Laws

- CH. SURAVINDA

Lesson - 19

MEETINGS

19.0 OBJECTIVES

This lesson is intended to discuss about various types of Meetings.

Structure

- 19.1 Introduction**
- 19.2 Statutory Meetings**
- 19.3 Annual general Meeting**
- 19.4 Extraordinary General Meeting**
- 19.5 Summary**
- 19.6 Self Assessment Questions**
- 19.7 Reference Books**

19.1 INTRODUCTION

Every company limited by shares or guarantee have to conduct certain meetings according to the Provisions of Company's Act. Depending upon the nature and pupose the meeting called may be of diferent types. They are usually:

1. Statutory Meeting [Sec -165]
2. Annual General Meeting
 - called by Company [Sec -166]
 - called by NCLT [Sec -167]
3. Extraordinary General Meeting [Sec -169]
 - called by company
 - called by NCLT
 - called by Members

Now we wil see the procedure of conducting these meetings and their objects according to the Act.

19.2 STATUTORY MEETING [Sec -165]

Every company limited by shares and every company limited by guarantee and having share capital is required to hold a meeting of the members of the company immediately after its incorporation. Actuall it is the first meeting of the members.

A statutory meeting is to be held once in the life time of the public limited company wiht share capital within a period of not less than month and not later than 6 months from the date of commencement of business.

All the members of the company shall be sent a report called 'Statutory Report' atleast 21 days before the date of meeting. The notice must say it is intended to be a statutory meeting.

Private companies, government companies and a company limited by guarantee and not having share capital are not required to hold a statutory meeting.

19.2.1 Contents of the statutory Report:

The following matters must be included in the statutory Report.

1. (a) Shares allotted:

It should reveal the total number of shares allotted, distinguishing

- shares allotted as fully or partly paid-up otherwise than in cash and
- in case of partly paid-up shares,

The extent to which they are so paid-up

- in either case the consideration for which they have been allotted.

(b) Cash received - The total amount of cash received on account of shares allotted.

(c) Summary of receipts and payments - An abstract of the receipts and payment of the company made up to a date within 7 days of the date of the report.

(d) Directors and Auditors - The names address and occupations of the Directors of the company and the charges if any, which have occurred since the date of incorporation of the company.

(e) Contracts - The particulars of any contract or the modification or the proposed contract which is to be submitted at the meeting for approval.

(f) Underwriting contract - The extent, if any, to which each underwriting contract has not been carried out and the reasons thereof.

(g) Arrears of calls - Call money due from each Director and from the Manager.

(h) Commission and Brokerage - Particulars of commission or brokerage paid/payable in connection with the issue of shares / debentures to any Director / Manager.

The statutory report shall be certified as correct by not less than 2 Directors, one of whom shall be a Managing Director, where there is one.

2.2 Audit certificate:

The auditors of the company shall certify as correct the following contents:

- a. Total shares allotted by the company.
- b. Cash received by the company in respect of all shares allotted.
- c. Summary of receipts and payments.

After this the statutory report shall be delivered to the Registrar of companies for registration.

2.3 Procedure at the Meeting:

A list showing the names, addresses and occupations of the members of the company, and the number of shares held by them, has to be produced at the commencement of statutory meeting and has to remain accessible to any member during the continuance of the meeting.

In any general meeting a member who intends to discuss any matter shall give previous notice to the company of his intention to discuss. Statutory meeting is an exception to this rule. The members present at the meeting may discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not. But no resolution can be passed for which notice has not been given as required by the Act.

2.4 Default:

If any default arises in holding the meeting or filing the statutory report, every Director or any other officer of the company who is in default shall be punishable with a fine which may extend to Rs. 5,000/-. Further default in holding the meeting or filing the report is one of the grounds for winding up of the company.

19.3 ANNUAL GENERAL MEETING [Sec -166]:

Every company shall, in each calendar year, hold in addition to any other meeting, a general meeting termed as an Annual General Meeting. The notice calling the meeting shall specify it as an Annual General Meeting.

According to [Sec 171] a Annual General Meeting may be called by giving not less than 21 days notice in writing. The period is calculated from the date of receipt of the notice by the members. It excludes -

- the day of service of the notice
- the day on which meeting is to be held.

Notice is deemed to have been received by the members at the expiration of 48 hours after the letter containing it is posted.

A meeting may be called by a shorter notice, if it is agreed by all the members entitled to vote thereon. The consent for a shorter notice may be obtained either before or after the meeting.

3.1 Venue:

Every Annual General Meeting shall be held at the Registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated and on a day which is not a public holiday and during the business hours.

3.2 Business to be transacted [Sec -173]

In the case of an Annual General Meeting the business to be transacted may be of ordinary business or special business.

3.1.a. Ordinary business: [Sec -173]

In the case of an Annual General Meeting, the following is deemed as ordinary business:-

- Consideration and adoption of annual accounts and the reports of the Board of Directors and auditors.
- Declaration of dividend
- Appointment of Directors in place of those retiring.
- Appointment of Auditors and fixing of their remuneration.

3.1.b. Special Business [Sec -173]

In the case of an Annual General Meeting, any business other than the ordinary business, and in the case of any other meeting all business is deemed special.

It is to be noted that it is not the business, but it is the meeting which may make a business special. Some illustrations are given below.

- Appointment of a director other than a retiring director in an Annual General Meeting is a special business.
- An auditor is appointed in an extra-ordinary general meeting (i.e. due to casual vacancy caused by resignation), then it becomes a special business.
- Dividend may be declared in an extra-ordinary meeting, in which case it is a special business.

In case of a special business, the notice convening the meeting shall contain an explanatory statement giving the prescribed particulars.

3.2 Meeting time:

The following are the provisions of the Act regarding the time, when an Annual General Meeting should be held:

- An Annual General Meeting must be held each year (calendar year),
- The gap between two Annual General Meetings shall not exceed 15 months,
- As per Sec 210, the time gap between the end of the financial year and the date of Annual General Meeting shall not exceed 6 months. Ex: The financial year of a company ends on 31st March. each year. The Annual General Meeting to adopt the accounts of the year ending 31-3-03 was held on 29-9-03. The last date for holding the meeting would be 30-9-03.
- A company may hold its first Annual General Meeting within 18 months from the date of its incorporation.
- It shall not be necessary for a company to hold a Annual General Meeting in the year of its incorporation or in the following year, if it holds an Annual General Meeting within 18 months from the date of its incorporation.
- The registrar of companies may, for any special reason, grant extension of time to hold an Annual General Meeting by a period not exceeding three months except in case of the first Annual General Meeting.

3.3 Default [Sec -168]:

If any default is committed by the company in holding the Annual General Meeting in accordance with sec 166, then the company and every officer of the company who is in default shall be punishable with a fine which may extend to Rs. 50,000/-. In the case of continuing default, a further fine which may extend to Rs. 2500 per day during the continuance of default will be imposed.

3.4 Other points regarding an Annual Meeting:

The following are the provisions of Company's Act regarding the Annual Meeting:

- The Central Government may exempt any class of companies from the provisions of Sec 166.

- If any day is declared by the Central Government to be a public holiday after the issue of notice convening such a meeting, it shall not be deemed to be a public holiday in relation to the meeting.
- A public company or a private company which is a subsidiary of public company may by its articles fix the time for its Annual Meeting or by a resolution passed in one Annual Meeting fix the time for its subsequent Annual Meeting.
- The purpose of Annual Generation Meeting is not only adoption of accounts. Even if the accounts are not ready the Annual General Meeting shall be held within the prescribed period and transact other businesses other than accounts, and a suitable day may be fixed when the accounts are likely to be ready. However it should be noted that such an adjourned meeting should also take place within the statutory limit laid down under 166 read with 210 of the Act.
- Two Annual Meeting can be held on the same day. There should be separate notices for each such meeting and shall be held at different time.
- Where all members of a company were also members of BOD, a meeting of Board could well be treated as a general meeting of company (PV. Damodara Reddy Vs Indian National Agencies Ltd).

19.4 EXTRA ORDINARY GENERAL MEETING [Sec -169]:

Any General meeting of a company other than the statutory meeting or the Annual General Meeting is the EGM of the company. An EGM is called for transacting some urgent or special business which cannot be postponed till the next AGM.

The EGM may be convened by the Board on its own, by the Board on the requisition of the members, by the requisitionists themselves on the failure of the Board to call the meeting or by the National Company Law Tribunal

4.a. EGM by the Board on its own:

An EGM may be convened by the Directors if some business of special importance requires an approval from the members.

4.b. EGM on the requisition of members:

The Board of Directors of a company shall, on the requisition of such number of members of the company, forth with proceed duly to call an extraordinary general meeting of the company. The requisition shall be set out the matters for the consideration of which the meeting is to be called, shall be signed by the requisitionists, and shall be deposited at the Registered office of the company.

4.c. Number of members Entitled to Requisition:

The rules regarding the number of members entitled to requisition of the EGM are as follows:

- In case of the company having share capital, members holding 1/10th of paid up share capital of the company and having a right to vote on the date of deposit of requisition on the matter to be discussed at the meeting.
- In case of a company not having share capital, members holding 1/10th of voting power on the date of deposit of requisition on the matter to be discussed at the meeting.

4.3 Power of National Company Law Tribunal: to order calling of meeting [Sec -186]

If for any reason it is impracticable for the company to call an EGM of the company, the NCLT may either.

- of its own motion or
- on the application of any Director of the company or
- on the application of any member, entitled to vote at the meeting.
- order a meeting of the company to be called, held and conducted in such manner as the NCLT thinks fit.

4.a Notice [Sec -171]

21 clear days notice shall be given for calling a general meeting. A notice shorter than 21 days can be given in case of AGM with the concurrence of all the members entitled to vote at the meeting. In case of any meeting other than AGM, concurrence of at least 95% of members having share capital with voting rights or 95% of voting power is required to give a notice less than 21 days.

4.b. Contents of the Notice:

Notice shall specify the place, day and an hour of the meeting and shall contain a statement of business to be transacted at the meeting, It may be noted that -

- A notice for a special business shall contain an Explanatory statement.
- If any item to be transacted at the General Meeting requires a special resolution then the intention to propose the resolution as a special resolution shall be stated in the notice.
- Companies having a share capital shall state with reasonable prominence in the notice that a member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of himself and the proxy need not be a member.

The notice shall be served in the manner presented in Sec 53 viz, either personally or by ordinary post at the registered address in India.

4.c. Business at a Meeting [Sec -173]

All business in the Meeting is of special nature.

19.5 Quorum [Sec -174]

Quorum refers to the minimum number of members required to transact a business in a meeting. The Articles can fix the quorum required for a meeting. According to Company's Act, if the company is public company the quorum required is 5 members. (personally present, excluding proxies). If the company is a private company the quorum required is 2 members (personally present, excluding proxies).

19.5 SUMMARY

Every company has to conduct certain meetings according to the provisions of Company's Act. They are different types depending upon the purpose and nature i.e. statutory meeting, which is conducted once in the life time of the company. Annual General Meeting, conducted every year, extra-ordinary meeting conducted in special situations.

19.6 SELF - ASSESSMENT QUESTIONS

1. What are the different kinds of meetings under Companies Act -1956? Explain in detail.

19.7 REFERENCE BOOKS

1. Sen Mitra - Commercial and Industrial Law
2. Gulshan, S.S. & Kapoor, G. K. - A Handbook of Business Law
3. M.P. Vijay Kumar - Business & Corporate Laws

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Lesson - 20

RESOLUTIONS

20.0 OBJECTIVES

In the previous lesson you learned about the statutory provisions regarding the conduct of meetings. This lesson is intended to discuss about the provisions regarding resolutions

Structure

- 20.1 Introduction
- 20.2 Circulation of Member's Resolution
- 20.3 Members eligible for moving Resolution
- 20.4 Conditions
- 20.5 Resolution
- 20.6 Resolution requiring special notice
- 20.7 Passing of resolution by postal ballot
- 20.8 Minutes
- 20.9 Registration of resolutions and agreements
- 20.10 Summary
- 20.11 Self - Assessment Questions
- 20.12 Reference Books

20.1 INTRODUCTION

A company or its Board of Directors can move any matter with the members through a resolution. Now we will discuss the provisions regarding resolution.

20.2 CIRCULATION OF MEMBER'S RESOLUTION: [Sec -188]

A company shall on the receipt of the writte, requisition by such required members and at the expense of the requisitionists -

- a. given to the members of the company who are entitled to received notice of the next Annual General Meeting, notice of any resolution which may be properly moved and is intended to be moved at that meeting.
- b. Circulate to the members entitled to have notice of any general meeting, any statement of not more than 1000 words with respect to the matter referred to in any proposed resolution or any business to be dealt with at that meeting.

20.3 MEMBERS ELIGIBLE FOR MOVING RESOLUTION:

The members eligible for moving the above resolution are -

- a. such number of members as represent not less than 1/20th (5%) of the total voting power of all the members at the date of resolution, having a right to vote on the resolution /business to which the requisition relates, or

b. Not less than 100 members having voting rights and holding shares in the company on which there has been paid - up an aggregate sum of not less than Rs. 1 lakh in all.

The notice of such resolution or the statement that is required to be circulated shall be sent in the same manner as the notice of the Annual General Meeting is sent. The notice or statement is sent at the expense of requisitionists unless otherwise resolved by the company.

20.4 CONDITIONS

The following conditions shall be satisfied

- (a) Copy of the requisition duly signed by the requisitionists is deposited at the registered office of the company-
- in the case of requisition requiring notice of resolution not less than 6 weeks before the meeting.
 - in the case of any other requisition it is deposited not less than 2 weeks before the meeting.
- (b) A sum of reasonably sufficient to meet the expenses is deposited along with the requisition.

However, if after the requisition is deposited with the registered office, An Annual General Meeting is called for at a date 6 weeks or less after the copy has been deposited then the requisition is deemed to have been properly deposited thereof notwithstanding that it does not satisfy the limit prescribed under this section.

The company is not bound to circulate in the following circumstances:

(a) If the NCLT makes an order on an application made by the company or any other person who claims to be aggrieved and is satisfied that the power under this section is abused to secure needless publicity for defamatory matter.

b/. A banking company is not bound to circulate if in the opinion of the Board of Directors the circulation will injure the interest of the company.

20.5 RESOLUTION [Sec -189]

Resolutions are of two types

1. Ordinary resolution
2. Special resolution

20.5.1 Ordinary resolution:

A resolution shall be an ordinary resolution when, at a General Meeting of which the notice required under this Act has been duly given, the votes cast in favour of the resolution exceed the votes, if any, cast against the resolution (> 50%) i.e. A resolution passed by a single majority of those present in person or any proxy, where proxies are allowed and voting upon the resolution. The emphasis is on the members present and voting at the meeting. The members not participating are not taken into account.

Few matters which require ordinary resolution are given below:

- (a) To authorise an issue of shares at discount
- (b) To increase the share capital if authorised by the articles

- (c) To appoint auditors
- (d) To appoint directors
- (e) To adopt annual accounts
- (f) To declare dividend

5.2 Special resolution:

A resolution shall be a special resolution when -

- (a) The notice calling the General Meeting specifies the intention to propose the resolution as a special resolution.
- (b) The notice has been duly given of the General Meeting
- (c) The votes cast in favour of the resolution are not less than 3 times the number of votes, if any, cast against the resolution ($\geq 75\%$) i.e. even when the votes cast in favour is exactly three times the votes against the resolution, the resolution can be said to be a special resolution. Hence the casting vote of chairman is applicable only to ordinary resolution.
- (d) The notice shall also annex an explanatory statement as required u/s 173, in which the shareholders are informed of the material facts concerning the resolution and the nature of the interest therein of the directors.

A special resolution is required for transacting business only where it is specially so required by the Act or said in the Articles. All other business can be transacted by an ordinary resolution. A copy of special resolutions should be filed with Registrar of Company [Sec -192].

(e) A special resolution is required for the following: For example:

- To alter the objects clause and the situation clause in the memorandum
- To commence any new line of business
- To change the name of the company
- To delete the word ' Limited' or 'Private Limited' from the name of the company
- To amend the Articles
- To issue further shares without pre-emptive rights to non-members or to convert loans or debentures into shares.
- To determine that any portion of the share capital not already called up shall not be called up except in the event of , and for the purpose of winding up of the company.
- To reduce the share capital.
- Approval of variation of rights of special classes of shares.
- To keep registers and returns at any place other than within city, town or village in which the registered office is situated.
- To request the government to investigate the affairs of the company and to appoint inspectors for the purpose.
- To fix remuneration of Directors, where the Articles require such resolution.
- To sanction remuneration to Directors other than managing or whole time Directors on percentage of profit basis in certain instances.
- To consent to a Director or his relative or partner or firm or private company holding an office or

place of profit, except that of Managing Director, Manager Banker, or Trustee for debenture holders of the company.

- To make the liability of the Director or Manager unlimited when so authorised by Articles.
 - To appoint auditors in the case of a company in which the central auditor any state Government or public financial institution together hold 25% or more of its subscribed capital.
 - To appoint sole selling Agent or sole buying Agent in the case of companies having paid - up share capital of Rs 50 lakhs or more.
 - To alter the constitution of the company registered under part IX;
 - To lend, extend guarantee, provide security or to invest in securities in excess of 372 A limits.
- f. Special resolution cannot be amended in variance with the Explanatory statement annexed to the notice of the meeting unless from the point of view of the shareholders the amendment in any case only seeks to modify or make less onerous something in the resolution itself.
- g. An amendment to an ordinary Resolution may be proposed and adopted at a meeting even where the notice sets out the exact terms of the proposed resolution.
- h. A resolution whether special or ordinary, which has not been passed after giving sufficient notice or is otherwise irregular may be ratified or validated by a subsequently passed valid resolution. But there can be ratification or validation of a resolution only where the resolution originally passed was bonafide.
- i. Where a resolution has been not validly passed but has been acted upon it is to be regarded as effective and the company and its members cannot set up its invalidity against its creditors.

20.6 RESOLUTION REQUIRING SPECIAL NOTICE [Sec -190]

It is a notice given by a member to the company. The following four resolutions under the Act require resolution with special notice.

- a) To remove a Director before the expiry of tenure.
- b) To appoint a Director in place of the Director so removed.
- c) To move a resolution that the retiring auditor shall not be reappointed.
- d) To appoint as auditor a person other than a retiring auditor

The Article of a company may provide additional situations where special notice is required.

The notice of intention to move a resolution, shall be given by the members to the company not less than 14 days before the meeting at which it is to be moved.

The company on receipt of notice of the intention to move the resolution should give its members notice of the resolution.

Where it is not practicable, the company may either, advertise in a newspaper having good circulation or in any other mode allowed by the Articles, not less than 7 days before the meeting. The notice shall be given 14 days before the date of original meeting and not before the date of original meeting and not before the adjourned meeting.

Here the student have to note that a special notice and special resolution are entirely different, There is just one situation where special notice and special resolution are necessary. viz., appointment of

an auditor other than the retiring auditor of a company in which not less than 25% of subscribed capital is held by Central Government, State Government, public financial institutions etc. u/s 224 A.

20.7 PASSING OF RESOLUTIONS BY POSTAL BALLOT [Sec -192 A]

Postal ballot is a means for ascertaining the views of the members considering that many members may not be able to attend the general meeting and vote at the meetings even on very important subjects (business) which affect their interest 'postal ballot' includes voting by share holders by postal or electronic mode instead voting by being present personally for transacting business in a general meeting of the company.

A company shall send notice and draft resolution by registered post to all shareholders explaining the reasons and requesting them to communicate within 30 days from the date of posting of letter.

If a resolution is assented to by a requisite majority of shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

20.7.1 Notified resolutions requiring postal ballot:

- a) Alteration of objects clause,
- b) Alteration of Articles of Association,
- c) Buy Back of shares,
- d) Issue of Equity shares with differential, voting rights,
- e) Change of registered office,
- f) Sale of undertaking,
- g) Election of Director,
- h) Variation in the rights attached to a class of shares or debentures.

20.7.2 Procedure to be followed for conducting business through postal ballot:

- a) The Board of Directors shall appoint one scrutiniser who is not in employment of the company, may be a retired judge or any person of repute who in the opinion of the board can conduct the postal ballot voting process in a fair and transparent manner.
- b) The scrutiniser shall be in position for 35 days (excluding holidays) from the date of issue of notice for Annual General Meeting. He is to submit his final report on or before the said period.
- c) The scrutiniser shall be willing to be appointed and he shall be available at the registered office of the company for the purpose of ascertaining the requisite majority.
- d) The scrutiniser shall maintain a register to record the consent or otherwise received, including electronic media, mentioning the particulars of name, address, folio number, number of shares, nominal value of shares, whether the shares have voting, differential voting or non-voting rights and the scrutiniser shall also maintain record for postal ballot which are received in defaced or mutilated form.
- e) The postal ballot and other papers relating to postal ballot will be under safe custody of the scrutiniser till the chairman considers approves and signs the minutes of the meeting therefore, the scrutiniser shall return the ballot papers and other related papers / registers to the company so as to preserve such ballot papers and other related papers / registers safely till the resolution is given effect to.

- f) Consent or otherwise relating to issue maintained in the notice for Annual General Meeting received after 35 days from the date of issue will be strictly treated as if the reply from the members has not been received.
- g) If default is made in following this procedure, a fine of Rs 50,000/- will be levied for each default.

The companies (passing the resolution by postal ballot) Rules, 2001 read with section 192 A shall apply to notices calling meetings of the shareholders approved by the Board of Directors after 15th June 2001.

The voting right on postal ballot shall be in proportion to the shareholders share of the paid up equity share capital of the company.

20.8 MINUTES: [Sec -193]

Minutes represents a record of business transacted at a meeting. Every company is required to record the proceedings of every general meeting and of every meeting of the Board of Directors or of every committee of the Board.

It shall be recorded within 30 days from the conclusion of every such meeting in a book kept for that purpose with pages consecutively numbered.

20.8.1 Procedure:

Every page of the minutes book shall be initiated or signed and the last page of the record of the proceedings shall be dated and signed, in the case of -

- A Board Meeting by the chairman of the same meeting or in the event of his death or insanity, by a Director duly authorised by the Board for the purpose.

20.8.2 Contents:

- a) Pasting or otherwise shall make no attachment to the minutes book.
- b) The minutes book shall contain a fair and correct summary of the proceedings.
- c) Appointment of officers made at a meeting should be included.
- d) Minutes of meeting of the Board / Committee shall also contain the names of the Directors present and also those dissenting from or not concurring to the resolution.
- e) The chairman need not include any matter in the minutes if he is of the opinion that it is defamatory of any person or is irrelevant or immaterial or is detrimental to the interests of the company.

The minutes book must be bound and must be hand written. However, DCA has stated that loose leaf minutes books are agreeable provided the company takes appropriate safeguards and they are bound into books at reasonable intervals of say 6 months.

If there is something recorded at an earlier meeting which is not acceptable at a later meeting, the proper procedure is to pass a subsequent minute rescinding the old one.

The minutes book shall be kept at the registered office of the company.

Minutes of meetings kept in accordance with the provisions of Section -193 shall be conclusive evidence of the proceedings recorded therein. It does not require further proof of the facts stated therein.

20.8.3 Additional points:

- A Director, who is present at a meeting at which the minutes of a prior Board Meeting is confirmed is not thereby made responsible for what was done at the prior meeting.
- A member has the right to inspect the books containing the minutes of General Meeting during the business hours at the registered office of the company at free cost.
- On payment of the prescribed fee, he is entitled to be furnished with a copy of any such minutes within 7 days after his request.
- If any default is made by the company the above matter, the NCLT has the power to order so.

20.9 REGISTRATION OF RESOLUTIONS AND AGREEMENTS [Sec -192]

The following resolutions and agreements are required to be registered with the Registrar of Companies.

- a) Special resolution
- b) Resolutions which have been agreed to by all the members of the company but which, in the absence of such an agreement would have to be passed as special resolutions.
- c) Any resolution of Board of Directors or agreement executed by a company relating to appointment, reappointment, renewal of appointment or variation of the terms of appointment of the Managing Director.
- d) Resolutions or agreements which have been approved by all the members of a class of shareholders, but which have otherwise required to be passed by some particular majority or otherwise in some particular manner. And all the resolutions or agreement which effectively bind all the members of any class of shareholders though not agreed by all of them.
- e) Resolutions passed by a company giving powers to Board of Directors -
 - to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking.
 - to borrow money beyond a certain limit or
 - to contribute to charities beyond Rs 50,000 or 5% of company's average net profits for the last 3 years whichever is greater.
- f) Resolutions approving the appointment of a sole-selling agent.
- g) Resolutions requiring a company to be wound - up voluntarily.
- h) Copies of the terms and conditions of a sole selling agent (SSA) appointed under Section 294 or Section 294 AA.

20.10 SUMMARY

Resolutions are of two types.

1. Ordinary resolutions 2. Special resolutions, resolutions may be passed by postal ballot.

Some resolutions should be registered with Registrar.

20.11 SELF - ASSESSMENT QUESTIONS

1. What are the different types of resolutions which may be passed in the meetings of shareholders?
2. Discuss the following -
 - a) Postal ballot
 - b) Minutes

20.12 REFERENCE BOOKS

- | | | |
|----------------------------------|---|-------------------------------|
| 1. Sen Mitra | - | Commercial and Industrial Law |
| 2. Gulshan, S.S. & Kapoor, G. K. | - | A Hand Book of Business Law. |
| 3. M.P. Vijay Kumar | - | Business & Corporate Laws |

- Dr. CH. SURAVINDA