LL.B.-4th Sem. Paper-I Jurisprudence-1 Legal Concept

Question No. 1- Define legal rights. What are its essential elements? Describe the main principles of legal rights.

Answer - Meaning of legal rights - In legal and jurisprudential literature, rights may be the most ambiguous word. When rights are used as an adjective, it means just or fair or right. Words similar to rights or denoting rights are also similarly ambiguous and multi-meaningful. Roman jurists considered rights, law and justice to be inseparable from each other and used this word to convey the meaning of all these. The real contribution to the development of human civilization is of law and its restrictive process which has made the individual aware of his duties and rights as a member of society. When the individuals of a society come in contact with each other, they have certain legal rights and duties towards each other, which are controlled by the prevailing law. It is well known that the basic purpose of law is to regulate the dealings of individuals while protecting human interests. To fulfil this purpose, it is necessary that the state uses its physical power to enforce the rights of individuals and punish those who violate them. This work is done by the state which protects the rights of the people by enforcing the law and binding them to perform their legal duties.
Definition of legal rights - Legal experts have interpreted legal rights in different ways. Saving has considered it as power. Inhering has considered it as an interest protected by law. **According to Dr. Allen**, rights are the power guaranteed by law to achieve any interest.

According to Gray, a right is not an interest in itself, but it is only a means of protecting interests. Giving an example in support of this statement, Gray says that if a person lends money to another, then it is the interest of the lender to get his loan amount back from the debtor, it is not his actual legal right, but the power or ability given to him by law that he can recover the loan given, it will be his legal right. In other words, getting the loan amount from the debtor is the interest of the lender which is protected by law. But it is not a right in itself. Therefore, **according to Gray**, legal right is such a power by which a person forces other persons or persons by legal duty to do some work or to remain after doing the work.

The law protects the legal rights of every citizen. People are given legal rights by being a citizen of the country. It is the duty of every individual to protect the rights of every person. In simple terms it means that the action permitted by the law is called a legal right or the action recognized or protected by the state is called a legal right.

Definitions-

According to Holland this is fatal to the power or capacity. There is great difference of opinion among jurists about the definition and analysis of legal rights. According to Austin, a right is a capacity which is vested in a particular party or parties by virtue of a specified law and which is against some party or

parties other than the one in whom it is vested, or is corresponding to a duty imposed on some party or parties. According to him a person is said to have a right only when another or others are bound by law to do or refrain from doing something in relation to him. This means that a right always has a corresponding duty.

This definition is incomplete, as it appears from looking at it. Because in this definition there is no place for the rights of incomplete rights.

Salmond- Defines the right 1 day ago. It says that the right is an interest recognized and protected by the rule of merit. It is an interest which it is a duty to respect and which it is a duty to disregard. There are two main elements in this definition. First rule of rights or rule of merit means rule of law or in other words that which should be judicially enforceable. Thus according to the general a right should be judicially enforceable, secondly the right is an interest. Elements essential to create a right.

Main principles of legal rights - Mainly two principles of legal rights are as follows

(1) Interest Theory: Inhering believes that legal rights are based on "interest". According to him, legal rights are interests protected by law. The basic purpose of law is to protect human interests and to resolve conflicting human interests Conflict of interests has to be avoided. But Salmond considers the definition of 'right' given by Ihering to be incomplete and says that for a legal right, only legal protection is not enough but it should also get legal recognition. According to Salmond, cruelty towards animals is prohibited by law and there is a provision to punish the guilty person for this. So, would it be right to say that animals have a legal right to self-defense? The meaning is that this right related to animals has legal protection, but due to not getting legal recognition, it cannot be placed in the category of 'legal right'. This is the reason why Samand has accepted this right of animals only as a moral right. The well-known legal expert Gray also thought it appropriate to accept it only partially. According to Gray, 'right' is not interest itself but only a means to protect 'interest'. According to Gray, "It is the power in which a person can force another person or persons to do or not to do any work or works to the extent to which he gets this power from the society by applying it on another person or persons." Some jurists say that the basic basis of the right is 'rights'. For example- a child who is born and becomes one year old has some rights according to the law because it is known that a person is given rights from the day he is in the womb of his mother. But it cannot be said that They have a “will”. What a right secures is not a wish or a choice, but some interest for the benefit of the person who holds that right. An interest may be called “a claim or desire of a person or group of persons which that person or group seeks to satisfy. **According to C.K. Allen,** “the essence of a legal right is not a legally guaranteed power, nor a legally protected interest, but a legally guaranteed power to realize the interest”. It is the law that creates, protects and recognizes

the rights created. Thus, a characteristic of a legal right is its recognition. It is recognized by a legal system and enforced by a legal process. This principle, however, is subject to certain qualifications-

(1) The law will not always enforce the right, but will provide a remedy and compensation to the aggrieved party.

(2) Sometimes the law itself creates inefficiencies as far as the enforcement of a legal right is concerned.

(3) Sometimes a legal system lacks the mechanism to enforce its decisions.

Therefore, in view of the above difficulties it would be better to define legal rights in terms of recognition and protection by the legal order.

(2) Will Theory - Legal experts like Hegel, Kant and Hume have supported the interest theory of legal rights and said that the right of a person reflects his will. Pushta expressed the view that through right a person expresses his will power on a thing. In Germany

The supporters of historical jurisprudence have accepted the will theory of rights.

While criticising the will theory, Duguit has considered social solidarity as the basic source of rights. He considers will to be only an important element of rights. Patton has also accepted will as an element of rights. According to Holland, "Legal rights are the inherent capacity of a person by which he can control the actions of other persons with the consent and help of the state."

According to Austin, the right of a person means that other persons are bound by law to do or not to do something in relation to him. This definition of right given by Austin is based on the sovereign power of the state. Explaining duty, Austin has said that it is an obligation which if neglected is punishable due to the penalty associated with it. But John Stuart Mill has criticized the above idea of Austin on the ground that it is often necessary for interest to be associated with right. "Right is an inherent quality of human will." The right to self-expression and self-assertion is a part of the freedom of the individual which is inseparable from man and his personality. In the absence of such natural freedom and independence, man will feel helpless. All natural rights are necessary for the development in the life of man, provided that man does not use these rights for illegal things. The will theory was expanded by the theory of natural rights, which declared that there are some areas of personal life in which the state cannot legally interfere. The supporters of this theory are Hegel, Kant, Locke and Hume. On the other hand, Duguit criticizes that will is not an essential element in law. He says that more emphasis is placed on the rights of the individual than on his obligations. He considers this theory of subjective right to be merely a physical one called abstraction.

Elements of legal rights-

According to Sir John Salmond, there are five essential elements of every legal right-

(1) Underlying person - also known as the subject of the right. A legal right that is vested in a person and who can be identified as the owner of the right, its subject or the 'underlying person' Therefore, there cannot be a legal right without a subject or its owner. Here, subject means the person in whom the right is vested. Therefore, a right cannot be conceived without a subject or its owner. The owner of a right need not be definite or determinable. A right may be owned by society, at large, indeterminate.

(2) Person of the incident. - The person who is bound by the duty or is the subject of the duty is called the person of the incident it is said.

(3) Subject-matter of the right. The act or omission which is binding on the person obliged in favour of the person entitled is known as the content or essence of the right.

(4) Subject-matter of the right- The thing to which the act or omission relates, over which the right is exercised. This is called the subject-matter of the right.

(5) Title of Right- Salmond also gives a fifth element that is 'title'. He says that "every legal right has a title, i.e. some fact or event by virtue of which the right becomes vested in its owner". A popular illustration cited by Salmond satisfies all the above elements of legal rights. It is as follows- "If A purchases a piece of land from B, then A is the subject or owner of the right so acquired. The persons bound by the correlative right are persons in general, because this kind of right is against the whole world. The context of the right consists in non-interference with the exclusive use of the land by the buyer. The object or subject-matter of the right is the land. And finally, the title of the right is the transfer by which it was acquired from its former owner".

Question No. 2- Discuss the different types of legal rights. Explain the relationship between rights and duties. Differentiate between fundamental rights and constitutional rights.

Answer - Types of legal rights - Following are the types of legal rights-

(1) Public and Personal Rights- 'Rem' means the world and 'persona' means a person. Right in rem is a right which is available against the whole world while right in persona is against a particular person. Right in persona usually arises out of contractual obligations e.g. breach of contract while right in rem usually is a result of law e.g. tort, crime. Right in persona is usually transitory in nature which can be transferred into right in rem. Right in rem is a permanent thing while right in persona is transitory in nature.

In the pure sense, legal rights are related to legal duties. **Holland** has defined rights by saying that a person will be considered to have a legal right only if one or more persons are legally bound to do or not do something towards that person, i.e. existence of rights is not possible without concomitant duties. In other words, rights can be called such an interest which is recognised by law and which is protected by law by imposing duties on other persons. **According to Samand**, apart from the above-mentioned narrow meaning, legal rights can also

be used in a broader sense. In this sense, rights can be used in the form of freedom, power or immunity.

(2) Personal and Proprietary Rights- Proprietary rights of a person include his property, his assets and his wealth in various forms. Proprietary rights have some economic and monetary value. Proprietary rights are valuable and personal rights are not. Proprietary rights are elements of a person's property. Personal rights are only elements of his well-being. Proprietary rights have not only judicial but also economic significance. Personal rights have only judicial significance.

(3) Positive and Negative Rights- When a duty, which corresponds to a right, is a positive duty; the right is called a positive right. The person on whom the duty lies will do some positive act on behalf of the person entitled. A negative right corresponds to a negative duty, i.e. a person will refrain from doing some act which is prejudicial to the person entitled. A positive right is a right to be positively benefited; a negative right is only a right not to be harmed. In the case of a negative right, others are prevented from doing something. The satisfaction of positive rights results in an improvement in the position of the owner. In the case of negative rights, the position of the owner is only maintained as it is. The law is more concerned with the prevention of harm than with the enforcement of positive benefits. Liability for harmful acts of commission is the general rule, but liability for acts of omission is exempt.

(4) Fundamental and subsidiary rights- Fundamental rights are basic or main rights vested in an individual under the law. They are vital and non-essential rights while subsidiary rights are more incidental or consequential rights that are not essential but are ancillary to the more basic general rights.

(5) Absolute and imperfect rights- according to Salmond,

(1) An absolute right is one which corresponds to an absolute duty. An absolute duty is one which is not only recognized by law but also enforced by law.

(2) In all fully developed legal systems, there are rights and duties which, though recognized by law, are not of an absolute nature. Those rights are called imperfect rights.

Examples of imperfect rights are claims barred by the passage of time, claims against foreign states or sovereigns, claims that cannot be enforced because they do not fall within the local limits of the court's jurisdiction, debts owed to the executor from the estate which he administers. In these cases, rights and duties are incomplete because there is no action for their maintenance. An imperfect right may be good as a ground of defence, though not good as a ground of action. An incomplete right can be perfected. The right of action may be dormant and may not be non-existent.

(6) Rights in re-proprioria and rights in re-aliena – A right in re-aliena, also called burden, is one which limits or deprives some more general rights of another person in respect of the same subject-matter. All other rights are rights

in re-ownership. The owner of a property has a right of repossession or possession of his property. The mortgaged property has a right in repossession or a right over someone else's property. Again, ownership rights are rights in one's own property. Rights in alienation are rights over another person's property. There are four main classes of encumbrances – servitude, lease, security and trust. Serfdom is the right to limited use of a piece of land which is without ownership or possession. A lease is an encumbrance of property vested in one person by a right of possession and use vested in another person. Security is an encumbrance vested in a creditor over the property of his debtor for the purpose of securing the recovery of the debt. A trust is an encumbrance in which ownership of property is limited by an equitable obligation to dispose of it for the benefit of another person. The owner of the encumbered property is called the trustee and the owner of the encumbrance is called the beneficiary.

(7) Vested and dependent rights – Vested right is that right in respect of which all the events necessary for it to vest completely in the owner have occurred. No other conditions need to be fulfilled. In the case of contingent possession, only certain events necessary for the vesting of the right in the contingent owner have occurred. According to Patton "The right vests when all the material facts necessary to create the rights have occurred. When some part of the material facts has occurred, the rights remain contingent until all the facts on which the title depends have occurred."

(8) Legal and equitable rights – Legal rights are those which are recognized by the common law courts and equitable rights are those which are recognized only in the Chancery Court. Principles of equity were developed in English law to reduce the harshness of the common law. Despite the merger of law and equity by the Justice Act 1873, the historical distinction is still alive and relevant in some situations. When two legal rights are found to be inconsistent, the first right usually prevails. When a legal right and an equitable right are in conflict, the legal right will prevail over the equitable right, even if it is originally the latter, provided that the owner of the legal right acquired it for value and without notice of the former equitable.

(9) Tangible and Intangible Rights – Tangible rights are physical assets that can be seen, touched and measured, while intangible rights are non-tangible assets that represent valuable rights and privileges. Also known as real assets, these assets have a physical presence and are commonly used in day-to-day operations. Examples include fixed assets such as inventory and stock machinery and equipment real estate vehicles cash land buildings furniture intangible rights Also known as non-monetary assets, these assets lack a physical form and exist only on records and balance sheets. They derive their value from legal or intellectual property rights. Examples include intellectual property rights, patent licenses, brand name awareness, key research and development personnel,

copyrights, trademarks, goodwill, customer lists, software, proprietary technology.

(10) Primary and acceptance rights- Primary rights are also called prior, accepted or enjoyment rights. Secondary rights are called sanction able, restorative or remedial rights. Examples of primary rights are right to dignity, rights in relation to one's own person, rights of master or guardian etc. Secondary rights are a part of the machinery provided by the State to redress the damage caused to primary rights.

(11) Public and private rights- Those rights which are given to an individual by the state or government or the constitution are called public rights. For example, right to vote, right to use public parks etc.

Private rights are attached to private persons or individuals. Example- A contract between two people gives rise to their private rights.

There is a close relationship between rights and duties. Every right has a concomitant duty attached to it. While defining duty, Salmond has said that it is a binding act. The opposite word of which is 'misdeed'. In other words, it arises when duty is violated. Expressing his views regarding duty, Gray said that the main objective of law is to protect human interests by forcing people to do or not do certain specific tasks.

According to Hibbard, 'Duty is an obligation vested in a person whose actions are controlled by some other person with the permission and assistance of the state.

Mutual relation between duty and right- Most jurists agree that every right has a concomitant duty. Hence, there is no difference of opinion about the relation between legal rights and duties. According to Austin, duties can be both relative and absolute. By relative duties, he means such duties which have a concomitant right. Austin has given the following types of absolute duties-

(1) Duties relating to oneself, such as a person’s duty not to commit suicide, duty not to take intoxicants, etc.

(2) Duties to uncertain persons or the general public, such as the duty not to cause a nuisance.

(3) Duties which are not towards human beings but towards others, such as duties towards God or towards animals per duty etc.

(4) Duty to the sovereign or the State.

Austin's view is wrong - A closer examination of Austin's view makes it clear that it is wrong. The absolute duties mentioned by him are not duties in the legal sense, or even if they are duties, they are not absolute. Duty to God is not a legal duty. If it is not contained in any statute.

When a person is given a right it is assumed that certain duties are also imposed on him. Rights have their own correlative duties. When a person has a duty to perform his duty, there are two types of duties, when he has a legal duty, but in case of moral duty he has no obligation. It depends on the discretion of the

person. Duties are classified into absolute and relative duty, positive and negative duty and primary and secondary duty.

Base	Fundamental rights	Constitutional rights
Meaning	Fundamental rights are a set of rights that are innate necessities to live a dignified human life.	Constitutional rights are the rights given to the people of India in the Indian Constitution. It also includes fundamental rights.
Waiver of rights	Waiver is the process of deliberately giving up or renouncing a given right. Waiver of fundamental rights is not permissible as was first stated in Behram Khurshid Pesika v State of Bombay, September 24, 1954/	Constitutional rights cannot be abridged in India. However, the United States Supreme Court has permitted abridgement of rights. Gette v. INS, 121 F.3d 1285, 1293 (9th Circuit 1997)
Modifiability	Fundamental Rights can be amended by a Constitutional Amendment provided the basic structure of the Constitution remains intact.	Constitutional rights can be amended by a constitutional amendment, while statutory rights can be amended by an ordinary amendment.
Situation during emergency	During an emergency, all Fundamental Rights are suspended except Article 20 and Article 21. According to Article 32(4), Fundamental Rights cannot be suspended on any ground other than the conditions laid down in the Constitution, i.e., emergency provisions.	Not all constitutional rights are suspended during an emergency period.
Bond	Certain reasonable restrictions have been imposed on the fundamental rights contained in that particular article. For example Article 21 guarantees the right to life and personal liberty but it is subject to "procedure established by law".	Apart from the rights specified in the Articles, constitutional rights are also subject to statutory restrictions imposed at the will of the Lok Sabha. For example, the right to property under Article 300A can be taken away 'by authority of law'. This would not be possible if it were a fundamental right.

Remedies in case of deprivation of rights	If a person is deprived of the rights under Part III of the Constitution he can file a petition in the Supreme Court under Article 32 or the High Court under Article 226.	The High Court can also be approached under Article 226 for violation of any constitutional right.
Example	Examples of fundamental rights include: the right to privacy the right to basic education the right to constitutional remedies.	Examples of constitutional rights include: Right to property Legislative privileges Reservation of seats for certain classes in the Lok Sabha.

Question No. 3- Develop an explanation of the concept of ownership. Define the concept of ownership in detail.

Answer - The word ownership conjures up the image of property in the imagination, property without which there can be no ownership or possession. In the early times when humans were nomads and did not have the skills of agriculture and civilization, the concept of ownership never came to mind. However, the concept of ownership was formulated before the concept of ownership and that too only when humans started farming.

The Supreme Court of India has defined property as a legal concept in the case of **Guru Dutt Sharma v. State of Bihar** as, 'a set of rights and in the case of tangible property it would include the right to possess, the right to enjoy, the right to destroy, the right to retain, the right to alienate, etc.' And along with the clear concept of property comes the ideas of possession and ownership.

Concept of ownership-With the development of civilization, as humans settled down to farm and produce their own food and live in one place, they started developing the idea of ownership and the terms 'mine and yours' came to be recognised. First came the concept of possession and then the concept of ownership evolved. In Roman law there were two different terms 'possessio' which denoted physical control over something and 'dominium' which denoted absolute right over something. **According to Holdsworth**, ownership as absolute right in English law evolved through developments in the law of possession and the term 'dominium' was first used in English law in 1583.

Definition

Ownership has been defined by a number of jurists, some holding that it is the relation between a person and the right vested in him and some holding that it is the relation between a person and the thing which is the object of ownership.

Austin-According to him, ownership means a right enforceable against every person who is subject to the law which gives the right to put a thing to use of an indefinite nature. And indefinite in terms of use, unrestricted in terms of disposal and unlimited in terms of duration' when it comes to absolute ownership.

Austin's definition of ownership has three characteristics:

Indefinite in terms of use- This means that the owner can use the property as he wishes. For example, if a person has a piece of land, he can build a house on it, use it as a garden or leave it as is. But at the same time, he should not use it to harm his neighbours.

In the case of an exchange, the unrestricted owner has the right to transfer or dispose of the property without restriction. However, legal regimes impose certain restrictions on certain transfers or disposals.

In terms of duration the unlimited owner has the right of ownership as long as the thing is in existence and the right ceases as soon as the thing is destroyed.

Salmond-According to him, "Ownership, in its widest significance, denotes the relation between a person and the right vested in him. Whatever a person possesses is in all cases a right." Also he It is said that 'every right has ownership, and nothing can be owned except a right. Every person is the owner of his rights.'

He also distinguished between material and intangible ownership, 'Although the subject-matter of ownership in its broadest sense is a right in all matters, there is a narrower sense of the term in which we speak of ownership of material things. We speak of ownership, acquisition or transfer, not of rights in land or movable property, but of the most general sense of 'ownership'. We call this material ownership in order to distinguish it from the ownership of rights which may be called 'intangible ownership'.

Holland-He followed Austin's view of ownership and according to him an owner has three kinds of powers; possession, enjoyment and ownership all or some of which can be lost by lease or mortgage.

Hilbert-According to him, ownership consists of four rights which are the right to use the thing, the right to prevent others from using it, the right to dispose of the thing and the right to destroy the thing. In this regard, absolute ownership of land is not possible because land is indestructible, which is why there can be a legal interest in land in English law.

Pollock-According to him, 'Ownership may be described as the totality of powers of use and disposal permitted by law.'

According to Markby, ownership of an object indicates that all the rights related to that object are vested in that person. Hence, it is clear that ownership is a symbol of such a relationship between a person and an object which vests all the rights related to that object in that person. But Markby considers ownership as a collective right and considers it as an independent comprehensive right.

Characteristics of ownership- Ownership has the following characteristics-

(1) Ownership is either absolute or limited. When there are several co-owners of the same thing or property, the right of each owner is limited by the rights of the other co-owners.

(2) Ownership is also restricted in times of national crisis. For example, buildings can be acquired for the military during wartime.
(3) The owner also has to pay tax to the state for the use of his property. Hence, tax also limits ownership.
(4) No owner shall exercise his right of ownership in a manner that infringes the rights of other owners. He must exercise his right in a manner that does not cause harm to other people.
(5) The owner is also free to transfer his property at any time in any manner he wishes. He cannot transfer his property to defraud his creditors.
(6) Under the law, minors or insane persons cannot exercise the right of ownership over immovable property as the legal presumption is that such persons do not have the capacity to understand the true nature and consequences of their actions.

Nature and incidence of ownership-On analysing the concept of ownership one can find certain features which reveal the nature or characteristics of ownership such as use, enjoyment, disposal etc. The nature of ownership is as follows:

It is indeterminate at the point of use, that is, the user can use the owned object in any way he wants and is not bound not to use it. The user is free to use it. It is unrestricted at the point of disposal. The owner can transfer or dispose of the property during his lifetime or even after his death through a will.

The owner has the right to possess the thing owned, however, only if he actually possesses it.

Question No. 4- Explain the different methods of acquiring ownership and discuss the essential elements according to Austin. Explain the types of ownership.

Answer- Methods of acquiring ownership - Ancient Hindu jurists have written something about the policies of acquiring ownership. Narada has described 12 methods of acquiring ownership of property, but all these methods were not for all the castes. Some of them were only for specific classes.

Roman law also prescribed similar methods of acquiring ownership, many of which are still valid and some of them exist with variations. In terms of ownership, things can be of two types. Things which are not owned by any person. Such things are called ownerless property and ownership can be acquired on them by taking possession of them, but on such a condition that they are already owned by someone Ownership can be acquired by derivative method. Samand has described two ways of acquiring ownership- first is acquiring ownership by means of acquisition method, second is acquiring ownership as a result of some act or incident.

If a person acquires ownership of someone else's property due to the operation of the law of intestacy or bankruptcy, such ownership is said to be acquired by the action of law. But if a person creates or receives something from another person, such ownership is said to be acquired by the act of that person.

In ancient and medieval English law, importance was given only to the possession of land and movable property. Like possession, ownership is a complex judicial concept. Among the various legal rights, the right of ownership is of special importance. In the ancient legal system, the views of the jurists were not clear about the meaning and difference of ownership and possession, yet under Roman law, both were considered different from each other. In Roman law, the words dominium were used for ownership and possession for possession. Under Roman law, ownership signifies complete right over an object, while possession shows only physical control over that object. **According to Materland**, the word ownership was first used in English law in the year 1583 AD.

From the above discussion it is clear that Roman law does not consider the full right of ownership to be based on possession, whereas in English law possession it is considered to be a solid and strong proof of ownership. Therefore, when a person does not prove more rights than the occupant of a thing, then it will be clearly considered to be the ownership of the occupant.

Austin's views on ownership- While explaining ownership, Austin has written that ownership is such a right on a definite object which is indefinite from the point of view of use, unlimited from the point of view of disposal and unlimited from the point of view of duration. This shows. According to Austin, ownership must have the following elements:

(1) Uncertain from the point of view of use - The owner of an object has the complete right to use that object as per his wishes. No other person can create unnecessary hindrance in its use-consumption. For this it is necessary that the owner uses the object in such a manner that it does not cause harm or nuisance to other persons.

(2) Unconstrained in terms of addiction- The owner of a thing not restricted in possession has the right to dispose of or transfer it at will, such as by selling, mortgaging, donating, etc. No person can refuse such disposal or transfer unless a charge or restriction has been lawfully imposed on him.

(3) Unlimited duration- ownership in terms of duration is a perpetual right. It never ends. Even after the death of the owner, it remains vested in his legitimate heirs.

Status of ownership under Indian law- The right of ownership over property has been recognized in the Indian legal system of other countries as well. But in India no person can own any object elsewhere because the right of ownership in this country has been restricted by statutes and regulations. The law regarding maximum limit of land, rent control act, bank nationalization and company legislation etc. are direct examples of this. In ancient Hindu law also, the unrestricted right of disposal has been considered an important component of ownership. **According to Katyayana**, the owner's right to dispose was unlimited

and no restriction could be imposed on him. Types of ownership- Ownership is of the following types-

(1) Tangible and intangible ownership- Samand has used the word ownership in two senses- limited and broad. In the limited sense ownership refers to physical objects. When a person has ownership over physical objects it is called corporeal ownership. By corporeal or tangible objects we mean those objects which can be seen, examined or touched by the eyes, like land, house, coins etc.

According to Pollock, 'tangible ownership' means the complete right to the legitimate use of a physical object. In a broad sense, ownership is indicative of a person and the rights vested in him. This right can be of any form: personal, proprietary, in rem or in personam. Rights are such intangible concepts that cannot be perceived by the eyes. Examples: patent, copyright, right of way, right to recover the loan amount, etc. The subject matter of intangible ownership is not a tangible object but an intangible concept like rights. Thus, it is clear that ownership of a physical object is called tangible ownership, while ownership of a right is called intangible ownership.

Example - If a person has ten rupees in his pocket, then he will have 'tangible ownership' over those rupees because these rupees are a tangible object which can be felt by the eyes. But if that person has to take ten rupees from his debtor, then his right to get that loan amount will be called intangible ownership because this right cannot be felt by the eyes.

(2) Trust ownership and beneficial ownership - Trust of property is a unique example of duplicate ownership. Trust property is owned by two persons at the same time. For example, on one hand, the trustee owns the property and on the other hand, the beneficiary also gets ownership over the property. The trustee's ownership of the trust property is called 'trust ownership' and the beneficiary's ownership of the property is called beneficial ownership. In fact, the trustee's ownership is only for the welfare of the beneficiary, due to which he is the owner in name only and cannot use the trust property for his own benefit. The actual ownership of the trust property lies with the beneficiaries, i.e. the property belongs to the beneficiary and not the trustee. The trustee only represents or manages the rights of the beneficiary related to the trust property, otherwise also the trust's ownership has legal priority over any third person except the beneficiary. Regarding the trust, Samand said that its main objective is to protect the rights and interests of those individuals who, due to some reason, are unable to protect their interests effectively.

(3) Legal ownership and equitable ownership- The distinction between legal ownership and equitable ownership is based on the common law and equity law of England. Sometimes one person may own the same thing and another may have equitable ownership over it. For example, the ownership of a trustee is legal ownership, while the ownership of a beneficiary is considered equitable ownership as it is recognized by equity. In short, the ownership which has arisen

from the rules of common law is called 'legal ownership' and the ownership which has arisen from the rules of equity is called 'equitable ownership'. Common law did not recognize equitable ownership and it was recognized only by the Chancery Court.

(4) Sole ownership and co-ownership- If the right of ownership is vested in only one person, then such ownership is called 'sole ownership'. But if the right of ownership is vested jointly in two or more persons, then in that case the ownership of each will be called 'co-ownership'. This never means that all the persons are separate owners of any part of that property. The right of ownership is an indivisible right which can be jointly vested in many persons simultaneously. But the division of ownership by partition is called 'co-ownership' the rights can be divided into separate parts.

There are two main distinctions of co & ownership-

(a) Common or same ownership - In common or same ownership, two or more persons own a piece of land or object together. Their possession remains undivided and each of them is the owner of that piece of land or object along with other co-owners. In common ownership, after the death of any co-owner, his right passes to his successor. Common ownership is also called tenancy in common.

(b) Joint ownership- In joint ownership, on the death of any co-owner, his ownership also ends and the remaining living co-owners become the full owners of that property on the basis of the right of survivorship. After the death of its co-owner, the heir does not get the ownership, but it is transferred to the remaining living co-owners. Joint ownership is also called joint enjoyment. In a partnership firm, the ownership of the partners is joint ownership.

(5) Vested ownership and contingent ownership- Such ownership in which all the things related to acquiring ownership are completed and the right of the owner is already absolute, then such ownership is called vested ownership (amajmak vudmatipach). For example, if a person transfers his property to another person, then that other person will get vested ownership over that property. In vested ownership, the owner gets absolute right. Similarly, if some things related to acquiring ownership happen or are completed but some others remain to be completed or not, then such ownership is called contingent ownership. In contingent ownership, the owner is only a conditional owner. **Example -** If a person mentions in his will that after his death his property should be handed over to his wife (during the life of the wife) and after the death of the wife the property should be handed over to 'A' and if 'A' is dead by that time, then it should be handed over to 'B', then in that case both 'A' and 'B' will be the contingent owners of that property because 'A' will get the property only when the wife of the testator dies and 'A' is alive at that time. Similarly 'B' will get the property only when both the wife of the testator and 'A' die and 'B' is alive.

The gist of this is that in contingent ownership, the ownership of the property vests in the owner only on the occurrence or non-occurrence of a specified uncertain event. The contingent ownership of the owner turns into vested ownership on the occurrence or non-occurrence of the specified event.

There are two conditions of contingent ownership-

(1) Condition Precedent - A condition precedent is a condition which, if fulfilled, would render an action incomplete.

The right becomes complete. In case of condition precedent, the right which has already been conditionally acquired becomes absolutely acquired.

(e) Condition Subsequent: A condition subsequent to the fulfilment of which would extinguish the right, that is, it would be destroyed.

Example- If a testator leaves his property to his wife with the condition that if she remarries, she will be deprived of that property and that property will go to the sons of the testator, then in this case the wife will get vested ownership over that property and the sons of the testator will have contingent ownership over that property. It would be appropriate to clarify here that the condition of remarriage of the wife is a condition subsequent with respect to her own vested ownership, whereas it is a condition precedent with respect to the contingent ownership of the sons of the testator. If the wife remarries, her vested ownership will disappear and the contingent ownership of the sons will turn into vested ownership and they will get full rights over that property.

Question No. 5- Explain the concept of legal personality. Explain the various theories of legal personality Explain.

Answer- Legal Personality- Law is made for the human community, in other words, the existence of law is for humans. The main function of law is to control human conduct. In such a situation, the importance of the word 'person' increases. From the point of view of study, both the words person and legal person are very important.

Definition of legal person-

According to Paton, legal personality is an artificial creation of law. According to this, a 'legal person' need not be a natural being or a human being. In the words of Paton- "All those entities which are units capable of holding rights and duties are 'legal persons'."

According to Salmond, "Legal person means any entity other than a human being who has personality under the law." In simple words, it can be said that "a legal person is an artificial or imaginary person who is a person in the eyes of law, but in fact is not a real human being." A legal person is also called an artificial, imaginary or judicial person.

In the words of **Kelsen,** "The legal man is a myth because it consists of nothing more than rights and duties."

According to the analytical school of thought, "a legal person is a holder of rights and duties."

According to Hegel- "Personality is the subjective possibility of just will."

Also know the concept of legal duty and its types according to jurisprudence – Types of Legal Duty

Types of legal person-

According to **Hibbert,** there can be three types of legal persons-

(1) Corporation- Under law, a corporation is created under the Act. A corporation is a legal person and is a good example of legal creation. A corporation is a class or series of persons which is itself recognised by a legal code. A registered trade union is a legal person though it cannot be called a corporation in the literal sense. The Kerala High Court in the case of M. Paramasivam v. Union of India (AIR 2007 NOC 600 Kerala) held the State Electricity Board to be a legal person. A complaint can be filed against the Board.

(2) Institutions- Institutions are also legal persons. They are considered like corporate bodies. They also have perpetual succession and a common seal. Property can be acquired by them. A suit can be filed against them and by them. In this, personality is not given to any class of persons associated with the institution but to the institution itself. Its examples are - university, library, hospital, church etc.

(3) Funds or estates-Funds or estates used for some specific purpose are also considered as legal persons. Good examples of this are estates of the deceased or insolvent person, trust estate, etc.

Corporate personality - Corporate body or personality is the best example of a legal person. Even though a corporate personality is not a living being, it has the status of a living being in the eyes of law. The structure of corporate personality is subject to enacted law.

According to **Salmond,** "Corporation is a group of persons which has been recognized as a legal person by legal imagination." Thus, the structure of the corporation is formed by the humanization of classes and categories of humans. The corpus of this legal person is its members.

Since the legal personality of a corporation is based on imagination, it is also called fictitious or artificial person. Universities, hospitals, libraries, temples, banks, railways etc. are legal persons and have the status of corporate personality. The Union of India also has the status of a legal person.

Some important features of a corporate body-

(1) It has perpetual succession. A corporate body never dies. The death or removal of any member of a corporate body does not bring an end to the body but the place of such a person is taken by the government is taken over by his heir or other authorised person.

(2) It has its common seal.

(3) It may hold property.

(4) It may be sued and sued on its behalf.

Under the law there are two types of corporations-

(1) Corporation sole: A corporation sole is a corporate chain of successive persons.

A corporation is a corporate chain of persons coming one after the other in which there is only one person at a time. According to the law, the objective of a sole corporation is the same as that of a combined corporation. After the death of one person in a sole corporation, that post and the property, liabilities etc. do not end but they get vested in the next person who holds that post. Example – The King of England, Postmaster General, Minister of some department etc. are such sole corporations which have legal personality. These persons are the holders of such public post which is recognised by law as a corporation.

(2) Corporation aggregate: A corporation aggregate is a group of co-existing persons organized to fulfil some purpose. It is also called a deemed corporation. Limited companies are the best example of a corporate corporation. In this, the liability of each shareholder of the company is limited to the unpaid capital amount of the shares held by him. **Solomon vs. Solomon and Company (1887 A.C. 22**) is a good example of this, in which it is said that the main characteristic of a corporate corporation is "to have a separate existence from its members for certain purposes." For example, an incorporated company has its own rights over its assets and property. The rights of shareholders are limited only to dividends. This is the reason that even if the company goes bankrupt, there is no adverse effect on the financial condition of the shareholder. Similarly, even if a shareholder goes bankrupt, the financial condition of the company remains strong. Apart from this, the existence of the company does not end even if all the shareholders of the company die.

Principles of Corporate Body- There have been different views of jurists regarding the nature of corporate personality.

(1) Theory of Hypothesis- It is also called mythical or fiction theory. The names of Savini, Salmond, Gray, Holland, Kelson etc. are prominent among the strong supporters of this theory. According to the theory of hypothesis, corporate personality is only a legal fiction whose main objective is to bring unity in an unstable organization of people gathered collectively. Therefore, this fictional personality is different from the real person of those people who create it. In this, the change in the members of the corporation has no effect on the existence of the corporation. According to Salmond's concept, the corporate body is different from its members and the existence of the corporation continues even if all the members leave. Any corporation incorporated under the Act of Parliament can be closed only by the enacted law.

(2) Realist Theory- The main proponent of this theory was German jurist Gierke and Pollock, Dicey and Maitland are considered its supporters. It is also called Realist theory. According to this theory, the existence of a corporation is different from the collective form of its members. Corporate personality is not based on imagination but it has a real existence which is recognized by law and the state. When many people collectively establish a corporation, such establishment gives rise to a new will which is called the will of that corporation and such will is determined by the directors, employees, etc. of the corporation It is expressed through directors, officers and employees. The supporters of realistic theory are of the opinion that collective personality is not just an imagination but a reality. Here, reality does not mean real person or physical reality but psychological reality. Modern realistic theory is based on the analysis of human personality.

(3) Bracket Theory- German jurist Ihering is considered to be its strong supporter. He was of the opinion that only the members of a corporation are real persons and the status of legal personality created in the form of a corporation is like a bracket which shows the collective nature of the members. The common interests of its members are implemented through the corporation. The supporters of the bracket theory are of the opinion that just as the synonyms of a word are expressed by placing them in brackets, in the same way the collective nature of different persons is expressed in the form of a 'corporation' and they are given uniformity. Bracket theory is also called symbolic theory.

(4) Concession theory - Leading legal experts Savigny, Salmond, Dicey etc. are considered to be the supporters of this theory. According to this theory, the corporation is important as a legal person because it is recognized by the state or law. In other words, it can be said that the legal personality of the corporation is a concession granted to it by the state which is accepted by the law. Concession theory is the product of the rise of the power of the nation state. In this, the supremacy of the state was emphasized and its aim has been to strengthen it. Giving the form of a person to any rule or body is a matter of discretion of the state. If the state wants, it can give the form of a person and if it wants, it can refuse to do so. This theory is similar to the theory of hypothesis.

(5) Purpose Theory - The basic or initial basis of purpose theory is the same as that of symbolic theory. This theory is based on the fundamental concept that the subject matter of rights and duties are only real living human beings. It does not believe in attributing personality to any inanimate object. Corporations do not have the capacity to assume duties and rights because their personality is not real. They only have subjectless existence which is accepted as legal persons for certain special purposes. German jurist Brinz is considered to be the main promoter of purpose theory. Damelius, Bexer and Planiol are its strong supporters. Barker is credited with developing this theory in England.

Question No. 6- Explain the concept of possession. Explain the different types of possession.

Answer - Possession has an important place in jurisprudence. Possession is the second most important property right after ownership. Possession is the continuous and real relationship between an object and a person. According to Fredrick Pollock, possession means physical control over an object. We all know that human life is impossible without the use and consumption of physical objects. To survive, a human needs food, clothing and shelter.

According to **Samand,** possession of material things is very important for human life. According to him, possession reveals the basic relationship between humans and things.

Definition of possession- Legal experts have given different definitions regarding possession, which are as follows-

According to Samand – The continuous and real relation between an object and a person is called possession. Possession of a physical object means that no other person in the world should have any right over that object against the possessor. It is clear from this definition that Samand has considered possession to be related to the 'object' and not to the right. **According to Zachariae**, 'possession' is such a relation between an object and a person which shows that the person has the intention to hold that object and the ability to dispose of it. **According to Savigny –** the essence of concrete possession is that the possessor, on the basis of his physical force, prevents other persons from using or consuming the object in his possession. **According to Markby –** the strong desire and ability of a person to keep an object under his physical control by using his physical force for freedom is called 'possession'. **According to Inhering –** "Possession is protective ownership." This means that possession is a shield of ownership which accrues to the person who actually possesses the ownership.

According to Anglo law there are three main concepts of possession-

(1) A person may have both possession and physical control over a thing.

(2) Possession may exist without any personal or physical control.

(3) A person may have physical control over a thing without having possession of it.

Explaining possession, Holland has written that it is necessary for two elements to be present in it. Firstly, the possessor should have actual power over the thing in possession and secondly, he should have the desire to take advantage of that power. In English law, these are called 'corpus' and 'animus' respectively.

Savigny, in his theory of possession, has given two elements for possession, 'corpus possessionis' and 'animus domini'. In which "corpus possessions" means effective control and the ability to exclude external interference and the term 'animus domini' means the desire to keep holding an object as the owner.

According to **Justice Holmes** of America, to acquire possession of an object, it is necessary that a person has a physical relationship with that object and at the same time he has a definite intention towards that object. This makes it clear that both physical and mental elements are associated with possession. Thus, for concrete possession, it is necessary to have two elements. First, physical or objective element and second, mental or subjective element.

Essential elements of possession-Roman jurists have called the physical element of possession as 'corpus' and the mental element as 'animus'. These two elements can be called the body and concept of possession in legal language.

'Physical Element of Possession' - The first essential element of possession is the act of possession. It is also called the physical element of possession. This element indicates actual possession of a thing. The word 'corpus' means sole control over the thing and the ability to exclude others from possession of that thing. The occupant can get this type of protection in the following ways-

(1) Physical power of the occupier- The physical power of the occupier guarantees him the right to use the thing in his possession. On the basis of this he is assured of non-interference from other persons.

(2) Personal presence of the occupant - In many cases the personal presence of the occupant is necessary to retain possession of a thing, no matter how physically infirm that person might be.

(3) Secrecy - The person in possession may conceal an object so that no outsider may obtain possession of the object.

(4) Expression of intention-Expression of intention means that there should be an intention to retain possession of an object as well as to acquire that object. For example- If a person wants to acquire possession of a shop, then apart from the intention to retain possession, he should also be in a position to enter that shop and use it.

(5) Protection obtained by possession of other things- Sometimes, possession of one thing also gives possession of other things connected or attached to it. Example- A person's possession of a piece of land also gives him possession of other things, trees, plants etc. situated on that land. But the legal position in this matter is not completely clear. This principle that a person will get possession of all the things situated on the land due to possession does not always apply and it depends on the circumstances of the case. A good example of this is "South Staffordshire Water Works Company vs. Sherman. In which the company employed the defendant to clean the pond built on the company's land. While cleaning, the defendant found some gold rings lying at the bottom of the pond. The company filed a suit against the defendant claiming its possession of these rings. The court decided that the company itself has the first possession of those rings and not the defendant.

(6) Another element related to the corpus of possession is that the possessor must have possession of the thing. But this does not mean that the possessor has complete control over the thing. This control can be more or less depending on the thing. For example, if a person throws a net to catch fish, then that person does not have possession of the fish until they get caught in his net.

Mental element of possession- The second main element of possession is animus. It is also called the mental element of possession. It means the desire of the possessor to retain his possession over the object in possession. **According to Samand**, the intention to exclude other persons is the mental or subjective element of possession. In other words, it can be said that the person having physical possession of an object may or may not wish to use or consume that object, but it is very important to have the desire to retain possession over it.

The following points are noteworthy regarding the mental desire related to possession:

(1) It is not necessary that the intention to hold possession be justifiable; it may also be wrongful.

(2) The claim of the possessor on a thing should be exclusive, i.e. other persons should not have any right to it There must be an intention to exclude. But it is not necessary that the exclusion be absolute.

(3) A person in possession may also hold an object in custody. For example, a pledge has possession of an object pledged although his mental intention is to keep the object in custody until the debt is repaid.

(4) It is not necessary that the possessor himself holds the possession of the thing; it can be for some other person also. For example, a servant, attorney, trustee and bailee etc. do not hold the thing for themselves but for some other person.

(5) The occupant's intention regarding possession may be general and need not be specific.

Example- If a person has caught fish in his net, he will have possession of all of them, even if he does not know the exact number of those fish. Similarly, a person gets possession of all the books kept in his library, even if he is not aware of the existence of some of them. In the context of animus of possession, the case of **N.N. Majumdar vs State** decided by the Calcutta High Court is noteworthy. In this case, the police searched the house of the accused with the hope that perhaps a pistol would be recovered from there but the pistol was not found. The accused spoke to his wife and the wife went out of the house. She returned home after three-four minutes with a pistol and some cartridges.

The police relied on **Section 27** of the Criminal Code to argue that it should be presumed that the accused was in possession of the pistol. The court held that the Arms Act, 1959 being a special statute, the fact of "presumption" of possession must be proved. In the absence of presumption, mere act is

insufficient to prove possession. Important cases decided as to the element of possession-

In the case of **R. v. Hudson; 1943 K.B. 458** the accused received an envelope addressed to another person of the same name. The accused kept the envelope with him for a few days and opened it. He found a square inside the envelope which he used for his own purposes. He was convicted of theft. The court held in this case that the accused was not in possession of the envelope until it was opened because there was lack of intent. In the case of **Mary v. Green 1841 M & W 623** a carpenter bought a table with drawers at an auction. He discovered that the table had a secret drawer. He broke open the drawer and took the money kept inside it. This money belonged to the seller who had only sold the table. In the eyes of the law the seller was still in possession of the money kept in the secret drawer although he was not in actual possession of it.

Question No. 7- What do you mean by liability? What are the essential elements for determining civil liability? Explain.

Answer- Liability arises when a person breaks the law. Law prescribes rights and responsibilities for individuals. It provides legal rights to one individual and imposes liability on another. People should not violate the legal rights of others. If someone violates these rights, he is considered to have done something wrong and this gives rise to liability. In civilized societies, most of the relations between the individual and the state are governed by rules made or recognized by the state, i.e. law. Law prescribes rights and duties of individuals. In other words, it prescribes what the individual is to do and what he is not to do and what he has the right to have done. Violation of these rules is called wrong. When a person does a wrong, he is said to be liable. Thus, liability is the condition of the person who has done the wrong. Salmond defines liability as an essential bond between the wrongdoer and the remedy of the wrong. The function of law is not limited to merely prescribing rights and duties; it also ensures their protection, enforcement and redressal. Therefore, liability is a very important part of the study of law. Types of liability, when a person becomes liable or in other words, when liability comes into existence and the measure of liability are things that need to be known in this regard.

Definition of liability-

Sir John Salmond-Sir John Salmond defines liability as the necessary relationship between the wrongdoer and the remedy for the wrongdoing. In simple terms, it is the relationship between the person who does a wrong and the remedy for correcting it.

According to Markby, the term 'obligation' describes a situation when a person has to fulfil a duty, whether that duty is his primary responsibility or a secondary or enforced one. It is about doing a job.

Austin prefers to use the term 'obligation' rather than 'responsibility'. He says that certain actions, omissions or deeds, along with their consequences, are attributed to those who did or did not do them. In other words, it is about holding people responsible for their actions or inactions.

Civil Liability - Civil liability refers to the legal responsibility of one person or entity to another for matters involving non-criminal issues. It arises from violations of civil laws or regulations, typically involving disputes between individuals or entities over issues such as contracts, property rights, personal injury, or family matters.

When someone is found civilly liable, they may be required to compensate the injured party through remedies such as monetary damages or specific performance (fulfilment of a contractual obligation). Civil liability cases are typically initiated by private individuals or organizations seeking compensation or resolution of a dispute.

Criminal Liability-Criminal liability deals with the legal responsibility borne by an individual or entity for actions that violate criminal laws and regulations established by the government. Crimes are generally offenses against the entire society and the government represented by prosecutors' initiates' criminal proceedings. If a person is found criminally liable, he or she may face penalties such as fines, imprisonment, probation, or other punitive measures. The purpose of criminal liability is to punish the wrongdoer for violating laws designed to protect public safety and order.

Difference between Civil and Criminal Liability

Different jurists have provided different perspectives on the distinction between civil and criminal liability.

Some of these approaches are as follows-

Austin's Approach - Austin says that an offence committed at the discretion of the injured party or his representatives is considered a civil injury. On the other hand, offences committed by the sovereign or his subordinates are crimes. All absolute obligations are enforced through criminal means.

Salmond's View - Salmond's view is that the difference between criminal and civil wrong is not based on the nature of the right violated, but on the nature of the remedy applied. He identifies four major differences between the two-

Nature of the wrong; Crime is considered a wrong against society, while civil wrong is considered a wrong against a person or persons.

Remedy: Criminal offenses are redressed through punishment, while civil wrongs are redressed through damages procedure; criminal proceedings are used for crimes, while civil proceedings are used for civil wrongs and they take place in different courts.

Liability Measurement - In a crime, liability is measured by the wrongdoer's intent, while in a civil wrongdoing, liability is based on the wrongdoing, not the intent. Remedial and Penal Liability in Jurisprudence Liability can be further

classified into two categories: Penal Liability: When the wrongdoer is given a punishment such as a fine or imprisonment after successful proceedings, it is called penal liability in jurisprudence. Criminal liability falls under this category. Remedial Liability: This type of liability in jurisprudence involves measures that are not punitive in nature. After successful proceedings, the defendant may be ordered to pay damages, repay a debt, or take a specific action. Civil liability generally falls under this category. Remedial Liability Explained Remedial Liability is based on the principle "ubi jus ibi remedium", which means that where there is a right, there must also be a remedy. When the law establishes a duty, it also ensures that there is a means to enforce it. In most cases, the law prescribes a remedy for a breach of a duty and this remedy is enforced by the legal system.

Exceptions to this rule include-

Duties of imperfect obligation: Some duties exist in law but are not enforceable. For example, a time-barred debt, though legally recognized, cannot be compelled to be paid. Duties that cannot be specifically enforced: There are duties which, once broken, cannot be specifically enforced. For example, in cases of perfected assault, the defendant must be required to undo the act In some cases, although specific performance of a duty is possible, the law may, for various reasons, choose to award damages to the plaintiff rather than enforce specific performance. For example, when a contract involves personal services, the law may not compel performance, but may award damages instead (as per the Specific Relief Act).

Penal liability-The legal principle 'actus non facit reum, nisi mens sit rea' (the act alone is not a crime, it must be accompanied by a guilty mind) is fundamental to understanding penal liability, which is liability for criminal offences.

Two essential conditions of penal liability

There are two main conditions for a person to be held criminally liable: actus reus and mens rea. Act (actus reus) Act is considered to be a voluntary bodily movement, which is caused by the will or desire of the person. It includes bodily movement caused by the intention of the person, provided that the body part involved is in a normal position.

Question No. 8 - What do you understand by property? Explain the various theories regarding the origin of the concept of property.

Answer- Origin- The word property is derived from the Latin word proprietari and the French equivalent propriété, which means thing owned. The concept of property and ownership are very similar to each other. However, there is a fine line that separates the two terms. It would not be wrong to say that human beings have long been aware of their rights to whatever they possess. The term property has been interpreted widely by various jurists such as Salmond, Bentham and Austin. A close observation of the definitions given by them will help us understand the concept in a better way. The word property is not a term

of art. It has been used in various senses. In the broadest possible sense, property includes all the legal rights of a person, whatever may be the description. The property of a person is all that belongs to him according to the law. Though it has become a fashion now, such usage of the term is common in old books. According to Blackstone- "An inferior person has no more property in the company, care, or assistance of a superior person, than the superior has property in the inferior person."

According to Locke- "Every person has a property in his person. Every person has a right to preserve his property, that is, his wife, liberty and estate."

In a narrow sense, property includes a person's ownership rights, not his possessions. Ownership rights constitute his property or estate, while personal rights include his status or personal position. If viewed through the lens of the narrow sense, only land, property, shares and debts are personal property, not his life, liberty or reputation. This is the most commonly used interpretation of property in modern times. However, another interpretation and meaning of property includes only those rights that are both proprietary and real. The law of property is the law of proprietary rights. According to this interpretation, a freehold or leasehold estate or copyright also includes the meaning of property. In the narrowest possible sense, property includes nothing more than the right to own physical property or material things.

Austin believed that property can have different meanings at different times. It can be used to denote rights to the greatest enjoyment known to law except slavery or it can be life interest or sometimes even slavery. It can be the whole group of assets owned by a person including both in-rem and personal rights. Today, intellectual or intangible property has become very important. For example copyright, trademarks, property in designs and patents.

Theories of Property - Several theories have been put forward to explain the origin and justification of property.

Natural theory - According to this theory, property is based on the principle of natural reason derived from the nature of things. Property was acquired by taking possession of an ownerless object and as a result of personal labour. According to Grotius, all things were originally ownerless and whoever acquired or took possession of it became its owner. According to Pufendorf, things originally belonged to people. There was no concept of personal ownership. The need for ownership and possession arose only with time and the development of mankind. Thus the principle of possession became the basis and foundation of all property.

Metaphysical theory-This theory was propounded by Kant and Hegel. A particular thing truly belongs to the owner when it is so attached to him that any person who uses it without his consent causes him harm. But to get a better justification on the law of property we have to go beyond cases of possession where there is an actual physical connection to the object and interference is

based on personality In simple terms, property is something over which a person has the freedom to direct his will.

Historical Theory-According to this theory, private property has undergone a slow and steady growth. It evolved from collective group or joint property. There were several stages in the development of private property. The first stage of natural possession existed independently of law. The second stage of juridical possession was a concept of both fact and law. The last stage in the development cycle was that of ownership. Ownership became a purely legal concept. According to Dean Roscoe Pound, the earliest form of property was a group property. It was a matter of time that families became divided and individual property came into existence.

Positive Theory-The founder of this theory was Spencer. He based his theory on the fundamental law of equal liberty. According to him, property was the result of individual labour. No person has any moral right to the property which he has not acquired by his individual labour and effort.

Psychological Theory - According to this theory, property came into existence from man's acquisitive tendency. Every person wants to own things and this is how property comes into existence. Bentham has rightly said, "Property is nothing more than the basis of a certain expectation of obtaining some benefit in the future from a rational thing." Sociological Theory - According to this theory, property should be considered not in terms of private rights but in terms of social functions. It is an institution which secures maximum interest.

Question No. 9: Write notes on six of the following.

Answer- (1) various ways of acquiring wealth - According to Samand wealth can be acquired in many ways. There are following four main ways of acquiring wealth.

Possession - It is the objective acquisition of ownership. The possession of a physical object is the right to own it. The actual relationship between a person and an object brings with it a legal relationship as well. The person who claims a piece of land as his own and also holds it, also makes it legal through ownership. If a person holds possession of something, he cannot do so forcefully. He also has to take the help of law to prove his right. But if a property does not belong to anyone, then the person who occupies it and has possession of it has a good right over the whole world. It is just like the birds flying in the air and the fish in the water belong to the person who catches them.

Prescription-According to Salmond, "Prescription may be defined as the effect of the passage of time creating and destroying rights. It is the operation of time as a versatile effect."

There are two types of prescription- positive acquisitive prescription and negative or extinctive prescription. Prescription is not confined to rights in rem. It is found in the realm of obligations and property. Positive prescription is possible only in cases of rights which admit of possession. Most rights of this nature are

rights in rem. Personal rights usually extinguish by their exercise and cannot be acquired or acquired by prescription. Negative prescription is common to the law of property and obligations. Most obligations are destroyed by the passage of time. Possession of them cannot be associated with ownership.

Agreement - According to Patton, an agreement is an expression of a common intention by two or more persons to each other to effect the legal relations between them. It is the result of a bilateral act. It may be in the nature of assignment or grant. Assignment transfers existing rights from one owner to another. Grant denotes an assurance or transfer of ownership of property as distinct from delivery of property. There are certain agreements which require attestation and registration of the deed. There is a general rule that the title of the transferee by agreement cannot be better than the title of the transferor. This is mainly due to the fact that no person can claim a better title than the title he has cannot transfer.

Inheritance - Another way of acquiring property is through inheritance. When a person dies, certain rights pass to his heirs and successors. The rights that remain with a person are called inheritable rights. Proprietary rights are inheritable rights. While, personal rights are generally not inherited, there are exceptions to this general rule. Inheritance of a person's property can be intestate or intestate. It can be through a will or without a will. If there is a will, succession takes place according to the law. If there is no heir, the property goes to the state.

(2) Legal status of unborn person- As already stated, a person is considered a natural person from his birth till his death. Such a natural person is entitled to bear rights and duties A natural person is capable of having a legal personality, thus having a legal personality. Generally, a natural person has no legal personality before birth and after death. Therefore, for a natural person to have rights and duties, he must be alive. However, the law faces a problem when it comes to the case of an unborn child. Disciplines such as medicine and theology establish that an unborn child is a living entity. According to the legal fiction, a child growing in his mother's womb is considered already born. When he is born alive, he gets legal status. In general terms, the law pays attention only to living natural persons, but in the case of an infante vendre sa mere (baby growing in his mother's womb), the law makes an exception. A child growing in his mother's womb is capable of having certain rights and inheriting property, but it all depends on whether the child is born alive or not. An unborn child is considered a person during partition. Compensation can also be sought for the injury caused by such unborn child to its mother in the womb.

(3) Legal status of a mosque- Mosque is not a juristic person. The Lahore decision (**Maula Bakhsh v. Hafiz-ud-Din, AIR 1926 Lahore. 372**) held that a mosque is a juristic person and can sue and be sued, but in the **Masjid Shahid Ganj case (1940, 67 I.A. 251**) the Privy Council held that suits cannot be brought by or against mosques, as they are not artificial persons in the eyes of the

law. However, it left open the question whether a mosque can be regarded as a 'juristic' person for any purpose.1 In **Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee (AIR 1938 Lah. 369)** the Full Bench of the High Court held that a mosque is a juristic person.

(4) Legal status of the President of India- The post of President of India can be placed under a single corporation because after the death of the person holding this post, another person takes over the post. The real holder of any post is the person who does not die. Living officials come and go, but this person created by law always exists in the same form. The President of India is a judicial person.

(5) De facto possession - When a person possesses an object or exercises physical control over it, it is called de facto possession. In simple terms, the relationship between a person and an object is called de facto possession. De facto possession of an object is a sign of physical control over it. For example, if a person has kept a parrot in a cage, he will have possession of the parrot but as soon as the parrot flies away, the person loses his possession of the parrot.

In fact the following points are important regarding possession-

(a) Things over which a human being cannot have physical control cannot be the subject of possession. For example, the moon stars, etc.

(b) To have actual possession of an object, it is necessary for a person to have physical control over it. But this does not mean that a person always keeps the object in his actual control.

(c) Mere physical control of the thing is not sufficient for factual possession; that person must have there must also be the power to exclude the other person from that possession.

(d) To determine the acquisition, renunciation or termination of possession, it is important that the possessor has the intention to continue to hold the thing. But in exceptional cases, possession can remain even without any intention or desire.

(6) De jure possession - Possession at law is also called "de jure" possession. It has already been stated that the law secures possession for two obvious reasons, in particular, which are as follows.

(1) By granting the owner certain legal rights.

(2) By punishing the persons in possession as individuals or by imposing compensation on the holder.

Whenever a person files a suit for possession, the first thing the court finds out is whether the plaintiff had actual possession of the thing in dispute. The facts show that in most cases of actual possession there is lawful possession, but there are many cases where a person does not have legal possession even though he has actual possession of the thing.

In the legal sense, possession is used as a relative term. The law is not usually concerned with who has the best ownership; rather, it is concerned with which of the preceding groups has the better ownership.

(1) Merry v Green (1847) 7 M&W 623- In this case the plaintiff bought a table at auction and found a purse in one of its drawers. Subsequently, he discovered that the seller had some money in a secret drawer, but he had not kept it grabbed it. It was held that it was not the plaintiff's but the seller's because the element of intention for that purse was missing during the process of transfer. The seller did not intend to sell that purse and the buyer did not intend to buy that purse.

(2) Hannah v. Peel (1945) 1 K.B. 509- In this case, the plaintiff was a soldier and was asked to stay in a house and he found a brooch there. The defendant filed a suit against the soldier but the brooch was not given to the owner as he had not taken physical possession of the house and the brooch was found on the floor. The corpus element was never in favour of the owner of the house and the principle of res nulls was applicable in the manner in which the brooch was found.

(7) Difference between ownership and possession-

Base	**Ownership**	**Possession**
Meaning	Legal rights recognized by law.	Physical control without ownership.
Legal recognition	Real concept.	Real concept.
Limitation of rights	More extensive.	Limited.
Transfer	Complex processes.	Simple, often no formal documentation.
Legal remedies	Proprietary treatments are available.	Official security measures

(8) Difference between law and morality-

Base	**Law**	**Policy**
Meaning	These are a set of rules and regulations to administer justice in society and regulate human behaviour.	Morality refers to all the acceptable customs and practices that have been prevalent since time immemorial.
Original	Laws in a country are made by the legislators or lawmakers and the parliament plays an active role in this entire process.	Morality is a product of society. It is prepared by the religious leaders of the society or the family members.
Role of religion	Religion has no role in law making.	Morality can be determined based on the religion of the people in a particular region.
Uniform	The laws are the same throughout the country and it is mandatory for all people to follow them.	Morality varies from region to region depending on the beliefs of different people living in different areas.
Flexibility	Laws are more flexible than morality as they can be changed depending upon the demand of the people.	It is very difficult to change the morals because of the rigid mentality of the people in the community.
Purpose	The aim of laws is to create a civilized society with proper social order and peace.	The purpose of ethics is to teach people to distinguish between right and wrong and to protect the moral rights of others.

Punishment	A person can be punished for doing something wrong, such as paying a fine or being imprisoned.	A person cannot be punished for not following ethical standards because they are not legally binding.
Enforceability	Laws are enforced by the state on the citizens of the country.	Morality cannot be enforced by the state, and individuals are not legally bound to follow them.
Example	An example of law is the provisions of the Indian Penal Code, 1860.	An example of morality is respecting your parents and obeying them.

Question No. 10- Morality is the basis of law. Explain the importance of morality in the light of the above statement.

Answer- Law and Morality- Ever since law has been recognized as an effective instrument of social order, there has been a debate on its relationship with morality. **According to Patton**, morality or ethics is the study of the highest good. In general, morality is defined as: All kinds of rules, standards, principles or norms by which human beings regulate, guide and control their relations with themselves and with others. Both law and morality have the same origin. In fact, morality gave birth to laws. The state gave its sanction to the moral rules and enforced them. These rules were named law. In the words of Hart, the law of every modern state reflects the influence of both accepted social morality and the broader moral ideal at thousands of points. Both law and morality have the same purpose or end, as both guide the actions of human beings in such a way that maximum social and individual well-being is produced. Both law and morality have the support of social or external sanction. Bentham said that law has the same center with morality, but its circumference is not the same. Morality is generally the basis of law, i.e. what is illegal (murder, theft, etc.) is also immoral. But there are many immoral acts such as sex between two unmarried adults, lewdness, ingratitude, etc. which are immoral but not illegal. Similarly, there may be laws which are not based on morality and some of them may even be contrary to morality, such as laws on technical matters, traffic laws, etc. Morality as a criterion of law: Many jurists have observed that law must conform to morality, and a law which is not consistent with morality should be violated and the government making such a law should be overthrown.

Patton said if a law lags behind popular standards, it falls into disrepute, even if legal if the standards are too high, enforcement becomes very difficult.

Morality as the end of law: According to some jurists, the purpose of law is to do justice.

Patton said that justice is the end of law. In its popular sense, the term 'justice' is based on morality. Thus, such morality, being a part of justice, becomes the goal of justice. The goal which the Preamble of our Constitution seeks to achieve is morality.

Introduction-No distinction in ancient times: In the early stages of society there was no distinction between law and morality. In Hindu law, the main sources of which are Vedas and Smritis, we do not find any such distinction initially. However, later Mimamsa laid down certain principles to distinguish

between imperative and recommendatory orders. The situation was similar in the West also. The Greeks formulated the theoretical moral basis of law in the name of the theory of natural rights. Roman jurists recognized certain moral principles as the basis of law in the name of 'natural law'. In the Middle Ages, the Church became dominant in Europe. Natural law was given a religious basis and Christian morality was considered the basis of law.

Morality as the basis of law

Throughout history, no clear distinction has been made between law and morality. Because of the lack of distinction, all laws originated from principles considered morally correct by people in society. Eventually, the state chose the morally correct things and gave them the form of laws or rules and regulations. Therefore, law originates and is based on the values prevailing among people, creating a similarity between the two concepts, i.e. law and morality. For example, it is morally wrong to kill someone or rape someone. This value has taken the form of law. Morality has been separated from laws over time, but it remains an integral part of legal development. Law essentially consists of certain basic principles such as the principle of fairness and equality, and these principles are derived from morality and ethics.

Morality Criterion of Law- The whole purpose of the existence of laws is to ensure justice in society and to work towards the best welfare of all people. Since the principle of justice falls under the purview of morality, many jurists believe that there should be no contradiction between law and morality. Any law that does not follow moral standards should be removed and whether a law is right or wrong can be evaluated on the basis of whether it is in conformity with moral values or not.

Morality as the Objective of Law- As stated earlier, the ultimate goal of lawmaking is to maintain a society that is based on the principles of justice, fairness and equality. The whole purpose of certain moral standards is also to maintain some kind of order in society which will reduce conflicts. This shows that more or less the purpose of both these phenomena is the same. Jurists believe that if law has to remain involved in the lives of people, it cannot ignore morality. If a law is against moral standards, people may hesitate to follow it which will create more conflicts in society.

Philosophical Choices - There are broadly two theories in the development of law, which are legal positivism and natural law theory.

According to natural law theory, any grossly unjust law that violates standards of morality is not law. This means that law and morality are deeply intertwined. The term 'natural law' itself comes from the idea that human morality comes from nature and takes the form of rules and regulations in society. Legal theorists who supported the natural law theory were Augustine, Aquinas, Lon Fuller and others.

Legal positivism, on the other hand, states that the body of law is devoid of any norms of morality. That being said, this theory does not completely negate the influence of morality on laws. The theory follows the view that all laws, rules, and regulations are man-made and thus advocates the separation of laws and morality. Legal theorists who advocate legal positivism include John Austin and H.L.A. Hart.

Hart-Fuller Debate on Law and Morality - The Hart-Fuller debate is one of the most interesting exchanges of ideas and opinions between Lon Fuller and H.L.A. Hart on the interesting interdependence between law and morality. It was published in the Harvard Law Review in 1958 and highlighted the differences in views in positivist and natural law philosophies. To understand the points presented by these two thinkers, it is important to analyze their beliefs and the reasoning behind them separately.

H.L.A. Hart - Hart is a positivist and is therefore of the opinion that while there may be a close relationship between law and morality, the two are certainly not dependent on each other. Having said that, Hart believes that law has been greatly influenced by the morality prevailing in society. According to him, a clear distinction must be made between what the law should be and what it ought to be. This is where Hart brings up the problem of penumbra, which means determining the meaning of the law when it is ambiguous. Fuller, in opposition to this, said that in situations where the law is uncertain, judges make decisions based on morality, basically what should be. To this, Hart responded by saying that determining what ought to be should be understood from the legal meaning, not the moral meaning. Essentially, the interpretation of law cannot come from outside the legal world.

Challenges due to the interrelationship between law and morality- The two concepts of law and morality may differ for many reasons, but one thing they have in common is that both of them affect the way we live our lives. Both morality and law are vague concepts that do not have any fixed meaning. Both these concepts have evolved with the new ideas that have emerged over time. Nowadays, it appears that the idea of morality has started to differ from person to person. This means that morality itself has become subjective; what may be morally wrong for one may be morally right for another. When there is no fixed standard of what can be morally right, how can lawmakers make laws based on morality? The modern world is witnessing a clash between law and morality and there are many issues where both these concepts should not overlap, and new laws should completely depend on the existing legal framework. Making laws that ensure justice requires a progressive approach, which may not be completely in line with morality. To understand the conflict between law and morality from a practical point of view, the following issues can be analyzed.

The Dudley and Stephens **case R v Dudley and Stephens (1884)** is one of the most famous cases dealing with the age-old debate between law and morality. The case discussed whether cannibalism, which was considered a highly immoral act, could be committed on the question of necessity and helplessness. The facts of the case involved four men who were stranded in a boat in the middle of the ocean, far from land. The men had no way of contacting anyone and were stranded in the boat without any food and water. After torturing themselves for seven days without food and water, the captain of the ship, Thomas Dudley, came up with an unethical solution. He suggested that one of the four men had to be sacrificed so that the other three could survive by eating his flesh. Edward Stephens agreed while Ned Brooks refused to pursue the plan and cabin boy Richard Parker was not consulted. Eventually, the boy was killed by Dudley and Stephens after whom the three men ate the boy's flesh.

Question No. 11-What do you understand by vicarious liability? Determine the liability of the Government of India for the torts committed by its servants.

Answer- The law imposes certain duties on its citizens. Violation of these duties is a wrongful act. When a person violates a duty imposed by civil law as opposed to a criminal wrong or a civil wrong such as breach of contract or breach of trust, he violates tort law. Tort primarily a civil wrong is the violation of the general legal rights vested in another. In the normal course of law, the person who commits a crime incurs the punishment. However, there are certain exceptions to this general rule, one of which is the common law concept of vicarious liability. The term vicarious liability is derived from the Latin word 'vice' meaning in place of. Etymologically, vicarious liability means 'liability instead' i.e. liability incurred by one but suffered or paid by another. The word 'vicar' is synonymous with vice and means 'in person' or substitute. In the eyes of law, a person cannot be held liable for the acts of another, he will be held liable only for the tort or wrong done by him. However, under certain circumstances, a person can be held liable for discharging the liability of another person. When a person discharges the liability of another person under such circumstances, it is called vicarious liability. Vicarious liability imposes liability on a person other than the wrongdoer, which is also called imputed liability.

(1) A wrongful/criminal act or omission is done by a person

(2) There is a relationship of control between the wrongdoer and the tortfeasor.

(3) When such act or omission is directly related to the said relationship.

There are 3 types of relationships in which the concept of vicarious liability can be applied, namely, relationship between the agent and **(1) Principal -** There is a fiduciary relationship between the agent and the principal, i.e. a relationship based on trust. In this relationship, the principal appoints the agent and authorizes him to act on his behalf and discharge the duties imposed on him by the principal. The person who is so authorized to act is the agent. The authority

of the principal may be express or implied. If the agent commits a tort in the course of his employment or in the discharge of his duties, liability may also be imposed on the principal who authorized such act in the first place. Here, the principal is in a position of power and control over his agent. Therefore, both the agent and the principal are joint tortfeasors and their liability is joint and several. The plaintiff has the right to sue both or either one. In the case of State Bank of India v. Shyama Devi, the plaintiff's husband had given cheques to be deposited in his account to a friend of his who was an employee of the defendant bank. No receipt for the deposit was taken and the friend misappropriated the amount. The court held that the employee was not acting within the scope of his employment with the bank but was acting as a friend of the depositor at the time of committing the fraud. Therefore, the respondent bank cannot be held liable under vicarious liability.

(2) Relationship between master and his servant- It is a general rule of law that if a master authorises or commands certain acts to be done by his servant, the master should be held liable for any tort committed by the servant. Again, here the master is in a position of control or authority over the servant working under his supervision. The master's liability arises because he derives the benefit of the acts done by his servant.

However, the following requirements must be fulfilled to make the master liable for the acts of his servant:

Should be done-

(1) The tort was committed by a servant. A servant is a person who is required to perform all the duties assigned to him by his master is appointed to complete it.

(2) The servant committed the tort in the course of employment. An act is said to be in the course of employment if the wrongful act is expressly authorised by the principal or if it is a wrong or unauthorised way of doing something authorised by the principal.

It is pertinent to note that this liability arises even when the servant has acted against the express instructions and not for any benefit of his master. Like the agent and principal relationship, the liability of the master and servant is joint and several and both are joint tortfeasors. However, in cases where the servant acts in the course of his employment, the master cannot be held liable for his actions simply because he would not have had the opportunity to act but for having been in the service of the master. Similarly, the master cannot be held liable for the wrongful acts of the independent contractor employed by him. Like a servant, an independent contractor undertakes to carry out the work of his employer, however, unlike a servant; he is not under the supervision or control of his employer and can exercise independent discretion in discharging his duties.

Traditionally, the test to determine the difference between a servant and an independent contractor was the "control test". However, modern authorities

apply the "hire and fire" test, i.e. to test whether a person is the wage employer of another and has the right to fire his employee.

(3) Liability of Partners- The relationship between partners is that of principal and agent and the rules of agency apply to them. In a partnership all the actors act on behalf of each other while representing themselves collectively. The partnership may be in the form of a firm, company, trustee or a partner representing a Hindu joint family. Therefore, a partner can be held liable for the wrongful or negligent act of another partner under the rules mentioned in the **Indian Partnership Act, 1935**.

In **Hamlin v. Houston & Co**., one of the partners of a firm, acting within the scope of his authority, attempted to bribe the plaintiff's clerk to induce him to violate his employment contract. The court held that the other partner could be held liable for a tort committed by one of the partners.

State Responsibility - Over the last several decades, the powers and functions of the State have expanded considerably. There has been a great change from traditional laissez-faire policies to the recognition of the State as a welfare State. It is also a popular saying that "power corrupts and absolute power corrupts absolutely." Therefore, checks on the powers of the State are an essential requirement to ensure its accountability in circumstances of violation of the common legal rights of citizens by persons employed by the State. This requirement is met by **Article 300** of the Indian Constitution, which provides that the Union of India and the States are juristic persons for the purpose of any suit or proceeding and can thus sue or be sued in their name. Before the present-day Indian Constitution came into being, there was a brief mention of State liability under **Section 65** of the Government of India Act, 1858. The concept of imposition of vicarious liability on the State is essential for the performance of its fundamental duty of protecting its citizens. If such provisions were not there, no doctor in a government hospital or any police officer could be held liable for any malicious or wrongful act. Basis and justification of the concept of vicarious liability.

The concept of vicarious liability has its roots in the following Latin proverb "Quit facit per aliamfacit per se" literally meaning, "Whoever does something through another is considered in law to be doing it himself." This proverb applies in master-servant and principal-agent relationships because in this relationship one actor is specifically appointed by another to act on their behalf or to perform certain specified functions. Since they take advantage of the actions of another, they are also liable to accept any liability incurred in the performance of such actions.

Respondate Superior - Literally means, "let the superior be responsible." Here too, the master and the principal have a position of power and control by which they can direct or authorize the performance of an act. In these cases, since they

hold a position of superiority, they can be held vicariously liable for the actions of their employees.

This principle is also justified due to the following reasons-

(1) The notion that anyone who hires another to act on his behalf has "too much money" and can, therefore, be held liable to satisfy the claims of the person who has been wronged as a substitute for the actual offender. For example, in a master-servant relationship, the master may be able to satisfy the claim because of his deep pockets or his insurance.

(2) Since the owner has potential financial concerns, he will ensure complete safety and care for his employees and others.

(3) Since a person enjoys the fruits of another's labour, he must be held liable for any losses incurred. He cannot be allowed to accept the benefit and reject the burden of his labour.

Question No. 12-Law is a means of achieving justice. Explain the objectives of law in the light of the above statement do it.

Answer- The term 'law' has three primary meanings. First, it refers to the concept of 'legal order'. It refers to a structured system that regulates relations and guides proper conduct through the organized and authoritative influence of political society. It establishes a framework for resolving conflicts and maintaining order using the regulated force of the governing body.

Second, 'law' encompasses the entirety of the legal precepts that exist within a politically organized community. It comprises a comprehensive collection of rules, regulations and principles that guide the behaviour of individuals and institutions, ensuring a functioning and orderly society. This set of legal principles forms the foundation on which the operations and interactions of society are built.

Third, the term 'law' encompasses all forms of authoritative control that operate within a politically structured society. It includes not only the theoretical construction of law, but also the practical application of justice. It involves the implementation of established legal principles to resolve disputes and maintain fairness in society. This aspect of law distinguishes between the theoretical guidance provided by legal frameworks and the active execution of justice by authorities. In a narrower sense, 'law' may refer specifically to civil law or the legal rules governing a particular geographical area. This definition emphasizes the tangible and operational aspects of the legal system that govern daily interactions, disputes, and matters of social significance.

Purpose of law - Law serves several purposes, of which the four main ones are-

(1) To maintain order-Law serves as a derivative of established social norms. Just as a civilized society requires shared values, law provides a coherent framework. Enforced law ensures alignment with society's guidelines. For example, wildlife management laws protect and preserve game for future generations.

(2) Setting standards - The law sets a benchmark for acceptable conduct within society. It specifies the actions that are considered criminal, reflecting society's stance on behaviour that harms individuals or their goods. For example, causing unreasonable harm to another person is a crime, as is assault.

(3) Dispute resolution-In societies involving diverse wants, needs and values, disputes are inevitable. The law provides a formal way to resolve these disputes, often through the court system.

(4) Protection of Freedoms and Rights – Constitutions and laws provide individuals with various rights and freedoms in their respective jurisdictions. One of the important functions of the law is to protect these rights from unjust violation by entities such as governments or individuals. If someone feels that their right to freedom of expression has been violated by the government, legal recourse is available through court proceedings. These key purposes of law collectively underscore the role of law in maintaining social order, defining acceptable conduct, settling disagreements, and protecting individual freedoms and rights.

Functions of Law in Jurisprudence- The functions of law in jurisprudence have been the subject of diverse views among jurists. Law is recognized as a dynamic concept that evolves over time and place, adapting to social changes. Its contemporary interpretation places law not only as a goal but as a means to achieve a goal, such as the attainment of social justice. The consensus among theorists is that law serves as a major means to ensure justice. A view expressed by Holland on the functions of law asserts that law serves the greater welfare of society, going beyond the role of mere protection for individual rights.

Roscoe Pound identified four major functions of law: preservation of law and order, maintenance of social equilibrium, facilitation of individual liberty, and satisfaction of fundamental human needs. He regarded law as a form of social engineering, designed to optimize the welfare of both individuals and the state. Realists propose that the functions of law in jurisprudence advance the best interests of individuals and the state, acting as a regulatory force. Salmond's view on the essence of law is logical. The term "law" covers a wide range of rules and principles. It serves as a mechanism regulating human behavior, reflecting justice, morality, logic, structure, and authority within the framework of society. It also deals with legislative components such as statutes, acts, rules, regulations, orders, and ordinances. From a judicial perspective, it includes court judgments, decrees, judgments, court orders, and injunctions. This broad definition includes acts, laws, rules, regulations, orders, morality, justice, logic, fairness, court procedure, orders, judgments, injunctions, legal wrongs, legal philosophy and principles.

LL.B.-4th Sem. Paper-II Law of Insurance

Question No. 1- Define insurance. Do you agree that insurance is a contract? Briefly explain the basic principles of insurance.

Answer- Understanding the principles of insurance is important for both insurers and insured persons, as they help ensure that insurance policies are fair and effective. By following these principles, Insurers can provide financial protection to their customers, while insured individuals can be confident that they will be compensated in case of loss or damage.

There are seven such principles and they include-

(1) Principle of Utmost Good Faith - The principle of Utmost Good Faith is one of the fundamental principles of insurance. It requires both the insurer and the insured to act in good faith and disclose all material facts that may affect the decision to insure or the terms of the insurance policy. This principle is based on the belief that insurance contracts are based on trust and mutual confidence between the insurer and the insured. If either party fails to disclose material facts, it may give one party an unfair advantage over the other.

The principle of supreme good faith applies to all types of insurance contracts, including life insurance, health insurance, property insurance and liability insurance. It is the responsibility of both the insurer and the insured to ensure that all material facts are disclosed at the time of the contract. Material facts are those that may affect the decision to insure or the terms of the insurance policy. For example, if an insured person has a pre-existing illness, it is his responsibility to inform the insurer about it. Failure to do so may result in the insurer rejecting the claim in the future. In addition to the duty to disclose material facts, the principle of supreme good faith also requires both parties to act honestly and fairly during the insurance contract.

This means that the insurer must act in good faith when assessing claims and the insured must be responsible for all costs and expenses incurred by the insured must act in good faith when providing information to the insurer. The principle of utmost good faith is an essential principle in insurance. It ensures that insurance contracts are based on trust and mutual confidence between the insurer and the insured. By disclosing all material facts and acting honestly and fairly, both parties can ensure that the insurance contract is valid and enforceable. Get free quotes in minutes.

(1) Your company name (2) Your company name (3) Your name (4) Your name (5) Your phone number (6) Your phone number (7) Your work email address (8) Your work email address

(2) Principle of insurable interest - Insurable interest refers to the legal right of a person to insure a particular thing or person. It is a fundamental principle of insurance that ensures that the policyholder has a financial interest in the property or person being insured. This principle is essential because it prevents

individuals from taking out insurance policies on things or people in which they do not have a financial interest.

In the case of property insurance, the policyholder must have an insurable interest in the property being insured. For example, a homeowner has an insurable interest in their home because they have a financial interest in the property. If the property is damaged or destroyed, the homeowner will suffer a financial loss. Therefore, they have a right to insure the property to protect themselves from financial loss.

Similarly, in the case of life insurance, the policyholder must have insurable interest in the person being insured. This means that the policyholder must have a financial interest in the life of the insured. For example, a person may take a life insurance policy for his spouse because he would suffer a financial loss if his spouse dies. The principle of insurable interest is essential because it ensures that insurance policies are not taken for speculative purposes. It prevents individuals from taking insurance policies on objects or people in which they do not have a financial interest. This helps prevent fraud and abuse of the insurance system.

(3) Principle of Indemnity - The principle of indemnity is a fundamental principle of insurance which aims to compensate the insured for actual loss without giving any financial benefit to the insured. It is based on the principle that insurance is a means of restoring the insured to the same financial position he was in before the loss occurred. In simple terms, indemnity means that the insured has the right to be compensated for the actual loss suffered but not more than the amount of the loss suffered. This principle applies to most types of insurance including property, liability and motor insurance This applies to all policies. For example, if a car is insured for Rs 3,00,000 and is damaged in an accident, the insurer will compensate the insured for the actual cost of repairs up to the policy limit. If the cost of repairs is less than the sum insured, the insurer will pay only the actual cost of repairs. If the cost of repairs is more than the sum insured, the insurer will pay only up to the limit.

(4) Principle of Substitution- The principle of substitution is an essential principle of insurance that allows the insurer to assume the rights of the insured after paying out a claim. In other words, it gives the insurer the right to pursue the third party who has caused the insured the loss. The insurer can do this by taking legal action against the third party to recover the amount paid to the insured. The principle of substitution is based on the idea that the insured should not be made to pay twice for the same loss. If a third party is responsible for the loss, the insurer has the right to recover the amount paid to the insured from the third party. This principle is particularly relevant in cases where the insured has a liability policy. For example, if a driver causes an accident that result in damage to another person's car, the driver's insurance company will compensate for the loss. However, if the driver was not at fault, the insurance company can approach

the other driver's insurance company to recover the amount paid to the insured. The principle of substitution is closely related to the principle of indemnity, according to which the insured should be compensated for the amount of the actual loss suffered. By allowing the insurer to recover the amount paid to the insured, the principle of substitution helps ensure that the insured is adequately compensated for his or her loss.

(5) Principle of Contribution- The principle of contribution is a fundamental principle of insurance which states that a person cannot claim more than the amount of actual loss suffered. In other words, if a person has insured a property for an amount higher than its actual value, he cannot claim the excess amount from the insurance company. The principle of contribution applies when a person has taken more than one insurance policy for the same property. In such cases, the person is not allowed to claim the full amount of loss from both the insurance companies. Instead, each insurance company will pay a proportionate amount of loss based on the amount insured by their policy. For example, if a person has insured their car with two different insurance companies for Rs 1,00,000, and the car is involved in an accident causing a loss of Rs 80,000, they cannot claim the full amount of Rs 80,000 from both the insurance companies. Instead, each insurance company will pay a proportionate amount of loss based on the amount insured by their policy. If one insurance policy covers 60% of the value of the car and the other covers 40%, the first insurance company will pay Rs 48,000 and the second will pay Rs 32,000. The principle of contribution is designed to prevent individuals from benefiting from an insurance claim. It ensures that an individual cannot recover more than the amount of actual loss suffered and insurance companies are not required to pay more than their fair share of the loss.

(6) Principle of Loss Minimization- The principle of loss minimization is an essential principle of insurance. It refers to the steps taken by the insured to minimize the loss or damage that may occur to the insured property. This principle is based on the premise that it is the responsibility of the insured to take reasonable and necessary steps to prevent or minimize the loss or damage that may occur to the insured property. The principle of loss minimization applies to all types of insurance policies, including property insurance, liability insurance, and life insurance. In property insurance, the insured is expected to take precautions to prevent damage or loss to the insured property. For example, the insured may install fire alarms, sprinkler systems, and security devices to reduce the risk of fire or theft. In liability insurance, the insured is expected to take measures to prevent accidents or injuries that may cause claims against them. For example, a business owner may implement safety procedures and provide training to employees to reduce the risk of accidents. In life insurance, the insured is expected to take measures to maintain good health and avoid risky behaviors that may lead to premature death. For example, a person can quit smoking, exercise regularly and maintain a healthy diet to reduce the risk of

developing chronic diseases. The principle of loss mitigation is also relevant in the claim process. If the insured fails to take reasonable steps to prevent or minimize the loss or damage to the insured property, the insurer may reduce the amount of the claim or reject it altogether.

(7) Principle of Causa Proxima - The principle of causa proxima, also known as the proximate cause principle, is one of the seven principles of insurance. It states that the insurer will consider the cause of the loss or damage, and will cover the loss only if it is caused by an insured peril. In simple terms, this principle means that the insurance company will only pay for a claim if there is a proximate or proximate cause of the loss or damage.

Question No. 2- What do you understand by double insurance? What are its essential elements?

Answer- Whenever a property or liability is covered by different legally enforceable policies for the same risk, it is called double insurance. It means that when an insured person insures himself from several insurers for the same risk of the same subject matter or takes several insurance policies from the same insurer, then it is called double insurance. 'Double insurance' can be done in all types of insurance, whether it is life insurance or general insurance. In life insurance, on the occurrence of the insured event, the full amount can be recovered from each insurance policy, but in other types of insurance, on loss, an amount more than the actual loss cannot be recovered from all the policies combined because the principle of indemnity applies in them.

Essential Characteristics of Double Insurance-Double insurance will be considered only if the following characteristics are present in it-

(a) Policies with different areas-For double insurance it is not necessary that the area of policy should be same. The area of policy can be different. For example, in the case of Albison Insurance Company vs. Government Insurance Office of South Wales, it was held that double insurance can be done through motor policy and employer's liability policy. Similarly, a household policy can also cover the property of an insured which is outside the house, for example, a household policy covers the TV of an insured and can also be covered when it is taken for repair. Hence, after reaching the repair shop, this TV is also covered by the policy taken by the repairer, at that time this TV becomes subject to double policy.

(b) Same risk for double insurance it is necessary that there should be 'same risk'. Same risk means that the same interest of the same insured should be covered in both the policies. For example- in the case of North British and Mercantile Insurance Company vs. London Liverpool and Globe Insurance Company, the grain of the bailor was in the possession of bailees who were wharfinger and the grain was lost under such circumstances that the bailees were legally responsible for the loss. This grain was insured by both the parties. The bailor had taken insurance under a general property policy, while the bailees had taken floating policies. The bailees had indemnified themselves from their

insurers. Thereafter those insurers demanded contribution from the bailor's insurer. The Court of Appeal held that there was no right to contribution because both the policies covered different interests. Since in the above circumstances the bailees suffered a loss and due to this their insurer suffered a loss, if the bailee's insurer had paid the insured amount to the bailee, then he could have substituted the bailee's right to claim the bailees. Therefore, where there is no contribution, whenever there is a loss legally, it should be borne by only one insured person.

(c) Same insured person - For 'double insurance' it is also necessary that all the insurance policies relate to the same insured person. If two persons have separate interests in a property for which each has taken separate insurance, then it will not be double insurance. As is clear from the decision of the North British case, not only should the same interest be insured again but in fact the insured person should also be the same. But according to John Bird's opinion, there should be such a law that there is no need to have a single insured person to get the benefit of contribution. The benefit of contribution should be available even in such a situation where an insured person has the right to get benefit from another policy even though that insured person is not insured under that policy and hence is not entitled to file any kind of suit on the basis of that policy.

Conditions Relating to Double Insurance- There are certain conditions relating to double insurance in indemnity policies which are important to note.

It has importance and can be divided into two categories.

(a) Conditions releasing from liability- Such conditions may be of the following nature-

(1) This insurer shall have no liability to that extent if the insured is indemnified by another insurance policy.

(2) If the insured is entitled to receive his claim under any other policy, the insurer shall be responsible for that claim there will be no liability.

It is clear that if such a clause is there in the policy of one insurer and there is no such clause in the policy of the other insurer, then there will be no problem for the policyholder and in a way it will not be a situation of double insurance which will not cause any harm There may also be trouble. But if both the insurers mention this in their policies then it will be a problem for the insured. In Gayle vs Motor Union Insurance Company, A was driving B's car at the time of the accident.

A had his own insurance policy and was to be indemnified by it even in a situation where he was driving someone else's car with his permission/consent. Along with this, A was also to be indemnified by B's motor policy under which B's car was insured in case any authorized driver drove it and such authorized driver was also entitled to indemnity. But it was written in both the policies that in case of any other insurance, the insured will not be liable. At the same time, the terms of proportional part were also written in both the policies. In such a situation, Justice Roche decided that the terms of excluding liability in both the policies

were not clear and they could be considered meaningful for such a situation when the other policy provides complete protection. But here the proportional part clause was there in both the policies, neither of them provides complete protection, hence the terms of excluding liability of both the policies were not applicable in the said situation and both the insurers were liable on the basis of the clause of proportional part.

Bedell v Road Transport & General Insurance Co. It is not in every case that the existence of these separate contribution clauses gives rise to contribution claims because in some cases the clauses may not apply, or be in conflict, or cancel each other out. Judicial authority shows that the courts generally abhor contribution clauses which seek to avoid liability from other insurers and will usually hold that such other insurance clauses will cancel each other out and both insurers will be liable to contribute to the loss. **In Bedell v Road Transport & General Insurance Co. Ltd. (1932)**, the trial judge held that, "The proper construction is to exclude from the category of co-existing cover, any cover which is expressed to be itself cancelled by such co-existence, and in such cases to hold that both companies are liable, subject of course to any rateable ratio clauses which may be in place in both cases." In the Canadian case of Northbridge **General Insurance v Aviva Insurance (2022)**, the Ontario Court of Appeal held that where two policies each contained a clause making them excess if any other insurance existed, the two excess clauses were irreconcilable and self-cancelling and a contribution could be claimed by the paying insurer. John Birds of Modern Insurance Law stated that, “It has now been conclusively settled in **Commercial Union Assurance v Haydon (1977)** that the independent liability approach is the legal basis for liability insurance. In that case the insured had taken out a public liability policy with Commercial Union CU with a maximum limit of £100,000. The insured also took out another public liability cover with Haydon, a Lloyd’s underwriter, with a maximum limit of £10,000. The claim settled for £4,425 and was paid by CU, who claimed a contribution from Haydon on the independent liability method for 50: contribution. Hayden argued that the maximum liability method should be applied and that they were only liable for 1/11th of the loss and the contribution should be £4,023 and £402 respectively. The High Court applied the maximum liability method in favour of Hayden, but on appeal the Court of Appeal to C.U.

Agreed and applied the independent liability system. (c) Apart from making the condition of giving information ineffective in case of double insurance, such conditions are also kept in some policies that in case the policy is considered ineffective in case the policyholder does not give information about the double insurance. Such policies usually relate to fire or property. But even in such a situation, the courts give decisions on the basis of judicial principles and not on the basis of the technical meaning of the wording. This position can be clarified by the following cases.

In the case of Australian Agricultural Company v Saunders these clauses provide that the policy will be void unless the insured gives notice in writing to the insurer of the existence of other insurance covering the same risk. Generally this will mean that if the property insured is previously or subsequently insured elsewhere the claim will be recoverable unless the details of such insurance have been notified in writing to the company.

Question No. 3- Insurance is just a cooperative method of distributing a specific risk among a group of people affected by it. Explain this statement.

Answer- From the viewpoint of functions of insurance, the meaning of insurance is "Insurance is just a cooperative way of distributing a specific risk among a group of people affected by it." If we interpret this statement, then in the words of R.S. Sharma, "The function of insurance is to distribute the loss among innumerable people through the process of cooperation; those people have formed a single policy.

Covered a particular type of risk, in which those people when faced with a particular risk if there is a loss, share it amongst you."

Maclean also says - "Insurance is a method of distributing the potential financial loss which cannot be easily borne by a single person, among a large number of people."

Therefore, after looking at these definitions, it is clear that such a social function of insurance, through which mainly the following objectives are fulfilled in relation to the policyholder -

(1) To provide individual economic security,
(2) To provide mental strength and security,
(3) Provides assistance in business,
(4) To provide economic stability to commerce, industry and the community,
(5) Serving as the basis of credibility,
(6) Contribute to the reduction of losses.

The ancient system of insurance, which was aimed at providing social/economic security, gradually transformed into a business in which there were two pre-determined parties involved, one party which took the responsibility to compensate the other party in case of loss in case of any risk occurring and the other party which was compensated by the first party in case of loss occurring. The party which took the responsibility to compensate was called the insurer and the party who was compensated was called the insured. Thus, now the insurance system has transformed into a contract. Hence, in the present times, 'insurance' is defined as 'contract of insurance'.

Question No. 4- Explain the nature of reinsurance and the similarities and differences between reinsurance and original insurance. Explain their types and the method of reinsurance.

Answer- The insurer believes in the principle that the premium charged by the insurance contract will be sufficient to meet the liabilities of many risks in the given time. But the acceptance of insurances of large amounts which are required in the course of business puts this principle in danger and in such a case it is natural for the insurer to re-insure a part of the risk liability with another insurance company. This is called reinsurance.

Reinsurance, also known as "insurance for insurance companies", is a contract between an insurance company (the acquirer) and a reinsurance company where the acquirer transfers part of its risk to the reinsurer. The reinsurer then assumes all or part of one or more of the acquirer's insurance policies.

Nature of Reinsurance - Reinsurance is a contract between an insurance company (ceding company) and a specialized company (reinsurer) that allows the ceding company to transfer part of its risk to the reinsurer. The reinsurer then assumes some or all of the risk for one or more of the ceding company's insurance policies in exchange for a premium. Reinsurance is also known as 'insurance for insurance companies'.

Reinsurance can help stabilize the insurance market and make coverage more affordable and available.

It can also help insurers-

(1) Remain solvent: by recovering some or all of the amounts paid to claimants.

(2) Reduce risk: by reducing the risk to the primary insurer and freeing up capital to issue new policies.

“Reinsurance is the transfer of risk reinsured to the original insurer in return for a fixed premium under a reinsurance contract” Undertakes to indemnify against the liability of."

Similarities and differences between reinsurance and prime insurance

(a) Equality-

(1) A policy of reinsurance is generally governed by the same rules as the original policy of insurance. For example, if a policy of marine insurance provides for reinsurance only in respect of fire, it will be governed by the rules of marine insurance. Similarly, the answer to the question "whether the company has the right to contract reinsurance" depends on whether it has the right to contract insurance in respect of the same subject matter.

(2) Both contracts of insurance and reinsurance are contracts of good faith.

(3) The same rules regarding misrepresentation and non-disclosure apply in contracts of insurance and reinsurance.

(4) A warranty has the same effect in a contract of reinsurance as in a contract of original insurance.

(5) The doctrine of insurable interest also applies to contracts of reinsurance. A contract of insurance gives the insurer an insurable interest which enables him to reinsure up to the full amount of his liability under the original policy. French

authorities held that if the insured has no insurable interest, his insurer also has nothing to reinsure.

(b) Differences - To this extent the similarity between insurance and reinsurance is very close, but there are certain provisions in substantive insurance which are not applicable in reinsurance. As in Home Insurance of New York the same has been considered in the case of Victoria-Moctrial Fire. In this case, a contract of reinsurance was made on a fire policy and some special conditions of reinsurance were added to it. The Privy Council held that the condition in the original policy limiting the claim to those who started within 12 months of the fire did not apply to the contract of reinsurance because the original insurer cannot make a claim against the reinsurer until the actual loss has been determined between the two parties (the insured and the original insurer) over which the reinsurer has no control and cannot interfere in those proceedings.

(1) The date of determination of indemnity is different in original insurance and reinsurance. In fact, when the physical loss occurs in the period specified in the reinsurance policy, no liability arises under it until the amount fixed to the insured under the original policy has been determined. The indemnity under reinsurance should be determined only after the amount fixed to the insured has been determined and not on the date of loss as is the case in case of other indemnity policies.

(2) Another difference between original insurance and reinsurance is that if the original insurer becomes insolvent, the reinsurer still has the right to receive compensation from the reinsurer even if it does not have to make any payment to the original policyholder, even when the original policy expresses an obligation to pay only what it receives.

(3) In the event of insolvency of the original insurer the reinsurer has to make full payment and not just the amount the insured is entitled to receive from the original insurer.

(4) A change in the terms of the original policy releases the reinsurer from its liability under the policy.

(5) The insured may not be obligated to tell its insurer about its deficiencies, but the reinsurer may be obligated to tell its reinsurer whatever it knows about it (the first insured).

(6) The re-insured does not have the advantage of not knowing that the material representations were incorrect. Thus, where the insured describes himself in a life policy as "a civilised person" and his insurer re-insured his life insurance against accident on that representation, his claim was held to be ruinous because the first insured was in fact a motor car driver.

Types of Reinsurance - Generally there are two types of reinsurance-

(a) Co-insurance or Original Insurance Insurance - Co-insurance occurs when two or more title insurance companies (called co-insurers) proportionately insure a given transaction using separate title policies or a single title policy with a co-insurance endorsement. The amount of risk is shared in proportion to their allocated insurance amounts.

(b) Risk premium or Annual Renewable Term Plan-Renewal premiums are the subsequent premiums which are paid by the policyholder to the insurer to keep the policy in force and to avail the policy benefits accordingly. Description: If a policyholder fails to pay the premium, his policy lapses after the grace period.

Method of Reinsurance although there are two main methods of reinsurance-

(a) Facultative Method- Facultative reinsurance is coverage purchased by a primary insurer to cover a risk or a group of risks that are held in the primary insurer's book of business. Facultative reinsurance is one of two types of reinsurance (the other type of reinsurance is called treaty reinsurance). Facultative reinsurance is considered more of a one-time transactional deal, while treaty

(b) Treaty System- Reinsurance is usually a part of a long-term arrangement of coverage between two parties. Under international law, an agreement or contract between two or more countries or other international organizations is called a treaty. Its form is similar to a contract and according to which mutual legal rights and responsibilities are created between the concerned parties.

Question No. 5- By what methods can an insurance contract be discharged? What is the claim for the sum insured on the death of the insured? How is settlement done?

Answer- An insurance contract may be originated in the following manner-

(1) By agreement. - The contract subsisting between the insurer and the insured or the policyholder may be discharged in various ways by mutual agreement between the insurer and the insured or the policyholder and the policyholder may make the policy paid up or accept the surrender value thereof, or the endowment value of a whole life policy may be converted into a endowment policy. Such converted contract shall be a novation. In accepting paid-up and surrender value the insurer may accept the premium by waiving any breach of assurance by the policyholder. But the insurer cannot cancel the contract in a suit on the ground of the same breach of assurance.

(2) By the impossibility of performing the contract- when the circumstances are such that they are beyond the power of the parties and they cannot perform their part of the contract i.e. the contract becomes impossible to perform If, for example, a war breaks out between the countries of the insurer and the insured, the contract becomes void under any law of their countries, then the contract becomes discharged.

(3) By breach of contract- When one party to a contract breaches the contract, the other party can cancel the contract. When the policyholder does not pay the premium, the insurer can refuse to take the risk. If the policy does not reach the paid-up status, the insurer can refuse to evaluate the surrender value of the policy, because in that case the policy becomes a sinking debt.

(4) By performance of contract- Performance of the contract by both the parties is the positive aspect of discharge of a contract i.e. the real intent and purpose of the contract remains its performance. Payment of all premiums by the policyholder and payment by the insurer of the sum assured at the end of the term of insurance or payment to the nominee or heir on the death of the policyholder is discharge by performance of contract.

Settlement of claim for sum assured on death of the insured - In settlement of such claim the insurer requires the following evidence-

(1) Proof of Death - A claimant has to fill up four types of forms from the insurer for proof of death:- Form A- occupation of the claimant, his relationship with the deceased, place and date of death of the deceased insured, period of the last illness, details of other policies of the insured, if any, doctors consulted by the deceased during the last three years.

Form 'B'- Last Physician's Replies which contains the answers to questions relating to the death of the insured and are filled out by the physician any other information given.

Form 'C'- Certificate of burial or cremation.

Form 'D'-Certificate of Identity.

Form 'E'-Proof of last employer if the deceased was in employment at the time of death.

Presumption of death can also be made under **Section 108** of the Act. In times of war, the certificate of death of a soldier is issued by the military officer.

(2) Proof of title.- Where a nomination is made in a policy on the death of the insured, the person nominated is entitled to receive the sum assured if the policy has been assigned. In its absence, any legal representative shall be entitled. In case of several rival claimants, the insurer shall deposit the sum assured in the court of the place where it is to be paid.

(3) Proof of age- At the time of issuing the policy or immediately thereafter, the insurer demands proof of age from the policyholder. If the age has been accepted on such proof, then there is no need for proof of age at the time of death claim. If the age has not been accepted till the time of death, then it will be mandatory to submit proof of age. Then the following proofs can be accepted-

(1) Certificate from the Birth and Death Registration Department,

(2) Birth horoscope,

(3) Conversion certificate, if it contains date of birth,

(4) School or college certificate,

(5) In case of employment, a copy of extract from service book; residence certificate,

Question No. 6 - Explain the statement "Fire insurance is a contract of indemnity as well as a personal contract."

Answer: General insurance business includes marine insurance, fire insurance and miscellaneous insurance business as per the definition given in **section 2 (6-B)** of the Insurance Act, 1938.

Sub-section (6-A) of Section 2 of the Act, instead of defining fire insurance, defines fire insurance business. According to this, fire insurance business means the business of entering into insurance contracts against loss caused by or in connection with fire or other events which are included in the risks usually insured against in fire insurance policies, other than any other class of insurance business incidental to it.

In the above definition the expression "in addition to and ancillary to any other class of insurance business" means that if there is any other class of insurance business (like marine insurance or motor insurance) fire insurance shall not be treated as business.

Fire insurance is primarily a contract of indemnity. Its objective is to compensate the insured for the loss caused to the insured's property by fire. Like marine insurance, no separate act has been made for fire insurance in India and the law related to fire insurance is determined on the basis of the principles of law laid down by the English and Indian courts and the conditions given in the various types of policies issued in the context of fire insurance. Along with this, since the policy related to fire insurance is also considered a standard contract, Therefore, it is also determined by the general principles of contract described in the Indian Contract Act, 1832.

Types of fire insurance- The terms and conditions of the policies issued relating to fire insurance are made on the basis of the tariffs prepared by the Tariff Advisory Committee and the following three types of policies are found in general circulation-

(1) Fire Insurance Policy 'A' (2) Fire Insurance Policy 'B' (3) Fire Insurance Policy 'C'

The above mentioned policies have been classified according to the risks covered by them, apart from these, different types of policies are issued according to the special needs of the policyholder, which are called special policies, such major special policies are as follows-

(1) Restoration value policy- Under the restoration value clause, the damaged property will be replaced with a new property of similar quality. This type of insurance empowers businesses to replace damaged property without putting any financial strain on their resources and is quite popular among building owners and industrialists.

(2) Informational Policy - Issued for stock whose quantity is subject to large fluctuations. This policy is issued under special regulations prescribed in the Tariff and with the permission of the regional office of the insurer.
(3) Temporary Policy - Issued to cover risks situated in more than one specified building for the same sum insured.
(4) Special policy for building under construction.-Such a policy can be taken only during the construction of a building and at the time of installation of machinery, plant and equipment in a newly constructed building, on any of the following grounds-
(1) Policies are issued in exchange for payment of premium.
(2) Policies are issued for the estimated full value of the building.
(5) Consequential Damage Special Policies- Such policies are also called profit or loss policies and cover only the basic issued in conjunction with fire insurance.
Question No. 7- What is assignment of policy? Explain. How is it accomplished?
Answer- Assignment - Assignment is a statutory right of the insurer, under which the insurer transfers its life insurance policy to any person in a proper manner.

The person who transfers his interest, title and rights contained in the policy is called the 'assignor' and the person in whose favour the title and rights contained in the policy are transferred is called the assignee and the transaction is called 'assignment'.

All assignments of life policies are regulated by **Section 38** of the Insurance Act, 1938. Section 38 provides the following rules for assignment-
(1) The assignor must be of adulthood and of contractual capacity.
(2) The assignor must have full right and interest in the policy which he is assigning.
(3) The assignment must be for lawful consideration.
(4) The assignment must be in writing, signed and witnessed by a witness.
(5) The assignment may be made by endorsement or by a separate instrument. In the case of a separate instrument, the stamp duty must also be levied.
(6) It is necessary to give notice of the assignment, notice may be given by the assignee himself.
(7) The insurer acknowledges the notice in writing and records the fact of the assignment in his books.
(8) The rights and obligations under the policy vest in the assignee from the date of assignment. The assignor cannot cancel or alter an assignment executed.
Question No. 8- Define marine insurance contract. Explain the rules related to insurable interest in this contract. Loss what do you mean by it happened or not?
Answer- Marine insurance is mainly of two types,

(1) Cargo Insurance (2) Body Insurance

The standard conditions of insurance for both are determined by standard terms framed by the Institute of London Underwriters and accepted internationally, known as Institute Clauses, which are made integral part of the contract of insurance by being attached to the policy of marine insurance.

Marine insurance in India is governed by the provisions of the Marine Insurance Act, 1963.

Definition - Section (13A) of the Insurance Act, 1938 separately defines 'marine insurance business' and according to this definition- "marine insurance business means the business of entering into all such insurance contracts-

(1) A ship is sailed for the carriage of goods, freight or any other insurable interest, or

(2) which covers the risks incidental to the transit of goods, whether the goods are transported by land or by water or which covers other risks incidental to warehousing and transit, or

(3) Covering such other risks as are customarily covered by marine insurance policies."

Till the year 1963, the law related to marine insurance was based on common law and the business related to it was governed by the Marine Insurance Act, 1906, and the (Indian) Insurance Act, 1938, but after the enactment of the Marine Insurance Act, 1963, marine insurance in India is now governed by this Act only.

Section 3 of this Act defines 'contract of marine insurance' as follows-

"A contract of marine insurance is an agreement by which the insurer undertakes to indemnify the insured in such manner and to such extent as may be agreed upon against marine losses, that is to say, losses which are incidental to marine risk."

The essential elements of a marine insurance contract are as follows:

(1) A 'marine insurance contract' is for the purpose of indemnifying the insured.

(2) Such compensation is made against marine losses.

(3) Such contract specifies the manner and limits of indemnity which the insurer undertakes to meet.

Condition relating to insurable interest under marine insurance contract- Condition No. 11 of Institute Cargo Clauses 'A', 'B', 'C' stipulates the following regarding insurable interest-

(1) In order to recover under this insurance the insured must have an insurable interest in the thing insured at the time of the loss.

(2) Subject to the above condition the insured shall be entitled to recover the loss insured during the period covered by this insurance notwithstanding that the loss occurred before the contract, except where the loss is known to the insured and not to the insurer.

Therefore, it is clear that in general insurances, the insurable interest should be present both at the time of taking insurance and at the time of loss, but it is clear from the above mentioned condition (1) that insurable interest is necessary only at the time of loss. The second condition puts the responsibility on both (insured and insurer) that if the policy has been taken on the basis of 'loss has occurred or not', then if the insured knows that the loss has occurred, then the contract will be void and in Section 8 of the Indian Marine Insurance Act, 1963, it is stated that the insurable interest of the insured must be present at the time of loss. Therefore, the following are the rules regarding marine insurance-

(1) The insured must have an interest in the property at the time of the loss.

(2) The insured need not have an interest in the property at the time of insuring.

(3) Where the insured insures under a condition whether the loss occurs or not, it is not necessary that the insurable interest exists at the time of the loss provided that the insured is not aware of the loss at the time of executing the contract of insurance.

(4) If the insurable interest of the insured has not arisen at the time of loss, he may no longer avail of the benefit of insurance after the loss, the insurer cannot get the insurable benefit in any way.

Question No. 9- Discuss the structure and functions of IRDA. Also evaluate its functioning.

Answer- Establishment of Insurance Regulatory and Development Authority (IRDA)- According to **Section 3** of Insurance Regulatory and Development Authority Act, 1999, the Central Government established an authority from 1st July 2000, which is called 'Insurance Regulatory and Development Authority'. It is a corporate body which will have perpetual succession. It will have the right to buy, keep and sell movable and immovable property. It will have its own seal. It will have the right to enter into contracts and sue on them. Its head office has been established in New Delhi. The Authority can establish its offices anywhere in India.

The main objective of this Act is to regulate, promote and ensure the growth of the insurance business and to look after matters connected therewith or incidental thereto.

Section 4 Composition of the Authority - The Authority shall consist of a Chairperson and not more than five full-time members and not more than four part-time members.

They shall be appointed by the Central Government from amongst persons who have experience or knowledge of life insurance, general insurance, actuarial science, finance, economics, law, accountancy, administration or any other special discipline which in the opinion of the Central Government will be useful to the Authority.

Objectives of the Insurance Regulatory and Development Authority- According to the Malhotra Committee, the objectives of this authority were as follows-
(1) To ensure the conduct of insurance business.
(2) To promote and ensure ease of choice among a wide range of insurance products and insurers.
(3) To ensure affordable, need based insurance products for vulnerable sections and rural areas.
(4) To provide support to domestic business and reduce foreign exchange outflows.
(5) To protect the lawful rights and privileges of policyholders.

The functions and powers of the Insurance Regulatory and Development Authority are as follows-
(1) To safeguard the interests of the insured,
(2) To improve efficiency in the conduct of insurance business.
(3) To levy fees and other charges for carrying out the purposes of this Act. To resolve disputes between insurers and intermediaries.
(4) To supervise the work of the Tariff Advisory Committee.

Therefore, it is mandatory for any institution which wants to run insurance business to obtain a certificate of registration from the Authority, because without getting this certificate, no institution can do insurance business (**Section 3**). But any person or insurer is doing insurance business in India before or after the commencement of the Insurance Regulatory and Development Authority, 1999, for which no registration certificate was necessary before its commencement or now he may continue to do so for three months from such commencement or if he has applied for such registration within such three months, then he can continue till the application is finalized. If a person has not obtained a certificate of registration, then he shall have the security obtained from the Authority as per the provisions of this Act.

A company carrying out insurance business without registration can be fined up to Rs 5,00,000 and punished with imprisonment of up to three years.

Question No. 10- Write in detail on the need and importance of social insurance.

Answer- Nature and Definition of Social Insurance- Social insurance is a form of social welfare that provides insurance against economic risks. Insurance may be provided publicly or by subsidizing private insurance. Unlike other forms of social assistance, individuals' claims are partly dependent on their contributions, which may be considered insurance premiums, to create a common fund from which future benefits are paid to individuals.

Thus, the contribution made for social insurance can also be seen as the price paid by the members of the society to keep the society dynamic and vibrant.

Economist Adam Smith also said that "we contribute to the general good by acting in our own interests with due regard to the interests of others."

But Henry Rogers Caesar, an economist at Columbia University, wrote in his book Social Insurance that there are many functions besides individual interests that require a collective and cooperative spirit. The United States passed the Social Security Act in 1935. Social insurance was very successful in the United States and in other countries, such as Sweden.

Underlining the need for social insurance, George Saros, the famous international investor, has described cooperation as as important as competition and has expressed the possibility of disintegration of society in its absence.

The right to social security is an important human right mentioned in the Universal Declaration of Human Rights declared by the General Assembly of the UN on 10 December 1948. According to this declaration, every member of the society has the right to social security and is entitled to receive it according to the resources of the respective state.

The International Labour Organisation has also recognised the need for social security benefits since 1919. Universally accepted principles were formulated by it to guide the world in the field of social security. Of these, the principle of determining the minimum level of social security is of utmost importance. Minimum levels of benefits have been determined in the event of illness, unemployment, old age, death, injury during work, disability etc.

Hence, it is clear from the above study that we get social security through social insurance. Insurance taken for a special purpose provides special security. This security is in the form of financial assistance, along with it, it also maintains a strong emotional bond of the members with the society due to which they do not hesitate in taking necessary risks for the society and thus make a special and necessary contribution in the progress of the society.

Question No. 11- Write notes on four of the following.

Answer – (1) Nomination – Nomination is a very common and unique method of getting the sum assured after the death of the insured.

Section 39 of the Insurance Act, 1938 provides for nomination. Section 39 gives the right to the policyholder to nominate one or more persons at the time of taking an insurance policy on his life or even before the policy matures for payment, for the purpose of receiving the insurance money available under the policy in the event of the policyholder's death.

The nominee is the legal representative of the policyholder. After the death of the policyholder, when the insurer pays the insurance money to the nominee, the insurer is legally discharged. Nomination can be done in two ways-

(a) By writing the name in the proposal letter

(b) By endorsement, provided notice of the endorsement is given to the insurer and the insurer registers the nominee.

The policyholder has the right to cancel or change the previous nomination at any time. As long as the policyholder is alive, the nominee has no rights in the insurance policy.

(2) Workmen's Compensation Insurance- At present, Workmen's Compensation Insurance is playing an important role in compensating the employees. This Insurance Act provides for the legal responsibility of one person to compensate for the loss caused by another person. Three types of policies have been provided in the tariff of Workmen's Compensation Insurance Scheme, which are as follows-

(a) Table 'A' Policy
(b) Table 'B' Policy
(c) Table 'C' Policy

Under Table 'A' policy the insured is covered for the legal liabilities of workers under the following Acts-

(1) The Workmen's Compensation Act, 1923
(2) The Fatal Accidents Act, 1855
(3) General method

Under Table 'B' policy the insured is covered for the legal liabilities of the workers under the following Acts-

(1) The Fatal Accidents Act, 1855
(2) Under the common law

(3) Subrogation - The principle of subrogation generally confirms compensation, it is its co-principle. Subrogation

Subrogation means taking the position of others. According to the principle of subrogation, after giving compensation, the insurer takes the position of the insured, that is, if the insured has the right to get any compensation from other parties for that loss, then this right goes to the insurer. The purpose of the principle of subrogation is that the insured, by exercising his legal rights, should not be able to get more amount than the actual loss of the insured subject under any condition. Like the principle of compensation, the principle of subrogation also

It does not apply to life insurance or personal accident insurance, it applies only to indemnity contracts. In the case of Oberoi Forwarding Agency vs New India Insurance Co. Ltd. it was said that subrogation is to substitute another person in place of a person.

Therefore where the insurer is included in the rights and remedies of the insured the insurer must be in the same position as the insurer in respect of third parties and his claims against them in cases of motor accidents must be based on tort liability. But it should be noted that the fact that the insurer is included in the rights and remedies of the insured does not automatically enable him to sue third parties in his own name. It will only entitle the insurer to sue in the name of the insured, as it is the duty of the insured to lend his name and assistance in such

action. By substitution, the insurer does not get any better right or any different remedy than the insured. Substitution and its effect should not therefore be confused with a transfer or assignment by the insurer of his rights and remedies to the insured.

Section 79 of the Indian Marine Insurance Act, 1963 contains provisions regarding subrogation. In the case of Castleden v Preston, J Bretrous also stated that "a person who is indemnified for the entire loss is liable to pay the compensation due to the loss suffered by him." He is not entitled to get both types of benefits. If he has any means by which his loss can be reduced then the insurer will have the right to use this means.

(4) Main Cause Doctrine - In an insurance contract, specific types of risks are insured. Under a fire insurance policy, the insurer will be liable to indemnify only those losses which are caused by the perils mentioned in the policy. If the loss is caused by any such peril which is prohibited in the policy, that is, which is not insured, then the insurer cannot be held liable for that loss. The same thing applies to indemnity insurances, like marine insurance, motor insurance and other types of accident related insurances, whenever there is a loss of the insured subject matter, then it is determined up to what extent the insurer will be liable. The direct cause of the loss can be known if the direct cause of the loss is the insured peril or not, if the cause of loss is any insured peril, then the insurer will be liable for compensation. Ultimately it can be said that "Look at the proximate cause, do not look at the remote cause". This means that if there are many reasons for the loss of the insured subject, then we should ignore those reasons which are remote or important. The one which is the direct effective cause of the loss will be considered effective.

(5) Settlement Insurance Policy - In insurance contract, specific types of risks are insured. Under the fire insurance policy, the insurer will be responsible to cover only those losses which are caused by the disasters mentioned in the policy. If the loss is caused by any such disaster which is prohibited in the policy, i.e. which is not insured, then like term insurance, it is also issued for a fixed period for that loss, but it is issued for a longer period than term insurance and under this, payment is usually certain. Its following types are as follows-

(1. General
(2) Limited payment
(3) Delayed
(4) Double
(5) Pure

Special policies of Endowment Insurance Policy- Life Corporation has launched many special policies on the basis of Endowment Insurance Policy.

(6) Joint Policies have been started, the main ones of which are as follows-

(1) Marriage Endowment Policy

(2) Child Delayed Endowment Policy
(3) New Child Delayed Endowment Policy
(4) Child Prospective Policy
(5) Refund Policy
(6) Public Defense Policy
(7) Life partner policy
(8) Jeevan Mitra Policy
(9) Future Life Policy
(10) Pragati Protection Policy

Life Insurance Certificate- In life insurance, the sum assured is payable only on the death of the insured, the insured cannot receive this amount himself. Life insurance policy is suitable for those who want to arrange a certain amount of money to gift or donate to someone for paying estate tax for family protection after their death. The premium rate of life insurance policy is less than endowment insurance; hence life insurance is considered the cheapest insurance for family protection. Life insurance policies

Mainly consists of four-

(1) Ordinary whole life policy
(2) Limited Pay Whole Life Policy
(3) Variable Whole Life Policy
(4) Anticipated Whole Life Policy

(6) Insurance Contract - Insurance is a business based on contract. According to this contract, one party undertakes to provide protection to the other party from the ill-effects of accidental events. In an insurance contract, the party taking the risk is called the insurer and the other party is called the insured. The consideration given by the insured is called premium. The document in which the terms of the contract are written is called the policy. Meaning, insurance is a contract between two parties in which one party who insures is called the insurer and the other party who gets the insurance done is called the insured or the insured person. The fixed consideration given to the beneficiary is called premium In return for the insurance, the insured promises to pay a certain sum of money on the occurrence of a specified event against which the insurance is being provided.

General Contract - Insurance is a contract and it contains all the essential elements of Section 10 of the Indian Contract Act 1872. In an insurance contract also, free consent of both the parties and the insurance contract being eligible is necessary. In an insurance contract also, it is necessary to have a valid reward and a lawful purpose, there will not be any such insurance contract which is prohibited by any law at that time. An insurance contract is like a general contract.

The following elements are necessary for a valid contract which are contained in **Section 10** of the Indian Contract Act, what is a valid contract, how is it determined, who can enter into a contract, how is the contract followed, under what conditions the contract is breached, what will be the consequences of breach of contract, etc. In an insurance contract, it is necessary to follow the basic rules of a general contract. Which are as follows:-

(1) Proposal and acceptance
(2) Free consent
(3) Qualified party
(4) Legitimate purpose
(5) Legitimate consideration
(6) The contract must be in writing

LL.B.-4th Sem. Paper-III Transfer of Property Act, 1982 and Indian Easement Act, 1882

Question No. 1- Define selling and describe its essential elements.

Answer: According to Section 54 of the Transfer of Property Act, 1882, "Sale is the transfer of ownership in exchange for a price which has been paid or promised to be paid or a part of which has been paid or promised to be paid."

How is a sale made? - Such transfer, in the case of immovable property of the value of one hundred rupees or more or in the case of any heirloom or other intangible, can be made only by a registered instrument.

In the case of tangible immovable property worth less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller hands over possession of the property to the buyer or to a person specified by the buyer.

Contract of sale- A contract of sale of immovable property is a contract that the sale of immovable property will take place on the terms agreed between the parties. It does not by itself create any interest in or any burden on such property.

G. Hampamma v. Kasthigi Sajivalda Kalingappa AIR 1990 Sale price is transfer of ownership. In other words, for sale, ownership must be exchanged for price.

In the case of **Khiria Devi vs. Rameshwar Rao AIR 1992**, the Supreme Court held that the right to re-convey under the contract of sale was transferred by the impugned sale deed.

Essential elements of sale - Section 54 defines sale as the transfer of ownership in exchange for a price which has been paid or promised to be paid or a part of which has been paid and a part of which has been promised to be paid.

Sale is a transfer of ownership in exchange for a price. Thus, sale is a transfer of ownership from one person to another. "Transfer of ownership" by a person means that the person transfers all rights and interest in the property completely and permanently. In other words, the interim-seller transfers the property to the buyer.

From the analysis of the above definition given in the section, the following essential elements emerge:

(1) Parties- There is two parties in a transaction of sale. The party who transfers is called the seller and the one who accepts this transfer is called the buyer. In common language, they can also be called transferor and transferee, that is, the seller is the transferor and the buyer is the transferee. The seller is the person who sells or sells the property. It is also necessary for the seller to be a competent person.

According to **section 7** of the Act, a competent person is a person who-

(a) Should be an adult, (b) should be of sound mind, (c) should have the right to sell the property i.e. the person should be the owner of the property or should have the authority to dispose of the property.

Further, the buyer can be any person who has the capacity to purchase the goods or property and is not ineligible under **Section 6(j)(iii).**

In the case of **Mohri Bibi vs. Dharmadas Ghosh** it has been said that a minor cannot sell the property because he is not competent to enter into a contract. **(1930) 30 Kolkata 539**, while a minor can be a transferee i.e. a buyer.

A case of **'Labanya Singh vs. Tapoi Singh' (AIR 2003 Orissa 155)** regarding the health of the seller good case.

In this, a sale deed was executed by an illiterate woman and registered. According to the person who prepared the deed and the witnesses, i.e. the persons who attested, the document was read out to the person who executed it and he put his thumb impression on it accepting its authenticity. Thus, this transaction of sale was considered valid.

(2) Object of sale - The subject matter of sale is immovable property which may be directly immovable property, such as land, house or anything attached to the land, or it may be indirect property (fishing right or mortgage loan etc.).

Section 54 applies only to the sale of immovable property, so the subject matter of the sale must be immovable property. On the sale of movable property, the provisions of the Sale of Goods Act apply.

In the case of **Haji Sukhan vs. Board of Revenue (AIR 1979 SC 310**), the Supreme Court held that the right to remove garbage and manure deposited by the municipality from the pit as a land benefit.

Ramaswamy v. Chinnan (1901) 24 Madras According to the third school of thought, where the property is subject to a general mortgage, the right of redemption is tangible immovable property and where there is a mortgage, the right of redemption or equity of redemption is intangible immovable property.

Mortgage loan is considered as immovable property. Its transfer can be in the form of sale, exchange or donation.

(3) Transfer of ownership - Transfer of ownership is an essential element of sale. Sale involves transfer of ownership of property from the seller to the buyer. Transfer of ownership means "the transfer by a person of all his rights and interests in respect of the property, which is the right, interest and ownership of that person-

Decided case - In the case of "**B.R. Koteswara Rao vs. G. Rameshwari Bai (AIR 2004 Andhra Pradesh 34**)", the Andhra Pradesh High Court has said that in a transaction of sale, the title to the property is transferred from the seller to the buyer as soon as the sale is completed and such transfer must be voluntary and the purpose and consideration of the transfer should not be "against the law and immoral and public policy.

Apart from this, the purpose and consideration of such transfer should not be subject to oppression, undue influence, fraud, misrepresentation and mistake. The seller should fully understand the nature of transfer as stated in the case of **'Labanyasingh vs Tapoi Singh (AIR 2003 Orissa 155)**.

(4) Consideration or price - Transfer of ownership in exchange for a price is an essential element of sale. Without consideration, transfer can never take place. Therefore, consideration i.e. price is essential in sale. Consideration i.e. price is a fixed amount of money which is paid to complete the transfer of sale and such amount can be paid in future as per the agreement and such amount can also be paid partially.

Decided case- In the case of **Rajo vs Lajjo (1928) 26 A.L.J. 169)** price has been generally taken to mean a sum of money. The Transfer of Property Act does not define the word 'money' but it has been recommended to adopt the definition of 'money' given in the Sale of Goods Act. (**Income Tax Commissioner vs Motor and General Stores, AIR 1967 SC 200**)

In the case of **State of Chennai vs. Gagan Dunkerley & Co.**, the Supreme Court has said that "In a transaction of sale, it is necessary to have money as consideration somewhere. If the consideration is not in the form of money but in the form of goods, then such a transaction will not be a sale but an exchange or barter etc. (**AIR 1958 SC 560**)

The price may be paid in cash or credit. All that is required is that the price be paid. (**Motilal vs Ugranarayan, AIR 1950 Patna 288**)

In the case of **K. Lakshmana Rao vs. G. Ratna Manikyamma (AIR 2003 Andhra Pradesh 241**), settlement can be considered as a consideration for execution of agreement of sale.

Question No. 2- Describe the rights and responsibilities of buyer and seller.

Answer- Property Transfer Act, 1882 **Section 55** mentions the rights and liabilities of the buyer and seller before and after the sale. This section in a way clearly mentions the rights of the buyer and the seller and their liabilities against each other so that there is no difficulty of any kind in any sale before or after it.

The author is presenting a commentary on these rights and responsibilities in this article. In the previous article, the entire concept of sales was commented upon under which the definition of sales, elements of sales and types of sales were highlighted.

Obligations of the seller before the sale-

(1) Disclosure of material and significant defects in the property being sold and in the title of the seller - Under **Section 55(1)(a),** the seller has two important duties in respect of the property being sold-

(a) Liability relating to property, and

(b) Liability related to ownership.

In respect of both these matters, the duty of disclosure extends only to those facts which are known to the seller. There is no duty to disclose such facts which are not known to him. Similarly, there is no duty to disclose those defects which could have been easily known to the buyer. For example, if the thing to be sold is a building, then whether its doors and windows are in good condition or not, whether the building is dilapidated or not, etc. Similarly, if the property is land, then whether there is a footpath on it or not, etc.

The Seller is not liable for obvious defects or deficiencies, but the Seller will be liable if the following circumstances exist

(1) The defect in the property is fundamental and substantial

(2) The seller has knowledge of it.

(3) The address of the buyer is unknown.

(4) It would not normally be possible for the buyer to know it.

The seller's duty of disclosure will continue even if the sale has been made with all the defects. In the context of ownership, the presumption is that the seller will give the ownership without any defects, because only he can have the knowledge of this intention. It is necessary for the seller to give information about the facts such as if the land has been acquired under the Land Acquisition Act or if any person has an easement on the land to be given, or if the land is on lease, etc. If both the parties to the transaction are unaware of any such thing which is material to the transaction, then such a transaction will be void. The term 'material defect' or 'material defect' has not been defined in this Act. In the case of Flight vs. Booth, it has been expressed in the following manner - "It should be of such a nature that it can be determined that if the buyer had known about it, he would not have entered into the contract at all because in that case he would have received a different thing from what he had contracted for." Section 55(1)(a) binds the seller to disclose any material defect in the property, or in the seller's title to the property, which is known to the seller and not known to the buyer and which the buyer could not have discovered with ordinary care.

In the case of **Sukhdev Kaur vs Gurdev Singh**, the question was disputed whether if the government is merely considering to acquire a land and the notification of acquisition has not yet been issued and this fact is in the knowledge of the seller but he does not disclose this fact to the seller at the time of agreement or sale, then this transfer will be considered to refer to **Section 55 (1) (a)**. Can it be said that the seller has failed to discharge his responsibility. Is this act equivalent to a material defect, which could not be detected with ordinary care?

The Punjab and Haryana High Court has clarified that the seller is not bound to disclose this fact until the notice of acquisition is issued and non-disclosure of this fact will not be treated as a violation of **Section 55(1)(a)**. If the notice of acquisition has been issued, the seller can take cognizance of the information himself because such information is for the public and if the buyer is unable to

find it, it will be his own fault. The court has also clarified that non-disclosure of this fact does not signify any material error or this error cannot be called a material error. It cannot be said that the seller has not discharged his responsibility due to non-disclosure of this fact. If on this ground the buyer refuses to execute the transaction or abstains himself from the transaction, then the seller can refuse to refund the advance money given to him towards completing this transaction. In this case, discussions were going on at the government level regarding the acquisition of the disputed land, which the seller was aware of, but a formal government notification for the acquisition of the said land had not been issued till the time the agreement for its sale was made between the seller and the buyer, but the notification was issued before the transaction was executed (completed), due to which the buyer refused to complete the transaction and filed a suit to get back Rs. 10,500 - only, which he had given as advance payment. The court rejected the buyer's argument and dismissed his demand.

(2) Production of title documents Section 55 (1) (b) - provides for production of title documents. The documents may be inspected either by the buyer himself or by any other person authorised by him. Inspection of the documents is necessary on the part of the buyer. If he does not inspect them, it will be presumed that he had prior knowledge of the facts which he would have known if he had studied the documents. The seller is not automatically liable to produce the documents for inspection. He is liable to produce them only on demand of the buyer.

The document to be presented should be the original and not its copy. A certified copy can be presented only in case the original copy is destroyed. On demand for the title deed, the seller will present not only the original deed but also all other documents which he is in a position to present. The deeds are generally presented at the residence of the seller but if the buyer has expressed the desire to present it at some other place then it should be presented at the desired place only.

(3) Answering questions put to him Under Section 55 (1) (c),- the seller is liable to answer all relevant questions put to him by the buyer. The questions put to him should be related to the title to the property. This process gives the buyer a fair opportunity to make enquiries about the property. Questions relating to property may be of the following types: whether the property is transferable Bhumidhari or transferable Nazul land or of any other nature. What kind of interest does the seller have in the property? Is the seller the owner of full interest or limited interest? Whether the property is used as a cemetery, cremation ground, market or bazaar etc. etc. Questions relating to title may be of the following types: whether the deeds created in favour of the seller were executed by a competent person or not? Whether the seller is the owner of the property or not? If not, whether he has the right to sell the property or not?

Whether the deeds of the property are genuine or forged? Whether the attestation is effective or not? etc. But if the seller wishes, he can waive this responsibility. The buyer can clearly state that the buyer will get the same interest as he has. If the buyer is aware of the seller's interest and accepts the property, he will not be able to challenge the seller. But if the contract clearly states that the seller will transfer the interest without any defect and he transfers the interest with defect, then he will be answerable to the buyer. The buyer can waive his right to ask questions directly or indirectly at his discretion.

(4) Execution of Transfer Section 55 (1) (d)- After the contract of sale is completed, the seller is liable to deliver the property as and when the buyer requires. At the time of delivery the buyer must pay the price therefore as payment of price and delivery of property are reciprocal processes. These processes can be varied by contract. The property must be delivered by the seller and by all persons interested in the property. This section does not lay down any principle as to the place and time of delivery. In this regard sections 46 to 50 of the Contract Act, 1872 will play an important role.

(5) Duty to protect property Under Section 55(1)(e),- from the time of the contract to sell till the delivery of the property, the seller is responsible for the protection and care of the property. During this period the seller will act as a trustee and this duty is collateral. If the seller fails to discharge this duty properly, he will be liable to pay compensation to the buyer if any damage is caused to the property due to his negligence. The seller is not only responsible to take care of the property but also to protect the title deeds as damage to the property would diminish the value of the property.

(6) Payment of Expenses [Section 55 (1) (ch),- even after the agreement for sale is made, the seller is liable to pay all types of rent, land revenue and taxes till the date of the agreement. This liability is also a collateral liability like the above, which can be enforced even after the sale if it is not complied with before the sale. This liability is limited only to public charges, but it can also be terminated by a contrary agreement. Liabilities of the seller after the sale is completed:-

(1) Duty to deliver possession Section 55 (1) (g)- After the sale proceedings are completed, it is the duty of the seller to hand over possession of the property to the buyer and, if he is not in possession, to endeavour to get possession thereof. The buyer should not be left to obtain possession on his own. The time for delivery of possession is not prescribed in this section but the concept is that possession should be delivered simultaneously with the transfer of ownership. Transfer of ownership generally takes place upon execution of the document. However, this position can be changed by a contrary contract. If the seller is not in a position to deliver possession of the property sold, the buyer can terminate the contract and take back any advance money paid to the seller. The delivery of possession should be in accordance with the nature of the property.

For example, possession of a building will be completed by transfer of keys. Possession of agricultural land will be completed by going to the land and declaring its soma etc. Possession of the property can be given to the buyer himself or to a person authorized by him.

(2) Implied covenant of ownership Section 55 (2),- this clause provides that the seller shall covenant with the buyer that the interest which the seller has not expressed to transfer to the buyer exists and that he is competent to transfer that interest. This covenant may be direct or implicit. This clause relates only to implied covenants. If the property is sold by a person in a fiduciary capacity, then it shall be implied from his context that he has covenanted that the seller has not done anything which creates a charge on the property or which impairs his capacity to transfer the property This implied covenant shall be annexed to the interest of the transferee and shall be transferred along with it. It may be enforced by such person in whom the interest may from time to time vest either wholly or in part.

(3) Delivery of title deeds Section 55 (3)- The general rule in respect of property is that only the person in possession of the property can retain the title deeds.

This clause provides that the seller is liable to deliver the title deeds in his possession or control. The title deeds are transferred along with the property as an annexure to it, but the buyer can get it only after he has paid the entire sale price. As soon as he pays the price, the seller is immediately liable to deliver the deeds. It cannot be divided. But there are two exceptions to this.

(1) If the seller retains a part of the property mentioned in the sale deed, then the ownership the buyer can keep the title deed with him. When the buyer demands it, he will provide a true copy of the title deed to him.

(2) Where the property is being sold in portions, the purchaser of the larger portion shall be entitled to retain it seller's rights before sale.

(1) Right to receive rent and profits under section 55(4)(a),- before transfer of ownership in property the owner is entitled to receive rent and other benefits arising from the property. Till then he remains the owner of the property and as the owner he will be entitled to receive all the benefits which arise from the property.

But if the buyer takes possession of the property before the completion of the entire sale proceedings and receives the profits and rent arising from the property, then he will be liable to pay interest on the unpaid price. Because it would be unfair that the same person takes the rent and profits of the property and also receives interest on it. But if the seller delays in completing the transfer and the circumstances are such that the amount of the price remains useless and unused with the buyer, then the seller will not be entitled to receive interest.

Liability of the seller after the completion of the sale-

Vendor's Lien **Section 55 (4) (e)** If all the proceedings for sale have been completed, the property has been transferred but the sale money or any part thereof has not been paid, the vendor will have a charge on the unpaid amount. The right of the unpaid vendor is a lien. This right is not a right to retain the property. He is only entitled to retain the title deeds and to have a charge on the unpaid price. If there are not one but several purchasers, the vendor will not be concerned with the fact as to what proportion each purchaser will pay, but so far as the charge is concerned, it will remain with the vendor in respect of the whole unpaid amount. The buyer will be liable to pay the unpaid amount even if he has accepted property from someone other than the property for which the contract was made. The buyer has to pay interest on the unpaid amount, but if the seller himself is in possession of the property, the buyer will not be liable to pay interest. The buyer will not be liable to pay interest even if he has retained a part of the sale amount because he has to pay some charges to the seller. But if he has retained a part of the sale amount with him for the purpose of paying those charges himself but fails to pay, then he will be liable to pay interest.

The lien obtained under this section may be terminated by a contrary contract, by estoppels or by renunciation. In the absence of an express contract, an inference to this effect may be drawn from the circumstances of the case or the conduct of the seller. The lien also terminates if the buyer, at the direction of the seller, executes a promissory note in favour of a third person extinguishing the seller's liability. In such a situation the buyer will become liable to the third party instead of the seller. In order to complete the transaction of sale it is necessary that the interest in the property sold has passed from the seller to the buyer. In this context an important practice, which lays down a legal arrangement, called "Khubjul Badalan", is prevalent in the state of Bihar. According to this the ownership of the property passes from the seller to the buyer only when there is an exchange of equivalents between them. So if the sale deed mentions that the entire consideration has been paid and possession of the property has been handed over, but the seller retains the registration receipt and the possession of the property also remains with him because the seller did not receive the payment of the fixed consideration either fully or in part even though the sale deed mentions otherwise. The transfer of ownership to the buyer will not be considered complete until the buyer pays the entire sale amount and obtains the registration receipt.

In the case of **Janak Dulari Devi and others vs. Kapil Dev Rai** and others, 'A' who was the owner of the property sold his property by a registered sale deed in favour of 'X' for a consideration of Rs. 22,000/-. But out of the total consideration amount only Rs. 17,000/- was paid and it was promised that the remaining amount of Rs. 5000/- will be paid soon. But 'B' failed to pay the remaining amount. As a result, 'A' cancelled the transfer in favour of 'B' and sold the property to 'C' and also gave him possession of the property. The question was

whether the transfer in favour of 'C' was binding. On the basis of the principle of 'Khubjul Badalan', the court considered the transaction in favour of 'C' valid and cancelled the transfer in favour of 'X'.

Obligations of the buyer - before the sale is completed -

(1) Duty to disclose facts constituting a substantial increase in the value of property under section (55) 5(a),- Just as the seller is duty bound under this section to disclose the inherent defects, similarly under this section it is duty bound on the buyer to disclose the facts to the seller which are likely to substantially enhance the value of the property, but the buyer's responsibility is limited to disclosure of facts of which he is aware but the seller is not aware and which may substantially enhance the value of the property.

"Every buyer is required to observe good faith in everything he says or does in the execution of the contract and to avoid fraud. Fraud may exist by suppression of true facts or by false suggestion. Generally, the buyer is not under a prior obligation to disclose to the seller those facts which may influence his conduct and judgment in the transaction for his own interest. Fraud will be presumed by the mere silence of the buyer, if he gives any information other than those facts which are obviously and potentially false." But there are exceptions to this rule. Generally, it is the responsibility of the seller to know about his ownership, but there may be circumstances in which the seller does not know and the buyer does. In such a situation, it will be the responsibility of the buyer not to take undue advantage of his knowledge. Therefore, in such a situation, the buyer is under an obligation to disclose his knowledge to the seller, otherwise, on getting information about this fact, the seller can cancel the transaction on the basis of fraud. For example, if a woman sells her property at a price much lower than the market price, because she is under the illusion that she cannot transfer a good interest in that property, while the buyer knows that she can transfer a good interest, then in such a situation it will be considered that the buyer had suppressed the facts. On this basis, the transaction can be cancelled.

(2) Payment of price Section 55(5)(b)- This section requires the buyer to pay the price the payment should be made at the time the sale deed is being executed. Both these actions should be completed simultaneously. The seller is not bound to execute the sale deed unless the buyer pays the full price for the property or enters into an agreement to that effect. If the price is not actually paid, a tender for payment will be sufficient. This section is the natural corollary of subsection 55(1)(d) which provides that if the buyer has paid more than the fair price, he will be entitled to get the excess price back from the seller.

Obligations of the buyer after the sale-

(1) Suffering loss of property **Section 55(5)(c)** Generally a buyer of title is entitled to a sale deed.

(The conveyance is transferred immediately upon execution. He acquires all the rights and powers of the seller. Hence, he will have to bear all the losses incurred in relation to the property. The loss to the property may be due to accidental destruction or deterioration. To bear the loss, it is not necessary that the property is in the possession of the buyer. It is sufficient that the ownership has vested in the buyer.

(2) Payment of public charges Section 55 (5) (d) - The buyer becomes liable to pay all public charges from the date of execution of the sale deed. He is liable to pay the principal as well as interest, but he is not liable to pay the balance amount of interest.

If a person purchases the property of a company which is subject to dissolution, he will get clear title to the property free from all encumbrances and encumbrances even if an order of attachment has been made by the statutory authority. When a purchaser purchases property on 'as is where is' basis, its status is as such. In the case of Special Officer (Commercial), NESCO and others versus **M/s Raghunath Paper Mills Pvt. Ltd. and others, M/s Konark Papers and Industries Ltd.** which was a company incorporated under the Companies Act, 1956, the Official Liquidator published an advertisement for sale on 'as is where is' basis.

On the basis of this advertisement, **M/s Raghunath Papers Mills Pvt. Ltd.** also confirmed its participation in the tender and was found to be the highest bidder. As a result, the company was sold to M/s Raghunath and its possession was also handed over by the official liquidator.

At that time, M/s Konark Papers was not getting electricity supply, hence M/s Raghunath submitted an application to the General Manager (Commercial) for electricity supply, which was approved by the General Manager.

After completion of necessary formalities for electricity supply, M/s Raghunath also received the certificate of completion of work.

After this, M/s Raghunath signed an agreement with NESCO management and deposited the required amount as security. But the electricity department did not start the electricity supply, instead said that electricity charges of about Rs. 79,02,2628 were outstanding and said that till this amount is not deposited, the electricity supply will not be started. Under these circumstances, the dispute reached the court.

The Orissa High Court held that when a person purchases a company under a government winding up order, he gets clear title to the property free from all encumbrances and encumbrances even if there is an order of attachment by a statutory authority. When a person purchases property on 'as is where is' basis, he is not liable for the previous dues. In this case it was held that M/s Raghunath had applied for getting a new electricity connection in its name and not for transferring the electricity connection taken by the previous institution to its name. Hence, M/s Raghunath is not liable to pay the previous dues.

Rights of buyer before sale-

Lien of purchaser **Section 55 (6) (b)** Just as a seller has a lien, a buyer also has a lien under this section. This right arises when a buyer has paid the price in advance with the expectation that the seller will transfer the property to him provided he refuses to take possession illegally. The lien arises not only on the money paid by him but also on the interest generated thereon. Interest is calculated on the date on which possession is delivered. If a buyer refuses to take delivery of possession illegally, his lien will cease, but even in this situation the seller will not be entitled to retain the advance payment. If a property is sold by auction on the ground that the owner has failed to pay the amount due to the electricity department, the person purchasing the property in the auction will be liable to pay those charges because the auction buyer purchases the property knowing all the circumstances. He will be bound by the terms of the auction. He will be liable to pay the balance amount. **Section 55 (6) (b**) provides that the charge of the buyer on the property is enforceable not only against the seller but also against all persons claiming in lieu thereof unless the buyer has unreasonably refused to accept delivery of the property. This charge of the buyer is a statutory charge and it

It is different from contractual burden. Contractual burden comes into existence only as a result of a contract between the parties.

Question No. 3- Discuss the definition, nature and scope of easement.

Answer- Meaning and nature of easement-The concept of easement is defined under **section 4** of the Indian Easement Act, 1882. As per the provisions of **section 4**, easement right is a right acquired by the owner or occupier of land over another land, which is not his own, with the object of providing beneficial enjoyment of the land. This right is granted because without the existence of this right the occupier or owner cannot enjoy his property fully. It includes the right to do or continue to do or to prevent or refrain from doing anything in relation to another land, which is not his own, for the enjoyment of his land. The term 'land' means everything permanently attached to the earth and the term 'beneficial enjoyment' signifies convenience, advantage or any facility or any necessity. The owner or occupier referred to in the provision is known as the dominant owner and the land for the benefit of which the easement right exists is called the dominant heritage. while the owner on whose land the obligation is imposed is known as the slave master and the land on which such obligation is imposed to do or abstain from doing something is known as the servile inheritance.

Example-'P' being the owner of a certain piece of land or house, has a right to go out into the street to the house of Q, adjoining his house. This is called the right of easement. The voluntary surrender by 'X' of a right to the public to pass or re-pass over the surface of a certain land is not a right of easement.

The right of X to go to the house of his neighbour Y to fetch water from the well for the purpose of his house is an easement right. Here, the path to the well passes through the land of Y. Therefore, X has an easement right to pass through the house of Y.

In the words of the great jurist Salmond, an easement is a legal servitude which can be exercised over a piece of land of another for the exclusive beneficial enjoyment of one's own land. The right of easement is basically a right of A form of privilege, integral part of which is to do certain things or prevent certain things from being done on another person's land, so that he can enjoy his own land. Other examples of the right of easement include-

Right of way, Right to discharge rainwater and Right to sunlight etc.

Essential elements of happiness-

1. Dominant and subordinate inheritance- For the enjoyment of the right of easement, it is necessary to have two estates i.e. dominant and subordinate inheritance. This is because by definition, it is a right exercised by the owner or occupier of a land over the land of another person to enjoy the benefit of his land. Dominant and subordinate inheritance cannot be one and the same. Thus, the existence of two estates and their separation from each other is necessary.

2. Different owners- To exercise the right of easement, the owners of the two properties must be different and not one person.

3. Beneficial pleasure- The purpose of a beneficial enjoyment is that the dominant owner enjoys it in a manner that includes both express and implied benefits.

4. Positive or Negative- Easement can be either positive or negative. The first, refers to the right through which the dominant owner does certain acts to exercise authority over the land of the subordinate owner. Whereas, the second, refers to the act of prevention. In a negative easement, the dominant owner prevents or restricts the subordinate owner from doing certain acts or things.

In a right of easement the owner of the dominant heritage can prevent the subordinate owner from doing something or do something but he cannot compel the subordinate owner to do something for him. Easement right exists only when two heritages are adjacent to each other. It is a right of easement, which means a right available against the whole world. Easement as a right is always attached to the dominant tenancy. It is a right of re-abandonment which means a right over the subordinate tenancy and not over his own land.

Classification of easements- Section 5 of the Indian Easements Act, 1882 classifies easements as follows-

Continuous or Discontinuous - Continuous easements are those that can be enjoyed without the intervention of any human conduct or act of any person. It does not involve the intervention of any person and adds special character to the property. While, on the other hand, the right of easement that requires the

intervention of any person is called discontinuous. In this type of easement it is necessary that some human act be carried out on the servant heritage.

Obvious or unobvious-An obvious easement is one whose existence can be seen through a permanent mark. It can be seen by careful investigation and reasonable foresight. It is also called an obvious easement. Inspection is required to check the existence of a right. For example - There is a drain from A's land to B's land and from there it goes into an open yard. This can be seen through obvious inspection and is an obvious easement.

Question No. 4- Define mortgage. What are the essential elements of a valid mortgage and its different types? Describe.

Answer: Mortgage has been defined in **section 58 (a)** of the Transfer of Property Act which is as follows- "Mortgage is the transfer of any interest in any specific immovable property with the intent to secure the payment of money given or to be given as a loan or the payment of an existing or future debt or the performance of an undertaking which may give rise to a pecuniary liability. Transfer of property done with the intent to secure the payment of money is called mortgage."

According to this section, the transferor is called the mortgagor and the transferee is called the mortgagee, the principal and interest for the payment of which is secured by the mortgage is called the mortgage money and the instrument by which the transfer is made is called the mortgage deed.

In simple words, mortgage means transferring the interest in any specific property or a part of it in favour of the person from whom the loan or borrowing has been taken, in order to secure the money of the person giving the loan.

Nidhi Shah vs Muralidhar, 1903 is an important case in this regard, in which the Privy Council has said that the property is transferred in mortgage only to guarantee the payment of the loan. Therefore, giving security for the recovery of any of the above three - loan, debt or promissory note - is a mortgage.

Essential Elements of Mortgage - Following are the important elements of mortgage-

(1) Transfer of interest - The first essential condition of every mortgage is the transfer of interest in some immovable property or any part thereof. It is clear here that in mortgage, there is transfer of interest in the property but not of ownership. That is, the interest goes to the mortgagee while the ownership remains with the mortgagor. Movable property is outside this scope. Similarly, whether there will be transfer of possession in mortgage or not, it depends on the type of mortgage. **Ratanpal vs. Kunwarpal Singh AIR 2001** Mortgage of property does not create any obstacle in the execution of the agreement of sale in respect of the same property because the title of the mortgaged property is not transferred to the mortgagee and that too when the mortgagee has no information or knowledge.

(2) Transfer of interest in specified immovable property- According to **Section 58** of the Transfer of Property Act, 1882, a mortgage is a transfer of interest in immovable property to secure the payment of a loan, debt or other obligation. The owner of the property or the mortgagor creates a lien on the property for the lender or mortgagor. The mortgagor can secure the loan by depositing the title deeds of the property with the lender or their agent or by executing a mortgage deed. The Transfer of Property Act gives certain rights to the mortgagor and the mortgagee. For example, if the mortgagor defaults on the loan, they may lose their right of redemption. There are also different types of mortgages, including simple and conditional mortgages. In a simple mortgage, the mortgagor agrees to pay the loan, but does not transfer the property to the mortgagor. In a conditional mortgage, the mortgagor may have the right to sell the property if the mortgagor does not make his payments.

Example-A, a Hindu widow, whose husband has left collateral heirs, alleging that the property she owns is insufficient for her maintenance, agrees to sell a farm, a part of such property, to B, for neither religious nor charitable purposes. B satisfies himself by due enquiry that the proceeds of the property are insufficient for the maintenance of A, and that the sale of the farm is necessary, and, acting in good faith, purchases the farm from A. As between B on the one hand, and A and the collateral heirs on the other, the necessity for sale shall be deemed to exist.

(3) Consideration of Mortgage - A mortgage is a contractual agreement between the lender and the borrower under which the lender can claim the borrower's property if the borrower does not pay the loan and interest. Mortgages are often used to purchase a home or to borrow money using the value of an existing home. The mortgaged property serves as collateral for the loan, which can be repaid or recovered through sale. "A person may give a voluntary mortgage if he wishes, and that would be fine for those who may be deceived by it. But the fact that a mortgage is given without any consideration may have a significant impact on any disputed question concerning its delivery or recording."

Types of Mortgage - According to **Section 58** of the Transfer of Property Act, there are different types of mortgages which are as follows-

(1) Simple Mortgage - According to **Section 58 (b),** in simple mortgage, possession of the mortgaged property is not transferred. Rather, the mortgagor takes personal responsibility to pay the mortgage money without transferring possession and contracts, either explicitly or implicitly, that in case of failure of the mortgagor to pay the mortgage money, the mortgagee will have the right to sell the mortgaged property and use the proceeds from such sale to pay the mortgage money. Where such a transaction takes place, it is called simple mortgage.

(2) Mortgage by conditional- sale-**Section 58 (c)** deals with mortgage by conditional sale. In this, the mortgagor hypothetically sells his property, which also has some conditions. According to the conditions, if the payment is not made

by a certain date, then the sale will be considered and if the mortgagor pays the mortgage money by the due date, then the mortgagee will transfer the property to the mortgagor. But such a transaction will be considered a mortgage by conditional sale only when these conditions are clearly mentioned in the mortgage deed and not in any other agreement or form.

(3) Usufruct mortgage - According to **section 58(d),** where the mortgagor delivers or binds himself expressly or impliedly to deliver possession of the mortgaged property to the mortgagee and gives the mortgagee the right to have possession of the property pending payment of the mortgage money and to receive the rents and profits or any part of the rents or profits derived from the property and to invest the same in payment of interest and mortgage money, such a transaction is called usufruct mortgage. In usufruct mortgage, possession of the property is compulsory. In usufruct mortgage, there is no right of seizure and sale.

(4) English Mortgage- Section 58(e) of the English Mortgage Act defines an English mortgage. An transaction where the mortgagor binds himself to pay the mortgage money on a certain date and transfers the mortgaged property to the mortgagee, but with a condition that the mortgagee shall deliver the property back to the mortgagor on payment of the mortgage money is called an English mortgage.

(5) Mortgage by deposit of title deeds- As per **section 58(g),** where any person is a resident of any of the following cities, namely, the cities of Calcutta, Madras and Bombay or in any other city as may be specified by the United States Government, In the said case, where a person delivers documents of title in immovable property to a creditor or his representative with the intention of creating a guarantee over such immovable property, such transaction is called mortgage by deposit of title documents.

(6) Unique Mortgage - Unique mortgage has been defined in **Section 58(g)** of the Act. According to which a mortgage which is not a simple mortgage, mortgage by conditional sale, usufruct mortgage, English mortgage or mortgage by deposit of title deeds, is called unique mortgage. Unique mortgage was added to the Transfer of Property Act by amendment of 1929. In unique mortgage, the rights and liabilities of the parties depend on the contract. If usufruct mortgage is made without giving possession and personal liability is taken in usufruct mortgage, then such mortgage will be unique mortgage.

Question No. 5- What do you understand by the right of redemption? Explain the doctrine of encumbrance on the right of redemption.

Answer- Right to redeem- As per **section 60** of the Transfer of Property Act, 1882 one of the important rights of the mortgagor is the right to redeem the mortgage. Once the money becomes due on the specified date, the mortgagor has the right to get back the mortgaged property by paying the money to the

mortgagor. At any time the mortgagor has the right to deliver or tender the mortgaged money at the time and place aforesaid that he-

(a) Deliver to the mortgagor the mortgage deed and all such documents relating to the mortgaged property as are in the possession or power of the mortgagor.

(b) Where the mortgagee is in possession of the mortgaged property, to deliver the mortgagors in possession thereof, and

(c) at the mortgagor's expense, either to cross-transfer the mortgaged property to him or to such other person as he may direct, or to execute and register, where the mortgage has been done by a deed, an acknowledgement in writing that any right which is in derogation of the interest of the mortgagor which has been transferred to the mortgagee, has been renewed.

This right of the mortgagor is called the right of redemption, and is called enforceable. In other words, the right of redemption means getting back the title property by paying the mortgage money.

In a usufruct mortgage where no time limit is prescribed for redemption, the mortgagee does not acquire the right of ownership by the lapse of time. It is based on the principle that once a mortgagee, he always remains a mortgagee. The right of redemption can be exercised by the mortgagee at any time by paying the mortgage money.

When does the right of redemption arise- Right of redemption- The right of redemption is described in **Section 60** of the Transfer of Property Act. Right of mortgagor to redeem at any time when the principal becomes due - The mortgagor has the right to require the mortgagee to deliver up the mortgage, on payment or tender of the mortgage-money, at a reasonable time and place.

Exercise of Right of Redemption- The mortgagor can exercise the right of redemption by any one of the following means-

(a) By payment of mortgage money or by tender- For the exercise of the right of redemption it is necessary that the mortgagor pays the mortgage money with interest to the mortgagee or a person authorized by him or tenders to pay. If there are more than one mortgagee, then payment should be made jointly to all, but the mortgagor is not bound to pay the mortgagee's executors unless they obtain the will certificate. In case of non-payment of mortgage money, tender is necessary for payment. Tender means that the unconditional offer by the mortgagor for payment of mortgage money and interest should be such that there is full possibility of the mortgagee getting the mortgage money. The tender should be unconditional and should not be less than the amount payable. A valid tender stops the charging of interest. But an invalid tender does not give this benefit to the mortgagor. The tender can be made either personally to the mortgagee or can be deposited in the court under **section 83**.

(b) Deposit of mortgage money in Court-The deposit of the mortgage money in Court by the mortgagor operates as a continuing tender and the mortgagee has

the immunity to withdraw the money from the Court and accept it at any time before the mortgagor revokes the tender.

(c) Decree in Redemption Suit- A decree in redemption suit when defined in layman's language means a process whereby a borrower called the mortgagor files a suit in the court to recover his immovable property which was earlier mortgaged as security to the lender called the mortgagor for money.

Doctrine of bar to redemption- Once a mortgagor remains a mortgagee, this phrase means that the mortgagee will always remain a mortgagee and will never become the owner. He can redeem the rights of the property cannot transfer it to a third party because he does not have the right to pass on the benefits of the property. This phrase is a part of the equality of fairness.11 The courts developed this phrase to ensure that there is no exploitation.

Accordingly, a mortgage deed establishes two things, one the lender's right limited to his interest and the other to deduct the lender's remaining interest from it. The right of redemption in a mortgage deed always exists and cannot be written off unless the debtor fails to pay the amount or does not wish to do so. This right is equivalent to the right of redemption.12 The basis of this principle lies in value, equity and the exercise of a good conscience and it applies to areas where the deeds are not applicable. On proper scrutiny of the deeds of mortgage, it has been observed in most of the cases that the mortgagor goes into such an agreement as a result of some monetary difficulty. The law understands the power of the dominant party to include such provisions which would serve his own advantage by placing constraints on the right of redemption13 and the same philosophy was also kept in mind through **U. Nilan v. Kannaiyan (Dead) LRS** 14. Conclusion The right of redemption of the mortgagor is an implied right conferred in the mortgage deed. Looking at the various aspects of the mortgage deed, the right of redemption forms a primary part of the mortgage deed. Moreover, the right of redemption is applicable only when the mortgagor has performed the rights and duties assigned to him. A mortgage deed cannot be changed to a sale deed. Thus, the right of redemption of the mortgagor is secured by the court and he is given protection against exploitation by him. Further, **section 60** of TPA aims to secure the interests of the mortgagor and it also provides the essentials of the mortgage deed and conveyance of the property.

Gangadhar v. Shankarlal A.I. Bar 1958 SC 70-The Court further held that the condition that if the mortgagor fails to redeem the debt within the specified period of six months, he would lose his right to do so and the mortgage deed would be treated as a sale deed in favour of the mortgagor, is clearly a bar to the equity of redemption and is therefore illegal.

Validity of the Deed - It is the quintessential and primary requirement of a mortgage deed that it should be legally valid and can be maintained in the court. In **Vishnu Kaya vs Vishnu Maya** it was held that the deed should be registered fulfilling all the criteria of registration. It was also held that only after the deed is

registered the mortgagor can redeem the property after paying the dues or take the mortgagor to the court.

Examples of bar to redemption-There are many examples which create bar to redemption by the mortgagor. They are void ab initio. Such examples are as follows-

Postponement by the mortgagor as a benefit of his position- Mere postponement of redemption is not a bar as it may be to the benefit of both the mortgagor and the mortgagor. Also, sometimes the postponement may be due to some unavoidable reasons. In cases where it is found that the mortgagor is deliberately postponing the redemption **Bhullan v. Bacha** in the case of Lal is a condition of redemption and is taking reasonable advantage of his position, it is a bar. **Seth Ganga Dhar v. Shankar** it was held that the postponement of 85 was not a bar because of the conditions existing at that time. In the case of, it was held that in a consumer mortgage, there was a bar after 60 years on a particular. Therefore, the time period amounts to a bar after taking into account certain important conditions like the terms of the mortgage, money advanced etc.

Conditional sale of property- Sale of property by the mortgagee under any condition is an encumbrance. When the contract between the mortgagee and the mortgagee shows that if the mortgagee does not pay the amount on time, the mortgagee will be entitled to sell the property, such a condition is considered void. The right of redemption is an equitable right and thus cannot be extinguished by selling the property under any condition. In the case of **Kanaram v. Kuttuli** it was held that non-payment of money on the due date did not allow the mortgagee to sell the property and any such condition contained in the contract amounts to an encumbrance.

Restrictions on other mortgages- In a mortgage, the mortgagor transfers only interest, not ownership in the property. The mortgagor also has the right to mortgage the property to take another loan. Any condition in the first mortgage deed that states that the mortgagor cannot mortgage the property subsequently is an encumbrance.

Collateral benefits to the mortgagor in case of consumer mortgages- In case of consumer mortgages, the mortgagor has the right to collect rent of the property, and this is not illegal. If apart from all these benefits, the mortgagor takes advantage of the needy situation of the mortgagor and enjoys collateral benefits, then it is a detriment.

In the case of **Krelinger v New Patagonia Meat & Cold Storage Co. Ltd.** certain conditions relating to the collateral benefits of the mortgagor which result in encumbrance were explained, they are: if the benefit is unfair, if it is in a condition which prevents redemption or it is inconsistent with the right of redemption.

All such conditions are violative and cannot be enforced in a mortgage as the right of redemption relates to equity and every mortgagor has a right to redeem the property after payment of the amount.

Question No. 6- Once a pledge, always a pledge. Discuss the use of the promise.

Answer- The rule of the opposition on the right of redemption is based on the maxim, once a mortgagee always remains a mortgagee. A mortgagee always remains a mortgagee and no change or modification can be made to it. Such right of redemption of the mortgagee cannot be extinguished or limited. According to this maxim, the right of redemption vests in all mortgagees, on full payment of the debt for which such immovable property was used as security. In this regard, the case of **Knox v. Rowlands (1902 SC 24)** is a good example, where Lord Deo said that- "Once a mortgagee remains always a mortgagee and nothing but a mortgagee." The right of redemption of a mortgagee cannot be frustrated by any activity, i.e. it cannot be made non-redeemable. If any exercise is made it will become void and void. If any condition is imposed by the party it will also become void. In the present case, the goodwill and premises were mortgaged by Mr. Rice to the company and a condition was put that on payment of the mortgage money and interest by Mr. Rice he would have the right to get back the mortgaged property. The court held that the mortgage deed created the mortgage and such mortgage always remains a mortgage. But the limitation of the right of redemption after the mortgage by contract would not be held to be in conflict. Indian courts have reiterated the same principle in **Jaimal v. State of Himachal Pradesh**, wherein the right of redemption was found to be an absolute right which cannot be waived by any contract to the contrary. The condition to convert the mortgage into a sale is also held to be in conflict with the right of redemption. A condition that the mortgagor would hold the mortgaged property as a lease in the event of non-payment of the mortgage amount has also been held to be illegal and ineffective in the mortgage deed. In short, the intent is that the mortgage and the right of redemption of the mortgagor are co-extensive, whether the right of redemption is mentioned or not. The mortgage and the right of redemption are co-extensive, whether the right of redemption is mentioned or not. Thus it means that once it is mortgaged it will always remain mortgaged. It cannot be transferred in any other transaction can.

Examples of bar to redemption-There are many examples which create bar to redemption by the mortgagor. They are void ab initio. Such examples are as follows-

Postponement by the mortgagor as a benefit of his position- Mere postponement of redemption is not a bar as it may be to the benefit of both the mortgagor and the mortgagor. Further, sometimes postponement may be due to some unavoidable reasons. In cases where it is found that the mortgagor is deliberately postponing the redemption and taking due advantage of his position,

it is a bar. In the case of **Seth Ganga Dhar vs Shankar Lal** it was held that the postponement of 85 was not a bar because of the conditions prevailing at that time. In the case **of Bhullan vs Bachcha**, it was held that in a consumer mortgage, the condition of redemption after 60 years on a particular was a bar. Therefore, the time period amounts to a bar after taking into account certain important conditions like the terms of the mortgage, money advanced etc.

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Restriction on other mortgages - In a mortgage, the mortgagor only transfers interest, not ownership in the property. The mortgagor also has the right to mortgage the property to take another loan. Any condition in the first mortgage deed that states that the mortgagor cannot mortgage the property later is an encumbrance.

Collateral benefits to the mortgagor in case of consumer mortgage In case of consumer mortgage, the mortgagor has the right to collect rent of the property, and this is not illegal. If apart from all these benefits, the mortgagor takes advantage of the needy situation of the mortgagor and enjoys collateral benefits, then it is a detriment.

In the case of **Krelinger v. New Patagonia Meat** and **Cold Storage Company Limited** certain conditions relating to collateral benefits of the mortgagor were explained which result in encumbrance, they are: if the benefit is unfair, if it is in a condition which prevents redemption or it is inconsistent with the right of redemption. All such conditions are encumbrances and cannot be enforced in a mortgage as the right of redemption relates to equity and every mortgagor has the right to redeem the property after payment of the amount.

Question No. 7- Explain the meaning of lessor and lessee. What are the rights and liabilities of lessor and lessee under the Transfer of Property Act, 1882? Discuss.

Answer- A lessee is a person who leases something to someone else. Thus, the lessor is the owner of the asset that is leased to the lessee under an agreement. The lessee makes a lump sum payment or a series of periodic payments to the lessor in exchange for the use of the asset.

A lessor is a person or entity that owns an asset and grants the right to use and occupy that asset to another party, known as the lessee, through a legal agreement called a lease or tenancy agreement. The lessor is often colloquially

referred to as the landlord. The lessor retains ownership of the asset, while the lessee receives the right to use the asset for a specific period of time outlined in the lease agreement, usually in exchange for rent or other form of consideration. The lessee is commonly referred to as the tenant and is responsible for complying with the terms of the lease, including paying rent and taking care of the property during the lease term.

Under the Property Transfer Act, **Section 108** mentions the responsibilities of the lessor. The responsibilities of the lessor are also the rights of the lessee. All those responsibilities are being mentioned in brief under this article. **Section 108** provides for the rights and responsibilities of the lessor and the lessee, but these rights and responsibilities are not absolute. They are subject to contract or local custom, but are not subject to any local law.

The lessor and the lessee may themselves agree on rights and duties different from those mentioned herein. This section operates only if there is no contract to the contrary.

Duties of the lessor - The lessor has the following responsibilities which are as follows-

(1)-Duty to disclose any latent material defect in the property- This duty is similar to the duty prevailing in case of sale. The lessor is bound to disclose to the lessee all defects in the property to be leased which are important in relation to the proposed use, which are known to the lessor, which are not known to the lessee and which could not be discovered by exercising ordinary care. In other words, the said duty of the lessor is limited to disclosure of latent defects. If the lessor fails to discharge his duty of disclosure, his act would amount to an act of fraud under **section 17** of the Contract Act and the contract of lease would be voidable like normal contracts. A material defect which can affect the contract of lease should be of such a nature that if the lessee had known it, he would not have been a party to the transaction. For example, a liability imposed on the property under which the property had to be compulsorily acquired. For this purpose, a material defect is defined as a defect in the lease.

It is a defect which the lessee would not be able to discover by ordinary care. It is noteworthy that this sub-section does not require the lessor to disclose defects of a trivial nature such as the leased property not being physically in a fit condition for use, a broken window pane or a door not closing properly. The expression "ordinary care" is an expression of an indefinite nature. Any defect in the title of the lessor is not a substantial defect within the meaning of this section. It is the duty of the landlord to disclose to his tenant all inherent defects in the property. If a fire breaks out in a thatched house and the furniture of the tenant gets burnt and the fire spreads to the fire-place in the chimney, the lessor should not be allowed to do so.

If the lease is caused due to some defect and the landlord had not informed the tenant about such defect, then the landlord will be responsible for the loss

suffered by the tenant. It is the duty of the landlord to disclose the defects present in the property to the lessee while providing lease, although it is not necessary to disclose that the leased property may deteriorate over time and reduce its utility. In the case of **Tarak Nath vs Bhutoria Brothers**, a company rented a premise in which the director of the company was residing. The director alleged that the company had surrendered its lease and he had got a new lease of the said premises in his favour in his personal capacity. The question was whether the lease has been validly terminated by the company. The answer to this question can be obtained on the basis of what kind of evidence the tenant company presents. It cannot be presumed that the lease has been terminated. The party alleging this fact has to prove the condition of termination of lease by producing evidence. If the answer to this question is in the affirmative then and only then the question of new lessees can be considered. Right to disclose defects the lessor is limited to disclosing substantial defects in the property which are related to the intended use of the property. These words relate only to the nature and condition of the property. This provision does not compel the lessor to produce documents or answer the questions asked. The lessee cannot request the lessor to produce satisfactory evidence regarding his title before the completion of the transaction but the lessee shall have the right to delay the completion of the transaction.
Refuse to produce evidence to the effect that the lessor's title is defective.
(2)Delivery of possession (Section 108 (b) - The lessor is bound to deliver possession of the property to the lessee on his request. This provision is parallel to the obligation provided in **section 55 (1) (g)** of the same Act. **Section 108 (b)** The important feature of lease is that the lessor will be bound to give possession of the property only when the possession is demanded by the lessee. The lessee will not be liable to pay rent due to non-possession of the property. If the lessor files a suit for rent, then the lessee will be able to present the condition of non-possession as an important evidence for his defense. If the lessee gets possession of only a part of the leased property, then he will be liable to pay rent only for that part. If the lessor fails to give possession of the entire leased property, then the lessee will have the right to refuse the entire lease contract, but if he does not do so and continues to hold that part of the property, the possession of which he has got, then he will be liable to pay proportionate rent for the said part. If at the time of creation of lease the property was in the possession of a third person and this fact was known to both the lessor and the lessee, then it will be the duty of the lessor to create such a situation that the possession of the property passes from the third person to the lessee, but if the lessee had full knowledge about the property and there was no obstacle or hindrance in getting the possession of the property, then the lessor is not liable to give possession of the property to the lessee unless the lessee makes a request to this effect to the lessor.

(3)- Covenant for Peaceful Enjoyment (Section 108) (c)- It is the duty of the lessor to enter into a covenant in favour of the lessee for the peaceful enjoyment of the leased property. This covenant forms an integral part of the lease contract and is deemed to be included in the lease contract. On the contrary, in the case of sale under **Section 55**, it is not a part of the contract. It is merely a statutory obligation. The present provision read with **Sections 18** and **25** of the **Specific Relief Act, 1963** makes it clear that the interest of the lessor in the property is as substantial in the case of a lease as in the case of a sale but when the lessee institutes a suit against the lessor for recovery of rent or premium, the burden of proving the faulty or defective interest of the lessor lies on the lessee. If the lessor has no title to the leased property and an unknown person prevents a lessee from taking possession then in such a case the lessee will be entitled to get back the premium amount from the lessor.

A covenant that the lessee shall have the right to the peaceful enjoyment of the property is implied in every lease contract, but it is not directly related to it. It means that the lessee shall be given possession of the property and shall be entitled to receive compensation if his enjoyment is substantially interrupted either by any act of the lessor himself or by any act of any person claiming under him. It is a covenant to be free from interruption. For example, if at the time of granting the lease the lessor reserves the right to mine for minerals and he mines in such a manner that the ground subsides or where the land was leased for hunting, the lessor builds a building on the land in such a manner that the land for hunting is not available or he wants to compel the lessee to leave the leased property and for this purpose he removes the doors and windows of the house or constantly threatens the lessee or creates obstructions in the way so that the lessee's movement becomes difficult. Such acts will be considered as causing substantial interference in the enjoyment of the leased property. But if such acts are done by a person who is doing so in his independent right and in the common interest, then it will not be considered as interference. Under **section 108(c)** the lessee has the option to terminate the lease or continue it. If he so desires, he may get it declared void and if he so decides, he shall have to restore the possession of the property to the lessor as required under **section 108(d)**. The said provision is of universal application whether the provision is enforceable in any area or locality or not. It is noteworthy that the covenant of peaceful enjoyment mentioned in this provision extends to the disturbance of the possession of the lessee by the lessor or the person making a demand under him.

In the case of **Gajadhar vs. Rammau**, the original lessor refused to allow the sub-lessee to run the theatre on the ground that he had given notice to the lessee for the termination of the lease and the sub-lessee should obtain a new lease from the theatre owner by paying an additional amount. According to the court's opinion, the lessor cannot be held responsible for all the disturbances caused by

any such person, no matter how intentional or negligent this disturbance or disturbance is. Certain limits should be set on the liability of the lessor.

It is noteworthy that this clause has been provided in a conditional manner. But this should not be taken to mean that the actual advance payment of rent is a condition precedent for the lessee's right to peaceful possession and enjoyment. This does not mean that if the lessee fails to pay any instalment of rent, he will be evicted from the property; he will continue to hold possession of the property and enjoy the property.

Right to cause repairs to be made (Section 108(f) - If the lessor neglects to carry out, within a reasonable time after notice, the repairs to the property which he is bound to carry out, the lessee may carry out the same himself and may deduct the cost of such repairs from the rent with interest thereon or otherwise recover it from the lessor. Subparagraph (f) It only talks about giving information to the lessor. The lessee cannot order the lessor to get the property repaired. There must be a direct contract between the lessor and the lessee for the repair of the leased property; otherwise the lessor is not bound to get the leased property repaired. If there is any defect in the leased property, then the lessee must inform the lessor about that defect and after this notice, if the lessor neglects to get it repaired, then the lessee can get the repair work done himself.

For the purpose of this Act, 'repair' means making the leased property suitable for the purpose for which it is intended. For example, if the roof of a building leaks in the rain, it is not suitable for residential purposes. Similarly, if the doors are unable to protect privacy or water is not available in the house, then the building is not suitable for residential purposes. But the lessee cannot make radical changes in the thing or property in the name of repair. For example, the lessee is not authorized to convert the tiled roof into a cement concrete roof in the name of repair. He is authorized to replace the broken tiles with new tiles in the name of repair.

Similarly, if the municipality has ordered the lessee to cover a well present in the premises, he will not have the right to fill the well with soil and pebbles. If he does so, he will not be able to recover the expenses incurred in this from the lessor.

Effect of non-repairs by the lessor- If the lessor neglects to get the property repaired within a reasonable time after giving notice to the lessee, which he is bound to get done, then the lessee can get the repairs done himself and the expenditure incurred in such repairs can be deducted from the rent payable to the lessee along with interest or otherwise recovered from him. The lessee is not authorized to terminate the lease. The lease cannot be terminated on the ground of non-repairs even where the lessee has committed to get the repairs done. But on the request of the lessee fails to perform his promise. The lessee has only the right to get the repairs done himself and either deduct the expenditure incurred in the repairs from the rent payable or otherwise recover it from the lessor. The

lessee will have to prove that the repairs done were necessary for the reasonable use of the property and were not a means of enjoyment.

Payment by lessee on behalf of lessor (Section 108(g)) - It provides that if the lessor neglects to make any payment which he is bound to make which, if not made by him, would have been recovered from the lessee or from the property, the lessee may do so himself and deduct the amount with interest from the rent or hire or otherwise recover the amount from the lease i.e. if the lessee discharges the liabilities of the lessor, he has full right to receive the amount which he had paid on behalf of the lessor.

The lessor may recover the said amount from the lessor either by deducting the said amount from the rent amount or by recovering it from the lessor in any other manner as may be agreed between the two.

Right to remove earth-attached objects (**Section 108(g)-** This provision clarifies that on the expiry of the lease, at any time thereafter, but only so long as the lessee is in possession of the leased property, all those the things which he has attached to the earth, but it shall be necessary that notwithstanding this act the lessee leave the property in the same condition in which he received it.

Land-locked goods mean-

(1) Soil-rooted plants such as trees and shrubs

(2) Inserted into the ground such as walls or construction, or

(3) Anything attached to the thing to which it is attached so as to enable permanent beneficial use thereof. The lessee is entitled to remove all such things after the lease is granted but before the handing over of possession of the property. The lessee shall not be prevented from entering upon the premises and from removing the things on the ground that the lease has expired. This provision applies to land. Whatever is attached to the land is a part of the land and shall be affected by the same rights as the land itself. The position regarding things attached to the land, as mentioned in **section 108(h**), has been clarified by the Supreme Court in the case of **Rattan Lal Jain v. Uma Shankar.** According to the court, **Section 108 clause (h)** gives the right to the lessee to remove, at any time during the lease and even after the termination of the lease while he is in possession of the property, but not after the termination of the possession of the property, all things which he has attached to the land and this includes any building which he has constructed or erected on the leased land, but here the lessee is subject to any local custom or contract to the contrary.

Under **Section 108(h)** read with **Section 109**, the lessee has only the right to remove the building erected by him so that the possession of the disposed land may be delivered to the lessor. As far as the question of compensation for such building is concerned, it is not at all a matter of consideration, but if there is a contract to the contrary, the provision of **Section 108(h**) will not operate. In one case the terms of the lease provided that on the termination of the lease the building erected on the premises shall belong to the lessor unless the lessee

removes them on the termination of the lease or removes them within two months from the termination and pays all the dues and fulfils all the conditions. The lease was terminated for non-payment of rent and the lessee agreed to deliver the possession of the property to the lessor. On these facts it was held that all the attached things belonged to the lessor. The principle mentioned in **section 108 (j)** is also applicable to the sub-lessee. A lessee has the right to remove any unauthorised construction made by him on the expiry of the lease and return the property to the lessor in the same condition in which the lessor had transferred the property to him.

Right to remove crop (Section 108(i)- If a lease of indefinite duration such as a lease from year to year is terminated for any reason other than the default of the lessee, he or his legal representative shall have the right of free passage to collect and carry away all crops planted or sown by the lessee and grown on the land. The provisions of this provision are in consonance with the provisions of **Section 51** of the same Act which aim to protect the interests of bona fide transferees. Where a suit was passed for obtaining possession of property and an order was passed that if the plaintiff did not deposit a certain sum of money with the defendant before a certain date, the possession of the property would continue with the defendant. The plaintiff failed to deposit the sum of money. In such a situation the defendant raised crops on the said land. In the meanwhile the plaintiff demanded possession by depositing the sum of money. It was held that the defendant would get the benefit of this provision. The lessee cannot demand that the defendant should give him the right over the crops along with the possession of the property. Hand it over to him or pay him the price of the crops.

Right to transfer interest (Section 108 (A)- This provision provides important rights to the lessee. According to it, the lessee may transfer his interest in the leased property either absolutely or by mortgage or sublease and the transferee of such interest may transfer it back to him. The lessee shall not cease to be subject to any of the obligations attached to the lease merely by reason of such transfer. The right to transfer provided in that provision shall not operate under the following circumstances.

(1) The lessee has a transferable lien.

(2) The vested interest of a tenant who is unable to pay the land revenue in the said tenancy

(3) Interest of the lessee in property under the management of the Court of Wards. In this connection it is important to note that the obligation to hand over the possession of the property back to the lessor after the termination of the lease rests on the lessee and not on any other person as there is no contractual affinity between the lessor and the other person.

Therefore, the transaction should be between the lessor and the lessee only. But if the lessor agrees that he will accept another person i.e. the sub-lessee or

the assignee as the original lessee, then the original lessee will be free from his liability.

Subject to the provisions of **Section 10** of the Transfer of Property Act, 1882, the lessee is permitted to transfer the property in the ordinary course of the estate. Unless there is a covenant which limits the rights of the lessee, the rights of the lessee in the case of a fixed lease are both transferable and inheritable. By absolute transfer the lessee transfers his entire interest in the leased property and by this process a contiguity of estate is created between the lessor and the transferee and as a result a relationship is established between the new transferee and the lessor and the transferee becomes liable to the lessor by virtue of the covenants running with the land including the covenant to pay rent or lease. The above provision however authorises the lessee to create a sub-lease. If he transfers the property without taking the prior permission of the lessor and on this ground if the lessor initiates proceedings for eviction of the lessee, he (the lessee) cannot take the defence that he has the right to transfer the property under **section 108(j).** A transfer by sublease made absolutely for the unexpired term of the lease will not be an assignment for the unexpired term, it will be only a sublease and it will not be treated as a breach of the covenant against assignment.

Rights of the Sub-lessee - Since sub-lease has not been declared illegal under the Act, but the lessee has been given the right that if he wishes, he can create a sub-lease of the entire property or of a part of it, hence the sub-lessee will have certain rights under the lessor.

Generally, the right of the lessee to create a sub-lease depends on the mutual consent between him and the lessor, hence only in those cases where there is a specific prohibition in the lease agreement on creating a sub-lease of the property and this prohibition is ignored and an unauthorized sub-lease is created, then in such a situation the lessor can take action for forfeiture of the lease. It is a valid principle of property law that no person can transfer the best interest that he has in the property. Hence, a transferee of a fixed period cannot lease a longer period to the sub-leaseholder. Hence, if no period is mentioned in the sub-lease deed, it cannot be concluded that the sub-lease is a lease of permanent nature. It will only be concluded that the sub-lease has been created for the residual period of the original lease.

Contiguity of estate- When the liability of the lessee to pay rent is based on the contiguity of the estate, this liability ceases the moment the interest is transferred to another person. But so far as the original lessee is concerned, his liability does not cease by reason of assignment.

His liability ends only when the assignment is accepted by the lessor directly or indirectly as a lessee otherwise a suit for eviction can be instituted against both the lessee and the assignee. The liability of an assignee of a lease to pay rent arises as a result of contiguity of the estate and this contiguity arises as a result of

transfer of property and not by acquisition. If the assignee transfers his interest to another person, then his contiguity of the estate will end and as a result he will have no liability in case of breach of covenant after assignment. A mortgagee of a leasehold property who has acquired it by forfeiture of the interests of other mortgagees is liable to pay rent to the lessor because in such a case the entire interest of both the lessee and the mortgagee is merged in one person i.e. the mortgagee by operation of law. If the lessee creates a mortgage in violation of the terms of the lease property and the landlord obtains a decree for eviction on the basis of forfeiture, the mortgagee, since he is not the assignee, cannot say that the notice given under **section 111 (g)** is not valid or that the terms of the lease have not been violated. If the person who has taken possession of the property from the lessee is a complete trespasser and there is no proximity between him and the lessee, the court may pass a decree in favour of the lessor for possession, but in other cases where the occupant is in possession as a result of a transfer made by the lessee, a decree in favour of the lessor for possession will not be passed unless abandonment by the lessee is proved.

Question No. 8- What do you mean by donation? When can a donation be suspended or revoked? Explain.

Answer- Under the Property Transfer Act, just as sale, lease, exchange are the means of transfer of property, similarly donation is also a means of transfer of property. Any property can also be transferred through donation. Provisions related to donation are adequately given under the Property Transfer Act. **Section 122** of the Property Transfer Act presents the provisions related to donation. Under this article, an explanation is being presented on this section and the definition of donation is being highlighted.

Donation - It is the transfer of any existing movable or immovable property made by one person, called the donor, to another person, called the donee, voluntarily and without consideration and accepted by or on behalf of the donee. It is a voluntary and without consideration transaction which is completed between two persons who are alive at the time and is of absolute nature.

(1) It is agreed between the donor and donee that the donation may be suspended or revoked on the occurrence of a specified event.

(2)The event occurs without depending on the will of the donor.

(3) The donor and the donee have agreed to the condition at the time of accepting the donation.

(4) The condition imposed is not illegal or immoral and is not detrimental to the property created by the donation.

It is important to note that **section 126** is regulated by **section 10**. Therefore, if any clause contained in the gift deed completely prohibits the transfer of the subject matter of the gift, then the transfer would be void in view of the provision mentioned in **section 10**.

A donation is not revocable merely at the will of the donor, because in such a situation the person donating can take it back at any time, as a result a valid and permanent donation cannot be created. If the occurrence of the condition or event does not depend on the will of the donor, then it can be suspended or revoked.

In the case of **Thakur Raghunath Ji Maharaj vs. Ramesh Chandra**, an unconditional gift of land was made by a gift deed, but on the gift deed itself there was a written contract between the donor and the donee according to which it was covenanted that if the donee, after obtaining possession of the land, does not take action to construct a college within a specified period of six months, then the donor can take appropriate action to obtain possession of the said property.

On the basis of these facts, the Supreme Court held that the donation was not absolute or that the unconditional donation deed and the agreement, which are the components of the transaction, should be read together and should be given effect accordingly. The donation was subject to a condition. Therefore, in case of non-fulfilment of the condition, the donor can revoke the donation.

When may the donation be revoked- Paragraph 2 of this section provides as follows-

"It may be revoked in any case except in the case of absence or failure of consideration in those cases in which it would have been revocable if it had been a contract." From the above paragraph it can be concluded that on the same grounds on which contracts are rescindable under the Contract Act, 1872, the donation will also be rescindable. Contracts are rescindable under the Contract Act, 1872 on the ground of coercion, undue influence, fraud, mistake and misrepresentation etc. Therefore, following this section i.e. Section **126** paragraph 2, Transfer of Property Act, it can be said that the donation can also be revocable on the ground of coercion, undue influence, misrepresentation, fraud or mistake. The burden of proving that the donation is revocable on any of the above grounds lies on the person who wants to cancel that donation. If there is a mere mistake of law, then this ground will not be sufficient for revocation of the donation. If there was a relationship of Yajman and Purohit between the donor and the donee and the donor due to his bad health donates all his property in favour of his priest who was an influential person who also had influence over the donor, then the burden of proving that the donor understood the legal effect of the transaction will be on the influential donee and if he fails to discharge his responsibility then the donation will be cancelled. In this case the donation was cancelled by the court. If a client transfers his property in a fit of impulse in favour of his lawyer's wife then this transfer will not be cancelled. A different situation arose in the case of **Ram Chandra vs Sheetal Prasad**. A father transferred all his property by donation in favour of a person who was the lover of his daughter. The lover was also living in the same house in which the father

and daughter were living. In this situation the court had to consider whether the donation made by the father was valid?
The court, after observing all the circumstances, expressed the matter thus-
1. The daughter and her lover who was the donor were in a position to influence the wishes of the donor father.
2. The donor giving all his property to the donee without paying any attention to the interest of the daughter makes the transaction against conscience.
3. Both the situations mentioned above together give rise to the presumption that the gift deed came into existence under undue influence. Hence it was held that the donor can get the transaction cancelled. Unless the donor is aware of his right and the gift is free from undue influence, it will not be possible for the donor to express his intention towards the gift or to approve it.

Revocation of donation on the ground of undue influence or fraud- Undue influence or fraud has the same effect on a transaction of donation between two living persons as it has in the case of a principal contract. Therefore, a person seeking to revoke a donation on this ground has to plead and prove the circumstances mentioned in **section 16(1)** of the Contract Act. To shift the burden of proof to the donee, both the conditions mentioned therein have to be satisfied. Three points have to be considered in this context.
(1) Whether the plaintiff or the person seeking remedy on the ground of undue influence has proved that both the relations between the two were such that one of them was in a position to influence the will of the other.
(2) Whether the effects amount to undue influence which rendered the transaction unconvincing.
(3) That the person exercising undue influence must prove that he did not exercise undue influence was in the case of **Ajmer Singh vs Atma Singh**, an old man whose eyesight had also deteriorated filed a suit for cancellation of the gift deed made by him in favour of his son on the ground that he had not voluntarily transferred the property in donation. It was evident from the circumstances that the plaintiff had not voluntarily made the donation. The defendant donor influenced his intention because he was in a position to do so. In such a situation, it was only on the donor to prove that the donation was voluntarily made. If this was not proved, the donation was declared void. In another case, it was alleged that the gift was obtained by resorting to fraud from a veiled woman. The plaintiff, who was a veiled woman, was not aware of the transaction and she was deceived into making the donation. Even if the woman is unable to prove the fraud, the donor will have to prove that the woman was not deceived.

When the donation cannot be revoked has been mentioned in Para 1 and 2 of **Article 126**. The circumstances under which the donation can be revoked are mentioned in **Article 3** and it is made clear that the donation is not otherwise revocable. Hence If the donation is being revoked in any other circumstances other than those mentioned in paragraphs 1 and 2 of this section, then the

donation cannot be revoked. Therefore, the revocation of a donation, which is completely dependent on the intention of the donor, cannot be done because the transfer of property by donation becomes final and binding as soon as the transaction is completed. Once the transaction of donation is completed, the donor cannot revoke it on the ground that he made the transfer by mistake or he thought that the donor would perform his last rites or death rites. If after the transaction of donation is completed, the donor's opinion about the donor changes or the donor's attitude towards the donor changes, then also he cannot revoke the donation. If the donor had made the donation under undue influence, despite which he later expressed his consent for the donation, then after giving consent, he will not be able to challenge the donation. The donation cannot be revoked even if the donor alleges that he had transferred the immovable property without due consideration and due to his foolishness.

Revocation of donation under Hindu and Muslim Personal Law- Hindu Personal Law is clear about the revocation of donation. Once a valid donation is created, it can be revoked only if it is proved that the donation was not voluntarily executed; rather it came into existence due to undue influence or fraud. If the transaction of donation is questioned due to undue influence, then the parties can file a case against the donor personal relationships should be considered first.

Question No. 9 – Define lease and discuss its essential elements.

Answer- Section 105 defines lease as a partial transfer i.e. transfer of right of enjoyment for a certain period of time. According to this section, lease of immovable or immovable property means transfer of right to enjoy such property which is given by the transferee to the transferor on specific occasions for a fixed period of time in consideration of price paid or promised to be paid, money, share of crops or any other thing of value to be given periodically. In simple words it can be said that the lessor transfers the right to enjoy his immovable or immovable property to the lessee and the lessee in return for this right either pays or promises to pay to the lessor a consideration in the form of price. The consideration may be in the form of share of crops or in the form of any service or in the form of any other thing of value which is given or is to be given by the transferee to the transferor on a periodic basis or on specific occasions. The important aspect of lease is that in it ownership and possession are separated. The right of enjoyment is given to the lessee for whom possession of the property is necessary, while the right of ownership remains with the transferor. Since the transferor does not transfer his entire interest in the property to the lessee, whatever remains with him in residual form is called 'Right of Reversion'. This Right of Reversion is an important right of the lessor through which he is entitled to get back the property given to the lessee and his fragmented ownership becomes complete again.

Essential elements of lease - The following are considered essential elements of lease -

1. Parties - Like a normal contract, there are two parties in a lease and the agreement between them creates a lease. One person is the owner of the property, called the lessor or lessee, from whom another person proposes to take the property on rent for a period of time for a consideration. The proposer is called the lessee or 'lessee'. The two parties are also called the landlord and the tenant respectively. It is necessary for the lessor to have all the qualifications mentioned for the parties to a contract in the Contract Act, 1872, such as, he should be an adult, mentally sound, the property should belong to him and he should have other legal capacities and should be free from restrictions. The property should belong to the lessor. This term means that the lessor should be the owner of the property or should be authorized by the owner of the property in this behalf. If the lease is made by the owner of the property who is not affected by any disqualification, the lease may be created for any period as the lessor may deem fit. But if the lease is made by a person who is not the owner of the property himself or is a limited holder in the property, such as for life or for a fixed period, such person may lease the property under his tenure unless he is otherwise specifically authorised. Under this principle, the lessee is also authorised to lease the property and the lease made by him is called a sub-lease or subordinate lease.

A testamentary guardian is authorised to grant a lease subject to the terms of the will and an administrator or executor is authorised to grant a lease within the ambit of **section 307** of the Indian Succession Act, 1925. A minor may create a lease through another friend who is an adult, which may contain conditions binding the minor to do certain acts. Such a lease shall not be void even if the covenant is unenforceable against the minor. The lessee cannot have the lease terminated. He cannot enforce specific performance of the covenant from the minor, but he shall be entitled to compensation. A minor even if a lease made by a minor is void, the court has power under the ordinary principles of equity to order that the consideration paid by him before evicting the lessee be refunded to him. A transfer of property in favour of a minor as mentioned in **section 7** of the Act is not void. But if a lease is made in favour of a minor who contains covenants which are to be performed by the minor, the lease will be void. If the consideration has been paid as a lump sum premium under the terms of the lease and there are no covenants outstanding which are to be performed by the minor lessee, such lease will be valid.

In the case of **Raghavachariar vs Srinivas Raghav**, Justice Srinivasa Iyengar has clarified the difference between cases where the transfer is in consideration of certain promises or covenants and cases where the property transferred itself is associated with certain liabilities. In the first case, the transfer in favour of a minor will be void while in the latter case it will not be void.

2. Subject matter of lease- The object which can be leased under the Property Transfer Act should be immovable or immovable property. What will be called immovable or immovable property is described in **Section 3** of the Act. According to this, standing wood, growing crops or grass do not come under immovable property. This is a negative definition in which those objects are not included, that is, except these; all other objects are immovable property. But this is not true. Table, chair, utensils, motor etc. will not be immovable or immovable property. Therefore, to understand immovable or immovable property, we will have to take help of other statutes like Registration Act, General Clauses Act, Sale of Goods Act etc. Immovable or immovable property, whether tangible or intangible, will be the subject matter of lease. On the basis of the definitions given in these various Acts, it can be said that land, building, benefits derived from land such as right to fish, right to sail, right to cut and take away trees for a certain period, fees quoted from the market etc. will be the subject matter of the lease. The thing in respect of which the lease will be created or can be created should be definite. For example, if the responsibility of storing the goods has been created under the lease, but no room is definite for storing the goods or the room is changeable from time to time as per the convenience of the owner of the premises, then in such a situation the lease will not be considered to have been created. But if the premises are clearly definite, then no matter how complex the restriction imposed on the use of the premises, will not prevent the creation of a lease and the lease will be considered to have been created. Land is the most important thing in respect of which a lease is created. It is important to note in respect of land that along with the upper surface, the land can also be leased for various layers below the surface, such as lease in respect of minerals and mines. Discussion relating to land also includes 'earth bound' things.

'Earth-locked goods' means-'

(a) Rooted in the soil, such as trees and shrubs. (b) Imbedded in the soil, such as walls or constructions.

(c) Is tied to the input object in order that it may be put to permanent beneficial use.

A building or any part thereof is also the subject matter of a lease. Lease of a mine-The lease of mines is regulated by the Mines and Minerals (Regulation and Development) Act, 1957 and the definition of 'lease' under this Act is not expressed in the narrow and technical sense in which 'lease' is defined in **section 105** of the Transfer of Property Act, 1882. But any arrangement or compromise in relation to mines is treated as a 'lease' in India. The right to carry on mining operations in land is a right to enjoy immovable property within the meaning of **section 105** of the Transfer of Property Act.

3. Transfer - The transaction of lease is a transaction in which the transfer is partial, not absolute. In other words, both the transferor and the transferee have rights over the property. The difference between the two is that the physical possession of the property is with the transferees while the ownership remains with the transferor. The transferee or lessee uses the property during the period of lease while the transferor or the lessor is deprived of the right to use the lease during that period. For such a transaction, the word 'demise' is used in English law, which means partial transfer, especially transfer done through lease.

Clarifying the status of lease, it has been said- In the case of **Bairamji Bhay (P) Ltd. vs. State of Maharashtra** it was stated that a lease contemplates a 'demise' or the right to enjoy a land for a period or in perpetuity in exchange for a price paid or promised to be paid or money or share of crop or service or any other valuable thing payable by the transferee to the transferor periodically or on specified occasions."

In the case of **Nai Babu vs Lala Ram Narayan**, the landlord filed a suit for eviction of the tenant. The suit ended in a settlement in which the tenant agreed to vacate the property, but it was also agreed between the two that the tenant would be able to reside in one part for the next five years. After a period of five years on termination, the landlord initiated legal proceedings to obtain possession of the said portion which was opposed by the tenant. The disputed point was whether the tenant was the lessee of the said portion. After considering all the circumstances, the court decided that in this case there was no intention to create a lease in respect of any portion. Hence, there is no question of registration of the decree. The lessee is liable to hand over the possession of the property under the agreement.

4. Period-Period is an important component of a lease- A lease for perpetuity is created for a fixed period. This period will be determined directly or indirectly. The date of commencement of the lease is usually determined by mutual agreement between the lessor and the lessee, but if for some reason or due to negligence the date from which the lease can be considered to have commenced is not determined, then under Section 110 of this Act the lease will be considered to have commenced from the date of execution.

In the case of **Sevak Ram vs Meerut Municipal Board**, it was held that such transaction would be void as a lease. But it has also been opined that such transaction would create a tenancy at will which would turn into a yearly or month-to-month lease after payment of rent.

5. Consideration Lease - It is a transaction which requires consideration to be valid. The consideration may be either premium or rent or both. Premium and rent is not the same thing. Premium is the price or value of the transfer of the good which has either been paid or promised to be paid. On the contrary, rent is any payment made by the lessee which is part of the consideration for the lease. The difference between premium and rent has been clarified by the Supreme

Court in the case of **Commissioner of Income Tax vs. Panwari T. Co**. The Supreme Court has clarified that - "When the interest of the lessor is transferred in exchange for a price, the price or value paid is called premium or salami. Whereas the periodical payment of money for the continued enjoyment of the benefit under the lease will be in the nature of rent. The first payment is capital income while the subsequent payment is a revenue receipt."

Question No. 10- Define the right to easement. Describe the essential elements and different types of easement do it.

Answer- The concept of easement is defined under **Section 4** of the Indian Easements Act, 1882. As per the provisions of **Section 4**, easement right is a right enjoyed by the owner or occupier of land over another land, not his own, with the object of providing beneficial enjoyment of the land. This right is granted because without the existence of this right the occupier or owner cannot enjoy his property to the full. It includes the right to do or continue to do something or to prevent or abstain from doing something in or with respect to another land, which is not for the enjoyment of his own land. The term 'land' means everything permanently attached to the earth and the term 'beneficial enjoyment' signifies convenience, advantage or any facility or any necessity. The owner or occupier referred to in the provision is known as the dominant owner and the land for the benefit of which the easement right exists is called the dominant heritage. While the master on whose land the obligation is imposed is known as the slave master and the land on which such obligation to do or to abstain is imposed is known as the servile inheritance.

(1) According to Gale - "It is a privilege, a right of perpetual use, of one neighbour to go over the land of another without profit."

(2) According to Peacock - "Easement is a free privilege which a commissioner obtains from the owner of a property thereby binding on the owner of the property from the exercise of his absolute power or from doing any act for the benefit of the commissioner."

(3) According to Samand - "Easement is a legal servitude which applies to one plot of land for the benefit of another plot; it is not the servitude which is called the benefit.

Essential elements of happiness-

1. Dominant and subordinate inheritance - For the enjoyment of the right of easement it is necessary to have two estates namely dominant and subordinate inheritance. This is because by definition, it is a right exercised by the owner or occupier of a land over the land of another person to enjoy the benefit of his land. Dominant and subordinate inheritance cannot be one and the same. Thus, the existence of two estates and their separation from each other is necessary.

2. Separate owners-To exercise the right of easement, the owners of the two properties shall be different and not one person.

3. Beneficial Enjoyment - The purpose of the enjoyment is that the principal owner enjoy it in a manner that involves express and implied benefits.

4. Positive or Negative- Easement can be both positive or negative. The former refers to the right through which the dominant owner does certain acts to exercise authority over the land of the subordinate owner. Whereas, the latter refers to the act of prevention. In negative easement the dominant owner prevents or restricts the subordinate owner from doing certain acts or things. In the right of easement the owner of the dominant inheritance can prevent the subordinate owner from doing something or act, but he cannot compel the subordinate owner to do something for him. Easementary right exists only when the two inheritances are adjacent to each other. It is an in rem right, which means a right available against the whole world. Easement as a right is always attached to the dominant tenancy. It is a right of re-estoppel which means a right over the subordinate tenancy and not over his own land.

Types of easement-

(1) Continuous or Discontinuous - A continuous easement is one which can be enjoyed without the intervention of any person's conduct or act. It does not involve any intervention of any person and adds special character to the property. While, on the other hand, the right of easement which requires the intervention of any person is called discontinuous. This type of easement requires that some human act be done by any person on the servitude.

(2) Obvious or non-obvious- Obvious easement is one whose existence can be seen through a permanent mark. It can be seen on the basis of careful investigation and reasonable foresight. It is also called as non-obvious easement. Inspection is required to check the existence of a right. For example – there is a drain from A's land to B's land and from there it goes into an open yard. This can be seen through obvious inspection and it is an obvious easement. Whereas, non-obvious easement is just the opposite of obvious easement. This type of easement is not visible through inspection. There is no such permanent sign. The right is in use but is not visible and thus, it is known as non-obvious easement. For example, A has a right in possession of A's land to prevent B from constructing on his house. Another example to explain non-obvious easement is the right to prevent construction above a certain height.

Question No. 11 - What do you understand by mortgage of securities? Discuss the law relating to contribution in respect of mortgage loan.

Answer - In this article related to the Property Transfer Act, brief comments are being presented on **Section 81** of this Act which mentions the mortgage and **Section 82** which mentions the contribution. In the previous article, it was mentioned about the suspension of the previous mortgagee. Under this one article, important comments are being presented on both these sections so that important information can be obtained on both the sections in one article.

Serial Encumberance - (Section 81)- 'Serial Encumbrance' means to keep things or objects in one order. The right of serial encumbrance is the right of the subsequent mortgagee. Section 81 enacts the principle of serial encumbrance of securities. According to the principle of serial encumbrance, if the owner of two or more properties mortgages them to one person and subsequently mortgages one or more of those properties to another person, then in the absence of a contract to the contrary, the subsequent mortgagee is entitled to satisfy the debt of the previous mortgage as far as possible from that property or properties which have not been mortgaged in his favour. The principle of serial encumbrance was propounded by Lord Elton in the case of **Aldrich vs Cooper**. The judge observed, "It would not depend on the willingness of one lender to frustrate another."

In order to satisfy both, equity compels the first mortgagee to pay his debt from the property which is within his reach and give up the property which is not within his reach to the other, but if the first security is not sufficient for payment of the mortgage amount, then after using it, the prior mortgagee can retain his right over the security which was given as security to the subsequent mortgagee. The principle of serial encumbrance was in practice in this country even before the implementation of this Act. But in this section, only the English legal principle has been incorporated. According to English law, the arrangement of securities in such a manner that the claims of all the mortgagees can be satisfied as far as possible is called serial encumbrance.

Essential elements - For the enforcement of the principle mentioned in this section, the following elements are necessary-

(1) The mortgagor is one and the same person who mortgages different properties to different persons. The different properties which are the subject matter of the mortgages belong to the same mortgagor and the persons claiming the properties are creditors of the same mortgagor.

(2) The subject matter of the mortgage is more than one property. Firstly, all the properties are mortgaged in favour of one person, and then only one of them or some of them is mortgaged in favour of another mortgagee.

(3) Both mortgagees are situated on the same ground. If both mortgagees have separate claims in respect of the mortgaged properties, then the question of sequencing will not arise. Not only this, but also that the mortgagees have equal interest in the properties mortgaged in their favour. For example, if the prior mortgagee had a right of charge on one of the two properties transferred in his favour and a right of set-off (mujrai) on the other property. In such a situation, the subsequent mortgagee cannot force the prior mortgagee to satisfy his claim from the set-off property and leave the property under charge so that the subsequent mortgagee can satisfy his claim. Similarly, there cannot be sequencing between a fund and a right of suit.

(4) There should not be a contract to the contrary, that is, if there is a contract to the effect that after the satisfaction of the claim of the first mortgagee, the second mortgagee will submit a demand for the satisfaction of his claim, then he will not be able to request the first mortgagee for arrangement.
(5) The doctrine of gradation will not apply if its effect is to impair the rights of the first mortgagee or the rights of any other person who has acquired any interest in any property for a consideration. That is to say, gradation should neither prejudice the interests of the first mortgagee nor destroy the interests of the subsequent mortgagees. For example, A mortgages property to B and L mortgages the property to C and D mortgages the property to D. In this case, if C makes payment from L, there may be no balance for D and therefore the property will be distributed to secure the interests of both C and D. Insist that B gets his whole amount. Thus D's claim will be destroyed and B's interest in L will be proportionately affected.

The principle of adverse contract of serial bond is applicable only when there is no contrary contract between the parties. In other words, it can be said that **Section 81** gives full permission to the parties that they can save themselves from this principle by mutual contract and can regulate their relations with voluntarily determined conditions. The adverse contract can be expressed or implied but it will be appropriate if it is in writing. For example, two properties were given as mortgage security to A and B. Thereafter, the property was mortgaged to C with the condition that C will release B. This condition means that C has not been released from the right of serial bond. He can only release B, that is, by paying the mortgage amount to B, C will take the place of B. In no case can he ask B to pay his debt as far as possible from the property which is under his (B's) own control. Here C's right has been terminated by the contract as implied.

Contribution - (Section 82)- Contribution means arranging money for the general fund. **Section 82** provides a provision to this effect. This is a principle of equity. According to this, when more than one person is responsible for the same loan, then their liability will be in the same proportion as their share in the mortgaged property. For example, if A, B and C, three brothers who have equal interest in the property and mortgage the said property as security for the payment of the loan in favor of D. Thereafter, the property is divided among the three brothers. D institutes a suit for the sale of the property and the recovery of the mortgage amount and according to the decision, he pays his amount by selling A's share in the property. In this situation, the question will arise that what will be the duty or responsibility of B and C towards A? Are B and C bound to help A? In this example, the shares of all three were transferred in favour of D as security and hence all three shares are equally liable for the payment of the loan for which the property was given as security. Since the mortgage amount has been paid from only one share, it becomes the responsibility of the remaining two shares to compensate A for the amount he paid in excess of his share. Hence,

A will be authorized to receive contribution from the shares of B and C in the same proportion in which their share was in the property. The liability of contribution does not arise unless there is equity, that is, the properties given as security are equally liable for the payment of the loan. In the case of a common loan, it is not fair to compel a debtor to pay the entire loan. Every debtor should pay his share in proportion. This is the principle of equity, justice and good conscience. But as far as the mortgagee is concerned, he can expect payment from one or more or all the borrowers.

If he (mortgagee) has relied on the property of one of the debtors for payment of his amount, then it will be the duty of the other debtors to pay to the extent that he had paid more than his share. The contribution of the other debtors in this regard will be in the same proportion as their own share was in the mortgaged property.

According to Sir Ras Bihari Ghosh- "When the property of two or more persons is given to a mortgagee for the creation of a mortgage or the same property is delivered to several persons after the mortgage, the creditor can as a rule take action against any one of them and to prevent the sale or discharge of the property it will be necessary that the whole mortgage amount should be paid. It is therefore natural and reasonable that in such cases the person who was bound to pay the whole common mortgage amount should have a right to demand compensation from the others and a fair rule cannot be formulated that each of them should contribute to the value of the property held by him or by them or to the extent of his interest therein. The law will not pain the creditor to select his victims and convert a common burden into a severe individual hardship by undue partiality."

Principle of Contribution- Section 82 of this Act lays down the following rule-

Rule 1.- This rule provides that if the property subject to the mortgage belongs to two or more persons having distinct and separate ownership thereof, then, unless there is a contract to the contrary, the different shares or portions of such property owned by such persons are liable to contribute in proportion towards the debt secured by the mortgage and for the purpose of determining the proportion in which each such share or portion shall contribute, its value shall be deemed to be its value as on the date of the mortgage after deducting the amount of any mortgage or charge to which it may have been subject. This rule provides for contribution and also clarifies how the value of the mortgaged property shall be ascertained. The mortgagor from whose property alone the debt is recovered may compel the other co-mortgagors to contribute towards the debt. When the debt is normal the load will also be normal.

A and B, two brothers mortgage their joint property for Rs. 10,000 in favour of C. After the mortgage, they divide the property and take half share each. Both A and B fail to redeem the mortgage, as a result of which C recovers his money by selling A's share. A is entitled to receive a contribution of Rs. 5,000 from B.

Suit for contribution-A suit for contribution will be maintainable only when the entire mortgage amount has been paid from a part of the mortgaged property. It is not necessary that the entire loan has been paid from the plaintiff's property only. The question of contribution between the mortgagees can also be determined in the decree passed in the suit for enforcement of mortgage. If the mortgage loan has not been paid in full, then the claim for contribution will not be accepted as it will lead to complexity and multiplicity of suits.

Rights of the mortgagee- The mortgagee has the right to receive his mortgage amount. The claim of the mortgagee cannot be divided from any property mortgaged at the instance of any purchaser of the mortgaged property. The important fact is that the mortgagees are not liable to contribute individually. They are liable to contribute only to the extent of their separate shares in the mortgaged property. When one of the two properties has been mortgaged, and then both the properties are mortgaged-

Rule-2- provides that where a mortgagor has two properties and one of them is mortgaged as security for one debt and both the properties are then mortgaged as security for another debt and the earlier debt is paid out of the first property, both the properties shall, in the absence of a contract to the contrary, be proportionately liable for the payment of the second mortgage but the contribution shall be taken from the value of the property out of which the earlier debt is paid after deducting the amount of the earlier debt from the value thereof. For example, A has two properties A and B and the value of each property is Rs. 5,000. A first mortgages property B as security and receives Rs. 3,000 from B. Thereafter he and L mortgage both the properties in favour of C for Rs 7,000. Rs 3,000 is paid to B, the mortgagee, from the property.

Since the value of the property is only Rs. 5,000 out of which only Rs. 3,000 has been paid in favour of B. Hence only Rs. 2,000 is left from A's property. In the second mortgage both the properties and loan have been given as security and at present the value of loan is not Rs. 5,000 but only Rs. 2.00. Hence if there is no contract to the contrary then the property will be liable to pay only Rs. 2,000. Since the second mortgage was done for Rs. 7,000, hence the remaining Rs. 5,000 will be paid from the property. In proportion, the properties and loan will be liable for payment in the ratio of 2 and 5 ($2 \times 5 = 7$) respectively.

In fact, the second rule is just an illustration of the first rule and it presumes that if the previous mortgage has been paid, then to ensure proportionate contribution, contribution for payment of subsequent loan will be taken from the said property only after deducting the amount paid from it. And proportionate contribution of both the properties will be ensured on the basis of the current situation.

Example: Two properties A and L are mortgaged as security for a loan of Rs. 1,000. The market value of property B is Rs. 1,000 while the market value of property L is Rs. 15,00. Property B is already secured for Rs. 500. The market value of property L will be determined by deducting the Rs. 500 for which property L is already secured from its market value of Rs. 1,500, which will be Rs. 1,000. This Rs. 1,000 will be considered as the market value of the property and will be accepted for determining the liability share of property L. As a result, property B and L will be liable for payment of the second loan in the ratio of Rs. 1000: 1000. In other words, the contribution share of both the properties will be equal. Since the mortgage amount is Rs. 1,000, hence Rs. 500 each will be paid by I and II. But if the amount payable under the prior mortgage is more than the market value of the prior security, then the market value of the prior security will be considered zero for payment of the subsequent mortgage amount and there will be no liability on the said property for payment of the subsequent mortgage amount and the entire liability for payment will be on the other property. It will be appropriate to keep in mind that in a suit for contribution, the owner of the property can demand only that much amount as contribution which he had paid from his proportionate share. The demander cannot demand more than this. Demand for contribution is a claim on the property.

Contribution No liability will arise unless it is clear that both the properties were subject to a common mortgage. Similarly, contribution would not arise where one property was security for the mortgage and the other property was subject to a general lien. Contra Contract The doctrine of proportionate contribution is subject to contra contract. If it is mentioned in the mortgage deed that one property is the main security for payment, the liability for contribution will be on that property only.

Section 82 (Rule 3) of the Act provides that nothing in this section shall apply to property liable under **section 181** for the claim of a subsequent mortgagee. For example, A has two properties, A and L. He mortgages property A to C and both the properties and L and then to property D. Here, L is liable for the payment of the debts of D proportionately out of the two properties and L is liable for the payment of the debts of D. After payment of the mortgage amount out of property A to B and the mortgage amount out of property L to C, so far as L is concerned, his right of mortgage will prevail over the right of contribution. In other words, it can be said that if there is a conflict between serialisation and contribution, then serialisation will have priority over contribution because the principle of serialisation protects the interests of the subsequent mortgagee, binding the prior mortgagee to pay his amount as far as possible from the same property which has been given to him as security for payment of the mortgage loan. The important fact is that the right of contribution is of the mortgagor while the right of serialisation is of the subsequent mortgagees.

Question No. 12- Define exchange. Differentiate it from sale and donation.

Answer - Definition of Exchange - When two persons transfer the ownership of one thing to each other for the ownership of another thing, neither of which is money or both are money, and then the transaction is called "exchange". In other words, the transfer of one thing for another and both or both of them having a movable or immovable thing will be exchange.

Transfer of ownership - Mutual transfer of ownership for exchange means transfer of ownership of one good from the ownership of another good to the ownership of another good. A transaction is not an exchange between 'A' and 'B' unless-

(1) The ownership of an article does not pass from A to B; and

(2) The ownership of the second thing is not transferred by B to A.

So my pen can be exchanged for your book, or all my chairs and tables can be exchanged for one bigha of your land. But if one of the things to be transferred is money or rupees paisa then the transaction will not be an exchange but a sale. Because the price is only in money or rupees paisa. But according to the rules of this section, money or rupees paisa can be exchanged in one form, money or rupees paisa can be exchanged in another form like rupees can be exchanged for notes. Similarly, one type of stamp can be exchanged for another type of stamp and this will not be a sale.

There the Orissa High Court held in **Shri Harijena vs Kshetramohan** that such exchange is barred by **Section 23** of the Contract Act. Hence such contract is not valid.

A and B were adjacent owners. The survey trends regarding their Khata were wrongly made in the survey record of rights. The Khata whose ownership and possession was vested in A was recorded in the name of B. Their correct Khata numbers were not mentioned.

The fact of possession was acknowledged by a document executed between them. In such a situation, the Jharkhand High Court held in the case of Mohammad **Uddin vs Asibun Nisha** that neither the ownership was exchanged nor the property was transferred by this document, this document will be interpreted as an acknowledgement of possession and not as an exchange. It will be valid without registration.

Rights of party deprived of thing received in exchange.—If a party to an exchange or any person claiming through or under such party is deprived of the thing or any part of the thing received by him in exchange by reason of any defect in the title of the other party, then, unless a contrary intention appears from the terms of the exchange, such other party shall be liable to him or any person claiming through or under him for any loss thereby sustained, or, at the option of the person so deprived, to return the thing transferred, if the same is still in the possession of such other party or his legal representative or transferee from him, without consideration.

Rights and obligations of parties.-Save as otherwise provided in this Chapter, each party, in respect of the things which he delivers, has the rights, and is subject to the obligations, of the seller, and in respect of the things which he takes, has the rights, and is subject to the obligations, of the buyer.

Exchange of Money – On exchange of money, each party guarantees the genuineness of the money it gives.

What is the difference between a gift deed and a sale deed?

Some of the important differences between a gift deed and a sale deed are as follows:

Sr No	Deed of gift	Sale deed
1	Transfer of property is often done for the purpose of gift or inheritance without any monetary benefit.	The property is sold at a predetermined price, providing the seller with a monetary benefit.
2	Potential for gift tax or income tax for recipient; no tax burden on donor.	Capital gains tax may apply to the seller, but usually not to the buyer.
3	The cost of stamp duty is less as compared to sale deeds.	The higher cost of stamp duty, depending on the value of the property, affects the buyer.
4	Simpler legal process; less stringent documentation required.	This involves more extensive legal process and documentation.

Question No. 13- Write short notes on any four of the following.

Answer: (1) Licence: According to section 52 of the Indian Easements Act, 1882, where a person gives the right to one or more persons to do something in or over certain immovable property, which, in the absence of such right, would be illegal and such right does not amount to an easement or interest in the property, the right so created is called a licence.

Factors for determination-While determining whether there is a lease or licence or not, the following factors shall be taken into account-

(1) Exclusive possession is in itself an indication of a lease, although such possession may be subject to certain reservations.

(2) Whether the agreement contains terms that are normally found in a lease.

(3) The expression actually used by the parties to describe the transaction.

(4) The existence of some special relationship between the parties.

(5) A servant living on his master's premises may be a tenant or a licensee.

(6) The degree of control exercised by the owner over the premises.

(7) The degree of formality surrounding the transaction; the greater the formality, the greater the presumption of tenancy.

(2) Onerous gift: Section 127 of the Transfer of Property Act explains onerous gift. Where a gift is a single transfer of several things to the same person, of which

one thing is not a liability, the donee cannot take anything from the gift unless he has fully accepted it.

Where a gift is made of several things to the same person in the form of two or more separate and independent transfers, the donee is at liberty to accept one of them and reject the other, though the first may be beneficial and the other one burdensome.

Onerous donation to an unqualified person-If a donee is not competent to contract and accepts property burdened with any liability, he is not bound by his acceptance. But if he retains the property given after becoming capable of contracting and after being aware of the liability, he becomes bound. Illustration-
(a) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulty. A is expected to have a great demand for the shares in Y. A gives to B all his shares in the joint stock companies. B refuses to take the shares in Y. He cannot take the shares in X.
(b) A, having a lease of a house for a certain number of years, and the rent of which he and his representatives are bound to pay during that term, and which is more than the rent to be paid for letting the house, leases it to B, and also pays a sum of money, as a separate and independent transaction. B refuses to accept the lease. He does not by this refusal forfeit the money.

(3) Universal Doneeship: Section 128 of the Transfer of Property Act, 1882 deals with universal doneeship. This section states that if a gift comprises the whole of the property of the donor, the donee is responsible for all the debts and liabilities of the donor at the time of the gift. This responsibility is to the extent of the property gifted. If the debts and liabilities of the donor exceed the whole of the property gifted, the donor is not responsible for the greater amount. This provision protects the interests of the creditor. It also ensures that if the creditor is owed any money, he is able to take possession of the property of the donor. An equitable principle embodied in Section 128 is that the one who benefits from a transaction should also bear its burden. For example, if a donor makes a pronote in favour of the plaintiff and gifts his entire estate to the defendant, the defendant must pay the donor's debts from that estate. The defendant, as the universal donor, cannot retain the benefit and avoid that burden. The Transfer of Property Act, 1882, is an Act of India that regulates the transfer of properties in the country. It contains specific provisions regarding the transfer of property and the conditions attached to it.

In **Anuradha Kumar vs Lakshmichandra** it is said that sarvasva means everything, that is, when a donor donates his movable and immovable property, only then the one who accepts that donation will be the recipient of the entire donation.

(4) Actionable title- Section 3 of the Transfer of Property Act, 1882 defines actionable claim. According to it, any actionable claim for any debt, other than by mortgage of immovable property or by hypothecation or pledge of movable

property or any beneficial interest in movable property which is not in possession, shall be treated as an actionable claim. Action may be taken in court for relief or relaxation on such debts. Examples- Examples of actionable titles are as follows-

(a) A wants Rs. 500 from B, payment of which will become due on 5 May. A's claim is justifiable.

(b) Rent in arrears is a suitable title

(c) Share in testimony is a justifiable title.

(d) The right to maintenance is a justifiable title.

Transfer of actionable title- A transfer of any actionable claim, whether with or without consideration, shall be made only by the execution of a writing signed by the transferor or his duly authorised representative, and shall be full and effective upon the execution of such document, and thereupon all the rights and remedies of the transferor, whether in damages or otherwise, shall vest in the transferee, whether such notice of the transfer has been given as hereinafter provided or not: Provided that every dealing by the debtor or other person relating to the debt or other actionable claim, from which or against which the transferor, without such document of transfer as aforesaid, would have been entitled to recover or enforce such debt or other actionable claim, shall (except where the debtor or other person is a party to the transfer or has had express notice thereof as hereinafter provided) be valid as against such transfer. The transferee of any actionable claim may, upon the execution of the instrument of transfer aforesaid, effect a suit or proceeding in his own name without obtaining the consent of, and without making him a party to, such suit or proceeding. can institute a suit or proceeding.

Example- (1) A lends money to B, who transfers the debt to C. B then demands the debt from A, who pays it to B without receiving notice of the transfer as prescribed in **section 131**. The payment is valid, and C cannot sue A for the debt.

(2) A takes out a policy on his life with an insurance company and assigns it to a bank to secure the payment of an existing or future debt. If A dies, the bank is entitled to receive the amount of the policy and to sue on it without the consent of the executor of A, subject to the provisions of **sub-section (1)** of **section 130** and the provisions of **section 132**.

Rights and liabilities of transferee of actionable title- The transferee of an actionable claim shall take the same subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Section 132 of the Transfer of Property Act 1882 states that the transferee of an actionable claim takes the claim subject to all liabilities and equities which the transferor had at the time of the transfer. This means that the transferee cannot get a better title than the transferor. For example, if A transfers a debt owed to him by B to C, but A is already indebted to B, C can sue B for the debt, and B can set off the debt owed to him by A, even though C was not aware of it at the time of the transfer.

(5) Encumbrance. - Section 100 of the Transfer of Property Act, 1882 defines encumbrance as follows: “Where immovable property of one person is assigned by the act of the parties or by operation of law to another person for the payment of money, and the transaction does not amount to a mortgage, the latter person is said to have an encumbrance on the property; and all the provisions hereinbefore contained, which apply to an ordinary mortgage, shall, so far as may be, apply to such encumbrance. Nothing in this section applies in relation to a charge on trust-property of a trustee for expenses properly incurred by the trustee in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforceable against any property in the hands of a person to whom such property has been transferred for a consideration and without notice of the charge.”

Example-X has two daughters, P and Q. X gives his entire property to P and puts a condition that P will be bound to pay Rs. 10,000 out of the property to Q every month. This amount will constitute an encumbrance in favour of Q. If P sells the property to a third person (say), then Q can enforce his right against the third person, provided he (third person,) has notice of this encumbrance.

LL.B.-4th Sem. Paper-IV Criminal Procedure code-II Juvenile Justice Act and Probation of Offenders Act

Question No. 1- Define charge. What is the content of charge? Can the charge be changed by the court? Explain.

Answer - The word charge is a word related to common life. We repeat it many times, it is a part of common conversation. In the legal field it is generally understood that the complaint before the police is an allegation whereas it is not an allegation. Charges are made by the court. This is a stage of any case. A case is fixed for charge only after the police submit its final report.

After this the court decides the charges. In this article the charge in criminal cases is being discussed. The charge is also called 'blaming'. It has an important place in the trial. In fact the trial is conducted in two ways: It all starts with allegations.

Section 2(b) of the Code of Criminal Procedure, 1973 defines charge as follows-

"Charge includes any head of charge when it has more than one head." This is the only definition of charge given in the Code of Criminal Procedure but it is not the literal definition of charge. Charge can be defined as follows: "Charge is a written statement of information about the crime against the accused in which along with the grounds of accusation, the time, place, person and thing about which the crime has been committed are also mentioned. In simple words, it can be said that the description of the crime committed by the accused is the charge. The charge is framed so that the accused knows what he is accused of and how he has to defend himself. Provisions regarding charge have been made in **Sections 211** to **224** of the Code of Criminal Procedure, 1973.

Contents of the charge- This is very important. **Sections 211, 212** and **213** of the Code mention those things have been made which are required to be included in the charge.

The charge mentions the following:

(1) The name of the offence with which the accused is charged,
(2) The law under which the offence is covered and the name of the offence
(3) A brief definition of the offence, if it is not named in the law,
(4) Section relating to the offence (**section 211**)
(5) The time of the commission of the offence,
(6) The place of commission of the offence,
(7) The person or thing against which the offence is committed (**section 212**), and
(8) Manner of committing the offence (**section 213**)

In this manner, all those things are required to be mentioned in the charge so that the accused knows clearly what the charge i.e. the accusation is against him.

Some important points regarding the allegation The following points are worth noting regarding the allegation:

(1) The charge must be written in the language of the court.
(2) The charge should be in brief. It should briefly mention the incident's time, place, person and thing etc. should be done.
(3) Where necessary, the manner in which the offence was committed may be stated.
(4) If the accused is charged with being a member of an unlawful assembly, there must be a "common object" should be mentioned.
(5) If the allegation is defamatory, it must mention the ‘words’ which are harmful.
(6) If the case is of kidnapping of a minor girl from guardianship, the statement of “age” of the girl in the charge should be given.

Change in charge- The court can change or add to the charge at any time. This is mentioned in **Section 216**. According to **Section 217**, when the charge is changed or added, those witnesses who have already been examined can be called again for examination. It is worth mentioning

here that the framing of the charge is done in such a manner that the court does not require any evidence to be found the trial does not automatically become vitiated merely because the trial is not made or there is some error in the charge. It all depends on the circumstances of the case. The general rule is that there should be a separate charge for a separate crime.

For every distinct offence of which a person is accused, there shall be a separate charge and each such charge shall be tried separately. It is clear that according to **Section 218,** there shall be a separate charge and trial for every distinct offence. Its violation is not preventable.

Exceptions - But there are some exceptions to **section 218**, such as

(1) Up to three offences of the same kind committed in the same year may be charged together. This is mentioned in **section 219**.

For example, the dishonour of cheques issued at an interval of two months can be charged together and tried together. But in a case it has been said that the dishonour of three cheques issued on different dates cannot be charged together because they are not part of the same transaction. (2) According to **section 220**, multiple offences constituting the same transaction by the same person can be charged together and tried together.

For example, the accused can be charged simultaneously under **Section 302** of the Indian Penal Code, 1860 and **Section 27(3**) of the Arms Act and tried together.

(3) Under **Section 223**, all persons accused of the same offence committed in the course of the same transaction may be charged together.

(4) The charges of 'abetment' and 'attempt' may be levelled together with the principal offence.

Though it is the duty of the court to frame the charge, however, the advocate should also take care as to whether the charge has been framed properly or not.

Question No. 2 - For every different offence of which a person is accused there shall be a separate charge and such each charge will be tried separately. Describe.

Answer- This provision says that, there shall be a separate charge for every separate offence and every such charge shall be tried separately.

Provisions- On an application made by the accused to the court in writing, the Magistrate may, if in the opinion of the Magistrate, try the accused simultaneously on all or any of the charges against him. **Section-218(2)** is an exception to the general rule contained in **section 218(1).** This subsection says that "Nothing in **sub-section (1)** shall affect the operation of the provisions of **sections 219, 220, 221** and **223**."

Exception 1- Three offences of the same kind committed within a year can be charged together. This section has been made so that multiplicity of proceedings can be avoided when the offences are of the same kind. There are two circumstances in this-

1. According to **Section 219 (1)**, if a person is charged with three offences of the same kind, that person can be tried for all the offences together if they were committed within a period of twelve months from the first to the last offence.
2. **Section 219(2)** talks about offences which are of the same kind, and punishable with the same punishment.

Exception 2- Offences committed in the course of the same transaction and tried together. This includes the following-

1. If a person has committed several acts which are so connected with each other that they constitute a single transaction, such offences shall be charged together and tried together. The term 'transaction' is not defined under the Code.
2. In case of their concomitant offences of criminal breach of trust or dishonest misappropriation of property and falsification of accounts. Sometimes the offences of criminal breach of trust or dishonest misappropriation of property are committed simultaneously with offences like falsification of accounts etc., and the latter offence is committed for the purpose of the first offence. In such cases, **Section 220(2)** empowers the courts to try such offences together.

3. If the same act falls under different and distinct definitions of offences, such different offences shall be tried together as mentioned under **section 220(3)**. For example: If a person X wrongfully assaults a person Y with a cane, X may be charged and tried separately under section **352** and **section 323** of the Indian Penal Code or may be tried and convicted together.
4. If the acts constituting an offence constitute separate offences when taken and tried separately or when taken in groups, such offences shall be treated as one offence at one trial. For example if A commits the offence of robbery on B, and in the course of doing so he voluntarily causes hurt to B, A may be separately charged with and convicted of the offences mentioned under sections **323, 392** and **394** of the Indian Penal Code.
Exception 3- Section 221 provides for cases in which there is some doubt regarding the circumstances and events that occurred during the crime. According to this section, if the accused has committed several acts which create confusion about the facts to be proved, the accused may be charged with any or all of such offences or may be charged with alternative offences. In such cases, the accused is charged with one offence and during the stage of evidence, if it is proved that he has committed a different offence, he may be convicted of the same even though he was not charged for the same.
Exception 4-Section 223 talks about the class of persons who can be tried jointly. This section allows joint trial of several persons under specified circumstances, as there exists some connection between the different offences committed. The different classes will not be treated as mutually exclusive and can be clubbed together if necessary. As per this section, the following classes of persons can be tried and charged together-
1. Accused persons who have committed the same offence during the same transaction.
2. Persons who have committed a particular offence and those who have instigated the commission of the offence.
3. Persons who fall within the purview of **section 219**.
4. Persons who have committed different offences during the same transaction.
5. Persons who have committed crimes such as theft, extortion, fraud or criminal misappropriation of property, as well as persons who have obtained, possessed, disposed of or assisted in the concealment of property, the possession of which is illegal and alleged to be illegal.

6. Persons charged with offences under **sections 411** and **414** of the Indian Penal Code or under those sections in relation to stolen property, the possession of which is already lost by another person convicted of another offence
7. Persons who have been charged with any offence relating to counterfeit coins under **Chapter XII** of the Indian Penal Code are charged.

The accused whose cases do not fall under any of the classes of Section 223 cannot themselves claim joint trial. The provision of this section curbs the discretionary power of the court. Rules from **Sections 218** to **Section 223** have been made for the benefit of the accused. Sections of different classes need not be treated as mutually exclusive. Courts have been empowered to combine the provisions of more than two sections. Joint trial of several persons by applying partly one section and partly another section has also been authorised.
Question No. 3- Describe the procedure of trial of summons cases by Magistrate.
Answer- Procedure for hearing in summons cases-
Explanation of details of offence-Section 251 provides that it is not compulsory to frame a charge but the section does not preclude explaining the details of the offence when the accused is brought or produced before the court. This is done to make the accused aware of the charges levelled against him. If the accused is unable to state the details of the case, it shall not affect the trial proceedings and it shall not prejudice the accused as such irregularity is rectifiable under

Section 465 of the Code. Under **Section 251** the court shall ask the accused whether the accused pleads guilty, and on such plea of guilty it is necessary to comply with **Sections 252** and 253 for conviction.

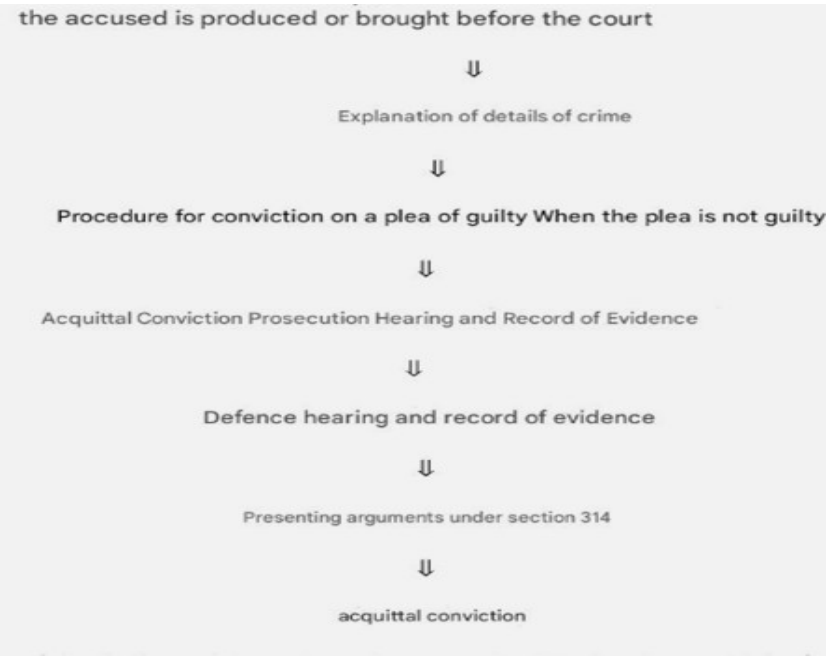
Conviction on plea of guilty - Sections 252 and **253** provide for conviction on plea of guilty. **Section 252** deals with plea of guilty in general and **section 253** deals with plea of guilty in petty cases. If the accused pleads guilty, then if the answer is in the affirmative, the court as per law shall record the plea in the exact words of the accused, on the basis of which the accused may be convicted at the discretion of the court. If not in the affirmative then the court is required to proceed with **section 254**. If the accused pleads guilty, and the charges against him do not make out any offence then the accused cannot be convicted by mere plea. Since the Magistrate has the discretion to convict or not convict on the plea, if the accused is convicted on the plea then the Magistrate shall convict the accused as per **section 360** The Magistrate shall proceed otherwise than to hear the accused on the question of sentence and sentence him according to law. If the plea of guilty is not accepted the Magistrate shall proceed according to **section 254.**

Procedure if the accused is not convicted on plea- If the accused is not convicted under **sections 252** and **253**, **section 254** provides for the case of both prosecution and defence.

Prosecution case-The Magistrate will hear the accused and take all evidence. At the hearing the prosecution will be given an opportunity to open its case by setting out the facts and circumstances forming the case and by highlighting the evidence it relied upon to prove its case. On the application of the prosecution the Magistrate will issue summons to any witness to attend and produce any document or thing. The Magistrate will prepare a memorandum of evidence as per **section 274**. In summons cases as in other trials the Magistrate will follow the provisions of **section 279** i.e. explanation of evidence to the accused and **280** i.e. recording of demeanour of witnesses.

Hearing of Defence (Defence Case)- After examining the evidence of the prosecution under **section 254** and the defence under **section 313,** if it continues, the court shall hear the defence under **section 254 (1).** In hearing the defence the accused shall be asked to put forth his case against the evidence of the prosecution. In any case the absence of hearing of the accused shall amount to fundamental defect in the criminal trial and cannot be cured under section 465. The evidence adduced by the accused shall be recorded in the same manner as in the prosecution case under **sections 274, 279, 280**. After the defence evidence is adduced, he shall be allowed to put forth his arguments under **section 314**.

Acquittal or Conviction - After recording evidence under **section 254**, if the magistrate finds that the accused is not guilty, he will acquit him. If the accused is guilty, the magistrate will precede as per **section 360** or **325** or else sentence him as per law.



Absence or death of complainant- According to **section 256,** the absence of the complainant on the date fixed for the appearance of the accused shall entitle the court to acquit the accused, unless the court has reason to adjourn the case to another day. **Section 256 (1)** also applies in case of death of the complainant. If the representative of the deceased complainant does not appear at the place where the respondent appeared for 15 days, the respondent may be acquitted by the Supreme Court. 4,

Discharge in summons cases- I discharge summons cases instituted in cases other than complaint. **Section 258** empowers the first class magistrate to stay the proceedings at any stage with the previous sanction of the Chief Judicial Magistrate. Hence if he stops the proceedings 'after the record of evidence' it amounts to a judgment of acquittal, and if the proceedings are stopped 'before the record of evidence' it amounts to discharge which has the same effect as immunity. It is debatable that in a summons case instituted on a complaint the magistrate has no power to quash the case even if he does not have sufficient ground to proceed against the accused. This is because if the magistrate does so he would be withdrawing his own order. The Supreme Court held that the issuance of process is an interim order of the magistrate, not a judgment, hence it can be withdrawn. In such circumstances no provision is required to give the magistrate power to quash the case. In summons cases initiated on complaint, the Magistrate cannot quash, review and withdraw the order of issuing process. The case cannot be dropped, the trial court has to complete the hearing. 6 In summons cases the Magistrate of the trial court has no power to quash the proceedings in the absence of such provision in the law. In such circumstances a person can approach the High Court under **section 482** of CrPC

Analysis- The hearing of summons cases is less formal than other trial processes, so that speedy treatment is possible. Therefore, **Section 258**, which does not empower the Magistrate to drop the case even in the absence of sufficient grounds, is somehow prejudicial to the accused. In KM Mathew case, the Court was of the opinion that if the allegations against the accused do not prove the commission of any offence, the Magistrate has the inherent power to drop the case. It has disagreed in various judicial pronouncements. In Arvind Kejriwal case, the Supreme Court held that the law does not specifically empower the Magistrate to drop the case under **Section 258** and referred the matter to the High Court for disposal under **Section 482**. But the point needs to be considered that the High Court also needs to re-look at the case to find out whether there is any sufficient ground to proceed against the accused; all this will hamper the main purpose of summons case i.e. speedy trial. Though this issue has been raised before the Supreme Court in various cases, it needs to be re-examined to avoid jeopardising the fair trial and rights of the accused in such circumstances.

Question No. 4- Describe the procedure of trial of warrant cases instituted on the basis other **than police report.**

Answer- Sections 244 to **247** and **248** to **250** of the Code of Criminal Procedure are related to the procedure of trial in a case instituted on the basis other than police report. Such cases are tribal by a magistrate. Their procedure is as follows-

Section 244 Prosecution Evidence- Section 244 states that in warrant cases initiated in any manner other than a police report and in cases filed directly with the magistrate, the accused is produced before the magistrate who begins the trial process by calling the witnesses nominated by the prosecution and taking into account all evidence produced. All evidence must be considered and entered on record by the magistrate under Section 138 of the Indian Evidence Act.

Section 245- Section 245 of CrPC states that if no case has been made out against the accused by the prosecution, the accused shall be acquitted by the Magistrate, who may, if not challenged, convict him. And if the allegations presented by the prosecution are considered by the Magistrate to be unfounded, nothing prevents the Magistrate from acquitting the accused at any previous stage.

Section 246 Procedure where accused is not discharged- a. Once all the evidence has been adduced before the Magistrate by the prosecution and the said evidence has been examined by him, the Magistrate is of the opinion that there are reasonable grounds for the allegations mentioned in the complaint and the accused is capable of committing the offence, the charge is framed and a fair trial is held. The accused is given an opportunity to defend himself. In the case of **Ratilal Bhanji Mithani v. State of Maharashtra, 1978**, it was held that there were reasonable grounds to believe that the accused had committed the offence, and the Magistrate started the trial proceedings by refusing to dismiss the case under **Section 246(1)**.

Section 246 (2) states that the charge against the accused should be read out and explained to him, and he shall be asked whether he wishes to plead guilty to the charges or contest the said charges by going to trial. **Section 246 (3)** gives the accused an opportunity to plead guilty and present himself before the court. The Magistrate has the power to record a plea of guilty, convict the accused and sentence him as he deems fit. If the accused does not plead guilty, a trial shall be held later and the accused shall be given a fair trial. The Magistrate may state in writing that he is not willing to give any evidence to the accused The Magistrate considers the reasons for recalling the witness for cross-examination and if so, which are the prosecution witnesses whose evidence has been recorded. The same reasons are recorded and the prosecution witnesses are recalled for cross-examination by the Magistrate. Subsections (5) and (6) under **Section 246** give the accused the right to recall and cross-examine or re-examine any witness named by the accused, following which they are acquitted. The evidence of the remaining witnesses produced by the prosecution is taken and they are acquitted after cross-examination and re-examination as required. Its application can be seen in the case of **Varisai Rowther and others vs. Unknown, 1922**.

Section 248- Section 248 states that after the Magistrate has arrived at a decision after examining the evidence, the judgment is pronounced. If the accused is found not guilty, an order of acquittal shall be recorded by the Magistrate under **section 248(1).** If the accused is found guilty, the Magistrate shall, after hearing the accused, pronounce sentence on him, if he does not proceed according to the provisions of **section 325** or **section 360**. And this order of conviction shall be recorded under **section 248(2).** In a case where there is a previous conviction under the provisions of **section 211(7)** and the accused does not admit that he has been convicted earlier as per the charge, the Magistrate may collect evidence regarding the alleged previous conviction after the conviction of the accused and record that finding. However, no charge shall be read out by the magistrate, the accused shall not be asked to plead and no previous conviction shall be mentioned or produced by the prosecution unless the accused has been convicted under **Section 248(2)**.

Section 250 Compensation for prosecution without reasonable cause- Section 250 discusses the procedure relating to cases where a case is registered on a complaint made to a magistrate or a police officer and the magistrate finds that there are no grounds against the accused person. The accused shall be acquitted immediately. The complainant shall be called upon to justify his complaint and explain why he should not pay compensation to the person against whom the complaint was made. The magistrate shall then order the accused to pay compensation of a certain sum not exceeding the amount of the fine if he is satisfied that the reasons for filing the complaint are baseless and have no foundation.

If there is more than one accused person, the magistrate will order the complainant to pay compensation to all the accused. This can be seen in the case of **Valli Mitha vs Unknown, 1919**.

In the case of **Abdur Rahim v. Syed Abu Mohammed Barkat Ali Shah, 1927**, the Court had declared that the compensation amount would be given only to the accused and not to his relatives or any other person.

In case the complainant fails to pay the compensation, he shall be liable to simple imprisonment for a term not exceeding 30 days. If the person is already in prison, **Sections 68** and **69** of the Indian Penal Code shall apply. And the person who is directed to pay the compensation shall be exempted from any criminal or civil liability in respect of the complaint. **Section 250 (6)** states that an appeal lies against the complainant or informant for an order made by a Magistrate of the second class under sub-section (2) exceeding one hundred rupees to pay compensation, as seen in the case **of A.M. Pereira v. D.P. Demelo, 1924**. The compensation shall not be paid before the expiry of the period of appeal or after the Court has decided the appeal. And in cases not connected with the appeal, the amount shall be paid after one month from the date of passing of the order.

Question No. 5- Explain the powers of the appellate court. Can the appellate court take additional evidence?

Answer- Under the Code of Criminal Procedure, the powers of the appellate court are-

(1) Powers of Appellate Court under section 386.- Section 386 of the Code provides that if the Court, after perusing the record and hearing the appellant and the Public Prosecutor, is of the view that there are no grounds for interference in the appeal, it may dismiss the appeal.

(a) On an appeal against acquittal, reverse the order of the subordinate Court and direct further investigation or order commitment for trial.

(b) In the case of an appeal against conviction, (1) may reverse the finding and sentence and acquit or discharge the accused or order the case to be retried or committed for trial.

(2) May alter the finding while maintaining the sentence.

(3) Alter the nature or consequence of the sentence with or without altering the finding, but not in a manner that enhances the sentence.

(c) In an appeal for enhancement of sentence (1) when the prosecution or the complainant is aggrieved by the sentence passed by the original Court after conviction of the accused following a trial by the original Court, And when an appeal is made for enhancement of punishment, what powers does the appellate court get here, it has been mentioned in sub-section 2 of section 386 of the Code of Criminal Procedure.

(2) The court may reverse the finding and acquit or discharge the accused or order the trial of the accused to be conducted by a competent court.

(3) May alter the finding while keeping the sentence intact.

(4) Alter the nature or magnitude of the sentence, either by increasing or decreasing it, with or without altering the finding.

(5) If the appeal is against any other order, the appellate Court may alter or reverse such order.

(2) Power to suspend sentence and release appellant.--Under **sub-section (3)** of **section 389** of the Code of Criminal Procedure, 1973, the sentence of a person convicted of this offence may be suspended for such time as is reasonable for preferring an appeal.

A person convicted of a crime has this right as a matter of right, that is, he can ask the court giving punishment to suspend the sentence for such a period as is reasonable for appealing. But under **section 389 (3)** of the Code of Criminal Procedure, this right is available to the convicted person on 2 conditions-

(1) When the person so convicted is sentenced to imprisonment for a term of up to three years while on bail.

(2) The person so convicted has been convicted of an offence which is bailable

If the court refuses to release the person convicted in such a case on bail, it will have to mention the special reasons for such refusal as to why such convicted person cannot be released on bail and why his sentence cannot be suspended.

In the case of **Kashmira Singh vs State of Punjab 1977 Supreme Court 2147**, the Supreme Court has said that the policy of releasing the accused sentenced to life imprisonment on bail should be seriously reconsidered because excessive delay in disposal of the appeal is

detrimental to the appellant. Also, if the appellant is granted special leave to appeal in the Supreme Court, then he should generally be released on bail.

(3) Power to order arrest of accused in case of acquittal.-If an order of acquittal is passed in a case instituted on a complaint and the High Court, on an application made by the complainant in that behalf, grants special leave to appeal against the order of acquittal, the complainant may prefer such appeal to the High Court.

Taking of additional evidence by the Court of Appeal Generally, the Court of Appeal does not take additional evidence or hear witnesses. However, in some cases, the Court of Appeal has the power to take additional evidence under exceptional circumstances. For this, the conditions prescribed under Order 41 Rule 27 of the Code of Civil Procedure must be fulfilled. In the Bhagwan Das case, the Court held that additional evidence can be accepted at the appeal stage only if the additional evidence is taken by the Sessions Court or Magistrate, then it will certify it to the Appellate Court. After this, the Appellate Court can go ahead and dispose of it. When additional evidence is taken, the accused or his lawyer also has the right to be present. If the Appellate Court decides to take additional evidence, it will also have to record why it did so. Also, it has to decide whether the additional evidence sought is necessary to pronounce the verdict or not.

Question No. 6- The purpose of Section 144 of the Code of Criminal Procedure is not to restrict the freedom of citizens but to immediately remove the threat of breach of peace. Explain.

Answer- Section 144 Purpose-Section 144 of the Code of Criminal Procedure empowers a Magistrate to issue a direction against any person that the person should not do any particular act or should take any appropriate order with respect to any specific property in his possession or under his protection so as to prevent any obstruction, annoyance or damage to any person lawfully authorized or danger to human life, health or safety or disturbance of public tranquillity or riot or riot. The order given by the Magistrate under **Section 144** is of judicial or executive nature.

The Supreme Court has also clearly stated in one of its recent decisions that the purpose of the order given under Section 144 is to prevent the danger of sudden breach of peace. It can neither be permanent nor semi-permanent (**Acharya Jagdishwaranand Avdhoot and others vs Commissioner of Police, Calcutta and others AIR 1984 SC 51**)

Remedies and orders to prevent breach of the peace, etc.- In cases where, in the opinion of the District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government, the breach of the peace is unlawful under this section There is sufficient ground for taking action and immediate prevention or speedy remedy is desirable, such Magistrate may, by an order in writing stating the material facts of the case and served in the manner provided by **section 134**, direct any person to abstain from any act or to take certain order with respect to any property in his possession or under his management, if such Magistrate considers that such direction is likely to cause or is likely to prevent hindrance, annoyance or injury to any person lawfully employed, or to endanger human life, health or safety, or to cause a breach of the public peace, or to cause a riot or affray. An order under this section may be passed ex parte in an emergency or in cases where the circumstances do not permit timely service of notice on the person against whom the order is made.

An order under this section may be issued in respect of any particular person, or persons residing in any particular place or area, or the general public visiting any particular place or area. No order under this section shall remain in force for a period longer than two months from the date on which it is made. Provided that if the State Government considers it necessary so to do in order to prevent danger to human life, health or safety or to prevent riot or affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period, not exceeding six months, from the date on which the order would

have expired but for such order, as it may specify in the said notification. Any Magistrate may, either suo motu or on the application of any aggrieved person, cancel or alter any order made under this section by himself or by any Magistrate subordinate to him or by his predecessor.

The State Government may, on its own motion or on the application of any aggrieved person, cancel or alter any order passed by it under the proviso to **sub-section (4).** Where an application is received under **sub-section (5)** or **sub-section (6),** the Magistrate or the State Government, as the case may be, shall give the applicant an early opportunity of being heard appearing before him in person or through pleader and showing cause against the order and if the Magistrate or the State Government rejects the application either wholly or in part, he or it shall record the reasons for so doing in writing.

Execution of the order **Section 144** of CrPC is imposed to maintain peace or to avoid any emergency. There is a possibility of any kind of security, health related threat or riot. Where **Section 144** is imposed, five or more people cannot gather together in that area.

Duration of order - No order under this section can remain in force for a period exceeding 2 months. The state government may, at its discretion, choose to extend the validity for two months, with a maximum validity of six months. **Section 144** can be lifted when the situation becomes normal.

Alteration or rescission of order- A Magistrate may, of his own motion or on the application of any person, alter or rescind any order made by him or by any subordinate Magistrate or a predecessor Magistrate.

The State Government may also, on its own motion or on an application by any person, alter or rescind any order made by it, provided that it does not consider it necessary to continue for a period of six months.

On receipt of an application for modification or repeal of the order, the Magistrate shall give such person an early opportunity of being heard and if the Magistrate or the State Government rejects his application either partially or fully, the reasons for the same shall be recorded in writing.

Power of an Executive Magistrate to impose restrictions under **Section 144** and **144** As we have discussed above, the Code of Criminal Procedure gives extraordinary power to an Executive Magistrate to issue ex parte order to prevent the commencement or taking place of any activity which is likely to result in causing great harm to any person, lawfully employed, public property or the society at large. This section provides for an order by an Executive Magistrate, which may remain in operation for 2 months and may be extended to six months by order of the State Government, it also provides that such order can also be revoked by the Magistrate or any aggrieved person, by way of an application to the Magistrate or the State Government, and such application has to be first considered and the authorities may, if they consider it fit and proper, act in accordance with the request. However, in **M.D. Ghulam Abbas & Ors. Vs.** In the case of **Ibrahim and others (1978),** the Supreme Court while discussing the provisions under **Section 144** of the CrPC in a revision petition also said that the order under this section can sometimes be issued against a person who is doing a certain legal act on his property, but such act is posing a threat to human life and public peace. For example, if a person shouts provocative slogans from the roof of his house, then in such a situation it would be appropriate to issue an order. Such an order by any Executive Magistrate directing a particular person to restrict himself or to refrain from doing a certain act or to prohibit the assembly of four or more persons in a specific area is not an order of the State Restricting movement of people, where traffic is also restricted by the government in that specified area. Some of the features under such an order are no movement of the public, no public gathering, closure of all educational institutions until the order is withdrawn, as well as blocking the internet in some cases, etc.

Though this section gives more power to the Executive Magistrates, it does not mean that they can misuse it, or act under any political pressure. A three judge bench of the Supreme Court of India held in the case of **Ghulam Abbas and others vs State of Uttar Pradesh (1982)** that the power under section 144 should be exercised by the Magistrate to protect the established rights of any victim, as was the case of the petitioner and the action of the Magistrate should be directed against the wrongdoer and not against the wrongdoer.

Question No. 7- Briefly describe the procedure related to trial before the Sessions Court.

Answer- Initially, the Magistrate takes cognizance of the offence and thereafter as per **Section 209**, he commits the case to the Court of Session. Under **Section 190**, the Magistrate is empowered to take cognizance of an offence on a complaint, on a police report, on information from any person other than a police officer or on his own knowledge. As per **Section 193**, the Court of Session cannot take cognizance of an offence directly, but the Court of Session is permitted to take cognizance of an offence without the case being committed if the Magistrate commits the case to it or if it functions as a Special Court. Under **Sections 207** and **208** the Magistrate is required to supply copies of documents such as the First Information Report, statements recorded by the police or the Magistrate, etc. to the accused. Under **section 209**, if the Magistrate finds that the offence is triable only by the Sessions Court, he may transfer the case to the Sessions Court and send all documents and records to it and either grants bail or take the accused into custody and shall also inform the Public Prosecutor. The procedure for trial before the Sessions Court is stated in **sections 225** to **237**. According to **section 225**, every trial before the Sessions Court is conducted by the Public Prosecutor.

Defence Counsel (Section 225)- In a trial before the Sessions Court, the prosecution shall be conducted by the Public Prosecutor. The accused has the right to appoint a lawyer of his choice. If he is unable to appoint a defence counsel, the court appoints one at the state's expense. Copies of documents such as police reports, FIR, etc. are provided to the accused before starting the trial.

Opening of the case (Section 226) - The public prosecutor begins the case by describing the charge against the accused. He briefly states the evidence on the basis of which he intends to prove the crime. The duty of the prosecutor is not to secure a conviction but to place the facts of the case before the tribunal whose job is to do justice.

Discharge of accused (Section 227)- After hearing both the parties, if the court finds that there is no sufficient ground to proceed against the accused, it may discharge him and record the reasons for doing so. There is no scope for examining any witness, but both the parties have the scope to put forth their arguments in favour of framing of charges or discharge.

Framing of Charges (Section 228)- After hearing both the parties, if the court believes that the accused may have committed the offence then- If the offence is exclusively triable by the Court of Sessions, a charge is framed in writing. If the offence cannot be exclusively tried by the Court of Sessions, it frames a charge and transfers the case to the Chief Judicial Magistrate. In the case of **Kanti Bhadra Shah and others vs State of West Bengal**, it was held that the judge exercising powers under **section 228** of CrPC need not record his reasons for framing a charge against the accused. While framing a charge, only a prima facie case is to be seen. At this stage the judge is not required to record the detailed order required to see whether the case is beyond reasonable doubt or not, as held by the Supreme Court in **Bhavana Bai vs Ghanshyam and others**.

In the case of **Rukmini Narvekar vs Vijaya Satardekar**, the Court had held that the accused cannot lead any evidence at the stage of framing of charges and only those materials which are specified in **Section 227** can be considered while framing charges.

Explanation of charge and enquiry into plea (Section 228(2)) – The contents of the charge must be explained to the accused to enable him to plead guilty to the offence or to claim trial. In Banwari v. State of Uttar Pradesh the Court held that failure to read out or explain the charge to

the accused will not affect the trial unless it is shown that non-compliance with Section 228 has caused prejudice to the accused.

Conviction on plea of guilty (Section 229)- If the accused pleads guilty, the judge may convict him of the crime.

The court shall record the plea and may in its discretion convict him. In **Queen Empress v. Bhadoo** it was held that the plea of guilty must be in clear terms otherwise such a plea is equivalent to a plea of not guilty. **Section 229** states that if an accused pleads guilty the judge shall in his discretion convict him and record the same. The court cannot convict an accused on the basis of a plea of guilty where the offence is of such a nature the punishment for which is death or imprisonment for life. In **Hasruddin Mohammed v. Emperor** the court held that it would be reluctant for the court to convict a person who is charged with an offence on the basis of his plea of guilty the punishment for which is death or imprisonment for life. If the accused is convicted on the basis of his plea of guilty the right of appeal of the accused is curtailed by **Section 375**.

Date for prosecution evidence (Section 230)- If the accused refuses to plead or does not plead or claims that he will be tried or has not been convicted under **Section 229**, the Judge shall fix a date for the examination of the witness or order the attendance of any witness or production of any object/document.

Evidence for the prosecution (Section 231)- On the date fixed above, the judge shall admit all evidence in support of the prosecution. The judge may, in his discretion, defer the cross-examination of any witness until any other witness has been examined or recall a witness for further cross-examination. In Ram Prasad v. State of Uttar Pradesh, the Supreme Court held that, if the court finds that the prosecution has not examined a witness for reasonable or rational reasons, the court would be justified in drawing an inference adverse to the prosecution. In **State of Kerala v. Rasheed**, the Court observed that while deciding an application under **Section 231(2),** a balance has to be struck between the rights of the accused and the privilege of the prosecution to adduce evidence. The following factors have to be considered.

Examining the accused- This has to be done without administering oath. It enables him to prove the facts alleged against him by the prosecution to give an opportunity to clarify the circumstances.

Acquittal (Section 232)- After hearing both the parties, if the Judge finds that the accused has not committed the crime then he can record an order of acquittal of the accused.

Admission of Defence (Section 233)- If the accused is not acquitted, he shall be called to present his defence. The court may at any stage summon or examine any person as a witness before the court.

Arguments (Section 234)- After the defence has been recorded the prosecutor summarises his case and the accused or his lawyer is entitled to reply. In case the defence raises any legal issue the prosecutor may be allowed to put his side.

Judgment of acquittal or conviction (Section 235)- After hearing the arguments of both the parties, the court pronounces a judgment of acquittal or conviction. On this point, the Supreme Court in **Santa Singh v State of Punjab** held that the judge should first pronounce a judgment of conviction or acquittal. If the accused is convicted, he will be heard on the question of sentence and only then will the court proceed to pronounce sentence against him. In **Bachan Singh v State of Punjab** the Court ruled that this section provides for a bifurcated hearing and specifically gives the accused person the right to a pre-sentence hearing which may not be entirely relevant or connected with the particular offence under investigation but may have a bearing on the choice of sentence.

The Court of Session taking cognizance of an offence under **sub-section (2)** of **section 199** shall try the case in accordance with the procedure for the trial of warrant cases instituted on grounds other than a police report before the Court of a Magistrate. Every trial under this

section shall be held in camera, if any party so desires or the Court thinks fit so to do. If in any such case the Court discharges or acquits all or any of the accused and is of opinion that there was no reasonable cause for making the charge against them or any of them, it may examine its order of discharge or acquittal, and may direct the person against whom the offence is alleged to have been committed to show cause why he should not pay compensation to such accused or to each or any of such accused, when there are more accused than one. The Court shall record and consider any reasons which may be shown by the person so directed, and if it is satisfied that there was no reasonable cause for making the allegation, it may order that compensation of such sum as it may determine, not exceeding one thousand rupees, be paid by such person to the accused or to each or any of them. The compensation awarded under **sub-section (4)** shall be recovered as if it were a fine imposed by a Magistrate No person directed to pay compensation under this section shall be exempted from any civil or criminal liability in respect of a complaint made under this section. A person who is ordered to pay compensation under **sub-section (4)** may appeal to the High Court. Where an order is made to pay compensation to an accused person, the compensation shall not be paid before the expiry of the period allowed for presenting the appeal or, if an appeal is presented, before the appeal has been decided.

Question No. 8- Describe the procedure to be followed in relation to neglected adolescents.

Answer- In the previous article related to the Juvenile Justice Act, a general introduction to this Act and definitions of special words given in this Act were studied. Under this article, the procedure to be adopted in relation to juvenile offenders and the formation of Juvenile Justice Board is being discussed. Juvenile Justice Board- Section 4 of this Act is the section related to the Juvenile Justice Board. Juvenile Justice Board has been constituted under this section. This section also has provisions for the formation of Juvenile Justice Board for investigation and hearing etc. in the cases of juveniles involved in anti-law activities and the appointment of its members, their qualifications and removal from office. The Board will have three members, out of which one will be a Metropolitan Magistrate or First Class Magistrate, and two social workers. It is mandatory for at least one of the two social worker members of the Board to be a woman. The Board has been given the powers of Metropolitan Magistrate or First Class Judicial Magistrate as the case may be under the Code of Criminal Procedure, 1973. Subsection (5) of this section provides that (i) the appointment of any member of the Juvenile Justice Board may be terminated by the State after due enquiry if he has misused any of his powers or (ii) has been convicted of any moral turpitude and has not been pardoned for the offence, or (iii) has been absent from the proceedings of the Board for three consecutive months without any reasonable excuse or has not attended less than three-fourths of the meetings of the Board in a year. The main objective of the establishment of the Juvenile Justice Board is to reform juvenile offenders and to ensure that the legal consequences of their criminal acts do not have an adverse effect on their future life and their character is not tarnished. This is the reason why juveniles are called criminals and are called juvenile offenders. Similarly, when a juvenile who is in conflict with the law is found guilty, instead of sentencing him to death, an order of conviction is passed so that he can avoid being called a prisoner.

In the case of **State of Karnataka vs Harshad,** the High Court held that where Juvenile Justice Boards have been set up under Section 4 of the Juvenile Justice Act, the Board will have exclusive jurisdiction to try juveniles in conflict with law and the Sessions Court or Fast Track Courts will not have jurisdiction to try cases of such juveniles. In this case, since the Juvenile Justice Board had been constituted under the notification of 27 July 2003, the order to send the convicted juvenile to a suitable home under **Section 15** was justified because punishing him would be against the purpose of the Act. The right to appeal against the order passed by the Juvenile Justice Board has been kept extremely limited so that the juvenile in conflict with law has to remain under the judicial process for a minimum period of time. If the Board finds the juvenile

innocent or if it finds that he is not an abandoned or neglected person, then the Board can release him. There is no appeal against this order, i.e. the decision of the Juvenile Justice Board will be final but only one appeal can be made against the juvenile being declared guilty or neglected by the Board in the Sessions Court, whose decision will be final. In other words, the decision of the Sessions Court in the case of a juvenile will be final and there is no provision for appeal against it in the High Court. In the case of a juvenile in conflict with the law, the High Court has only the power of revision and not of appeal. Rule 13 (6) (a) of the Juvenile Justice Rules, 2007 provides that the Board should dispose of the case of juvenile offenders within a period of one month, which may extend to two months in special circumstances.

Observation Home- Section 8 of this Act has provision about Observation Home. Observation Home houses those juvenile offenders who are in conflict with law against whom any investigation is pending. Such Observation Homes can be established by the State Government or by private organisations under an agreement.

In these, along with residential facilities, maintenance and medical examination and treatment arrangements for the adolescents, useful livelihood facilities are also provided to them.

In the case of **Sanjay Prasad Yadav vs. State of Bihar**, the question before the Supreme Court was whether a juvenile convicted under **Section 302/34** of the Indian Penal Code and ordered to be kept in a remand home during investigation, should be transferred to prison as a result of attaining the age of adolescence. On this the Supreme Court decided that even after the juvenile attains the age of adolescence, he will not be transferred to prison or elsewhere and he will be kept in the remand home till the final decision of the case.

Special Homes- Section 8 provides for remand homes for temporary keeping of juveniles under trial, while **Section 9** provides for special homes for juveniles in conflict with law. In these special homes, there is a provision to keep juveniles convicted of crime for their reform. In these homes also, juveniles are classified on the basis of age, nature of crime and mental and physical status and are kept separately so that arrangements can be made for their care and rehabilitation. Here, facilities of education and technical training are also provided to the juveniles so that they can become normal citizens.

In the case of **Sheela Barse vs Union of India**, the Supreme Court gave clear instructions that juvenile offenders should not be sent to jail under any circumstances and they should be given the benefit of the provisions of the Juvenile Justice Act and kept in a special home or any other reformatory institution like a juvenile home.

In the case of **Hawa Singh vs. State of Haryana,** a juvenile offender was convicted under **Section 302/34** of the Indian Penal Code and sentenced to life imprisonment and sent to a hostel institution under the Punjab Hostel Act, 1926. As a result of completing the age of 21 years there, he was transferred to a prison to serve the remaining sentence and he spent the next seven years in jail. The Supreme Court, while ordering the immediate release of the appellant, decided that since the accused was tried by the Sessions Court, he had completed the maximum period of detention of seven years. Therefore, he should be released immediately.

According to **Section 11** of the First Information Report on Juvenile Offenders, the police should refrain from registering First Information Reports against juvenile offenders who have committed crimes punishable with less than seven years of imprisonment and which are not of a serious nature. Instead, the police should record the crimes committed by such juvenile offenders in their general daily diary.

Similarly, under **Rule 11 (9)** of the Juvenile Justice Rules, 2007, it is prohibited to arrest juvenile offenders unless it is necessary to do so in the interest of justice. However, child or juvenile offenders committing serious crimes like murder, grievous hurt, rape etc. can be arrested but they should also be produced before the magistrate as soon as possible so that he can take appropriate decision about them and send their case to the Juvenile Justice Board. It is

clear from the provisions of **Section 12** of this Act that showing generosity towards juvenile offenders; arrangements have been made to release them on bail as far as possible. Under this section, it has been recommended to release juvenile persons. Unless there is a possibility that by releasing on bail, the juvenile may fall into the bad company of a serious criminal or a moral danger may arise for him or there is a possibility of failure of the purpose of justice.

In the case of **Sunil and others vs. State of Madhya Pradesh**, the Sessions Court rejected the bail application of a juvenile offender on the ground that on the basis of his medical report he had attained adolescence.

But the High Court ruled that the responsibility of proving age was not on the accused and the court should have determined it on its own initiative and ensured whether the accused can be released on bail by giving the benefit of Juvenile Justice Act 1956 or not. The meaning is that generally a juvenile should be released on bail by giving the benefit of **Section 12** unless there is a reasonable reason for not doing so.

In the case of **Sandeep Kumar vs State**, the juvenile was found guilty of raping a six-year-old girl and his bail was rejected. It was clear from this that the juvenile was of criminal nature and his mother had no control over him. In the case of Jack Ahmed Sheikh vs State, the Rajasthan High Court decided that it would be wrong to infer from the words "will be released on bail" used in Section 12 that the court has no other option except releasing the juvenile on bail. If the nature of the crime is such that releasing the juvenile on bail poses a threat to society, then his bail can be rejected. In this case, the accused was a juvenile but he was involved in the illegal trade of smuggling and there was evidence against him of being active in the gang of smugglers. Therefore, it was considered appropriate to reject his bail under **Section 12**.

Orders to be passed in respect of juvenile **Section 15** of this Act mentions in this regard. Where a Board, upon inquiry, is satisfied that a juvenile has committed an offence, then notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks fit, after making a proper inquiry against the juvenile and advising and reprimanding him and after counselling his parents or guardian, permit the juvenile to go home. When a juvenile accused of any offence is produced before a Juvenile Justice Board, the Board may pass orders under the provisions of this section.

They are as follows-

The juvenile can be allowed to go home with his parents or guardians after giving warning and advice. If the crime is not of a serious nature, the Juvenile Justice Board can release the offender by giving a warning. Similar provisions are also there in **Section 3** of the Criminal Probation Act 1958.

Question No. 9-What is meant by probation? Describe the factors that are taken into consideration while selecting a person for release on probation.

Answer- This Act is based on the reformative approach which has come from the deterrence theory over the years. It has been observed that the re-adjustment of the offender into the society after release is low. They may also face problems while dealing with professional criminals. This has an undesirable effect on the convicted person and his later life. The Probation of Offenders Act, 1958 protects minor offenders from becoming regular criminals. This is done by giving them a chance to reform themselves instead of going to jail. The probation officer reaches out to the needs and difficulties of the accused in a cordial manner and tries to solve the problem. This is done for a person convicted for minor crimes. The Probation Officer is the main person in the process of probation management. He has direct contact with the probationer. He is responsible for maintaining the provisions of the probation order of the court. He performs two primary functions which include current investigation of the probation offender and monitoring of the offender. The purpose of the Probation of Offenders Act 1958 is to release the accused after due warning if he is not found guilty of any offence not punishable with death or life imprisonment. It has been enacted to provide an opportunity to the offenders

to prove that they can reform their behaviour and live in the society without causing any harm. It should also be kept in mind that reformation is not always effective. Sometimes the crimes are so heinous and disgusting and the criminals are so reckless that punishment for such crimes becomes necessary. In some cases reformation is not useful and for the safety of the society it is best to sentence them to life imprisonment.

Purpose and Objective of Probation- The main purpose and objective of probation is to permanently reform the law breakers. It involves moulding the habits in a constructive manner through rehabilitation and reformation. Its objective is to give the antisocial person a chance to cooperate voluntarily with the society. This will also provide him social security and protection. It is an alternative to imprisonment. Imprisonment will not always serve the purpose of eliminating crime. The purpose of the probation law is to reform the offender more than to punish him. This is what we generally call probation. In simple words, it can be understood as the conditional release of the offender on the promise of good behaviour. The purpose of this section was to reform young offenders, who might commit crime under the influence of bad company or ignorance. Its purpose is to save and reform them from hardened criminals, who might take them on the path of crime. This section also helps persons of mature age, who might have committed crime under influence. They are expected to become good citizens of the country.

Statutory Provisions under the Act- This provision is broadly classified into procedural and substantive common laws which deal with the probation of offenders. The first provision to deal with probation was in **Section 562** of the Code of Criminal Procedure, 1898. After amendment in 1973, probation was included in **Section 360** of the Code of Criminal Procedure. This section states that if any person not below the age of twenty-one years and convicted of any offence punishable with imprisonment for seven years or any offence punishable with fine or any person not below the age of twenty-one years or any woman convicted of any offence not punishable with imprisonment for life or death sentence and there is no previous conviction against the offender appears before the Court, irrespective of the circumstances under which he committed the offence, the Court may release the offender on a promise of good conduct. The court may release the offender on furnishing a bond for good conduct and peace instead of sentencing him to imprisonment. In this case of **Jugal Kishore Prasad v. State of Bihar**, the Supreme Court held that the object of the law is to prevent juvenile offenders from becoming stubborn criminals as a result of their interaction with experienced adult criminals in case they are sentenced to imprisonment in jail. It is observed that this Act is in line with the current trend of penology which says that influence should be exerted to change and reshape the offender and not to avenge justice. Modern criminal jurisprudence holds that no person is born a criminal. A lot of crimes are the result of the socio-economic environment. The Probation of Offenders Act, 1958 excludes the application of **Section 360** of the Code of Criminal Procedure, 1973, whenever the Act comes into force. **Sections 3 to 12** of the Probation of Offenders Act, 1958 deal with the procedures of the court in dealing with the release of offenders. The important aspects of the provisions are discussed in five ways-

Warning - Section 3 of the Probation of Offenders Act, 1958 deals with the power of the court to release the offender after warning him. Warning in the literal sense means a strict warning or reprimand. **Section 3** explains how the offender is benefited on the basis of warning after fulfilling the following conditions-

(1) When any person is found guilty of committing an offence under **section 379** or **section 380** or **section 381** or **section 404** or **section 420** of the Indian Penal Code, 1860 or any offence punishable with imprisonment for a term exceeding two years or with fine or with both under the Indian Penal Code or any other law for the time being in force.

(2) An offender must not have been previously convicted of the same offence.

(3) The court considers the nature of the offence and the character of the offender.

(4) The court may, instead of sentencing the offender, release him on probation of good behaviour under **section 4** of the Act.
(5) Instead of sentencing the offender, the court may release him after giving him an appropriate warning.

Keshav Sitaram Sali v. State of Maharashtra, AIR 1983 SC 291 In this case, the appellant was an employee of the Railway at Paldhi Railway Station. He assisted in the commission of the offence of theft of charcoal committed by Bhikan Murad in the case before the Special Judicial Magistrate First Class (Railways), Bhusaval, who was accused of stealing charcoal. The learned Magistrate acquitted the appellant of that offence, and the State Government filed an appeal before the Bombay High Court against the judgment of acquittal passed by the learned Magistrate. He was fined Rs. 500 and in default of payment was sentenced to undergo rigorous imprisonment for two months. The subject matter of the theft was a quantity of coal costing Rs. 250. 8. The Supreme Court held that in cases of petty thefts the High Court should give the benefit of **section 3** or **section 4** of the Probation of Offenders Act, 1958 or **section 360** of the Code of Criminal Procedure, 1973 instead of imposing a fine.

Basikesan v. State of Orissa, AIR 1967 Ori 4 In this case, a 20 year old youth was found guilty of the offence under **Section 380** of the Indian Penal Code, 1860. It was held that the youth had not committed the offence intentionally and hence **Section 3** of the Probation Act should be applied in the case and he should be released after a warning.

Ahmed v. State of Rajasthan, AIR 1967 Raj 190 In this case, the court held that the benefit of the Probation of Offenders Act does not extend to a person who was involved in any activity which resulted in creating an explosive situation and causing communal tension.

Probation on good conduct- Section 4 of the Probation of Offenders Act, 1958 talks about the release of the offender on the basis of good conduct. This is a very important section of the Act. The important points to remember for the application of this section are-
(1) **Section 4** of the Act does not apply if the offender is found guilty of an offence punishable with death or imprisonment for life.
(2) The court has to consider the circumstances of the case, including the nature of the offence and the character of the offender.
(3) The court may pass a supervision order to release the offender on probation of good conduct. The supervision period must not be less than one year. In such a case, the probation officer must supervise the person for such a period. The supervision order must list the name of the probation officer.
(4) The Court may direct the offender to execute a bond, with or without sureties, to appear and undergo sentence during such period not exceeding three years.
(5) The Court may release the offender on the ground of good conduct.
(6) The court may impose reasonable conditions in a supervision order and the court making the supervision order may explain the conditions of the order to the offender. Such a supervision order must be served on the offender immediately.

The report of the probation officer is not mandatory for the enforcement of this rule, but if the information is required on record, the court shall take into account the information of the probation officer before passing a probation order for good conduct.

Question No. 10- Write short notes on any two of the following-

Answer - (1) Juvenile Delinquent- Any juvenile under the age of 8 who commits a crime is considered a juvenile delinquent. Legally, any child over the age of 8 and under the age of 16 committing any unlawful act is considered a juvenile delinquency. For juvenile offenders, juvenile detention is a system separate from prison. Juvenile detention centers provide age-appropriate resources to help rehabilitate young offenders. Some causes of juvenile

delinquency: poverty or socio-economic status, poor school preparation or performance, peer rejection, desire for protection from violence or financial hardship.

To prevent juvenile crime, proper supervision is required at home and school. The role of parents and teachers is important in the healthy mental development of children. Serious efforts should be made to accuse the culprit and bring about his social and psychological reform.

(2) Review- The provisions relating to review are present under **Section 114** and Order 47 of the Code of Civil Procedure. Review is a provision provided under the Code under which the judgment passed by the court in a particular situation and its facts are examined. The Latin principle 'Functus officio' applies to any judgment passed by a court following due process of law. The principle means that if the judgment has been passed after a fair and impartial hearing and trial in the case, then the case cannot be reopened. In other words, the jurisdiction of the court ends once it has completed its functions for which it was appointed.

The right to file a review is an exception to the Latin concept of functus officio. A review can be filed against-

(1) Any order or decree against which an appeal is provided under the Code of Civil Procedure, but no appeal has been made.

(2) Against any order or decree for which no appeal is provided under the Code of Civil Procedure.

(3) Decision passed on direction of Small Causes Court.

It is important to know that the application for review can be filed only in the same court in which the required order has been passed by the court.

Review of an order can be granted only on the following grounds-

(1) The discovery of new evidence and important matters of evidence which, after the exercise of reasonable diligence, were not within the knowledge of the applicant or could not have been produced by him at the time the decree was passed or order was made

(2) Due to any mistake or error which is apparent from a mere glance at the record.

(3) For any other sufficient reason (which may be deemed to be analogous to the other reasons specified above).

Is review an inherent power of the court or is it granted by law? Various High Courts have given their views in this regard. Some High Courts believe that review is an inherent power of the court.

The power of review is vested in every court having full jurisdiction to prevent gross injustice or to correct grave and manifest error. The High Court is a court of full jurisdiction and therefore has the power to review its own order. (**T. Krishnappa v. H. Lingappa, AIR 1982 Karn. 58**) But another opinion held that **Section 114** and Order 47 Rule 1 clearly confer the power of review on the civil court. Hence the court can exercise this power only under these provisions.

This cannot be done under **section 114** even if the review application claims to be under this section. It is well settled that the power of review is not an inherent power. It must be conferred by the law either specifically or by necessary implication. (**Kumaran Vaidyar v. K.S. Venkateswaran, AIR 1992 Ker-26**)

(3) Difference between appeal and revision-

(1) Legal Right to Appeal or Change- The right of a person who loses in court is the right to appeal, which is written in the Constitution. Amendment, on the other hand, is up to the court. This means it may or may not happen.

(2) An appeal is heard in court like any other case, but a revision case is not heard in court.

(3) Type of court According to the Code of Civil Procedure, a request is considered by the court which is superior to the previous court. This means that it cannot be the High Court. The High Court can only make some changes.

(4) In an appeal the Court may interfere in any way, but in a revision it may do only this can do

(5) Number of stages in appeal vs. number of stages in revision in appeal, there is only one stage,

which is the hearing of the case. However, in revision there are two stages: one initial and one final.
(6) An appeal occurs when a court trial on a certain matter continues while revision occurs when the court examines whether the law was followed during the case.
(7) What kind of examination is involved in an appeal or revision? An appeal looks at the fundamentals of the law and the facts. Revision, on the other hand, looks at the legal actions, the jurisdiction and the procedure used to arrive at the decision.
(8) Time limit in an appeal, a party has a certain time to file an appeal. This time starts immediately after the trial court gives its final judgment. In a revision, there is no set time limit. A party can request it at any time, but the time limit must be reasonable.
(9) It is necessary to apply for an appeal. The person appealing must appeal. However, it is not necessary to apply for a revision.

(4) Difference between instruction and revision- The following difference is found between Reference and revision is-

Sr. No	Reference	Revision
1	A reference involves a question regarding the validity of an Act, Ordinance or Regulation.	Revision involves a question as to the accuracy, validity or propriety of any record, judgment or sentence.
2	References may be made only in pending cases.	Revision may be made in both pending and decided cases.
3	A reference can be made only to the High Court.	Revision may be made both by the High Court and the Court of Session.

(5) Juvenile justice board- Section 4 of the Juvenile Justice Board Act provides for the formation of a Juvenile Justice Board. The power to constitute such a board is vested in the State Government. Such a board can be constituted for a district or group of districts specified in a notification issued by the State Government.

Section 4(2) provides for the composition of the Board. The Board shall consist of a Metropolitan Magistrate of the first class or a Judicial Magistrate, as the case may be, and two social workers of whom at least one shall be a woman. Every Bench of the Board shall have the powers of a Judicial Magistrate of the first class or a Metropolitan Magistrate, as the case may be, under the Code of Criminal Procedure, 1973.

Sub-section (3) of **Section 4** provides the qualifications of a Magistrate who may be appointed as a member of the Board. **Sub-section (4)** provides for the tenure of the members of the Board and **sub-section (5)** provides the grounds on which the appointment of a member of the Board may be terminated.

(6) Powers of Juvenile Justice Board- (1) Where a Board has been constituted for a district [* * *], such Board shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have exclusive powers to act in respect of all proceedings under this Act relating to a juvenile in conflict with law.
(2) The powers conferred on the Board by or under this Act shall be exercised by the High Court the Board shall have exclusive power to decide all proceedings relating to children in conflict with law under this Act.

Section 6(2) provides that the powers conferred by or under this Act shall also be exercised by the High Court and the Court of Session when the proceedings come before them in appeal, revision or otherwise.

In the case of **Sangeeta R. Jain v. S. A. Dwivedi**, the petitioner and her father were owners of a power-loom business in Bhiwandi. On the complaint filed by the first respondent, the Industrial Court at Thane passed an order on 22nd March, 1992 to the following effect:-

The respondents are directed to deposit with this Court within three weeks from today, 50 per cent of the wages of the concerned employees from 1st October, 1989 to the date of this order.

The petitioner and his father Ramchandra Jain (3rd respondent) were both respondents in the above complaint. The first respondent filed a miscellaneous complaint before the 2nd Labour Court alleging, among other things, that the 3rd respondent and the petitioner had wilfully ignored the order of the Industrial Court and thereby violated **Section 48(1)** of the Maharashtra Recognition of Trade Unions and Unfair Labour Practices Act, 1971 (hereinafter referred to as the Act). The petitioner applied to the Labour Court to dismiss the complaint against her as she was below 18 years of age on 7th August, 1992 when the complaint was filed and cognizance was taken. The Labour Court rejected the application, whereupon this application has been preferred before the High Court. The question in this application was whether a Labour Court can try a person under the provisions of the Act if he was a minor on the date of the alleged offence under **Section 48(1)** of the Maharashtra Act.

It was held that the provisions of the Juvenile Justice Act, 1986 have been enacted to supersede the provisions of **Section 27** of the Code of Criminal Procedure and a Special Court has been created having exclusive jurisdiction so far as juvenile delinquents are concerned. All courts other than those constituted under **Section 7** of the Act have been barred from having jurisdiction so far as juveniles are concerned.

It was further held that in view of the definition of "juvenile" contained in section 2(g), it is clear that the petitioner, who was a girl, had not attained the age of 18 years on the relevant date (the date of offence under **section 81(1)** of the Maharashtra Act) and was a juvenile and a delinquent juvenile under **section 2(g)** and, therefore, the exclusive power to try her is vested in the Court specially created under section 7. The Courts enumerated in **section 7(2) (a), (b)** and **(c)** should exercise the powers conferred on the Board or the Juvenile Court even if the Board or the Juvenile Court has not been constituted in the concerned area.

In the case of **Bandela Ailaiah v. State of Andhra Pradesh** it was held that the burden of proving the age of the accused does not lie on the juvenile delinquent but the court examines his age to find out whether the person is a delinquent juvenile for the purposes of the Act or not. In this case the court instead of giving a clear opinion about the age of the juvenile delinquent, made a cursory inquiry about his age and put the burden on him by asking him to produce school certificate etc. to prove his date of birth and without any material held that he was above 16 years of age on the date of commencement of the trial. It completely deprived the juvenile delinquent of the benefit of the provisions of the Act. Therefore the provisions of the Act were blatantly violated by the trial court. Therefore the trial of the Sessions Court resulted in conviction against the juvenile under **Chapter 18** of the Code of Criminal Procedure and the juvenile had to remain in prison for a long period with other offenders. The trial was held to be flawed. Trial of a delinquent juvenile without checking his age is flawed.

Question 11. Briefly describe the objects and reasons of the Probation of Offenders Act, 1958.

Answer-Statement of Objects and Reasons- The question of releasing criminals on probation on the basis of good conduct instead of sentencing them to imprisonment had been under consideration for some time. In the year 1931, the Government of India prepared the Criminal Probation Bill and circulated it to the then local governments to seek their views on it. However, the Bill could not be presented due to their being busy with other more important work. Later in the year 1934, the Government of India informed the provincial governments that it was not possible to make a central legislation at that time and it had no objection if the provincial governments themselves prepared the legislation. Accordingly, some provinces enacted their own probation legislations.

However, in some states there is no separate probation law. In the states which have probation laws, there is no uniformity in them and they are not adequate to meet the present

requirements. In the meantime greater emphasis is being laid on reforming and rehabilitating offenders as useful and self-dependent members of society without subjecting them to the evil effects of a life of imprisonment. In view of the wide interest in the probation system in the country, the question was re-examined and it was proposed that a Central legislation on the subject be enacted which would be uniformly applicable in all the states.

It was proposed to empower the courts to release offenders on probation after condemning them in certain specific cases. It was also proposed to empower them to release on probation in all suitable cases where the accused has been found guilty of an offence not punishable with death or life imprisonment. Special provisions have been made prohibiting imprisonment of offenders below 21 years of age in the case of such offenders. During the period of probation the offenders will be under the supervision of the Probation Officer so that they can be reformed and made useful members of the society. The Bill has been prepared to achieve the above objectives.

Objective and Application- The object of the Probation of Offenders Act, 1958 is that an offender should be released on probation after due reprimand. The present Act has been enacted after the introduction of reformative principle of punishment so that he gets an opportunity to reform himself and become fit to live in the society. Its object is to rehabilitate the offender. If a criminal who has become a criminal by chance is put in prison, he comes in contact with other criminals and the possibility of his reformation and living in the society is largely lost.

In the case of **Jugal Kishore Prasad v. State of Bihar**, the Supreme Court reiterated the object of the Act and stated that it is to prevent young offenders from becoming recidivist criminals in the company of hardened criminals of mature age when sentenced to imprisonment.

The above objective has been reiterated by the Supreme Court in the case of **Arvind Mohan Sinha vs. Mulya Kumar Vishwas**, which concluded that the Probation of Offenders Act is a reformative measure and its purpose is to reform immature offenders and rehabilitate them in society. The Act recognizes the importance of environment in the commission of crime and prescribes remedies for it through which offenders can be reformed and rehabilitated.

The Probation of Offenders Act, 1958 extends to the whole of India except Jammu and Kashmir. **Section 1 (3)** provides that the Act shall come into force in a State on such date as the State Government may publish in the Official Gazette. It also provides that different dates may be provided for different States.

In the case of **P.K. Tejani v. M.R. Dage**, it was held that the rehabilitative purposes of the Probation of Offenders Act are technically so wide that any offence under the Prevention of Food Adulteration Act can also be subsumed under it. But the enforcement of the principle of probation has become negative because of the constraints of social security. Food adulteration is injurious to human health. Economic crimes are committed by white collar criminals who cannot be prevented by soft preventive procedures. The Law Commission of India has also recommended in its 47th Report that social and economic crimes be excluded from the Act by suitable amendments. In the present circumstances of India, the probation movement has not become strong enough to remove these anomalies. It is possible that a different view may emerge in more developed circumstances. Therefore, at present the Probation Act does not apply to the crimes committed under the Food Adulteration Prevention Act.

In the case of **Ishwar Das vs. State of Punjab**, it was held that the Probation of Offenders Act, 1958 was enacted after the Food Adulteration Prevention Act, 1954 and the legislature was aware of this, therefore the provisions of the Probation of Offenders Act were not adapted to the provisions of the earlier Act. **Section 18** of the Probation of Offenders Act clearly excludes crimes committed under the Prevention of Corruption Act, but there is no such exclusion in respect of the Food Adulteration Prevention Act. Therefore, the provisions of the Probation Act will apply to crimes under the Food Adulteration Prevention Act.

Similarly, in the case of **Ram Prakash vs. Himachal Pradesh**, it has been held that the benefits under the Offenders Act will also be available to a person who is found guilty of an offence under the Prevention of Food Adulteration Act, 1954.

Question 12. Mention the procedure of summary trial under the Code of Criminal Procedure.

Answer: Summary trial Section: Procedure of summary trial of crimes is described in **Sections 260 to 265** of the Code of Criminal Procedure.

Section 260: Power to try cases in summary. Under **Section 260**, the following magistrates can try such crimes:

Any Chief Judicial Magistrate,

Any Metropolitan Magistrate,

Any First Class Magistrate appointed by the High Court for this purpose.

Cases triable in summary as per **section 260**, the following offences may be briefly described-

(i) Offences punishable with death, imprisonment for life or for a term exceeding two years,

(ii) Theft under section **379, 380** or section **381** of the Indian Penal Code, where the value of such property does not exceed Rs. 2,000,

(iii) Receiving or retaining stolen property under **section 411** of the Indian Penal Code, where the value of such property does not exceed Rs. 2,000,

(iv) Aiding in concealing or disclosing stolen property under **section 414** of the Indian Penal Code, where the value of such property does not exceed Rs. 2,000,

(v) Offences under **sections 454** and **456** of the Indian Penal Code,

(vi) Insult with intent to provoke breach of the public peace under **section 504** of the Indian Penal Code and offence under **section 506** of the Indian Penal Code. Criminal intimidation punishable with imprisonment for two years or with fine or with both,

(vii) Abetment of any of the above offences,

(viii) Attempt to commit any of the above offences when such attempt is an offence,

(xi) An offence for which a complaint may be made under **section 20** of the Cattle Trespass Act.

When during the summary trial it appears to the Magistrate that the case is of such a nature that it is undesirable to have a summary trial, the Magistrate shall recall any witnesses who have been examined and the case shall be heard again in the manner provided by this Code.

Section 261 Summary trial by Magistrate of the second class-According to **section 261**, a Magistrate of the second class may also try summarily offences where the offence is punishable with fine only or with imprisonment for a term exceeding six months with or without fine and the abetment and attempt of such offence shall also be tried in the same manner.

Section 262-According to **Section 262**, the following procedure is followed in summary trials-

(a) The procedure is the same as in summons cases.

(b) No sentence of imprisonment for a period exceeding three months is passed.

Section 263-According to **section 263**, the Magistrate shall enter the following particulars in a form specified by the State Government, namely:

(a) serial number of the case

(b) Date of the commission of the offence,

(c) Date of the report or complaint,

(d) Name of the complainant (if any),

(e) Name of the accused, his parents' name and his residence

(d) The offence complained of and the offence proved and, in a case falling under **clauses (iii)**, **(iii)** or **(iv)** of **sub-section (1)** of **section 260**, the value of the property in respect of which the offence is committed;

(a) plea of the accused and his examination,

(b) Finding,
(c) Sentence or other final order,

Date of conclusion of the proceedings. Section 264 Judgment in cases tried summarily.- In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record a judgment summarizing the evidence and stating the reasons for the finding.

Section 265 Language of record and judgment.- (1) Every such record and judgment shall be written in the language of the Court.

(2) The High Court may authorize any Magistrate empowered to try a case summarily to have the aforesaid record or judgment or both prepared by an officer appointed in this behalf by the Chief Judicial Magistrate and the record or judgment so prepared shall be signed by such Magistrate.

Question. 13. What is plea bargaining? Describe the procedure of plea bargaining. When plea bargaining cannot be done.

Answer- Plea bargaining has been added to **Chapter 21A** of the Code of Criminal Procedure by the Criminal Law (Amendment) Act, 2005. The agreement between the accused and the prosecution for a crime punishable with imprisonment for a period of less than 7 years is called plea bargaining. According to **section 265A**, plea bargaining will be applicable against an accused against whom-

(i) A report has been sent by the officer in charge of the police station under **section 173** that the accused appears to have committed an offence other than the offence for which the punishment of death or life imprisonment or imprisonment for a term exceeding 7 years is provided under the law for the time being in force or

(ii) A Magistrate has, on a complaint, taken cognizance of an offence punishable with death or life imprisonment or imprisonment for a term less than 7 years against the accused under the law for the time being in force and has issued a process under **section 204** after examining the complainant and witnesses under **section 200**.

But it does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman or a child below 14 years of age.

Application for plea bargaining- As per **section 265B**, an application for plea bargaining shall be made to the High Court where the case is pending.

The application shall contain a brief statement of the case in respect of which the application is filed including the offence to which the case relates along with an affidavit stating that the accused has filed the plea bargaining application voluntarily after understanding the nature and extent of punishment provided under the law for the offence and that he has not been convicted earlier by the Court in a case in which he was charged with the same offence.

The Court on receipt of the application shall issue notice to the Public Prosecutor, complainant (as the case may be) and the accused to appear on the date fixed for the case. When all are present on the date fixed, the Court shall examine the accused where-

(a) Other parties to the case are not present to satisfy themselves that the accused has filed the plea voluntarily and where.

(A) If the Court is satisfied that the accused has filed a voluntary application, the Public Prosecutor shall allow time to the complainant and Ajit to settle the case which may include payment of disclosure and other expenses by the accused to the victim and thereafter fix a date for full hearing of the case.

(B) If the Court is of the opinion that the accused has not filed a defence application or has been convicted by the Court earlier in the case in which he was charged with the offence, it shall proceed in accordance with this Code.

Procedure- According to **section 265 C**, the court will follow the following procedure for settlement under **section 265 (b)-**

(i) In a summary case on police report, the court will give notice to the public prosecutor, the police officer investigating the case and the victim to attend the meeting, but the court will have to ensure that the parties are voluntarily participating in the meeting. If the accused wishes, he can attend the meeting through his advocate.
(ii) In a summary case other than police report, the court will give notice to the accused and the victim to attend the meeting to settle the case, but the court will ensure that the parties are voluntarily participating in the meeting, but if the victim wishes, he can attend the meeting through his pleader.
According to **section 265 D**, if the court resolves the case by meeting, then it will prepare a report on which the presiding officer of the court and the parties participating in the meeting will sign. Disposal of the case- According to **section 265 (D),** the court will dispose of the case in the following manner.
(a) Provide compensation to the victim and hear the parties for consideration of the amount of punishment, release the accused on probation of good conduct under **section 360** or after pardon or consider the accused under the provisions of the Probation of Offenders Act, 1958 or any other law for the time being in force and hear the accused on the question of punishment,
(b) After hearing the parties, if the court is of the opinion that the provisions of **section 360** or the Probation of Offenders Act, 1958 or any other law for the time being in force are applicable to the accused, then it can release the accused on probation or give him the benefit of any law.
(c) If the court is of the opinion that the crime of the accused is punishable with the minimum punishment, then it can give the accused half of the minimum punishment.
(d) If the Court is of the opinion that the offence of the accused does not fall under **clauses (b)** and **(c)**, it may award one-fourth of the punishment provided or extended, as the case may be, to the accused for such offence.
Judgment of the Court - According to **section 265 (c),** the Court shall pronounce its judgment as aforesaid in open court and it shall be signed by the presiding officer of the Court.

According to **section 206 (g),** the judgment of the Court shall be final and no appeal from such judgment shall lie to any Court except by way of special leave petition under article 136 of the Indian Constitution and by way of writ petition under articles **226** and **227**.
Non-applicability of plea bargaining- Plea bargaining will not apply in respect of an infant or juvenile as defined in **section 2(t)** of the Juvenile Justice (Care and Protection of Children) Act, 2000. Plea bargaining will not apply in case of an offence punishable with imprisonment for a term exceeding 7 years. Plea bargaining will also not apply where the offence affects the socio-economic condition of the country or is committed against a woman or a child below 14 years of age.
Question 14. Explain in detail the provisions regarding maintenance of wife, children and parents. What will be the maximum amount of maintenance? Or explain in detail the provisions regarding maintenance of wife, children and parents.
Answer - Wife, children and parents in sections **125** to **128** of the Code of Criminal Procedure provision has been made for the maintenance of the wife. It is the natural and fundamental duty of every person to maintain his wife and children until they become capable of supporting themselves.

Similarly, it is the sacred duty of every person to support his parents if they are not able to support themselves.
Section 125 Maintenance of wife, children and parents.- (1) According to section 125 any person, if he is of sufficient means,
(a) His wife who is unable to maintain herself, or
(b) His legitimate or illegitimate minor child, whether married or not, who is unable to maintain himself or herself, or

(c) of his or her legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is unable to maintain himself or herself by reason of any physical or mental abnormality or injury, or

(d) Of his or her father or mother who is unable to maintain himself or herself,

Provided that if any person neglects or refuses to maintain any child, then, a Magistrate of the first class may, on proof of such neglect or refusal, direct such person to pay a monthly allowance for the maintenance of his wife, children or parents at such rate as the Magistrate thinks fit and to pay such allowance to such person to whom the Magistrate may from time to time direct the payment to be made:

As per the first proviso to **section 125**, a Magistrate may direct the father of a minor daughter described in **section 125(1)(b)** to pay such allowance until she attains her majority if the Magistrate is satisfied that the husband of such minor daughter, if married, does not have sufficient means to support her,

Provided further that in respect of maintenance under **section 125(1),** the Court may make an order that he pay to his wife, children and parents such sum as may be deemed fit for interim maintenance and for the expenses of such proceedings.

Provided further that the application for grant of monthly allowance of interim maintenance and costs of the proceedings shall, as far as possible, be disposed of within sixty days of the service of notice of such application on such person.

125(2) such allowance for maintenance or for interim maintenance or costs of proceedings shall be payable from the date of the order or, if such an order is made, from the date of the application for maintenance or interim maintenance and costs of proceedings.

125(3) If any person to whom an order has been made fails, without sufficient cause, to comply with such order, any such Magistrate may, for every breach of the order, issued a warrant for the recovery of the amount due in the same manner as is provided for the recovery of a fine, and may sentence such person to imprisonment for a term not exceeding one month, or, if it is earlier paid, for the amount of the unpaid amount (including maintenance or interim maintenance allowance and costs of proceedings, as the case may be), or any part thereof, for a term which may extend to one month, or, if it is earlier paid, until such time as it is paid.

Provided that no warrant for the recovery of any amount due under this section shall be issued unless an application for the recovery of such amount has been made to the court within a period of one year from the date on which it became due.

Provided further that if such person offers to maintain her on the condition that his wife lives with him and she refuses to live with the husband, such Magistrate may consider any grounds for her alleged refusal and may, notwithstanding the making of such proposal, make an order under this section if he is satisfied that there is just ground for making such order.

(If the husband has married another woman or keeps a mistress, she shall be treated as a justifiable part of his wife's refusal to live with him)

125(4) A wife shall not be entitled to receive from her husband any payment under this section (of maintenance or interim maintenance allowance and costs of proceedings, as the case may be) if she is living in a state of conjugality or if she refuses to live with her husband without sufficient cause or if they are living separately by mutual consent.

125(5) The Magistrate may cancel the order on its being proved that the wife in whose favour a decree has been made under this section is living in a state of adultery or without sufficient cause refuses to live with her husband or that they are living separately from each other.

Later in **Yumnabai v. Anantrao, 1988, KLJ 793, SC** the Supreme Court held that in order to claim maintenance under this section a wife has to be proved conclusively that she was a lawfully married wife under the law of the personal law applicable to the parties.

Similarly in **Mohammed Ahmed Khan v. Shah Bano Begum, 1985 Cr. Law J 875, SC** the Supreme Court later held that **section 125** applies to all irrespective of their religion.

Later in **Devchandra v. State of Maharashtra AIR 1974** Supreme Court 1488 it was held that where the husband marries another woman the wife can refuse to live with the husband and is entitled to maintenance.

Section 126 Procedure (1) any proceedings under **section 125** may be taken against a person in any district where he is or where he or his wife resides or where he last resided with his wife or with the mother of the illegitimate child, as the case may be. Such proceedings shall be taken in the presence of the plaintiff against whom an order for payment of maintenance is sought to be made, or when his attendance has been dispensed with, in the presence of his pleader and shall be reduced to writing by means of a joint statement of the plaintiff, but if the Magistrate is satisfied that the plaintiff is a plaintiff or his wife or his wife or the mother of the illegitimate child, or in the presence of the plaintiff. That any person against whom an order for payment of maintenance is to be made has wilfully avoided or wilfully neglected to attend the Court, the Magistrate may proceed to hear and decide the case as a judge and any order so made may, on an application made within 3 months from the date thereof for good cause to be shown, be enforced under such terms including such terms as to the payment of costs to the opposite party as the Magistrate may think just and proper.

Section 127 Change in allowance- This section gives the magistrate the power to reduce or increase the amount of maintenance due to change in the circumstances of the person receiving or paying maintenance. Such an order can be implemented from the date of the application. The amount of maintenance can be increased even in a situation where the original order has been passed on the basis of compromise.

Section 128 Maintenance is also like interim maintenance and expenses of proceedings-

Enforcement of order of maintenance or interim maintenance and costs of proceedings, as the case may be.- Under **section 128**, an order for maintenance or interim maintenance and costs of proceedings shall be paid free of cost to the person in whose favour the vote is given or to his guardian, if any, or to the person to whom the allowance for maintenance or interim maintenance and costs of proceedings is to be paid, and such order may be enforced by a Magistrate in any place where the person against whom the order was made is located, on being satisfied as to the identity of the parties and as to the non-payment of the allowance or costs due, as the case may be.

Question 15. What provision has been made in the Criminal Procedure Code regarding security to maintain peace? Explain.

Answer-The system of taking security to maintain peace has been classified into two parts-

(1) Security to keep the peace in case of conviction

(2) Security to maintain the peace in other circumstances.

(1) **Security to keep the peace on conviction.-Section 106** provides for such provision has been made for taking security for maintaining peace from a person who has been convicted in any case.

When the Court of Session or of a Magistrate of the first class convicts a person of any of the offences described in this section or of the abetment thereof and it appears to the Court that it is necessary to take security from such person for keeping the peace, it may order such person to execute a bond, with or without security, for keeping the peace for a period not exceeding three years.

An order under this section can also be passed during a summary trial if a conviction has been made for any of the offences specified in this section and such Magistrate has jurisdiction to find such conviction and pass such order.

Security to keep the peace may be taken on conviction of any of the following offences, namely:-
(i) an offence punishable under **Chapter VIII** of the Indian Penal Code, other than an offence punishable under **section 153A** or **section 153B** or **section 154**,'
(ii) Any offence which amounts to assault, use of criminal force or mischief, that is, any offence which involves assault, use of criminal force or mischief,
(iii) Any offence of criminal intimidation,
(iv) Any other offence which
(a) There has been a breach of the peace, or
(b) There is a danger of a breach of the peace, or
(c) Which was known to be likely to cause a breach of the peace.

There is judicial difference of opinion in the use of the term 'breach of peace'. In the opinion of the Allahabad and Mumbai High Courts, it extends to those crimes which are not just breach of peace or disturbance of 'public tranquility'. In its opinion, the crime of hurting a person is related to breach of peace whether it occurs in a public place or a private place.

In the case of **Emperor vs. Dharmaraj AIR 42 Allahabad 445** it was said that if any criminal trespass is committed with the intent to disturb the peace, then an order of security can be given under this section.

In another case, the Calcutta High Court said that such an order cannot be passed if there is any other intention, such as having illegal relations with the wife of the defendant etc.

Security for maintaining peace in other cases-Section 107 provides for security for maintaining peace in all other cases. The provisions of this section are as follows-
(1) Where an Executive Magistrate receives information that any person is likely to break the peace or disturb the public tranquillity or to do any wrongful act which is likely to cause a breach of the peace or to disturb the public tranquillity, he may, if in his opinion there are sufficient grounds for taking action, require such person in the manner hereinafter provided to show cause why he should be ordered to execute a bond (with or without sureties) for keeping the peace for such period, not exceeding one year, as the Magistrate may think fit to fix.
(2) Proceedings under this section may be taken before an Executive Magistrate if either the place where a breach or disturbance of the peace is apprehended is within his local jurisdiction or any person is within such jurisdiction that, beyond such jurisdiction is likely to breach or disturb the public tranquillity or does any wrongful act as aforesaid.

Sekar v. Padma Losai. Law J. 1405 Madras later held that an order cannot be made under this section against two parties belonging to the opposite group in one action as such an order would vitiate the proceedings and would be liable to be quashed.

In the case of **Mithya vs Rajasthan, 1987 Cr. Law. J 1042 Rajasthan**, it was determined that under **section 107**, the Magistrate has the power to imprison persons for a period of more than 1 year, this 1 year starts from the date when the Magistrate takes action is satisfied to do so and takes cognizance and initiates action and not on the basis of a warrant or the first appearance of the accused.

There are no provisions in **sections 107, 111** and **116** which definitely give power to the Magistrate to drop the proceedings which have been initiated, but such power may be granted to him to drop the proceedings initiated under section **107** at any stage, even after the order under **section 111** or before the inquiry under **section 116** of this Code.

Question 16. Under the Code of Criminal Procedure, a District Magistrate has what are the compulsory powers in urgent cases of public remedy.

Answer: Public nuisance has been defined in Section **268** of the Indian Penal Code. According to **Section 268**, a person is guilty of public nuisance who does any such act or is guilty of any such illegal act which causes general damage, danger or annoyance to the public or the general public who live nearby or have a claim on the nearby property or which is likely to cause damage, obstruction, danger or annoyance to those persons who have the opportunity to use any public

right. In general terms, public nuisance is an act which affects the reasonable comfort of any class of persons who come under its operation or neighbourhood. Provisions have been made in **Sections 133** to **143** of the Code of Criminal Procedure regarding public nuisance. Public nuisance has not been defined in the Code of Criminal Procedure.

Order for removal of pollution.- When the District Magistrate or Sub-divisional Magistrate or any other Executive Magistrate specially authorised in this behalf by the State Government, on receipt of a report or other information from a police officer and on taking such evidence as he thinks fit, considers-

(a) That any unlawful obstruction or pollution be removed from any public place or street or water-course which is or may be lawfully used by the public, or

(b) the carrying on of any trade or occupation or the keeping of any article or commerce which is injurious to the health or physical comfort of the community and in consequence such trade or occupation ought to be prohibited or regulated or such article or commerce ought to be removed or the keeping thereof regulated, or

(c) The making of any building or the sale of any substance which is likely to cause fire or explosion should be prohibited or discontinued, or

(d) any building, tent, structure or tree is in such a condition that it is likely that it may fall down and cause injury to persons living or working or passing by in the neighbourhood, and hence it is necessary to remove or repair such building, tent or structure or to provide support thereto or to remove or provide support thereto, or

(e) Any pond, well or excavation adjoining any such road or public place must be fenced in such a manner as to prevent danger to the public, or

(f) Any dangerous animal must be destroyed, confined or otherwise expressed,

then, such Magistrate may make a conditional order requiring the person causing such nuisance or pollution or carrying on such trade or profession or keeping such article or commerce or owning or having possession or control of such building, tent or structure, object, pond, well or excavation or owning or having possession of such animal or tree to do so within such time as may be fixed,

(i) Causes a nuisance or pollution, or

(ii) To discontinue the practice of such trade or profession or to close down or regulate it in such manner or to remove or regulate the keeping of such article or commerce in such manner as may be directed, or

(iii) Prevents or discontinues the manufacture or alters the development of such substance, or

(iv) Remove, repair or support such building or tent or structure or remove such trees, or

(v) Destroy, confine or sell such dangerous animal in the manner provided in the order, or

If he objects to doing so, he shall appear in person before him or before any Executive Magistrate subordinate to him at such time and place as may be fixed by such order and shall show cause why the order should not be made final (**Section 133**).

Thus the order made under this section is a conditional order (**Emperor v. Brij Kant Rai Chowdhary, I.L.R. 9 Calcutta 637**).

In the case of **Bhagirath Agarwal v. State of Maharashtra, (2004)** Cr. La. J. Su. Co. the Supreme Court held that to avail the benefit of section 133 it must be proved that the inconvenience to the people was great and a large number of people were suffering from it was affected and the Magistrate has to investigate and decide whether there is credible evidence to support the charge or not.

For the applicability of this section it is necessary to have immediate danger to public health, happiness and convenience (**Muralidhar Bhil Patil v. Omkar Venkat Patil, AIR 1961 Bombay 263**).

Where it is the duty of the municipality to provide the required facilities for health protection and to prevent public nuisance, the municipality cannot be free from its said responsibility due to lack of funds (**Nagar Parishad Ratlam vs. Shri Virdhichandra and others, Cri. Law Re. 1980 SC 543**).

Actions and further action - Sections 134 to **143** mention the relevant procedure and further action.

(1) Service of order.-Such order shall be served in the same manner as a summons.

(2) Order to be obeyed or cause to be shown.-The person against whom the order is passed shall, within the due date, either obey the order or appear and show cause as ordered.

(3) Consequences of default.-If such person fails to comply with the order within the prescribed period and does not show cause, then-

(i) Such order shall be made final, and

(ii) Such person is punished under **section 188** of the Indian Penal Code will go.

(4) Denial of public right.-Where such person denies the public right, the Magistrate shall inquire into the matter and stay the operation of the order pending the decision of the Civil Court with regard to such right. But if he does not find any credible evidence regarding such refusal, he shall proceed further by taking evidence etc.

(5) Finalisation of order.-Where after the hearing of the case, the said order is made final, notice to that effect shall be given to the person and he shall be required to comply with the order within the stipulated time.

If such order is still not complied with then-

(i) The Magistrate may get the work done as desired and the expenses incurred thereon shall be recovered from that person, and

(ii) Such person shall be punished under **section 188** of the Indian Penal Code.

(6) Issue of injunction.-The Magistrate may issue an injunction at any stage of the investigation if he is satisfied that it is necessary to prevent public danger or injury of a serious nature (**T. N. Sudhakaran v. E. M. George, 1973 Cri. Law. J. 542** and **Amar Krishna v. Vipra Charan, (1965) 1 Cri. Law. J. 520**).

LL.B.-4th Sem. Paper-V Code of Civil Procedure and Limitation Act

Question No. 1- What do you understand by decree? Describe the essential elements of a decree. Differentiate between preliminary and final decree.

Answer- Decree is defined in **Section 2**, **Subsection 2** of the Civil Procedure Code. It is as follows: "Decree means the formal expression of an adjudication which determines the rights of the parties with respect to all or any of the matters in controversy in the suit, so far as the court expressing it is concerned. It may be preliminary or final. A decree is preliminary when further action is to be taken before the latter can be fully disposed of. A final decree is one which finally decides the rights, when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

Any decree contains the following essential things:

(1) The suit has been settled.

(2) The dispute has been disposed of by the court.

(3) The settlement has been finalised by a civil or revenue court.

(4) The rights of the parties have been definitely determined.

(5) The order does not expressly state that the suit is dismissed in default.

In the case of **Chhola Ram vs. Mask**, it has been held by the Rajasthan High Court that the order barring the suit or appeal is not a decree, because it does not decide the rights of the parties.

In the case of **Rattan Singh v. Vijay Singh** it has been held that an order dismissing the appeal barred by delay by rejecting the application filed for condonation of delay is a degree of not there.

In the case of **Sinnamani vs G. Vetrivel** it has been said that the order passed by the High Court under **Article 226** of the Constitution does not come under the definition of decree. From time to time, the Supreme Court and High Courts of India have given decisions regarding decree.

Essential elements of a decree-(1) A decree means a judicial determination of the matter in dispute and the action of adjudicating. In order that a judgment of a court be equivalent to a decree, there must be a decree. In other words, if there is no judicial determination of the dispute between the parties, there cannot be a decree, for example, an appeal dismissed by default, or an order dismissing a decree for non-appearance of the parties does not amount to a decree for there is a judicial determination of the matter in dispute. Moreover, such a decree must be by a court.

(2) In a suit.-The second essential element of a decree is that the judgment mentioned above should be given in a suit. Here a natural question arises- what is a suit. The word suit has not been defined in the Code.

In **Hansraj v. Dehradun-Mussoorie Electric Tramways Company Ltd.,** the Court has defined suit in the following words- The word suit has its ordinary meaning and, except in certain contexts, should be taken to mean a civil proceeding instituted by the presentation of a plaint. Thus, every suit is

commenced by the presentation of a plaint and when there is no civil suit there is no decree. But as mentioned above, the definition does not appear to be exhaustive because there are certain civil proceedings which though commenced with an application are treated as a civil suit and a judgment therein amounts to a decree. Thus, a dispute probate proceeding though commenced by the presentation of an application is still equivalent to a civil suit. Similarly, a proceeding in which an application is made for filing a settlement to refer the matter to arbitration under the Arbitration Act, 1940, may be treated as a civil suit. Certain proceedings under the Hindu Marriage Act, 1955, and the Land Acquisition Act, may also be treated as civil suits. A judgment of the Kerala High Court held that proceedings under **Section 110-A** (started by an application) of the Motor Vehicles Act are in the nature of a suit under the Code of Civil Procedure 2, hence proceedings have also started on an application made under it. The UP Farmers Act was also treated as a suit. Apart from these proceedings, any other proceeding under any other Act cannot be treated as a civil suit cannot be construed as a decree and, therefore, any decision made under it shall not amount to a decree within the meaning of **section 2(2).**

(3) Right of parties in case of dispute.-By virtue of **section 2(2),** the above mentioned award has given the right to settle the dispute.

The adjudication must have determined the rights of the parties to the dispute in respect of all or any of the matters. In other words, there must have been adjudication on the rights of the parties. It is not, however, necessary that the adjudication must have determined all the matters in dispute. To clarify the matter it may be said that where the issue involved in a suit is as to who is in possession of the disputed house, whether the landlord or the tenant, any decision of the Court on such issue would be an adjudication on rights. Such adjudication would amount to a decree. But where the decision of the Court is not on the rights of the parties, such a decision cannot be said to be a decree. Thus, an order dismissing a suit for default of appearance or an order refusing permission to sue in forma pauperis or an order dismissing an appeal for default or an order under Order 9, Rule 2, when summons is not served amounts to dismissal of a suit. An order dismissing an application for execution for failure to pay court-fees by the plaintiff or for non-prosecution is not a determination on the rights of the parties and hence not a decree. The rights of the parties mentioned here are rights relating to status, limitation, jurisdiction, frame of suit and accounts etc. Again such rights are substantive rights and not procedural rights. Thus, where the question to be decided in a suit is as to which of the disputing parties has a real right over the property in dispute, it is a question relating to substantive rights. But where the question is whether the summons has been duly served on a particular party or not, the question relates not to substantive rights but to procedural rights. The word parties implies the parties and they are generally the plaintiffs who have a cause of action against the other as the defendant. Thus, an

order passed by the Court on an application made by a third party will not be deemed to be a decree. Parties to a suit refer to the person whose names are recorded as parties at the time of framing of the suit and may also include an arbitrator but shall not include a person who dies during the course of the suit and whose name is recorded in the suit by mistake. Similarly, a party who withdraws from the suit and whose name is struck off is not a party to the suit. The word parties also does not include a person who has been made a party to the suit.

(4) Final Determination- To be a decree, the decision of the court must be conclusive in nature i.e. it must be complete and final as regards the court which passed it. A decree becomes final in two ways viz. when the time for filing an appeal expires without appeal being filed or in cases decided by decree of the Supreme Court; where the decree completely disposes of the suit so far as is concerned by the court passing it. An interlocutory order which does not finally decide the rights of the parties is not a decree. Thus, an order refusing a stay or an order by the appellate court deciding certain issues and remitting other issues to the trial court for determination will not be a decree. Whether a decision is a decree or not will be directly determined by its pith and substance. If a decision is final and conclusive in pith and substance, it will be a decree, otherwise not.

(5) Formal expression- Such judgment must be expressed in a formal manner. All the requirements of form must be complied with. Generally formal expression means acceptance or rejection of any or all the reliefs claimed in the PLA and contained in the draft declaration. An order made in the form of a decree will not make it a decree, if all the requirements of form are not complied with and the decree is drawn up accordingly. No appeal will lie against such a judgment. However, the decree need not be in any particular form. However, not all formal expressions will amount to a decree, unless the subsequent conditions are also complied with. Where the trial court passed an order that the suit is barred by limitation and liable to be dismissed the expression of the words "dismissible by limitation" means that the suit is dismissed and may be the same as a formal expression of dismissal.

Difference between preliminary decree and final decree-

Preliminary decree	Final decree
The formal statement made by the court to determine the rights of the parties involved in the issues of the case is known as the preliminary decree.	A final order completely resolves the case and leaves no issue for future decision.
The court can determine the rights of the parties and wait for the final judgment to be given	Once the rights and liabilities of the parties have been established by the final decree, there is nothing left to decide.
The initial decree may be modified if circumstances change.	The final decree must always be consistent with the preliminary decree.

A preliminary order may be issued more than once.	More than one final order may be issued.
According to **Phoolchand v. Gopal Lal (1967)** a preliminary decree can be issued more than once.	As per **Shankar v. Chandrakant Shankar 1995**, there can be more than one final decree

Question No. 2- Explain the principle of Pralakshti Praangnyaya with examples. Does Praangnyaya apply to ex parte decree? Describe.

Answer- Constructive res judicata- The rule of constructive res judicata in section 11 of the Code of Civil Procedure is an artificial form of res judicata. It provides that if a plea has been raised by a party in a proceeding between him and the defendant, he shall not be permitted to raise the plea against the same party in a subsequent proceeding in respect of the same matter. This is against the public policy on which res judicata is based.

The rule of constructive res judicata helps to raise the bar. Hence this rule is known as the rule of constructive res judicata, which is actually an aspect of enhancement of the general principles of res judicata.

In the case of **State of Uttar Pradesh v. Nawab Hussain**, M was a Sub-Inspector and was dismissed from the service of D.I.G. He challenged the order of dismissal by filing a writ petition in the High Court. He contended that he did not get a reasonable opportunity of being heard before the order was passed. However, the argument was negated and the petition was dismissed. He again filed a petition on the ground that he was appointed by the I.G.P. and he had no authority to dismiss him. The defendant contended that the suit was barred by constructive res judicata. However, the trial court, the first appellate court as well as the High Court held that the suit was not barred by the doctrine of res judicata. The Supreme Court held that the suit was barred by constructive res judicata because the plea was in the knowledge of the plaintiff, M and he could have taken this plea in his earlier suit. The doctrine of constructive res judicata has been laid down in the Code of Civil Procedure, 1908.

This has been incorporated in Explanation 4 to **Section 11** of the CrPC. Explanation 4 provides that all matters which should have been made the basis of defence or should have been added to the suit but were omitted shall also be deemed to be directly or substantially in issue in such suit. If a party fails to adduce a proper ground of defence or attack during the suit, such issue is deemed to have been decided against the defaulting party. The basis of every judicial action is the cause of action. When the Court pronounces a final order, the cause of action is deemed to have extinguished. Thus, the same cause of action cannot be raised again to claim relief which should have been claimed in the initial suit. The cause of action cannot survive even after the judgment and is deemed to have been absorbed in the judgment.

Nemo debet bis vexari pro una et eadem causaru This maxim means that no person shall face prosecution twice for the same act. The aim of this principle is

to protect the offender from frivolous litigation. The aim of the criminal justice system is reformation, not vexatious prosecution of the offender.

Res judicata pro veritate acipitur- the decision of the judicial authority must be recognized as duly correct. If the judicial decision is not respected as conclusive, there will be indefinite litigation, leading to confusion and chaos.

Interes republica ut sit finis litium- The interest of the state lies in the end of litigation. It is a part of the public policy of the country that the courts should not be burdened by filing repeated suits on the same subject. The jurisprudential importance of these three principles makes res judicata a universal concept.

Directly and substantially in issue- Merely because a matter was in issue in a previous suit will not be sufficient to apply the principle of res judicata. It is necessary that the matter should be directly and substantially in issue in the previous suit There must be a substantial issue. It must be alleged by one party and admitted or denied by the other. The admission or denial may be made expressly or by necessary implication.

The doctrine of res judicata applies when the issues in two suits are similar in nature. Thus, even if the cause of action, object and relief claimed in two suits are different, the doctrine of res judicata can be applied as long as the issues are similar. A suit may also involve certain ancillary issues that are secondary to the primary issues. Issues that are ancillary to the substantive and direct issues are known as collateral or incidental issues. The doctrine of res judicata cannot be applied in respect of these collateral or incidental issues.

Judgment on Merits A judgment of a court will act as res-judicata only if it is given on the merits of the case. Thus, if a suit is dismissed for absence of jurisdiction or if a compromise decree is passed by the court, such dismissal or dismissal of the suit will not act as res-judicata. Similarly, if a suit is dismissed on procedural grounds such as wrong joining of parties or failure to provide security, such judgment will not act as res-judicata.

Question No. 3- What do you understand by non-coordination and miscoordination of the parties? Can the suit fail due to this reason? Explain.

Answer- On the above point there are the above provisions in Orders 1 and 9 of the Civil Procedure Code-

Misjoining or non-joining.-No suit shall be failed by misjoining or non-joining of the parties and the Court shall, in every suit, settle the matter in controversy so far as the rights and interests of the parties actually corresponding with it are concerned.

Suit in the name of wrong plaintiff (1) Where a suit has been instituted in the name of a wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the true plaintiff or not, the Court may, if it is satisfied at any stage of the suit that the suit has been instituted by a bona fide mistake and that it is necessary so to do for the determination of the real matter in

controversy, make an order for some other person being substituted or added as plaintiff on such terms as it thinks fit.

Court may delete or add names of parties (2) The Court may, at any stage of the proceedings, with or without an application by either of the parties and on such terms as appear to the Court to be just, order that the name of any party improperly added either as plaintiff or as defendant be deleted, and that the name of any person whose presence before the Court is necessary to enable the Court to prospectively and fully adjudicate and dispose of all the questions involved in the suit be added.

(3) No person shall be added as a plaintiff who is bringing a suit without representation, or as a representative plaintiff who is subject to an undisqualified, without his consent where defendant is added, plaint to be amended.

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary and amended copies of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant also.

(5) Subject to the provisions of **section 22** of the Indian Limitation Act, 1877, proceedings shall be deemed to have commenced on the service of summons so far as any person added as a defendant is concerned. (Order 7 Rule 10 of the Code of Civil Procedure)

Question No. 4- What is an inter-pleader suit? When and by who is it presented? Describe it.

Answer- Inter-pleader suit means an inter-pleader suit in which the actual dispute is between the defendants and the plaintiff has no interest in the subject matter of the suit. In this suit, the defendants themselves plead against each other and plead in relation to such debts or claims in which the plaintiff has no interest and which he is ready to grant to the "official defendant" who is entitled to that property.

According to Mulla- In every inter-pleader suit there must be some debt or money or other property divided between the defendants only and the plaintiff must be a person who has no interest other than the burden and expenses of that money and property and who is ready to give or deliver that property to the defendant whom the court declares entitled to that property.

Subject matter: Dispute regarding debt, money, movable or immovable property.

Prerequisites-

(1) Some defendants against each other, such as AEB S against each other.

(2) Claim to be the owner of the property, such as a claim to be the owner of a diamond ring.

(3) Which is held by some other person, such as the plaintiff?

(4) The other person has no claim to the disputed property except the charges and expenses; for example, plaintiff D has no claim to the amount of Rs. 1,000.
(5) That other person is willing to deliver the property to the rightful owner, for example, the plaintiff is willing to deliver the diamond ring to the rightful owner.
(6) In such a situation, the other person shall, in order to avoid any trouble, institute an inter-plead suit against all those defendants, like the plaintiff shall, in order to avoid any trouble, institute an inter-plead suit against all those defendants, in which he shall pray to the court to determine the real owner of the property and may demand his burden and expenses.

Provided that no such interlocutory suit shall be instituted where a suit is pending in which the rights of all the parties can be properly determined process procedure is given in Order 35.

Order 35 Rule 1 In an inter-pleader suit, the following statements shall be included in addition to the essential statements-
(1) A statement that the plaintiff has no claim for any interest, other than a claim for charges and costs, in the subject matter of the dispute; doesn't do it in the object.
(2) It shall state that the defendants are making separate claims.
(3) It shall be a statement that there is no collusion between the plaintiff and the defendant.

Order 35 Rule 2 Deposit of thing claimed in Court- Where the thing claimed is such that it may be deposited in Court or kept in the custody of the Court, the Court may order that the plaintiff shall deposit or keep the same before he becomes entitled to any order in the suit.

Order 35 Rule 3 Procedure where defendant is suing plaintiff- Where any of the defendants to an inter-pleader suit is actually suing the plaintiff on the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed of the same by the Court in which the inter-pleader suit was instituted, stay the proceedings against the plaintiff.

Order 35 Rule 4 Procedure at First Hearing- At the first hearing, the court may discharge the plaintiff from all liabilities. The court may discharge him from the suit by awarding him litigation costs.

If necessary in the interest of justice or convenience, the court may keep all parties in the suit until the case is settled.

Order 35 Rule 5 Who cannot file an inter-pleader suit - Under Order 35 Rule 5, an agent cannot file an inter-pleader suit against his principal or a tenant against his landlord.

The situation will be different where such other person is claiming through such land owner or proprietor in such cases the agent or the tenant may file an inter-pleader suit.

Example of inter-party dispute-

(1) A and B claim certain property which is in the possession of C and C does not claim any interest in the property and is ready and willing to deliver the property to such person as may be declared by the Court to be entitled to receive such property.

A shall institute an inter-pleader suit making A as plaintiff and B as defendants. From the suit so instituted, 'C' shall be removed from the suit on the first hearing after providing for the charges or litigation costs incurred by him and A and B shall be inserted in the suit for inter-pleading as if one were the plaintiff and the other the defendant.

But before removing plaintiff C from the suit, he will have to deposit the disputed property in the court.

In the case of **National Insurance vs Dhirendra Nath,** the Allahabad High Court has held that C (plaintiff) can apply to the court to get his name removed.

(2) A deposits a box of jewellery with B as his agent, C alleges that the jewellery was wrongfully obtained by A from him and he claims to have them back from B. B cannot institute an interlocutory suit between A and C.

Question No. 5- Explain the civil nature of suits under the Civil Procedure Code with the above mentioned examples.

Answer- Meaning and scope of suits of civil nature- CPC defines suit as a civil proceeding, which is initiated by presenting a complaint or written statement before the court. A suit of civil nature refers to a legal action which falls within the ambit of civil law and is governed by the CPC. Civil law covers a wide range of disputes, including disputes relating to property, contracts, torts, family law, etc. The scope of suits of civil nature under the CPC is wide and includes various types of civil disputes. These may include suits for recovery of money, suits for specific performance of contracts, suits for declaration of rights, suits for injunctions, suits for partition of property, suits for damages and many other suits. The CPC provides a procedural framework for the conduct of these suits, ensuring that civil disputes are resolved through an orderly and fair legal process.

Types of civil cases-

The CPC classifies civil suits into different categories depending on the nature of the dispute. Some of the common types of civil suits under the CPC are as follows:

(1) Suits for the recovery of money- These are suits in which one party seeks to recover an amount of money owed to him by the other party. This may arise from a contract, a debt or any other legal obligation.

(2) Suits for specific performance of contracts- These are suits where one party seeks to enforce performance of a contract by the other party. Specific performance is a discretionary remedy, and the court may grant it under certain circumstances.

(3) Suits for declaration of rights- These are suits in which a party seeks a declaration from the court confirming his legal rights or position. For example, a suit for declaration of ownership of a property.

(4) Suits for injunctions- These are suits in which one party asks the court for an order to restrain another party from doing a certain act or to compel him to do a certain act. Depending on the circumstances, an injunction may be temporary (interim) or permanent.

(5) Suits for partition of property- These are suits where co-owners of a property want partition of the property amongst themselves.

(6) Suits for compensation- These are suits in which one party seeks compensation for loss or damage caused by the wrongful act of the other party demands compensation for.

Provisions governing suits of civil nature under CPC-

There are several provisions in the CPC which govern the filing, procedure and disposal of civil suits. Some of the major provisions relating to civil suits under the CPC are as follows:

Jurisdiction- The CPC defines the jurisdiction of courts to entertain and try civil suits. It specifies territorial jurisdiction, pecuniary jurisdiction (based on the value of the claim) and subject-matter jurisdiction (based on the nature of the dispute).

Pleadings- The CPC lays down rules for filing a plaint (the document by which a suit is commenced) and a written statement (the reply to the plaint) in civil suits. It lays down the essential contents of a plaint, such as the parties involved, the facts of the case and the relief sought.

Evidence - The CPC lays down rules for the presentation and admissibility of evidence in civil suits. It includes provisions relating to the examination of witnesses, production of documents and the burden of proof.

Interim Orders- the CPC provides for interim orders in civil suits to protect the rights of parties during the pendency of the trial. This includes temporary injunctions, appointment of a receiver and attachment of property.

Appeal- The CPC outlines the procedure for filing and disposing of appeals against orders and decrees passed in civil suits. It lays down rules relating to the appellate jurisdiction of high courts, grounds of appeal and limitations on the power of appellate courts.

Execution of Decree-The CPC provides for the enforcement of decrees passed in civil suits. It includes provisions relating to execution of decree for payment of money, delivery of property and other reliefs granted by the court.

Importance and Significance of Civil Suits- Civil suits play a vital role in the Indian legal system as they provide a legal mechanism to resolve civil disputes between parties. They are important for several reasons-

Protection of rights and interests- Civil nature lawsuits allow parties to assert their legal rights and seek appropriate relief from the court. They provide a

platform to resolve disputes related to property, contracts, torts, family law and other civil matters, ensuring that the parties get an opportunity to present their case and obtain a fair settlement.

Ensuring compliance with legal procedures- The CPC lays down a comprehensive procedural framework for the conduct of civil suits, including provisions relating to jurisdiction, pleadings, evidence, interim orders, appeals and execution of decrees. It ensures that civil disputes are resolved in an orderly and systematic manner, thereby maintaining the integrity and fairness of the legal process.

Facilitating access to justice - Civil suits under the CPC are designed to provide access to justice to parties who have suffered legal wrongdoing. They provide parties a way to seek redressed of their grievances through the formal legal process, regardless of their socio-economic status or background.

Setting legal precedents- Judgments and decisions passed in lawsuits of a civil nature often serve as legal precedents that guide the interpretation and application of the law in future cases. These legal precedents help develop and evolve legal jurisprudence, ensuring stability and predictability in the legal system.

Resolving disputes amicably- Civil litigation also provides parties with an opportunity to resolve their disputes amicably through alternative dispute resolution mechanisms such as mediation, conciliation and arbitration, which are encouraged and facilitated by the CPC. This helps reduce the burden on courts and promotes timely and cost-effective resolution of disputes.

Upholding the rule of law- Civil suits under the CPC are essential to upholding the rule of law in the Indian legal system. They provide a mechanism to resolve disputes in a fair, impartial and transparent manner, ensuring that parties are held accountable for their actions and legal rights are protected **section 9** of the C.P.C.

Section 9 of the Code of Civil Procedure (CPC) is a provision in the civil procedure laws of India that deals with the jurisdiction of courts to try a suit. **Section 9** of the CPC is as follows-

"9. Courts shall have jurisdiction to try all civil suits unless barred. Courts shall (subject to the provisions herein contained) try all suits of a civil nature, except suits the cognizance of which is expressly or impliedly barred." **Section 9** of the CPC lays down the general principle that civil courts in India have jurisdiction to try and try all civil suits unless the cognizance of a particular suit is expressly or impliedly barred by law. This means that, by default, civil courts in India have jurisdiction to try and decide civil suits unless there is a specific statutory provision which expressly or impliedly prohibits them from doing so. CPC. The expression "expressly or impliedly barred" in **section 9** of the CrPC means that the bar on the jurisdiction of the court may be expressly stated in a statute or

statutory provision, or it may be inferred or implied from the nature of the suit, the parties involved, or the legal relationship between them.

For example, if there is a specific law or statute that prohibits the court from hearing a particular type of lawsuit, such as a lawsuit involving a matter that falls under the exclusive jurisdiction of a particular tribunal, then the court's jurisdiction may be expressly barred. On the other hand, if there is a legal principle or doctrine that suggests the court should not consider a particular type of lawsuit, even if there is no express provision, then the court's jurisdiction may be impliedly barred.

Section 9 of the CrPC is an important provision which lays down the general rule of jurisdiction for civil courts in India and serves as the basis for determining whether a court has jurisdiction to try a particular civil suit.

Question No. 6- Describe the procedure followed in penal suits. Can the defendant be allowed to defend as penal suit? Describe.

Answer- The term 'poor person' refers to a person who suffers from extreme poverty, impoverishment, or who lacks the basic resources required in normal life. In legal language, a poor person does not have the financial capacity to pay court fees. For the purpose of providing justice to such persons, **Section 33** of the Code of Civil Procedure, 1908 has been made Provisions were introduced under the CrPC. Any person who wishes to be represented as an indigent person has to file an application before the competent court declaring himself to be an indigent person. If the court is satisfied with such application and agrees that such person has no means to pay the court fees, the court shall declare such person to be an indigent person. Primarily, before the introduction of the expression "indigent person", the term "poor" was used to denote the underprivileged class of the society. However, it was later replaced by the term "indigent person". Rules 1-18 of Order 33 of the Code of Civil Procedure deal with suits filed by indigent persons.

(a) Persons permitted by the Code to bring beggarly suits- As soon as a civil suit is filed in the court, the plaintiff(s), at the time of filing their suit, is required to deposit the requisite court fees as prescribed by the Court Fees Act, 1870. However, Order 33 of the Code of Civil Procedure protects indigent persons from this by relieving them of the liability to pay the required court fees. It then allows such persons to be sued as beggars, subject to certain conditions under Rule 1 of Order 33 of the CPC.

Procedure for ascertaining the paucity of the plaintiff- First of all, the chief officer of the court shall inquire whether the plaintiff is pauper or not. Rule 1 (a) If the plaintiff has acquired any property after applying for permission to bring a pauper suit but before the decision thereof, such property shall be taken into account for making such inquiry. Explanation of Rule 2 If the plaintiff has filed the suit in a representative capacity, the question whether he is pauper or not shall be decided by reference to the resources which are in his possession in that

capacity. Explanation of Rule 3 If the court thinks fit, it may examine the applicant or his representative with regard to the property of the applicant and the merits of his claim. Rule 4 Even a company can bring a pauper suit because it is a legal person.

The Hon'ble Supreme Court discussed the definition of indigent person in **Union Bank of India vs Khadar** International Construction. The Court observed that indigent person is one who does not have sufficient amount (other than the property exempted from attachment in execution of decree and the subject matter of the suit) to enable him to pay the fee prescribed by law for the plaintiff in such suit. If no such fee is prescribed, such person would be indigent if he is not entitled to property worth one thousand rupees other than the property exempted from attachment in execution of decree and the subject matter of the suit.

In the case of **A.A. Haja Muniuddin v. Indian Railways** the court held that "access to justice cannot be denied to a person merely because he does not have the means to pay the prescribed fee." Rule 1 gives us the definition of an indigent person. Any person who does not have sufficient means to pay the requisite fee prescribed by the Court Fees Act. However, Rule 1 also states that considering the sufficient means, the property owned by an indigent person shall be exempted from attachment in the execution of the decree and the subject matter of the suit. The property so exempted is the basic necessity of living for the persons. Thus, as per the law, attachment of the same is not permissible. In cases where no such fee has been prescribed by the Court Fees Act and if the applicant does not have property worth one thousand rupees, or where the value of the property is less than one thousand rupees, then in such a case the person would be treated as an indigent person. However, there is the same exception to this rule as mentioned above. It said Section 60 of the Code of Civil Procedure will have to be kept in mind while calculating the valuation of the property.

Rejection of application- As per Rule 5 of Order 33 of CPC, the court shall prima facie dismiss an application seeking permission to sue as an indigent in the following cases-

(1) In a case where the application is not made and submitted in the prescribed manner. Here, the term 'prescribed manner' means that the application must comply with Rule 2 and Rule 3 of Order GXPP. Rule 2 and Rule 3 deal with the subject matter of the application and its submission respectively.

(2) If the applicant is not an indigent person the application may be refused by the court.

(3) The application may be dismissed by the court if the applicant has fraudulently disposed of any property within two months from the presentation of the application. It may also be dismissed if the applicant makes the application dishonestly for the sole purpose of obtaining permission from the court to sue as an indigent person.

(4) The court has the power to dismiss an application filed by an indigent person in a case where there is no cause of action.
(5) In a case where the applicant has entered into an agreement with a third party and such agreement relates to the subject matter of the suit in which the other party (other than the applicant) acquires interest, then, this is one of the grounds for rejection. It shows the intention of the applicant to deceive the court.
(6) The application is rejected if the allegations indicate that the suit is barred by any law.
(7) The application is rejected in cases where another person enters into an agreement with the applicant to help him financially in the litigation.

In the case of **Dhanalakshmi v. Saraswathi**, the valuation of the plaint was found to be low. Therefore, it was returned to be presented before the court with proper valuation and court fees. One month's time was given to do so and the plaintiff filed the plaint within the prescribed period. Subsequently, the plaint was presented before the Sub-Court along with another petition seeking permission to sue as indigent persons, to which the court observed that the petition was filed under Rule 1 of Order GXPP but one cannot say that the application was filed under Rule 2. Because permission to sue as indigent persons cannot be refused as per Rule 5 of Order 33 CPC. An analogy was drawn between Order 33 Rule 5 and Order 7 Rule 11 of CPC. While Order 7 Rule 11 is used for rejecting a plaint and Order 33 Rule 5 deals with the rejection of an application for permission to sue as indigent persons.
(1) Order 33 Rule 6 provides that the court is required to issue notice to both the opposite party and the public prosecutor. After which a day is fixed on which evidence is received. On such day the applicant leads evidence in support of his application. The opposite party or the public prosecutor can also lead evidence opposing the indigence of the applicant.
(2) Order 33 Rule 7 provides for the procedure to be followed in hearing the application. The court shall examine the witnesses (if any) produced by both the parties and hear arguments on the application or evidence (if any) admitted by the court. Thereafter, the court shall either allow the application or dismiss it. Rule 8 of Order 33 explains the procedure to be followed after admission of the application. After admission, the application should be numbered and registered. Such application shall be treated as a plaint in a suit. Thereafter, such suit shall proceed in the same manner as an ordinary suit.
(3) Order 33 Rule 9 states that the court also has the option to cancel the permission granted to a plaintiff to sue as an indigent person. The court may exercise this discretionary power on an application from the defendant or the Public Prosecutor in the following circumstances- (a) where the applicant is guilty of vexatious or improper conduct during the suit; or

(b) Where the means of the applicant are such that he would not continue to sue as an indigent person; or (c) where the applicant has entered into a settlement under which some other person has acquired an interest in the subject-matter of the suit have received.

In the case of **R. Jayaraja Menon v. Dr. Rajakrishnan and others**, the Kerala High Court, while deciding an application regarding withdrawal of permission to sue as an indigent, held that Rule 9 of Order 33 provides for a situation where the plaintiff, who was initially allowed to sue as an indigent, ceases to be an indigent after the suit is filed. If a plaintiff ceases to be an indigent, the Court shall compel him to pay the court fees which he would have paid if he had not been allowed to sue as an indigent. This is clearly a part of the order under Rule 9 of the Code directing the plaintiff to pay the court fees which he would have paid if he had not been allowed to sue as an indigent.

Procedure for filing suit as an indigent person - Before filing a suit as an indigent person, it is important to add all the relevant material to the application seeking permission to be an indigent person Rule 2.1 As per Rule 2 of Order 3, the application should contain the same details as mentioned in the plaint and all the movable or immovable properties of the indigent applicant along with their estimated value. The indigent person/applicant shall personally present the application before the court. In case such person is exempted from appearing before the court, an authorized agent may present the application on his behalf. In certain circumstances where there are two or more plaintiffs, any one of them may present the application Rule 3. As soon as the application to sue as an indigent person is duly presented before the court, the suit commences. Thereafter, the indigent applicant shall be called for summons by the court However, if the applicant is being represented by his agent, in such a case, the court may examine the applicant by commission under Rule 4.

Question No. 7- Explain the inherent powers of the court. When can the court use these powers? Explain.

Answer- 'Inherent' means something permanent, absolute, inseparable, essential or characteristic. Inherent powers of the courts are the powers which the court can exercise to do complete justice between the parties before it. It is the duty of the courts to render justice in every case, whether it is provided in this Code or not, it brings with it the substantial power to do justice in the absence of a specific or separate provision. This power is called inherent power which is retained by the court though not conferred. **Section 151** of the Code of Civil Procedure deals with the inherent powers of the court.

Provisions of Sections 148 to 153B of CPC- The law relating to the inherent powers of the court is mentioned in **sections 148** to **153A** of the Code of Civil Procedure, which deal with the exercise of powers in different situations. Following are the provisions of inherent powers of the courts-

(1) **Sections 148** and **149** deal with grant or extension of time;
(2) **Section 150** deals with transfer of business;
(3) **Section 151** protects the inherent powers of the courts; and
(4) **Sections 152**, **153** and **153A** deal with amendment of judgments, decrees or orders or in separate proceedings.

Extension of time- Section 148 of CPC states that where any period is fixed by the Court for doing any act provided by the CPC, it is the discretionary power of the Court to extend such period from time to time notwithstanding the period originally fixed. In simple words, when a period is fixed by a provision for doing any act, the Court has the power to extend such period up to 30 days. This power is exercisable notwithstanding any specific provision which reduces or disallows or prohibits the period. The power is limited to the extension of time fixed by the Court and is discretionary in nature.

Payment of court fees- As per **section 149** of CPC, where the whole or any part of any fee as may be prescribed by the applicable law relating to court-fees for a certificate has not been paid, the Court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or any part of such court fees; and on such payment, the document in respect of which such fee is payable shall have the same outcome as if such fees had been paid at the initial stage. This allows the Court to require a party to reduce the court fees payable on notice of complaint or appeal etc., even after the expiry of the period of limitation for filing the suit or appeal etc. Payment of the requisite court fees is mandatory for any document charged with court fees to be produced in the Court. If the requisite court fees are paid within the time prescribed by the Court, it cannot be negotiated as time-barred. Such payment made within the time prescribed by the court retrospectively validates a defective document. The power of the court is discretionary and must be exercised only in the interest of justice.

Transfer of business - According to **section 150** of CrPC, save as otherwise provided, where the business of any Court is assigned to another Court, the Court to which the business is assigned shall have the same powers and perform the same duties as are successively assigned or were assigned under this Code to the Court from which the business is assigned.

For example - when the business of a Court A is transferred to another Court B, then Court B shall exercise the same powers and perform the same duties as are conferred on the transferring Court by the CPC.

Section 151 of CrPC- Section 151 deals with the protection of the inherent powers of the court. This section states it is held that nothing in the CPC shall be construed to restrict or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the course of the court. It is not mandatory for the court to wait for a law made by Parliament or an order of the higher judiciary. The court has discretionary or inherent power to make such orders which are not provided under the statutes

for the protection of justice or to prevent abuse of the course of the court. The scope of the exercise of **section 151** of the CPC may be illustrated by some cases as follows-

(1) The court may re-examine its orders and remedy errors;

(2) When the case is not covered by Order 39 or does not amount to a revocation of an 'ex parte' order, a provisional ban may be issued;

(3) Illegal orders passed without jurisdiction are liable to be set aside;

(4) Subsequent events in the case may be taken into account by the court;

(5) Power of the Court to continue a trial 'in camera' or to prevent disclosure of its proceedings. The Court may expunge remarks made against a judge; and

(6) The court may reform the suit and rehear the case on the merits or re-examine its order.

Purpose of justice-

In the case of **Debendranath vs Satya Bala Das**, the meaning of "end of justice" was explained. It was held that "end of justice" are serious words, moreover, the words are not just a polite expression according to the judicial method. These words also indicate that justice is the pursuit and end of all laws. However, this expression is not a vague and indefinite notion of justice according to the laws of the land and statutes.

The court is allowed to exercise these inherent powers in matters such as re-examining its own order and correcting its own error, passing injunctions not covered by Order 39, and passing ex-parte orders against a party, etc.

Abuse of the process of court- Section 151 of CPC provides for the exercise of inherent powers to prevent violation of the process of court. The party to whom the abuse of the powers of the court causes injustice should be relieved on the ground that no one will be prejudiced by the act of the court. When a party commits a fraud on the court or on a party to a proceeding, the remedy should be provided on the basis of inherent power. The term ‘abuse’ occurs when a court uses a method to do something which is never expected of it is guilty of the said abuse and there is a failure of justice. The injustice done to the party should be relieved on the basis of the principle of actus curiae neminem gravabit (an act of the court will not prejudice anyone). A party to a case will become guilty of misbehaviour in cases when the said party commits a fraud on the court or on the party to the proceeding.

Amendment of Judgments, Decrees, Orders and Other Records- Section 152 of CPC deals with “Revision of Judgments, Decree and Order”. As per **Section 152** of CPC, the court has the power to alter errors arising from scribal or arithmetical mistakes or unforeseen omissions or imperfections in judgments, decrees or orders (either of its own action or on the application of any party). **Section 153** deals with “General Power of Revision”. This section empowers the court to amend any mistake and defect in any proceedings and also to make all necessary corrections in order to settle the issues raised or grounded in such proceedings.

Sections 152 and **153** of CPC make it clear that the court can at any time correct any mistake in their experiences.

The power to amend the decree or order where an appeal is dismissed and the place of trial is considered to be an open court is defined under **section 153** and **153B** of CPC, 1908.

Limitation - There are certain restrictions in the exercise of inherent powers such as-

(1) They can be enforced only in the absence of specific provisions in the Code;

(2) They cannot be applied in conflict with what is expressly provided in the Code;

(3) They may be applied in rare or exceptional cases;

(4) In exercising the powers, the court has to follow the manner shown by the legislature;

(5) The courts may not exercise jurisdiction not delegated to them by law;

(6) Observance of the principle of res judicata, that is, not to reopen issues which have already been finally decided have done;

(7) Selecting an arbitrator to render a fresh award;

(8) The fundamental rights of the parties should not be taken away;

(9) To limit a party from bringing proceedings in court; and

(10) To cancel an order which was valid at the time of its issuance.

Summary of the provisions of inherent powers of the courts-The gist of **sections 148** to **153B** is that the powers of the court are quite deep and wide to extend to the following-

(1) Reducing litigation;

(2) Avoiding multiplicity of proceedings; and

(3) To provide complete justice between the parties.

Question No. 8- What is temporary injunction? When and in which cases can temporary injunction be granted? Also mention the Civil Procedure Code (Amendment) Act, 1999 in this context.

Answer- Meaning of Temporary Injunction Temporary injunction is a court order given while a case is going on so that things remain as they are until the case is finally decided. Its main purpose is to prevent a person from causing serious harm to another party during the legal process. This idea was clarified in the case of "**Gujarat Potling Company Limited and others vs Coca Cola Company and others (1995)**".

The rules for temporary injunction are given in the Code of Civil Procedure 1908 and they are as follows-

(1) **Section 94** of the Act is about preventing interference with the course of justice. **Part (c)** deals with the granting of temporary injunctions and contains rules for making sure people obey them, such as putting someone in civil prison or selling their property to enforce their obedience.

(2) **Section 95** provides that if the plaintiff's claim is dismissed the court may consider awarding money to the defendant.
(3) Order 39 of the Code of Civil Procedure (CPC) contains several rules regarding temporary injunctions temporary injunction in C.P.C.
Temporary injunctions in India are regulated by the Code of Civil Procedure, 1908 and the specific rules for their grant and enforcement are as follows-
Order XXXIX, Rule 1: This rule allows the court to grant a temporary injunction under the CPC when it is considered just and proper to do so in order to prevent the breach of an obligation or to prevent harm arising from a real fear of such breach.
Order XXXIX, Rule 2: This rule lays down the conditions necessary for the grant of a temporary injunction. These conditions include a strong preliminary case, balance of convenience and likelihood of irreparable injury.
Order XXXIX, Rule 3: This rule explains the procedure for obtaining a temporary injunction in CPC and what you need to do, including submitting an application supported by an affidavit.
Order XXXIX, Rule 4: This rule covers the power of the Court to transfer property when it is necessary to ensure that the temporary injunction is not weakened.
Order XXXIX, Rule 5: This rule allows the court to vary or revoke a temporary injunction at any time during the proceedings, if it is justified by the situation.
Order XXXIX, Rule 6: This rule deals with how long a temporary injunction in a case lasts. It may remain in effect for a specified period or until the court otherwise orders.
Order XXXIX, Rule 7: This rule states what happens if a person violates or disobeys a temporary injunction. It includes contempt of court proceedings and other remedies for the aggrieved party.

These rules set out the structure for the granting and administration of temporary injunctions under the CPC. It is important for both parties seeking or challenging a temporary injunction to be familiar with these rules and to follow the rules outlined it is important to follow the procedures.

Grounds for temporary injunction in CPC-

In the case **of Dalpat Kumar and others vs Prahlad Singh and others (1991)**, three key requirements have been established for applying for temporary injunction under CPC and for grant of temporary injunction. They are-
Prima facie case- This means that in the suit, there must be a serious and disputed question for a temporary injunction in CPC. The facts surrounding this question must indicate that the plaintiff or the defendant is entitled to the relief. It is important to note that a prima facie case does not require an irrefutable argument that is certain to succeed in the suit. Rather, it means that the case presented for an injunction must have sufficient merit so that it cannot be dismissed outright.

Irreparable Harm - It would be a grave injustice if a person suffers irreparable harm related to a lawsuit before his or her legal rights have been determined at trial. However, it is important to understand that losses such as the emotional value of an item will not usually be considered irreparable. On the other hand, losses that cannot be adequately repaired through legal means, especially when there is no fair or reasonable solution, may be considered irreparable. Irreparable harm can also refer to situations where the injury is continuous or repeated, or where it can only be repaired through multiple legal actions.

Sometimes, the term "irreparable harm" refers to the difficulty of determining the amount of damages, but the mere difficulty of proving the injury does not establish irreparable harm.

Balance of convenience - the court must evaluate the circumstances of both parties and compare the likely harm or inconvenience caused by withholding the injunction versus the granting of it. In short, the court must determine whether the harm or inconvenience caused by not granting the injunction will outweigh the harm or inconvenience caused by granting the injunction.

These three requirements serve as important criteria for deciding whether to grant a temporary injunction in legal cases.

In **Mandati Ranganna v. T. Ramachandra (MANU/SC/7567/2008: AIR 2008 SC 2291)**, the Court held it was emphasised that while considering an application for grant of temporary injunction in CPC, it is not sufficient to consider only the fundamental elements such as existence of a prima facie case, balance of convenience and irreparable injury.

The granting of an injunction is an equitable remedy and the court must also take into account the conduct of the parties involved. In particular, if one party has remained silent for a long period of time and allowed another party to exclusively deal with a property, they may not be entitled to an injunction. The court will not intervene simply because the property concerned is valuable. The primary goal of the court is to protect the interests of all concerned parties.

In **Pedsetty Bhankanarayana v. Pedsetty Rajeswara Rao (AIR 1999 Ori 92)** the Court held that it is not always necessary for the plaintiff to prove his absolute right to the disputed property. It is sufficient if the plaintiff can raise a valid question about the existence of the right he claims. Further, if the plaintiff can convince the court that the property in question should be preserved in its existing condition until the legal question is resolved, this may justify the granting of an injunction. This highlights that in some cases, the party seeking an injunction does not need to establish absolute ownership but must show a genuine claim and a need to protect the property during the legal proceedings.

How long does a temporary injunction stay in effect?

The duration of the temporary injunction is determined by the court at the time of issuing the injunction. As per "Order XXXIX, Rule 6 of the Code of Civil

Procedure 1908", the temporary injunction may remain in effect for a specified period of time or until further orders are issued by the court.

The duration of temporary injunction in CPC depends upon the type of injunction granted-

Pendente Lite Injunction – This type of injunction remains in effect until the ongoing legal proceedings are over and the court issues a final decision. If the case is dismissed, the temporary injunction is also lifted.

Permanent Injunction Litigation In cases involving permanent injunctions, the temporary injunction issued by the court may be made permanent as part of the final decree. This means that the temporary injunction under the CPC effectively becomes a permanent remedy determined by the final decree of the court.

In short, the validity of temporary injunctions in the CPC varies depending on the nature of the injunction. For pendente lite injunctions, it lasts until the conclusion of the legal proceedings, while in suits for permanent injunctions, the temporary injunction may become permanent through a final order of the court.

Can an injunction be granted to the defendant?

The Supreme Court issued notice in the case of **Tammineedi Ramakrishna etc vs N. Jayalakshmi**. The main issue was whether the respondent had the right to seek injunction under Order XX Rule 1(c) of the Code.

The SLP (special leave petition) challenges the order of the Karnataka High Court, which affirmed the trial court's decision and granted a temporary injunction in favour of the defendant under Order GGG Rule 1(a), (b) and (c) read with **Section 151** of the Code. The High Court attempted to distinguish the three sub-rules of Order GGG Rule 1, suggesting that sub-rules (b) and (c) primarily provide remedies for the plaintiff, while sub-rule (a) is a more general provision.

Various High Courts have expressed different opinions on whether a defendant can seek an injunction against a plaintiff without filing a counter claim. The Travancore and Kochi (formerly) High Court and several other High Courts have held that a defendant can seek a temporary injunction against a plaintiff if their claim is related to or connected with the plaintiff's cause of action.

Question No. 9-The Limitation Act only prohibits remedies, not rights. Explain this statement along with its exceptions under the Limitation Act, 1963.

Answer- The limitation law finds its roots in the dictum “Interes Republicae ut sit finis litium” which means that there should be a limitation of litigation in the interest of the whole State and “Vigilantibus non dormientibus jura subvenient” which means that the law will only help those who are vigilant about their rights and not those who ignore it. The limitation law specifies the statutory time limit within which a person can commence legal proceedings or any legal action can be taken. If a suit is filed after the expiry of the prescribed time it will be barred by limitation. It means that a suit brought before the court after the expiry of the

time within which the legal proceedings should have been commenced will be barred.

History of the Act- The limitation law evolved through several stages and finally took the form of the Limitation Act of 1963. Before 1859, there was no limitation law applicable to the whole of India. It was only in 1859 that a law relating to limitation (Act GPT of 1859) was enacted which was applicable to all jurisdictions. The Limitation Act was subsequently repealed in 1871, 1877, 1908. The Limitation Act, 1908 was repealed by the Third Law Commission and the Limitation Act of 1963 came into force. The Act of 1908 mentioned only foreign contracts while the Act of 1963 talked about contracts made in the territory of Jammu and Kashmir or in a foreign country.

Purpose of the Act- The Limitation Act prescribes a time period within which a right can be enforced in the court. The time period for various suits has been provided in the schedule of the Act. The main purpose of this Act is to prevent litigation from being prolonged and to dispose of cases quickly leading to effective litigation. As per the Jammu and Kashmir Reorganisation Act, 2019, the provisions of the Limitation Act will now apply to the whole of India. The Limitation Act, 1963 contains provisions related to calculation of time for limitation period, condemnation of delay, etc. The Limitation Act has **32 sections** and **137** articles and the articles are divided into 10 parts.

Retrospective operation - In **BK Education Services Pvt Ltd v Parag Gupta & Associates**, the Supreme Court clarified that since the law of limitation is procedural in nature, it will be applied retrospectively. In **Thirumalai Chemicals Ltd v Union of India** the Supreme Court held that the laws of limitation are retrospective in so far as they apply to all legal proceedings brought after their operation to enforce previously accrued causes of action. In **Ministry of Excise and Taxation v M/s Frigoglass India Pvt Ltd**, the Punjab and Haryana High Court ruled that it is well established that the law of limitation is a procedural law and operates retrospectively unless it has been differently provided in the amending legislation. In other words, unless a contrary intention appears from the express or necessary implication of the law

Limit bar solution-Section 3 lays down the general rule that if a suit, appeal or application is brought before the court after the expiry of the prescribed time, the court shall dismiss such suit, appeal or application as time-barred. The statute of limitation only bars judicial remedies and does not extinguish the right. In other words, it means that the statute of limitation only prescribes the period within which legal proceedings have to be initiated. It does not restrict any period for setting up defences to such actions. Therefore, the substantive right to sue is not barred. **Section 27**, however, is an exception to this rule.

In **Punjab National Bank and others v. Surendra Prasad Sinha** the Supreme Court held that statutes of limitation are not meant to destroy the rights

of the parties. **Section 3** only bars the remedy but does not destroy the right to which the remedy relates.

As against the decision in the case of **AS 15/1996 vs KJ** Anthony the Court held that in a suit a defendant can raise any defence, however such defence may not be enforceable in the court as it is barred by limitation.

In **Bombay Dyeing & Manufacturing Co. v. State of Bombay** it was held that the statute of limitation only bars the remedy but does not extinguish the debt.

Limits do not prevent rescue-The law of limitation does not bar the defendant if he puts forward a valid plea in his defence, even if the suit is time-barred. It was held in **Rulia Ram Hakim Rai v. Fateh Singh** that the bar of limitation is not limited to the defence of the accused It only stays the action and only its recovery is time barred. There is no provision which prevents or prevents the debtor from paying his time-barred dues.

In **Shrimant Shamrao Suryavanshi v. Prahlad Bhairoba Suryavanshi,** the Supreme Court held that the Limitation Act deprives the plaintiff of the remedy to enforce his rights by suing in court but it does not put any bar on the defendant to put up a defence though such defence is barred by limitation and cannot be enforced in court.

Application to court-Under **Section 3(c),** an application may be made to the High Court by notice of motion when the application is presented before the proper officer of that Court. If the period prescribed for an application expires on a day on which the Court closes, **Section 4** provides that the application shall be made on the day on which the Court reopens.

Duty of the Court to plead limitation period-If a suit is filed after the time prescribed by the Limitation Act then the court is bound to dismiss it. The provisions of **Section 3** are mandatory and if the suit is not filed due to limitation then the court will not proceed with it. Under **Section 3** of the Act, it is clearly mentioned that every suit, appeal and application filed after the prescribed period shall be dismissed. Even if limitation is not set up as a defence.

In **Craft Centre v. Koncheri Coir Factories** it was held that it is the duty of the plaintiff to convince the Court that his suit is within time. If it is out of time and the plaintiff relies on any acknowledgment to save limitation he has to plead or prove the same if denied. The Court further held that the provision of **Section 3** is absolute and mandatory and if limitation has expired in a suit it is the duty of the Court to dismiss the suit even at the appellate stage even if the issue of limitation is not raised. **In ICICI Bank Ltd. v. Trishala Apparels Private Limited** it was held that there is no doubt that the Court is bound to dismiss the suit in a case if limitation has expired thereon even if no such plea is taken by the opposite party.

In **Mukund Limited v. Mumbai International Airport** it was held that it is clearly evident that when a suit is barred by limitation, the Court is barred from proceeding on the merits of the disputes and is in fact bound to dismiss the suit.

Starting point of the range-The time from which the limitation period starts depends on the subject matter of the case and a specific starting point of such period has been elaborately provided by the Schedule to the Act. It generally starts from the date when the summons or notice is served, or the date on which the decree or judgment is passed, or the date on which the event forming the basis of the suit occurs. In **Trustees Port Bombay v. Premier Automobile** the Supreme Court held that the starting point of limitation is the accrual of the cause of action.

Expiry period of limitation on closure of court-When a court is closed on a particular day and the period of limitation expires on that day, any suit, appeal or application shall be taken up in the court on the day on which it reopens. This means that a party is barred not by his own fault but by the closure of the court on that day. **Section 4** of the Limitation Act provides that when a period of limitation has been prescribed for any suit, appeal or application and such period expires on a day on which the court is closed, such suit, appeal or application shall be instituted, tried or made on the day on which the court reopens. The Explanation to this section states that a court shall be deemed to be closed on any day within the meaning of this section if it is closed on that day during any part of the normal business of the court.

For example, if a court reopens on 1 January and the time to file an appeal expires on 30 December (the day the court is closed), the appeal can be filed when the court reopens on 1 January.

Condemnation of delay

Condemnation of delay means the extension of the time limit granted in certain cases provided there is sufficient cause for such delay. Section 5 talks about the extension of the period prescribed in certain cases. It provides that if the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or application within that period, such appeal or application may be admitted after the prescribed time. This section further mentions that any provision of Order GPP of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to such court for any reason The Explanation states that in ascertaining or calculating the prescribed period when the applicant or appellant has been misled by any order, practice or judgment of the High Court. This shall be sufficient cause within the meaning of this section.

However, if a party does not show any solid ground for the delay then the application, suit or appeal will be dismissed by the court.

In **State of Kerala v. K.T. Shaduli Joseph**, whether there is sufficient cause or not is a question of fact which a Court held, to condone the delay depends on the circumstances of the particular case.

Sufficient reason-Sufficient cause means that the court must have sufficient cause or reasonable ground to believe that the applicant was prevented from proceeding with the application to the court.

In **State (NCT) v. Ahmed Jan**, it was held that the expression "sufficient cause" should get a liberal construction. In **Balwant Singh (Dead) v. Jagdish Singh & Ors.**, the Supreme Court held that it is mandatory for the applicant to show sufficient cause due to which he was prevented from continuing with the proceedings in the suit. In this case, there was a delay of 778 days in filing the application for bringing the legal representatives on record.

In **Ornate Traders Pvt. Ltd. v. Mumbai the Bombay** High Court held that where sufficient cause is shown and the application for condemnation of delay is made in good faith, the court will ordinarily condone the delay, but where no explanation for the delay is offered and the delay is inordinate apart from negligence and inadvertence, the discretion of the court will ordinarily go against the applicant.

In **Brij Inder Singh v. Kansi Ram the Bombay** High Court held that the correct guide for the court while exercising jurisdiction under **section 5** is whether the plaintiff has acted with prudence and due diligence in prosecuting the appeal.

Whether the applicant has given sufficient reasons or not depends on the discretion of the court and the circumstances of each case. For example, the court may condone a delay on medical grounds.

Question No. 10- Write short notes on any two of the following-

Answer- (1) Cause of Action- According to the Code of Civil Procedure (CPC), 1908, cause of action means a set of facts which on application entitle the plaintiff to seek relief against the defendant. In the 1996 case of **South East Asia Shipping v Nav Bharat Enterprises**, the Supreme Court held that cause of action is essentially a set of facts which give rise to a dispute. It is the cause of action which gives the plaintiff the legal right to move the court. Therefore, plaintiffs who do not come before the court with a proper motive are not entitled to be heard and in fact, such persons are not entitled to any relief from any judicial forum. Keeping this in view, Order 7 Rule 11 has been added in the CPC to enable the court to dismiss plaints which do not disclose a proper cause of action. Though Order 7 Rule 11 of CPC gives other factors which may lead to the dismissal of a plaint but they are all clerical in nature, but when a plaint does not disclose its cause of action, it lies with the court to interpret it (in the light of various decisions of the Supreme Court) as to which plaint discloses its cause of action and which does not.

(2) Second Appeal: Under **Section 100** of the Code of Civil Procedure (CPC), 1908, a second appeal can be filed in the High Court against the judgment of the subordinate court in the first appeal. However, this right can be exercised only for important legal issues that arise at the time of admission of the appeal or thereafter. If a legal issue in the case directly affects the rights of the parties or is a matter of concern to the general public, it will be considered important.

The Commission has powers to adjudicate an appeal filed under **Section 19(3)** of the RTI Act and pass an order directing supply of required information where it has not been provided by the Central Public Information Officer (CPIO) or the First Appellate Officer.

According to **Section 100** of the Code of Civil Procedure, an appeal can be made to the High Court against the decision of the District Court. An appeal is possible if the decree is passed ex parte.

If the High Court finds that an important legal issue exists it will give judgment. It should be mentioned that the second appeal is based on an important legal issue rather than factual inaccuracies.

Second Appeal under CPC : About The provision for a second appeal under CPC is made under **Section 100.** It states that, unless there are specific rules to the contrary, an appeal against the decision given by the subordinate court in the first appeal lies to the High Court. However, the right granted by this section is limited to substantial legal issues raised at the time of the admission of the appeal or subsequently. A second appeal under **Section 100** of the CPC can be made to the High Court if an important and substantial issue is raised. If the legal issue in the case directly and significantly affects the rights of the parties or is a matter of concern to the general public, it will be considered substantial.

Second Appeal: Nature and Scope-

Nature-The capacity to appeal is established by law rather than being inherited. The capacity to sue is innate in nature. This right becomes effective from the date of filing the suit.

The decision of the appellate court is conclusive. Before declaring a right void, the law must consider it void have to declare.

Scope-The following are the only situations in which a second appeal can be used-

(1) A question of law has been raised.

(2) The legal question must be important.

(3) Additional Explanation specified in **section 100** of CPC.

(4) Wrongly resolved question of fact should not be the criterion for a second appeal.

What is the ground for second appeal under CPC?

According to **section 101**, "Second appeal cannot be filed on any other ground- No second appeal can be filed on any ground other than the ground mentioned in

section 100." Consequently, it is clearly not possible to file a second appeal on any ground other than **section 100**.

The Constitution prohibits a second appeal on grounds of cause. The following are the justifications for a second appeal:

(1) The appeal must raise an important legal issue which the court can develop or the party can rise in the memorandum of appeal;

(2) That a second appeal may be filed where the decree was passed ex parte; **Second appeal:** decision of the case in **Annapoorani Ammal vs G. Thangapolam** it was held that the High Court may decide only when can intervene when there is an important legal issue.

In **Gyanoba Bhaurao vs Maruti Bhaurao Marnor**, it was held that there is no issue of law and the determination of fact is contrary to the preponderance of the evidence.

(3) Decree holder-Section 2(3) of the CPC defines the term decree holder. Decree holder means any person in whose favour a decree has been passed or any order executable has been made. The term decree holder refers to a person in whose favour a decree has been passed.

Characteristics of a decree holder-

Decree or order in favour- The primary characteristic of a decree-holder is the existence of a decree or executable order in their favour. This means that the decree or order must confer a right or impose an obligation that can be enforced through the execution process.

Not limited to parties to the lawsuit-The decree-holder need not be a party to the original suit. This aspect was emphasised in **Dhani Ram Gupta v Lala Shri Ram**, where the Supreme Court clarified that a decree-holder can be any person in whose favour a decree has been passed, irrespective of his participation in the original proceedings or not.

Legal right of execution-The decree-holder must be legally entitled to demand the execution of the decree. This right may arise from the terms of the decree or from the legal rights of the decree-holder determined by the court.

Judicial interpretation on decree holder

Dhani Ram Gupta vs Lala Shri Ram In this case, the Supreme Court highlighted that the term "decree-holder" is wide and includes any person in whose favour a decree has been passed. The court said- "So long as the person whose name appears on a decree is the person in whose favour the decree has been passed, such person should be presumed to be the decree holder." This decision emphasises that the name mentioned in the decree is important for the identification of the decree holder, but it is not necessary that the person is the plaintiff.

In the case of Ajudhia Prasad vs State of U.P., a Division Bench of the Allahabad High Court has laid down the scope of "decree holder".

Told in further detail-"It is now clear from this that the person in whose favour the executable order has been passed is also the decree holder.

It is also clear from this definition that the decree holder need not be a party to the suit. He can be "any person." This case highlights that a decree-holder can be any person who has the benefit of an executable order, and emphasises the wide applicability of the term.

(4) Judgment debtor. - Judgment debtor is defined in **section 2(10)** of the CrPC. Judgment-debtor means any person against whom a decree has been passed or an order executable has been made.

This definition does not include the legal representative of a deceased judgment debtor.

(5) Powers of the Appellate Court-(1) The Court may, by notification under **Section 107** of the Appellate Court, issue a notice in writing to the Court of Appeal under **section 107** of the said Act, to the effect that the Court may, by notification under **Section 107** of the said Act, effect a notice in writing to the Court of Appeal under section ... effect a notice in writing to the Court of Appeal Using your powers regarding the part.

(2) Making of cost orders.

(3) The order of the appellate Court shall be enforced in the same manner as the order of the court of first instance is done.

(4) Subject to **section 12 (3)** of the Regulations, or unless otherwise ordered, the Appellate Court shall not admit oral evidence or evidence which was not before the lower Court.

(5) At the hearing of an appeal, a party may not rely on any matter not included in his application unless the Appellate Court allows it.

LL.B.-4th Sem. Paper-VI Labour Law and Industrial Law-II

Question No. 1: Review the definition of worker as given in the Workmen's Compensation Act, 1923.

Answer- Workman- The definition of worker has been provided in **Section 2 (1) (d)** of the Workman Act. According to this definition, worker means the following person- whose appointment is not of casual nature and whose appointment is not otherwise than for the purpose of the employer's business or trade. The following persons are included in the definition of worker-

(1) According to **section 2 (34)** of the Railways Act, 1989, railway servant means any person employed by the Railway Administration in connection with the service of the Railway. As per the definition of employee under **section 2 (dd),** a railway servant is an employee if: he is not permanently employed in any administrative, district or sub-divisional office of a Railway; and he is not employed in any capacity specified in Schedule P to the Act.

(2) the master, seaman or other member of the crew of a ship or the captain or other member of the crew of an aircraft or a person recruited as driver, helper, mechanic, cleaner or in any other capacity in relation to a motor vehicle or a person recruited by a company for work abroad and who is employed outside India in any such capacity as specified in the Schedule and the ship, aircraft or motor vehicle or company, as the case may be, is registered in India; or

(3) Any person employed in any of the capacities specified in **Schedule 2**, whether the contract of employment is entered into before or after the passing of this Act and whether such contract is express or implied, oral or in writing, but does not include a person employed as a member of the Armed Forces of the Union; and in respect of an employee who is injured, where the employee dies, his dependents or this shall include a reference to any of them.

But the following persons cannot be included in the definition of worker-

(1) If the employment of any person is of a casual nature and is for the purposes of the trade or business of the employment has been employed for any work other than.

Kerala Balagram Registered Society v. V.K.M. Kochuman - In this case, it was held that a person employed for the purpose of threshing harvested paddy is an 'employee' within the definition of employee under section 2(dd) of the ECA, 1923.

(2) Any person who is acting in the capacity of a member of the Armed Forces of the Union of India. From the above description it is clear that in order to ascertain who is a workman other than a Railway employee, the following it is important to know three basic things-

(1) The posts specified in **Schedule 2**;

(2) The monthly wages of the worker;

(3) Nature of planning employment of casual nature- A worker whose appointment is of casual nature and who is employed for any purpose other than the employer's business cannot be included in the definition of a worker. It is necessary to clarify two things here- the first thing is that the burden of proving that the employed person is a worker is on the employer. The second important thing is that to keep the employed person out of the definition of a worker, the following things have to be proved: (1) The nature of the worker's appointment was of casual nature; (2) He was employed for any purpose other than the purpose of the employer's business or trade.

In the decision of **T.N. Sitaram Reddiar v. A. Ayyaswamy Goundar AIR 1956 Madras 212** the Madras High Court has expressed the concept that casual employment is employment which is accidentally made necessary by circumstances. The expression is not used in contradistinction to 'permanent or continuous' employment. "Occurring without any plan on the part of the agent, or by mere chance; occurring at uncertain times or without regularity; employment of a labourer or workman being merely irregular."

Madan Mohan Verma v. Mohan Lal (1983) 11 L.L.J. 322 Allahabad Mohan Lal filed an application under **section 3** of the Employee's Compensation Act, 1923 claiming compensation from the respondent Madan Mohan Verma on the following allegations. Mohan Lal was employed by Madan Mohan Verma as mechanic for setting up cotton ginning machine and chaff cutting machine at a daily wage of Rs. 15/- On 8th October, 1973 while Mohan Lal was trialling the chaff cutting machine, his right hand got caught in the teeth of the gear roller of the machine and all the fingers and thumb of his right hand were cut off, resulting in permanent total disability, which also affected his future earning capacity. He claimed compensation from his employer Madan Mohan Verma, but the latter refused to pay any compensation. On this Mohan Lal filed an application under section 3 of the Employee's Compensation Act. His case was that Mohan Lal had sustained injuries in the process of cutting his fodder into pieces in the machine installed by him. Under the circumstances, the employer could not be held liable to pay compensation. Further, the injuries were caused by the negligence of Mohan Lal. It was also denied that Mohan Lal was a workman.

In the decision of **Mahmood vs Balwant Singh (1980) (Allahabad),** the Allahabad High Court has held that a claim for permanent partial disability can be presented for a person employed in threshing wheat. A person can be included in the category of worker if he is employed in any profession or business, even if the nature of employment is casual.

Question No. 2: Discuss the main features of the Indian Maternity Benefit Act, 1961.

Answer- The Maternity Benefit Act, 1961 is a law that protects the employment of women during maternity. It entitles women employees to 'maternity benefit', which includes fully, paid wages during absence from work and for caring for

their child. The Act applies to establishments employing 10 or more employees. The Maternity Benefit Act, 1961 has been amended through the Maternity (Amendment) Bill 2017, which was passed in the Lok Sabha on March 09, 2017. Subsequently, the said Bill was passed in the Rajya Sabha on August 11, 2016. Further, it received assent from the President of India on March 27, 2017. The provisions of the Maternity Benefit (Amendment) Act, 2017 ('Amendment Act') came into force on April 1, 2017 and the provisions regarding crèche facility (**Section 111A**) came into force from July 1, 2017.

Overview of the Maternity Benefit Act, 1961

The Maternity Benefit Act 1961 was passed by the Union of India on 12 December 1961 after the independence of the country. This law contained conditional benefits for pregnancy, childbirth and their related complications, which were in line with the then international standards. The Act covered a wide range of areas with meticulous precision and took into account many dimensions of considerations affecting maternity benefits, despite the fact that India was still a developing nation and was in its 14th year of independence. The Maternity Benefit Act, 1961 governs maternity benefits in India. Every organisation with ten (10) or more employees is subject to the Act. As per the Act, maternity benefits are available to any woman who has worked for an organisation for at least eighty (80) days. The Maternity Benefit Act, 1961 aims to provide all facilities to the working woman in a dignified manner so that she can pass the state of motherhood 'with dignity, peace and tranquility, without being deterred by the fear of suffering for forced absence during the pre- or post-natal period', as observed by the Supreme Court in the case of Municipal Corporation of Delhi vs Women Workers (Muster Roll) (2000). According to the Maternity Benefit Act 1961, if there is a pre-natal delivery and no paid post-natal care, the employer must pay a medical bonus of up to Rs 1,000 to the beneficiary. The central government has increased the medical bonus to Rs 25,000. If the woman experiences a miscarriage or any other pregnancy-related complication, she is entitled to paid leave. After returning to work, the mother is eligible for leave and is granted leave twice a day to breastfeed the child till the age of 15 months. It has also been made compulsory for every firm having fifty or more women employees to provide “creche” facilities at convenient locations. Women will be allowed to avail leave with pay on the basis of proof provided for their tubectomy operation. According to the Act, it is against the law for an employer to dismiss or dismiss a pregnant woman during her absence or on account of her pregnancy, or to give her a notice of dismissal on the day when the period of notice will expire while she is absent, or to alter any of the terms of her employment to her disadvantage. According to the Act, light work allotted to pregnant women and leave for feeding the child are not grounds for pay deduction.

This law applies to all businesses, including government-connected businesses and businesses that employ people to perform horsemanship, acrobatics and other feats for display in factories, mines and plantations. Additionally, it applies to any store or business with ten or more employees. The inclusion of provisions for industrial, agricultural and commercial establishments marked this act as a significant improvement over the rudimentary Act of 1928. The Act covers all maternity benefits in the following sections-

Section 4: Employment or work of women is prohibited during certain periods.
Section 5: Right to payment of maternity benefit.
Section 7: Payment of maternity benefit in case of death of the woman.
Section 8: Payment of medical bonus.
Section 9: Leave for miscarriage etc.
Section 10: Sick leave arising out of pregnancy, delivery, premature birth of a child, miscarriage, medical termination of pregnancy or sterilisation operation.
Section 11: Nursing breaks.
Section 12: Dismissal during absence due to pregnancy.
Section 13: Wages not to be deducted in certain cases.
Section 18: Forfeiture of maternity benefit.

The Act was amended by the Government of India in 2017 to provide more inclusive maternity benefits to women. Among other amendments, a new section, **Section 5(5),** was added to the Act, under which women requesting maternity leave can avail the benefit of working from home. As per **Section 5(5)** of the Act, the employer may authorise nursing mothers to work from home, if the nature of work assigned to them permits it, under mutually agreed conditions.

Features of the Maternity Benefit Act, 1961

Period of leave - According to the Act a woman is entitled to twelve weeks of maternity leave, of which a maximum of six weeks may be before the date of delivery. This was taken into account in the PST guidelines at that time.

Job security - As per the guidelines of the 1961 Act, it is illegal for an employer to dismiss or let go a woman from her job at any time during or because of her absence. However, if the dismissal or termination is a result of serious wrongdoing, the employer may notify the employee in writing.

Remuneration during leave- Women who fulfil the requirements for maternity leave as laid down in the law are entitled to maternity benefit at the rate of average daily wage for the time they are actually absent from work.

Financial benefits- As per this law, every woman is entitled to maternity benefits and also has the option of getting medical bonus from the employer if prenatal or postnatal care is not provided by the employer free of cost to the employee. The employer is responsible to pay all the debts including maternity benefits to the woman's nominee or legal representative in the event of her death.

Benefits covered under the Maternity Benefit Act 1961

According to the Act, the employer should refrain from employing any known woman in any place for six weeks immediately following the day of delivery, miscarriage or medical termination of pregnancy. During the six weeks immediately following the day of delivery or miscarriage, no woman shall work in any company. The employer shall not employ such women in any work unless requested to do so by the employed woman.

(1) Which has an adverse effect on her pregnancy or the normal development of the foetus?

(2) Any act which may cause a miscarriage or have an adverse effect on her health.

Every woman has the right to maternity benefit, and it is the responsibility of her employer to pay her an amount equal to the average daily earnings for the time she was actually away from work, i.e.-

(1) The time until the day of her delivery.

(2) The day on which she gives birth to the child and for the period immediately thereafter.

Highlights of Amendments to Material Benefits

The Maternity Benefit (Amendment) Bill, 2017 was approved by the Rajya Sabha and Lok Sabha on August 11, 2016, and the President of India gave his assent on March 27, 2017. The provisions of the Maternity Benefit (Amendment) Act 2017 came into force in India on April 1, 2017. However, the clauses relating to childcare facility (**Section 11**) came into force on July 1, 2017. After the change, the Act still follows its basic principles but provides better benefits and promotes better child care. According to our investigation, the following changes have occurred at four levels of this law-

Duration of leave - The amendment provides for 26 weeks of maternity leave, extendable up to 8 weeks from the estimated due date weeks before, unless they have two or more living children. The total period of maternity leave has increased by 117% since the previous act. Additionally, it complies with the ILO's suggestion of 18 weeks or more. This amendment was passed to provide mothers with adequate time for self-healing and to improve child care, which will reduce infant mortality. Adoption is an exception to this rule. A commissioning mother or a woman who adopts a child less than three months old is eligible for twelve weeks of maternity leave.

Job security- The termination and dismissal section of the original Act will remain unchanged.

Financial benefits- No immediate financial benefits have been put into practice. However, the amendment provides that a woman has the right to work from home, provided both her employer and she mutually agree on it. Every business with 50 or more employees must include a crèche facility either independently or as part of the common areas. This is another benefit. The employer will allow the woman four visits to the childcare provider. The most important amendment is to

increase maternity leave from 12 to 26 weeks. According to WHO, the baby should be breastfed for 24 weeks after birth to reduce the mortality risk. Additionally, it should reduce the number of women leaving their jobs as a result of inadequate maternity leave. Additionally, the longer leave period is in accordance with the Maternity Benefit Conference Recommendation (No. 183). Adding maternity leave for women who are commissioning and adopting is an important step that allows them to take care of themselves and their children as well as honor their paternity. Due to these changes, India now ranks third after Canada and Norway in terms of the number of maternity benefits available to women.

Effect of the Maternity Benefit (Amendment) Act, 2017 on employment- The effects of the Maternity Benefit (Amendment) Act, 2017 on employability are listed below-

(1) In private companies, many employers may avoid hiring women who are about to become pregnant, as they are required to provide maternity leave and compensation for that period (up to 26 weeks). Since the amendment, many firms view hiring women as a hardship. The employer's specific obligation to pay all wages in full during the allotted time increases production costs for employers.

(2) Production costs increase because the employer has an exclusive obligation to pay all wages in full during the allotted time, which increases the employer's costs.

(3) This provision causes employers to be concerned about their financial stability, which may make them more willing to hire men than women.

(4) Losses caused by extended maternity leave, which is beneficial to businesses that generally employ female workers.

(5) This reduces employment prospects for female workers, as companies are either reluctant to hire them or ask them to leave the job just before the birth of the child to avoid further liabilities.

Applicability-On reading **Section 2** along with **Section 3(e)** of the Maternity Benefit Act, 1961 ('the Act), it can be safely concluded that the Act applies to establishments such as factories ('factory' as defined in the Factories Act, 1948), mines ('mine' as defined in the Mines Act, 1952) and plantations ('plantation' means plantation as defined in the Plantations Labour Act, 1951).

The Maternity Benefit Act also applies to Government establishments and to establishments in which persons are employed for the performance of horse riding, acrobatics and other performances as per **Section 2(b).** The said Act also applies to every shop or establishment as defined under the law which employs ten or more persons in a day during the preceding twelve months and which applies in respect of shops and establishments in a particular State.

Thus, in view of the above, in Delhi the Act applies to all "establishments" and "commercial establishments" who fall within the ambit of **Sections 2(9)** and **2(5)** of the Delhi Shops and Establishments Act, 1954. Further, as per the provision of **Section 2** of the Maternity Benefit Act, the State Government may, subject to obtaining approval from the Central Government, declare that the provisions of the Act shall apply to any other establishment or class of establishments which are carrying on industrial, commercial or agricultural activities or any other activity otherwise than under **Sections 5A** and **5B**. It is worth noting that the provisions contained in this Act shall apply to all establishments or class of establishments which are carrying on industrial, commercial or agricultural activities or any other activity otherwise than under **Sections 5A** and **5B**. The provisions of this Act shall not apply to any factory or other establishment which is covered under the provisions of the Employees' State Insurance Act, 1948 as per **section 2(2)** of the Act. Further, as per **section 26** of the Act, the appropriate Government has the power to exempt any establishment from the purview of the Act by notification, subject to the conditions specified in **section 26**.

Period for grant of maternity benefit - As per **Section 5(3)** as amended by the Maternity Benefit (Amendment) Act 2017, the maximum time a woman can receive maternity benefit is twenty-six weeks, excluding the eight weeks preceding the day of her estimated due date of delivery. Further, in the event that a woman dies within this time, maternity benefit will be paid only for the days preceding the day of her death. As per subsection (4) of Section 5, a woman who legally adopts a child less than three months of age or a mother who makes an adoption order shall be eligible for maternity benefit for a period of twelve weeks beginning from the day on which the child is delivered to the adopting mother or the commissioning mother, as applicable. As per subsection (5) of Section 5, if a woman's job requires her to work from home.

Conditions for claiming maternity benefit- A woman is eligible to receive maternity benefit only if she has actually worked for the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her estimated delivery.

How to claim maternity benefit - Any woman who wishes to exercise the right to maternity benefit must submit a notice to her employer in the manner and on the form required by the occupation in which she is employed in order to become eligible to claim the maternity benefit provided by the 1961 Act. The notice should include the following information-

(1) Maternity benefit and any additional fund to which she may be entitled under this Act.

(2) The name of the person who should receive such payments.

(3) A statement saying she will not work in the company while receiving maternity benefits.

(4) The day when his absence from work officially began.

After the woman submits documents certifying her pregnancy, the employer is required to provide the woman with it is necessary to pay maternity benefit in advance.

What if the woman dies during the period of maternity leave?

The maternity benefit which is applicable to a woman lasts only till the date of her death, if she dies within the above-mentioned period of maternity leave. If the mother dies soon after giving birth to a child, as a result of which the child survives, the full maternity benefit shall be payable to her. If the child dies while the mother is still eligible for it, the employer is required to pay the maternity benefit effective up to the date of the child's death. When a woman dies, these payments must be made to the person whom she specified in the notification given under **Section 6(1)** of the Act, or if she has not nominated anyone, to her legal representative.

Filing a complaint under the Maternity Benefit Act 1961- If a woman is denied maternity benefits or medical benefits, is fired from her job, or is dismissed while on maternity leave, she has sixty days to appeal the decision. She can do so by contacting the inspector designated by the Maternity Benefit Act, 1961. If she disagrees with the inspector's requests, she has thirty days to make a counter-proposal to the suggested expert. If she disagrees with the inspector's requests or if a more significant legal issue is raised, she can also file a lawsuit within one year.

Question No. 3- What is wages? Describe the different types of wages.

Answer- According to **section 2(h)** of the Minimum Wages Act, 1948 the term wages means all remuneration expressed in money terms which would be payable to a person in respect of his employment or for any work done in such employment if the express or implied conditions of the contract of employment have been fulfilment and it includes house rent allowance but does not include-

(1) Value

(2) Any house providing accommodation, supply of light and water, medical care or

(3) Any other facility or any service may be excluded by general or special order of the appropriate Government went;-

(4) Any sum paid by the employer under any personal fund or provident fund or any scheme of social insurance any contribution;

(5) Any travelling allowance or the value of any travel concession;

(6) Any sum given to an employed person to meet special expenses falling on him by reason of the nature of his employment, or

(7) Any gratuity payable on retirement;

Types of wages- At present the following four concepts are prevalent in relation to wages-

(1) Minimum Wages - Under the Minimum Wages Act, 1948, the classification was based on agricultural and non-agricultural work. However, under the Code on Wages, the classification has been done on the basis of skill level, and employment has been divided into highly skilled, semi-skilled and unskilled. To determine and revise the minimum wages to be paid by the employer to the employees in certain employments. To fix adequate minimum wages for all employees in the interest of the public. To fix the daily working hours of an employee according to the type of employment. To prevent exploitation of workers. To resolve any issue relating to non-payment or underpayment of wages. To establish and confer powers and duties of Inspectors. To establish and confer powers and duties of Labour Commissioners and other important labour officers. To confer rule-making powers on the appropriate Government. **Section 2(d)** of the Act defines cost-of-living index number as an index number which is prescribed by the appropriate Government in the Official Gazette in respect of employees. Under the Act, the appropriate Government determines scheduled employments in respect of which it notifies the minimum wages to be paid by the employer to the employees. The minimum wages are determined on the basis of the cost of living index number. The cost of living index number reflects the constantly changing cost of living standards. **Section 2(h)** of the Act provides an inclusive definition of wages, which includes all remuneration which can be expressed in terms of money which the employer pays to the employee during the course of employment. It includes house rent allowance. However, it does not include any housing, electricity, water supply, medical service or any other amenity which the appropriate Government may deem fit; any contribution of the employer to a pension fund or provident fund; travelling allowance; special expenses paid; and any gratuity payable on discharge of the employee. According to **Section 2(1)** of the Act, an employee is a person who is employed to perform any skilled or unskilled, manual or clerical work for which minimum wage rates have been fixed. This is an important definition under the Act as it defines the scope of its application. Not all employer-employee relationships are governed by the Minimum Wages Act. Moreover, not all types of employees are eligible for payment of minimum wages as prescribed by the appropriate government are not eligible to claim benefits.

In Workmen Represented by **Secretary v. Reptakos Brett & Co. Ltd. & Ors. (1992)** the Hon'ble Supreme Court took into consideration the Tripartite Committee of the Indian Labour Conference of 1957. The report of the Committee stated that the structure of minimum wage policy should be nothing more than the subsistence level.

In **Municipal Corporation of Delhi v. Ganesh Rajak (1995),** the Supreme Court held that entitlement to minimum wages under the Act is an existing right of the worker and does not require any decision other than that of the Labour Court.

NM Wadia Charitable Hospital & Ors vs State of Maharashtra & Ors (1986) In this case, the State of Maharashtra appointed a committee to advise on the matter of revision of minimum wages payable to hospital employees. However, the government did not adopt the wage rates recommended by the committee in its report but adopted a higher rate of minimum wages. The petitioners challenged the notification on the ground that the government had not given any consideration to it.

The court held that fixing different rates of minimum wages for different areas was permissible under the Act and did not violate any provision of the Constitution.

Bhikshusa Yamsa Kshatriya v. Sangamner Akola Taluka Beedi Kamgar Union (1958) In this case, the validity of the Minimum Wages Act, 1948 was again challenged before the Hon'ble Bombay High Court. There were various claims under Section 20 of the Act on the applicability of minimum rates of wages in certain districts of the State of Bombay. Among other things, the employers challenged the validity of the Act on the ground that it violates **Article 14** and **Article 19(1)(g)** of the Constitution and that the State of Bombay had not followed the requisite procedure for fixing minimum rates of wages.

Rejecting the arguments of the employers, the Court held that the petitioners had failed to prove that the requisite procedure was not followed by the State of Bombay while fixing and revising the minimum wages and that the provisions of the Act violate either **Article 14** or **Article 19(1)(g)** of the Constitution.

(2) Fair wages - Fair wages means wages which are higher than the minimum wage. It is a mean between minimum wage and living wage. Hence, the lower limit of fair wages should be the minimum wage while the upper limit is the fair wage which is the capacity of the industry to pay and is fixed Fair wages are primarily paid in comparison with the average pay for similar work in other occupations or trades requiring the same ability. Basically, it is the economic situation and its future prospects on which fair wages depend. Apart from this, there are certain factors such as minimum wages, paying capacity of the industry, level of national income and its distribution, productivity of labour, place of the industry in the economy of the country and wage rates prevailing in the same or similar occupations in the same or neighbouring localities on which fair wages depend. Fair wages refer to the remuneration given to workers for work requiring similar skill, difficulty and hardship.

In the decision of **Shiv Fine Arts Litho Works vs. Industrial Court (1978) L.L.J. 532 S.C.** the High Court has put forward the following concept regarding fair wages- “Fair wages should be between the living wage and the minimum wage.

(3) Living wage- 'The International Labour Organisation (ILO) defines a living wage as the minimum income that an employee needs to maintain a decent standard of living for himself and his family. It is usually higher than the minimum wage, which is the lowest legal hourly wage allowed by an employer. The following factors are considered in calculating the living wage; rent or mortgage, groceries, utilities, transportation, childcare, health, education, recreation, and social needs. **Article 43** of India's 1950 Constitution states that the State should work to ensure that all workers receive a fair living wage, as well as other conditions that allow them to enjoy a decent standard of living. India plans to replace its minimum wage system with a fair living wage by 2025, with the goal of reducing poverty, improving workers' well-being, and addressing workers' concerns.

(4) Living wage- Living wage is defined as the wage which is consistent with providing certain facilities and certain basic needs to the employee. It, therefore, means the wage level which is satisfactory to provide the basic needs and such necessities as are necessary for the betterment of the employee as well as his family according to his social status. Thus, the living age is defined as-

The living wage should enable the male earner to provide for himself and his family not only the basic needs of food, clothing and shelter but also a measure of frugal comfort including education of children, protection against ill-health, fulfillment of essential social needs and measures for insurance against old age. **Article 43** of the Constitution of India states that the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, whether engaged in work, agricultural, industrial or otherwise, a living wage, working conditions ensuring a decent standard of living and the full enjoyment of leisure and social and cultural opportunities. Therefore, the Government of India has adopted as one of the principles of State policy to ensure living wages. The living wage is the wage which is adequate to ensure the worker food, shelter, clothing, frugal comfort, provision for bad days etc. according to the skill of the artisan, if he is an artisan. Thus, living wages do not only mean meeting the basic needs of life of the employee like food, shelter and clothing but it also includes certain rest, leisure and amenities as estimated by current human standards like health, education of children, travel, old age, recreation and social needs etc.

Question No. 4- Explain the objectives and scope of the Minimum Wages Act 1948.

Answer- The Minimum Wages Act, 1948 is a labour law of India. This Act fixes the minimum wage rate for different categories of workers in both organised and unorganised sectors of employment. The purpose of this Act is to ensure fair wages to the workers and to ensure that the minimum wages are followed by the employers. This Act gives the right to fix wages to both the Central and State Governments. According to this Act, an organisation has to pay a minimum

amount to a particular employee for a particular work at a particular time. This amount cannot be less than any contract or collective agreement. The minimum wage should be sufficient to meet the basic needs of a family of four. For this, committees review the capacity of the industry from time to time and are bound to fix the minimum wage. The Minimum Wages Act was passed by the Central Assembly in the year 1948 and it came into force on 15 March 1948. After the implementation of this Act, a sense of equality and justice came among the blue-collar people.

Objectives of the Minimum Wages Act, 1948- The main objectives of the Minimum Wages Act, 1948 are as follows- (1) To fix and revise the minimum wages to be paid by employers to employees in certain employments;

(2) To fix an adequate minimum wage for all employees in the public interest;

(3) Determining the daily working hours of an employee according to the type of employment;

(4) To prevent exploitation of workers;

(5) resolve any issues related to non-payment or underpayment of wages;

(6) To establish and confer the powers and duties of Inspectors;

(7) To establish and provide for the powers and duties of Labour Commissioners and other important labour officers;

(8) To confer rule-making powers on the appropriate Government.

Section 3 of the Act provides for fixation of minimum rates of wages by the appropriate Government. **Sub-section (1)** provides that the appropriate Government shall fix the minimum rates of wages payable to employees in employments specified in **Part I** or **Part II** (scheduled employments) of the Schedule to the Act and shall review the minimum wages for a period of five years. **Sub-section (1A)** provides that the appropriate Government may refrain from fixing minimum wages for any scheduled employment where the number of employees throughout the State is less than one thousand, so long as such number does not remain less than one thousand.

Sub-section (2) provides that the appropriate Government may prescribe the following-

(1) Minimum Time Rate;

(2) Minimum piece rates;

(3) A guaranteed time rate; and

(4) Overtime rates.

Sub-section (3) empowers the appropriate Government to fix different rates of minimum wages for-

(1) Various scheduled employments;

(2) Different types of work in the same scheduled employment

(3) Adults, adolescents, children and trainees; and different areas

These minimum wages may be fixed on the basis of per hour, per day, per month or any other time period as determined by the appropriate Government.

Section 4 of the Act provides for minimum wage rates. The minimum wage rate will include the following-

(i) a basic rate of wages and a special allowance, which shall be adjusted at such intervals and in such manner as the appropriate Government may direct, so as to keep pace as closely as possible with changes in the cost of living index number applicable to such workers (hereinafter referred to as the "cost of living allowance"); or

(ii) a basic rate of wages with or without the subsistence allowance, and the cash value of concessions in respect of the supply of essential commodities at concessional rates, where so authorised; or

(iii) An all-inclusive rate consisting of the basic rate, the subsistence allowance and the cash value of concessions, if any."

Further, **Section 5** of the Act provides that the appropriate Government may fix or revise the minimum wages by appointing committees and sub-committees or by publishing its proposal in the Official Gazette for the purposes of making such proposals public.

A similar view was taken by the Hon'ble Supreme Court in the case of **Airfreight Ltd. v. State of Karnataka & Ors. (1999)**. The Court held that in cases where the minimum wages are linked to the cost of living index, the amount paid on account of dearness allowance should not be taken as an independent component but should be treated as an integral part of the minimum wages.

Advisory Board under the Minimum Wages Act, 1948

Section 7 of the Act establishes the Advisory Board. The scope of the Advisory Board appointed by the appropriate Government is to coordinate the Committees and Sub-Committees established under **Section 5** of the Act and to advise the appropriate Government on fixing and revising the minimum wages for scheduled employment. A Central Advisory Board (CAB) shall be established under **Section 8** of the Act. The Central Government shall establish the CAB and appoint its members. The members shall include equal number of representatives of both employers and employees along with independent members nominated by the Central Government. The Chairperson of the CAB shall be an independent member. The scope of the CAB is to ensure coordination with the Advisory Board and other matters under the Act.

Manner of payment of wages under the Minimum Wages Act, 1948

Under **Section 11** of the Act all wages shall be paid in cash only. However, where there has been a practice of paying wages wholly or partly in kind, authorisation from the appropriate government is necessary. This includes concessions on essential commodities as required.

Section 12 of the Act lays down the manner of payment of minimum wages to employees. The provision states that the employer shall pay minimum wages to every employee working under him within the prescribed time period.

Fixing of hours for a normal working day under the Minimum Wages Act, 1948 Section 13 of the Act provides that the appropriate Government may fix the working hours in the following manner-

(1) Specify the working hours of a normal day, including one or more specified intervals.

(2) A day of rest shall be provided to all employees or a class of employees in every seven-day period and adequate remuneration shall be paid to the employees on the day of rest.

(3) Employees shall be provided with rest days payment, which shall not be less than the overtime rate.

(4) **Section 14** of the Act provides that where an employee works for more than the number of hours specified in a normal working day, he shall be entitled to receive overtime wages at the rate prescribed under the Act for every hour beyond his normal working hours.

(5) If an employee works less than the prescribed number of hours in a normal working day, he will still be paid the minimum wages prescribed under the Act. However, this provision will apply only if the reduced hours of work are not due to the unwillingness of the employee. This provision is given under section 15 of the Act.

Question No. 5- Describe the nature, objective and importance of the Factories Act, 1948.

Answer- 'The second half of the nineteenth century saw the rise of large scale factories/industries in India. Major Moore, Chief Inspector of the Bombay Cotton Department, in his report in 1872-73 first raised the question of provision of legislation to regulate working conditions in factories. The first Factories Act was enacted in 1881. Since then this Act has been amended several times. The Factories Act 1934 was passed replacing all previous legislations in respect of factories. This Act was framed in the light of the recommendations of the Royal Commission on Labour. Suitable amendments have also been made in this Act from time to time. Experience of the working of the Factories Act, 1934 had revealed many defects and weaknesses which had hindered the effective administration of the Act, and a need was felt for a large scale amendment of the Act to extend its protective provisions to a large number of small industrial establishments. Thus, the Factories Act, 1948, which consolidated and amended the law relating to labour in factories, was passed by the Constituent Assembly on 28 August 1948. This Act received the assent of the Governor General of India on 23 September 1948 and came into force on 1 April 1949. Development of factories and industries-

The history of the Factory Act dates back more than a century. Modern industrialization began in India a century after it began in the United Kingdom. The first cotton textile factory was established in Bombay in 1854. By 1870, a large number of industries had been established in Bombay, Nagpur, Kanpur and Madras. In Bihar, the first iron and steel factory was established in 1873. Jute spinning mills were established in Rishra around 1855. In 1881, 5000 power looms were in operation in Bengal. During the 1870s, the Bally Paper Mill was built in Hooghly and many other tanning and leather factories were established in Kanpur, resulting in the growth of factory establishments in India. Working of women and children at an early age, length of working hours and dangerous and unhealthy working conditions created problems and crises in India and due to these scenarios, laws were established for all factories and industries. The need for protective labour legislation to deal with working conditions, especially for women and children, was recognised as early as 1850, but the British government did little. Shashipad Banerjee founded the Bara Bazar Organisation in 1878 to promote the welfare of jute mill workers. Strikes at the Nagpur Empress Mill in 1877 are on record. Production methods changed during the Industrial Revolution in England between 1760 and 1820. Many mechanical innovations began to develop, such as the steam engine, which gave humans the ability to drive powerful machines.

The objective of the Factories Act, 1948-The main objectives of the Indian Factories Act, 1948 are to regulate working conditions in factories, to regulate health, safety welfare and annual leave and to make special provisions in respect of young persons, women and children working in factories.

1. Hours of work - As per the provision of working hours for adults, no adult worker shall be required or permitted to work in a factory for more than 48 hours in a week. There shall be a weekly holiday.

2. Health - To protect the health of the workers, the Act stipulates that every factory shall be kept clean and all necessary precautions shall be taken in this regard. Factories shall have proper drainage system, adequate light, ventilation, temperature etc. There should be adequate provision of drinking water. Adequate latrines and urinals should be available at convenient places. These should be easily accessible to the workers and should be kept clean.

3. Safety- In order to provide safety to the workers, the act provides that the machines should be fenced, no young person shall work on any dangerous machine, and confined spaces should have provision of manholes of adequate size to enable the workers to escape in case of emergency.

4. Welfare- For the welfare of the workers, the Act provides that every factory must provide and maintain adequate and suitable facilities for the use of the workers, including washing facilities, storage and drying facilities, sitting facilities, first aid appliances, shelter, rest rooms and there should be dining room, crèche etc.

5. Penalties- If any of the provisions of the Factories Act, 1948 or any rule made under the Act or any order in writing given under the Act is contravened, it is an offence. The following penalties are liable to be imposed:-

(a) Imprisonment for a term which may extend to one year;

(b) A fine up to one lakh rupees, or

(c) Both fine and imprisonment.

If an employee misuses any equipment relating to the welfare, safety and health of workers or in connection with the discharge of his duties, he can be fined Rs 500.

Section 92 of the Factories Act, 1948 Save as otherwise expressly provided in this Act and subject to the provisions of **section 93**, if any contravention of the provisions of this Act or of any rule made there under or of any written order made there under occurs in, or in relation to, any factory, the occupier or manager of the factory shall be guilty of each offence and shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to one lakh rupees or with both, and if the contravention continues after conviction, with an additional fine which may extend to one thousand rupees for every day on which the contravention continues.

Provided that where an accident causing death or grievous bodily injury has occurred as a result of the contravention of any provision of Chapter IV or any rule made there under or under **section 87**, the fine shall be not less than twenty-five thousand rupees in the case of an accident causing death, and not less than five thousand rupees in the case of an accident causing grievous bodily injury.

Explanation.—In this section and in **section 94** "grievous bodily injury" means any injury which includes, or is likely to cause, permanent loss of the use of any limb or permanent injury or permanent impairment of sight or hearing or injury or fracture of any bone, but does not include fracture of a bone or joint (not being fracture of more than one bone or joint) of an arm or leg and fracture of the toes.

General Manager, Wheel & A.P., Bangalore v. State of Karnataka (1996). In this case it was held that the requirement of obtaining sanction for prosecution is mandatory and in the absence of sanction, taking cognizance of the offence cannot be permitted and should be set aside.

Provincial Government v. Ganpat, AIR 1643 Nag 243. In this case it was held that where the occupier or manager of a factory admits the offence under **Section 62** of the Act but accuses the clerk of the factory to be the actual culprit, the burden of proving innocence is on such occupier or manager, as the case may be.

Main features of the Factories Act, 1948- The important features of the 1948 Act are as follows-

(1) The term 'factory' has been extended by the Factories (Amendment) Act, 1976 to include contract labour while determining the maximum number of employees in a factory to be 10 or 20.
(2) The Act increased the minimum age for children working in workplaces from 12 to 14 years and reduced their daily working hours from 5 to 4 and a half hours.
(3) The Act prohibits women and children from working in factories between 7 p.m. and 6 a.m. The distinction between seasonal and non-seasonal factories has been abolished by the Act.
(4) This Act provides for factory registration and licensing.
(5) The State Government shall ensure that all factories are registered and have valid licences, which are renewed from time to time.
(6) The Act empowers the State Governments to make rules and regulations for the benefit of employees with the assistance of the management and employees union.
(7) The State Government has the power to impose the requirements of the Act on any establishment irrespective of the number of employees and whether the establishment is engaged in manufacturing operations or not.

In **Ravindra Agarwal vs State of Jharkhand (2010)** the Jharkhand High Court held that the Factories Act, the special law would prevail over the Indian Penal Code.

Question No. 6- Discuss the formation, functions and jurisdiction of the Employees State Insurance Court.

Answer- Establishment of Employees State Insurance Corporation- ESI operates through the Employees State Insurance Corporation established under **Section 3** of the ESI Act, which is a body created to maintain social security. It was established on February 24, 1952. The job of the corporation is to provide relief to employees in case of medical emergencies formation of corporation

The structure of ESIC is defined in Section 4, and it is as follows-
(1) Director General.
(2) Chairman, appointed by the Central Government.
(3) Vice-Chairman appointed by the Central Government.
(4) Not more than 5 persons nominated by the Central Government.
(5) One person to represent each State.
(6) 1 person representing the Union Territories.
(7) 10 persons representing employers.
(8) 10 persons representing employees.
(9) 2 persons representing the medical profession.
(10) Members of Parliament (2: Lok Sabha and 1: Rajya Sabha).

Tenure of members of the corporation

Through **Section 5**, the following members are appointed for a term of 4 years-

(1) Director General.
(2) Mr. Chairman.
(3) Vice President.
(4) Five persons to be nominated by the Central Government.
(5) Members representing each State.
(6) Members representing each Union territory.

Power of Employees Insurance Court-The Employees Insurance Court shall function with the same powers as a civil court, including, for enforcing the provisions of the ESI Act, enforcing the attendance of witnesses, compelling the production of documents and physical evidence, administering oath and recording evidence. All costs incurred before any proceedings are at the discretion and liability of the Court.

Powers.—(1) The Corporation may call its meetings.
(2) The Corporation has the power to administer the Fund.
(3) The Corporation may accept grants-donations and gifts from the Central and State Governments.
(4) The Corporation is empowered to approve appointments by the Standing Committee for the operation of the Fund.
(5) The right to own property.
(6) The Corporation may also borrow money under **section 29 (3)**.
(7) The Corporation is competent to provide for funds for its staff or any class of them.
(8) All property acquired before the establishment of the Corporation shall vest in the Corporation.
(9) All contributions made shall be credited to the Corporation.
(10) Power to fix the rate of payment of contributions.
(11) Right to receive returns by employers and to give directions as to their form, etc.

Contribution.-The contribution payable under this Act in respect of an employee shall be called the employee's contribution and the contribution payable by the employer shall be called the employer's share. Both the above types of contributions shall be called contribution under **section 39**.

Contribution shall be paid at the rates prescribed in the First Schedule and in cases where the provisions of this Act apply to any employee or class of employees employed in any factory or in any class of factories or establishments in such a manner that they are excluded from certain benefits under this Act, they shall be required to pay contribution at such rates as the Corporation may determine in this behalf. All payments due in respect of a week shall be payable on the last day of the week and where an employee is employed for part of a week or works for two or more employers within the same week, the contribution shall be payable to both of them as prescribed in the regulations.

The chief employer shall pay the contribution of both the employer and the employed in respect of every employee, whether employed by him directly or employed by or through any competent employer. General provisions regarding payment of contribution.

(1) No employee's contribution shall be payable by or on behalf of any employee.

(2) The contribution (contribution of both the employer and the employed) shall be payable by the principal employer for each week for which the whole or any part of the week in respect of which wages are payable to the employed and not otherwise.

(3) Where wages are payable to an employed person for part of a week, the employer shall be liable to pay the full weekly contribution of both the employer and the employed person but he shall be entitled to deduct the employer's contribution from the wages of the employed person.

Manner of payment of contributions.- Subject to the restrictions contained in the provisions of this Act, the Corporation may make regulations for any matter relating to the payment and collection of contributions payable under this Act or for all matters connected with the payment and collection thereof which shall not be contrary generally to its rights already mentioned.

Cases to be decided by the court - As per **section 75** of the Employees State Laws Act 1948, the following the following types of cases are decided by the court of-

(1) Whether or not a person is an employee under this Act or is liable to pay contribution.

(2) Any person who is, or was, the principal employer in respect of an employee.

(4) A dispute relating to a direction issued by the Corporation under section 45 on reconsideration of any payment of dependant's benefit.

(3) Dispute regarding the entitlement of a person to any benefit, its amount or its duration.

(5) Claim for recovery of principal employer's contribution.

(6) Claim by the principal employer to recover contribution of any nearest employment.

(7) Claim against the principal employer under **section 68**.

(8) Claim to recover profits obtained by illegal recovery.

(9) All such claims as may be made for recovery or other such claims under this Act shall be decided by these Courts.

Question No. 7 - Briefly describe the provisions relating to health, safety and welfare in the Factories Act, 1948.

Answer- The Factories Act, 1948 is a comprehensive law covering all aspects related to factories, including approval, licensing and registration of factories, inspecting officers under the Act, health, safety, welfare, hours of work, employment of adults and minor children, annual leave and penalties. In **Section 2(m)**, a factory is defined as any premises, including its limits 1. where ten or

more employees are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is usually so carried on, or

2. Where twenty or more employees are working, or were working on any day of the previous twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is usually so carried on. Section 85 of the Act empowers the State Government to apply the Act to certain premises in which

1. If the work is being done with the help of electricity, then the number of persons employed there should be less than ten and if the work is being done without the help of electricity, then the number of persons employed there should be less than twenty, or

2. The persons employed therein are not employed by the owner but are working with the permission of or under an agreement with such owner. Accordingly, considering the danger involved, this Administration has in the year 1989 notified 41 manufacturing processes falling under the Factories Act, 1948 vide Government Order No. 35/89-LAB/G dated 12th June, 1989.

Important provisions of the Factories Act, 1948

Obtaining approval, licensing and registration of factories (section 6)-

(1) The State Government shall make rules under this Act, it shall be necessary to formally submit the plans of factories of any class or description, and also to furnish to the Chief Inspector or the State Government, the particulars of the place where the factory is situated, for construction or extension.

(2) This section requires the registration and licensing of factories as well as the payment of fees for such registration and licensing and the renewal of licences.

(3) No licence shall be issued or renewed unless the occupier gives notice to the Chief Inspector.

(4) If the State Government refuses to grant permission for the construction or site of a factory, the applicant may, within 30 days of the refusal, appeal to the Central Government.

Labour and Welfare - The term 'labour welfare' refers to the services provided to employees inside and outside the factory, such as canteens, toilets, recreation areas, housing and any other facilities that support the well-being of the employee. States that take welfare measures care about the overall well-being and productivity of their employees. Early in the process of industrialisation, social programmes for manufacturing workers did not receive adequate priority. In the past, the condition of industrial labour in India was very poor. Due to the increase in industrial activity in the second half of the twenty-first century, several attempts were made to improve the working conditions of employees through the recommendations of Royal Commissions. After becoming aware of the shortcomings and limitations of the previous Act, the Factories Act of 1948 was amended. The definition of 'factory' was expanded to include any industrial

facility employing 10 or more people that uses electricity or any industrial establishment employing more than 20 people that uses electricity does not use it, which was an important development. Other important amendments include-
(1) Raising the minimum age of children eligible for working from 12 to 14 years.
(2) Reduction of the number of working hours for children from five to four and a half hours.
(3) Prohibiting children from working between 7 p.m. and 6 a.m.

Special attention is paid to the health, safety and welfare of all types of employees.

Welfare measures-The three main components of welfare measures are occupational health care, fair working hours and fair remuneration. It refers to the overall health of a person, which includes his physical, mental, moral and emotional state. Welfare measures aim to integrate the socio-psychological demands of the workforce, special technological requirements, organisational structure and processes and the current socio-cultural environment. It promotes a culture of dedication to work in enterprises and society, ensuring happiness of employees and increased productivity.

Washing facilities (Section 42) - (1) All factories shall provide and maintain adequate suitable washing facilities for the use of employees.
(2) Separate, well-maintained facilities must be provided for male and female employees; these facilities must be easily accessible and clean.

Standards for proper and appropriate facilities for washing should be prescribed by the State Government.

Facilities for storage and drying of clothes (Section 43) - This is a specific power with the state government. It states that the state government has the power to direct manufacturers where to store the clothes of workers. They can also tell them how to dry the clothes of workers. This refers to a situation in which workers are not ready for work.

Sitting Facilities (Section 44) - All factories must provide suitable sitting facilities for all workers who have to work standing, so that they can take advantage of the opportunities for rest that may arise during the course of work.

According to the Chief Inspector, workers involved in a particular manufacturing process or working in a specific room in any factory are able to perform their jobs effectively while sitting.

First aid equipment (Section 45)- All factories must have first aid kits or cabinets stocked with the necessary supplies during all working hours, and they must be easily accessible to all manufacturing employees. Accordingly, there should be more first aid boxes or cabinets than the usual ratio of one for every 150 industrial employees, with fewer than that. The first aid box or cupboard should contain only recommended items.

During the operating hours of the factory, each first aid box or cupboard should be kept under the supervision of a specific person who should be

separately accountable for it and should be available at all times during the working hours of the factory.

Canteen (Section 46)- In any specified factory where more than 250 persons are ordinarily employed, a canteen must be provided and maintained by the occupier for the benefit of the workers in such manner as may be prescribed by the State Government. Meals must be served and prices fixed.

Shelters, latrines and dining rooms (Section 47) - Every factory employing more than 150 workers must have proper and suitable latrines or shelters and a lunch room with drinking water where the workers may eat the food brought with them and kept for their use. If a lunch room is provided, the workers must stop eating during work. The shelters or latrines must be well lit, ventilated, clean, cool and in good condition. The State Government prescribes standards.

Crèche (Section 48)- Every factory employing more than 30 women employees must have a room suitable for the use of children under the age of six years belonging to such women. Such rooms must be well furnished, well lighted and ventilated, and must be kept clean and hygienic. Also, they must be under the supervision of women who have received training in infant and child care. In addition, facilities for washing and changing clothes may also be provided for the care of the children of women workers. Any factory may be obliged to provide free milk, refreshments or both to such children. Small children may be fed by their mothers at required intervals in any industry.

Health

Sections 11-20 of Chapter II of the Act relate to the Factory Health Act, 1948.

Cleanliness (Section 11)- Every factory must be kept clean and free from drains, latrines or other nuisances. In particular:

(1) Floors, benches, stairs and corridors must be cleaned daily by sweeping or by any other means and dirt must be properly disposed of.

(2) Floors should be washed with disinfectant at least once a week.

(3) During the manufacturing process, the floor becomes moist; this should be drained out through drainage. Disposal of waste and effluents (Section 12) - Every factory should have a method for treating the wastes and effluents generated from the manufacturing process.

Ventilation and Temperature (Section 13)- (1) To ensure the comfort of workers and prevent health problems, adequate ventilation must be provided to circulate air in the factory, which must be maintained at a specific temperature.

(2) Walls and ceilings should be made of materials designed for a particular temperature and should not exceed that temperature as much as practicable.

(3) Certain precautions must be taken to protect workers in factories where the manufacturing process requires extremely high or low temperatures.

Dust and Smoke (Section 14) - Every factory shall have efficient means for removing or preventing the inhalation and accumulation of dust, smoke or other impurities which are likely to injure or offend employees employed therein.

No factory may operate an internal combustion engine unless the exhaust is directed outside, and no other internal combustion engine may be used. Additionally, precautions must be taken to avoid the build-up of fumes that could endanger the health of any workers inside the room can put.

Overcrowding (Section 16)- Factories should not be overcrowded to the extent that it harms the health of workers. All employees must have adequate space to work in the building.

Lighting (Section 17) - (1) Adequate natural, artificial or both types of lighting shall be installed and maintained in every area of a factory where employees are employed.

(2) In factories, all glass windows and skylights providing light to the work room should be sealed from the inside and should be kept clean from outside.

(3) No manufacturing process should cause strain on the eyes by the production of shadows, and all factories should have preventive measures to prevent glare due to reflection from the source of light or from smooth or polished surfaces.

Drinking Alcohol (Section 18)- (1) All factories shall have suitable establishments and maintain convenient accommodation with an adequate supply of clean drinking water.

(2) The distance between any drinking water and any washing area, urinal, latrine, spittoon, open drain carrying filth or waste, or any other source of contamination in the factory shall be 6 metres, unless the Chief Inspector approves a lesser distance in writing. The labelling shall be legible and in a language which the workers can understand.

(3) All factories employing more than 250 regular employees shall have suitable means for providing cool drinking water during hot weather.

Latrines and Urinals (Section 19)-(1) All factories shall be provided with adequate latrines and urinals of the necessary description and located at such places as are convenient and always accessible to the workers.

(2) There should be separate closed rooms for male and female employees.

These places should be thoroughly cleaned, kept clean and have adequate light and ventilation.

(3) Cleaning staff should be used to keep toilets, urinals and washing facilities clean.

Spittoons (Section 20)-(1) All factories shall have spittoons located in easily accessible places and shall be kept clean and neat.

(2) The State Government may specify the number of spittoons to be provided, their location in any factory, and the manner in which they are to be kept clean and hygienic.

(3) No one shall spit on the premises of a factory except in spittoons designed for the purpose. A notice shall be put up stating that any violation shall attract a penalty of five rupees.

Safety- Safety is covered in **Chapter IV** of the Act and **sections 21-41** of the Factories Act, 1948.

Employment of young person's on dangerous machinery (Section 23):- No young person shall be permitted to operate dangerous machinery unless he has been adequately informed of the dangers associated with the machine and the steps to be taken, and has received suitable training in working on the machine or has received adequate supervision by a person who has full knowledge and experience of the equipment.

Prohibition on employing women and children near cotton machines (Section 27):- Women and children are not permitted to work in any area of a cotton pressing facility while the cotton opener is in operation. Women and children may be employed on that side of the partition where the feed end is situated, if the inspector so specifies.

Hoists and Lifts (Section 28)- Every hoist and lift must be of sound mechanical structure, adequate strength and made of robust materials. They also need to be regularly maintained, thoroughly examined by a qualified person at least once every six months, and a register maintained for mandatory examinations. Properly designed and installed cages must enclose all hoists and lift routes to prevent people from becoming trapped between any equipment.

No more than this weight must be lifted; the maximum safe operating weight must be marked on the hoist or lift. Each hoist or lift gate must be fitted with an interlocking or other effective system that prevents the gate from opening except when landing.

Eye protection (section 35)- The State Government may require the provision of effective screens or suitable goggles for the protection of persons employed in, or in the vicinity of, any manufacturing process carried on in any factory where the eyes are at risk from exposure to excessive light or from particles or fragments thrown up during the process.

Precautions against dangerous fumes, gases, etc. (Section 36)- No person shall be required to enter or leave any room, tank, no person shall be required or permitted to enter a vat, pit, pipe, chimney or other confined space where any gas, smoke, vapor or dust is present to such an extent as to constitute a risk of entrapment of persons, unless such chamber, tank, vat, pit, pipe, chimney or other confined space is provided with adequate manholes or other effective means of egress.

Explosive or inflammable dust, gas etc. (Section 37)- Any factory which is involved in manufacturing processes which produce dust, gas, smoke or vapour which may explode on ignition shall take all practicable precautions to prevent any explosion. Effective enclosure of the plant or machinery. By removing or

preventing the accumulation of such dust, gas, smoke or vapour etc., or by otherwise excluding or effectively shutting off all possible sources of ignition.

Precautions in case of fire (Section 38)- Precautions to be taken to keep persons safe and secure in case of fire to be in place, all factories must have precautionary measures to avoid the occurrence and spread of fire, whether internal or external. The equipment and facilities required to extinguish the fire must also be accessible.

All factory workers must have access to appropriate measures, who are familiar with fire escape routes and have received adequate training on the procedure to be followed in such situations.

Question No. 8 - What defences can be taken in a claim for compensation made under the Workmen's Compensation Act, 1923? Describe.

Answer- Accident Information and Claim- 10 (1). Where an accident occurs on the premises of an employer and accident. Where an accident results in the death or serious bodily injury to a worker, the employer shall, within seven days of the date of death or serious bodily injury, send a report to the Commissioner stating the circumstances attending the death or serious bodily injury. If a worker, who has been continuously employed in any employment specified under sub-section (2) of **section 3,** ceases to be employed and within two years of the cessation of employment develops symptoms of an occupational disease specific to that employment, the employee shall be deemed to have been employed in that employment.

Section 3(2) of the Workmen's Compensation Act, 1923 deals with the employer's liability for compensation. It states that the employer is liable to pay compensation for personal injuries sustained by an employee due to an accident occurring in the course of employment. However, the employer is not liable if the injury does not cause total or partial disablement for a period exceeding three days, or if it does not result in death or permanent total disablement. The employer is also not liable if the injury is caused by-

(1) Drugs or alcohol

(2) Refusal by the employee to comply with safety measures

(3) The employee performing work that was not required and involved serious risk.

Provided that the Commissioner may, if he is satisfied that there was sufficient cause for not giving the notice or not preferring the claim within the reasonable time, entertain and decide any claim for compensation in respect of which the notice has not been sent or the claim has not been preferred within the time provided in **section 10 (1).**

The notice under **section 10(1)** shall state the following-

(1) The name and address of the injured workman,

(2) In simple terms, the cause of the accident and

(3) Date of occurrence of the accident.

10 (2) Every such notice shall give the name and address of the injured person and state in ordinary language the cause of the injury and the date of the accident, and shall be given to the employer or to any one of several employers or to any person responsible to the employer for the management. **Section 10(2)** of the Employees' Compensation Act 1923 states that every notice shall contain the name and address of the injured person. The notice must be given to the employer, any of his employees or any person responsible for the management of the business. It may be delivered personally or sent by registered post. Section 10 also covers claims for compensation and states that the Commissioner may consider a claim even if the notice is not given in time, contains any defect, or the employer has information about the accident from another source got to know.

Section 10 (3) of the Employees' Compensation Act, 1923 states that the State Government may require employers to keep a notice book for injured employees on their premises. The book must be in the prescribed form and must be readily available at all reasonable times to injured employees and to any person acting on their behalf. Notice under this section may be given by:

(1) Deliver them to the person's residence, office, or place of business.

(2) Send them by registered post.

(3) Record it in the notice book, if one is maintained.

"The State Government may require that any specified class of employers shall keep, at their premises where workmen are employed, a notice book in the prescribed form which shall be readily accessible at all reasonable times to any injured workman employed on the premises and to any person acting in good faith."

10 (4) If the injury of the employee results in his death, the employer shall, in addition to the compensation under **sub-section (1),** deposit with the Commissioner a sum of not less than five thousand rupees for payment to the eldest surviving dependent of the employee towards his expenses.

Power to require statement from employers in respect of fatal accidents-As per **section 10(A)(1)** of the Workmen's Compensation Act, 1923, if the Commissioner receives information that any employee has died while on work, If the worker died in an accident at the time of the accident, he may send a notice to the employer by registered post. The notice requires the employer to submit a reply within 30 days. The Workmen's Compensation Act of 1923 is designed to provide compensation for injuries sustained by workers in accidents. Section 10 of the Act also covers notices and claims, and states that the Commissioner may consider a claim even if it is not filed in time, has defects, or the employer knows about the accident from another source.

According to **Section 10(A)(2),** if the employer considers himself liable to deposit the amount of compensation, he shall deposit the amount of compensation in the office within thirty days of the receipt of the above notice.
As per **Section 10(A) (3),** if the employer considers that he is not liable to deposit the compensation amount, he shall specify in his disbursement the sections on which he disclaims liability.

Where the employer has so denies his liability, the Commissioner may, after due inquiry, inform any of the dependents of the deceased workman that he is free to claim compensation and may also give such other information to the dependents as he considers fit.

Mefold State Nallakot Nilgiris v. Krishnan (1985) 2 LLJ 483 (Madras) held that under **section 10(A) (4)** the Labour Commissioner cannot determine the amount of compensation suo motu. He will only send notice to the dependents to submit their claims. The Commissioner has no power to determine compensation if he has disclaimed the liability to pay compensation. In such a situation, apart from filing a writ petition under section 30 of the Act, the aggrieved party can apply for a writ petition under Article 226 of the Constitution.

Reports of fatal accidents and serious bodily injuries- Section 10B (1) of the Workmen's Compensation Act, 1923 requires the person responsible for giving notice of a fatal accident or serious bodily injury to send a report to the Commissioner within seven days. The report should contain details of the circumstances of death or injury, such as-

(1) Permanent loss of use of any limb.
(2) Permanent damage to vision or hearing.
(3) Fracture of the limb.
(4) The injured person is absent from work for more than 20 days.

However, the State Government may provide that the report may be sent to any other authority instead of the Commissioner can.

Where an employer is required by or on his behalf by any law for the time being in force to give notice to any authority of any accident occurring at his premises resulting in death or serious bodily injury, the person required to give notice, within seven days of the occurrence of the death or serious bodily injury, is required to give notice, by or on his behalf to any authority, within seven days of the occurrence of the death or serious bodily injury. Where an employer is required by or on his behalf to give notice, to any authority of any accident occurring at his premises resulting in death or serious bodily injury, the person required to give notice, by or on his behalf to any authority, within seven days of the occurrence of the death or serious bodily injury, is required to give notice, by or on his behalf to any authority, within seven days of the occurrence of the death or serious bodily injury by.

The State Government may, by notification in the Official Gazette, apply the provisions of **section 10(b)(1)** to any class of premises other than those covered by this sub-section and may specify in such notification the persons who shall send reports to the Commissioner. But nothing in section 10 shall apply to factories to which the Employees' State Insurance Act, 1948 applies.

In the decision of **S. Suppiah vs Chitraprai AIR 1957 Madras 216**, the Madras High Court has held that in case of an accident, the worker has the option to either file an application under this Act or to file a claim for compensation under any other provision of law such as Employer's Liability Act. But the worker cannot avail the benefit of both repeatedly.

The provisions of **section 10(b)** of the Workmen's Compensation Act, 1948, do not apply to factories where the provisions of the State Employees Insurance Act, 1948, are applicable.

Medical Examination.-11(1) Where an employee has given notice of an accident, he shall, if the employer offers to provide him with an examination free of cost by a qualified medical practitioner, before the expiration of three days from the time of the service of the notice, to submit himself for such examination, and Any employee who gives notice of an accident shall, if the employer offers to provide him with an examination free of cost by a qualified medical practitioner, before the expiration of three days from the time of the service of the notice, to submit himself for such examination if the employee dies at the time of service of the notice by the employer, he shall be required to submit himself to such investigation.

Section 11 of the Workmen's Compensation Act, 1923

(1) Medical examination for employees includes-

(1) Where an employee reports an accident, the employer may, within three days of receipt of the report, inform the employee

(2) May offer free testing by a qualified medical professional the employee will have to take the test.

(3) Employees who are paid semi-monthly may also be required to take periodic tests.

(4) Employers cannot require their employees to undergo testing outside the regulations.

(5) If an employee refuses to submit to an investigation or obstructs the investigation, his or her compensation rights are suspended.

Section 11(3) of the Workmen’s Compensation Act, 1923 states that if an employee voluntarily leaves his place of work without undergoing examination, his compensation rights are suspended until he returns and submits himself for examination.

Section 11(4) of the Workmen's Compensation Act, 1923 covers medical examination of employees-

(1) Where an employee reports an accident, the employer may, within three days of receipt of the report, inform the employee may offer free testing by a qualified doctor.
(2) The employee must take a test.
(3) Employees who are paid semi-monthly must also take the test when required.
(4) Employers cannot require employees to take a test unless it is in accordance with the regulations.
(5) If an employee refuses to submit to an investigation or obstructs the investigation, his or her compensation rights are suspended.

Section 11(5) of the Workmen's Compensation Act, 1923 states that the compensation credited in respect of a deceased employee shall, after any deductions made under **subsection (4),** be divided among his dependents.

Question No. 9- What is the procedure for payment of maternity benefit in case of death of a woman? Discuss.

Answer- According to **Section 7** of the Maternity Benefit Act, 1961, if a woman is entitled to maternity benefit or any other amount under this Act and she dies before receiving that amount, then the employer has to pay that amount to the person nominated by the woman. If there is no such nominee, then the employer has to pay that amount to the legal representative of the woman.

According to **Section 5 (3)** of the Maternity Benefit Act, 1961, every woman gets 12 weeks of maternity benefit. However, this section has been amended under the Maternity Benefit (Amendment) Act, 2017. According to this, now women can get a maximum of 26 weeks of maternity benefit. This does not include the time eight weeks before the estimated delivery date. If the woman has two or more children, then she will get only 12 weeks of maternity benefit. This benefit can also be availed six weeks before the estimated delivery date. Under this Act, pregnant women can take maternity leave by giving written notice to their employer. In this, they also have to tell from which date they will be absent from work. Apart from this, women can also apply for maternity leave by informing the HR of the company or by visiting the company's portal. They can also inform their employer about taking maternity leave through email.

The Act states that every woman shall be entitled to 12 weeks of maternity benefit. The Act seeks to increase this to 26 weeks. Also, as per the previous provisions, a woman could not avail the said benefit before 6 weeks from the date of expected delivery.

If the employer does not pay the outstanding maternity benefit payable after the death of the woman who has given birth to the child to the person nominated by her or her legal heir, then no excuse can be made to keep the maternity benefit of the woman's death with oneself. If the woman dies before the delivery, then it is the responsibility of the employer to pay maternity benefit till the day of her death. If the woman dies after giving birth to the child and the child survives, then maternity benefit will be payable till 6 weeks of delivery. But if both the mother

and the child die, then the benefit will be given till the last day of their survival. If the newborn child is alive at the time of the mother's death and dies after the mother's death, then maternity benefit will be payable to him for the three days he remained alive.

According to **Section 6** of the Maternity Benefit Act, 1961, if a woman is entitled to maternity benefit or any other amount under this Act, but she has not been informed, then also she will not be deprived of this benefit. In such a case, the inspector can, on his own or on the application of the woman, order the payment of that benefit or amount within the prescribed time. Under the Maternity Benefit Act, 1961, pregnant women can write a written notice to their employer She can take maternity leave by giving notice in. She will also have to tell from which date she will be absent from work. Apart from this, one can also apply for maternity leave by informing the HR of the company or by applying on the company's portal. Apart from this, an email can also be sent to the employer.

Question No. 10- Write short notes on of the following-

Answer- (1) - According to **section 2(1)(c)** of the Workmen's Compensation Act, 1923, "compensation" means compensation payable under this Act. This Act is designed to provide financial security and support to employees and their dependents by way of compensation in case of any accidental injury occurring during the course of employment. Under this Act, employers have to pay benefits to employees who become permanently or temporarily disabled due to an accident at work place. The amount of compensation payable to the employee depends on the severity of the injury caused by the accident, the monthly salary of the employee, and his age. If an employee dies in an accident during or because of employment, the minimum amount of compensation payable to his dependents is Rs 1.20 lakh and the maximum is Rs 1.50 lakh. The dependents include the widow, minor legitimate or adopted son, unmarried legitimate or adopted daughter, or widowed mother of the deceased employee.

In the decision of **Bharat Heavy Plate & Limited vs. Commissioner of Compensation (1983) 1 LLJ 477 (Allahabad)**, the Allahabad High Court has given a wide interpretation in this context. The court has stated its position that once the compensation amount is determined by the Compensation Commissioner on the basis of a medical certificate, then the earlier compensation amount cannot be denied on the basis of a subsequent certificate, even if the second certificate indicates improvement in the injured part of the worker.

(2) Dependents - According to **section 2(d)** of the Workmen's Compensation Act, 1923, compensation means compensation payable under this Act. Whereas, 'dependent' means the following relatives of the deceased employee: widow, minor legitimate or adopted son, unmarried legitimate or adopted daughter, widowed mother.

Dependent means any of the following relatives of the deceased employee, namely:-
(i) Widow, minor legitimate or adopted son, unmarried legitimate or adopted daughter or widow and
(ii) If at the time of the employee's death he or she is wholly dependent on his or her earnings, his or her son or daughter who has not attained the age of 18 years has attained the age of one year and is a nullius
(iii) If wholly or substantially dependent on the earnings of the employee at the time of his death,
(1) Category I dependents are not required to prove their dependency on the deceased employee at the time of his death. For example, a widow or any other dependent in this category may not be dependent on the earnings of the deceased employee, yet they fall within the definition of Category I dependents and can claim compensation.
The dependents belonging to this category are, if they are completely dependent on the earnings of the employee at the time of his death, his
(2) son or daughter who has attained the age of 18 years and who is disabled. The dependents belonging to the second category have to prove their physical or mental disability as well as their complete dependence on the earnings of the deceased employee. If the dependents prove the above facts, only then they fall under the definition of second category dependents and can claim compensation.
(3) Category-III dependents are those who are fully or partially dependent on the earnings of the employee at the time of his death will have to prove.

R.B. Mundhra & Co. vs. Ms. Bhawari - In this case, the court held that "a widow who is entitled to claim compensation at the time of death of her husband is not debarred by her subsequent marriage".

Laxmirani Behera vs. Commissioner of Employees' Compensation & Assistant Labour Commissioner, Balasore - In this case, the Orissa High Court held that the concubine of the deceased employee is not a widow. Hence the concubine cannot be treated as a dependent and is not entitled to compensation under ECA, 1923.
(3) Employer. - Section 2(1)(m) of the Workmen's Compensation Act, 1923 means any person or institution consisting of the following -
(1) A body of persons, whether such body is incorporated or not;
(2) Managing agent of employment
(3) The legal representative of the deceased employer, and
(4) Where the services of a worker are temporarily lent or let out to another person by the person with whom the worker has entered into a contract of service or apprenticeship, the employer means that other person while the worker continues to work for the employer. In conclusion it may be said that apart from those for whom the term 'employer' is used, some other persons may also be considered as employers in the eyes of the law.

(4) Partial Disability - The Workmen's Compensation Act, 1923 defines partial disability as "reduction in the earning capacity of an employee due to an accident sustained in the course of his employment." The Act divides partial disability into two categories: temporary and permanent.

(1) Temporary partial disability-The employee's earning capacity is reduced in the employment he was holding at the time of the accident, but not in other employment.

Permanent Partial Disability-The employee's earning capacity is reduced in whatever work he was capable of performing at the time of the accident.

In case of partial disability it is necessary that (a) an accident occurs, (b) the accident results in injury to the employee, (c) it results in permanent disability and (d) his earning capacity is permanently reduced as a result.

'Partial disablement' means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of an employee in any employment in which he was engaged at the time of the accident, of which

' resulting in disability, and where the disability is of a permanent nature, such disability as reduces his earning capacity in every employment which he was capable of carrying on at the time Provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disability.

(5) Hazardous process.-'hazardous process' means any process or operation of the type described in the First Schedule, where, unless special care is taken, the raw materials introduced into it may be hazardous; or

or intermediate or finished products, by-products, wastes or effluents thereof which-(1) causes or is related to any particular injury to the health of persons working therein, or

(2) Results in general environmental pollution.

Provided that where such a thing happens the State Government may, by notification in the Official Gazette, amend the First Schedule to add, subtract or reduce the number of any factory mentioned in it.

Question 11. Discuss the appointment, powers and functions of the Employees' Compensation Commissioner. Or Explain the appointment process, powers and functions of the Employees' Compensation Commissioner under the Workmen's Compensation Act, 1923.

Answer- Appointment of Commissioner As per the provisions of **Section 20**, the State Government can appoint any person as Workmen Compensation Commissioner for a particular area by issuing a notification in the Official Gazette. The State Government also has the right to appoint more than one Commissioner. Where there is more than one Commissioner, their functions and powers will be determined by the order of the State Government.

Functions- The functions of the Commissioner should be determined only by the order of the State Government. Since the Commissioner is a court under Section 19, his job is to consider the cases and give decisions.

Powers and Duties- Under this Act, the Compensation Commissioner has the following various powers

1. If the employer fails to pay the compensation due under this Act within one month, the Commissioner may order the recovery of the amount of such compensation along with six per cent interest thereon and a penalty up to Rs. 50 from the employer.
2. The Commissioner may reconsider any half-monthly payment due under any agreement or under an order of the Commissioner.
3. Any claim for compensation may be entertained and decided by the Commissioner if the conditions specified in section 10 are fulfilment of the same.
4. The Commissioner may, in the case of any workman of the employer dying in an accident, serve a notice on him calling for information in the prescribed form regarding such fatal accident.
5. Where an employer enters into a contract with a contractor under **section 12** for the execution of any of his works and any workman employed by such contractor is required to pay any compensation to the employer as the principal person, all questions as to the right to receive compensation from such contractor and the amount thereof shall be decided by the Commissioner.
6. The Commissioner may cause the right to receive half-monthly payments under **section 7** to be redeemed by a lump sum payment.
7. Obtaining prior sanction of the Commissioner is a pre-condition for prosecuting a person guilty under **section 18-A**.
8. Any question relating to the liability of any person to compensation and all questions relating to whether a person is a workman or not or the amount of compensation and the extent and nature of the disability shall be decided by the Commissioner under **section 19** and no civil court shall have jurisdiction to decide such questions.
9. The Commissioner may transfer any proceeding pending before him to the Commissioner of such area who has competent jurisdiction to hear and dispose of the same.
10. The Commissioner has all the powers of a civil court under the CrPC for certain matters such as taking evidence on oath and compelling the attendance of witnesses etc. and shall be deemed to be a Court for the purposes of **section 195** and **Chapter 35** of the IPC.
11. The Commissioner has the discretion to make orders under **section 26** as to all costs incidental to any proceedings before him.
12. The Commissioner may refer any question of law to the High Court for decision under **section 27**.

13. The Commissioner has the power to register agreements between the parties under **section 28**.
14. An appeal from the orders of the Commissioner as specified in **section 30** shall lie to the High Court and if such appeal is preferred by the employer, the Commissioner may withhold payment of any amount standing to his credit.
15. The Commissioner may recover from any person who is liable to pay compensation under this Act, whether under any agreement or otherwise, the amount as a dues of land revenue.

Appeal against commissioner's orders

An appeal to the High Court against the following orders of the Commissioner is provided under **section 30(1)**

1. The order by which the compensation is awarded in lump sum or fortnightly the payment is made with a view to redeem or otherwise or which rejects the lump sum amount either wholly or in part.
2. The order by which interest or penalty is imposed under **section 4(a)**.
3. The order which refused to accept the redemption of fortnightly payment.
4. An order providing for the distribution of compensation money among the dependents of a workman or by which the claim of any person to be his dependent is rejected.
5. The order admitting or rejecting a claim for the amount of penalty under the provisions of **sub-section (2)** of **section 12**, and
6. An order refusing to register a memorandum of agreement or providing for its registration subject to certain provisions.

Provided that no appeal shall lie against any order unless a substantial question of law arises there from and if the order is an order described in clause (a) above, unless the amount in dispute in the appeal is less than three hundred rupees.

There is further provision that no appeal will lie in any case where the parties have agreed to comply with the order.

Provided further that no appeal under **clause (a)** shall be filed by an employer unless the grounds of appeal are accompanied by a certificate of having deposited the amount due.

Period of limitation for appeal: According to **section 30(2),** the period of limitation for filing an appeal to the High Court against the orders of the Commissioner referred to in **section 30(1)** shall be 60 (sixty) days, that is to say, the appeal should be filed within 60 days from the date of the said orders.

Further, **sub-section (3)** of this section provides that the provisions of section 5 of the Indian Limitation Act, 1963 shall also apply to these appeals. That is, even after the expiry of the said period of limitation, the High Court may accept the appeal by condoning the delay, if the appellant has sufficient reasons for such delay and the High Court is satisfied with those reasons.

Question 12. Explain the theory of "emotional expansion" with the help of important decisions decided. OR Explain the extent of the employer's liability to provide compensation to the employees under the Employees' Compensation Act, 1923. OR Under the Workmen's (Employee) Compensation Act, 1923, the employer will be liable to pay compensation only when the accident or injury "arises out of employment" and occurs or is caused "during employment". In the light of the above statement, explain the employer's liability to provide compensation to the employees.

Answer- Employer's liability for compensation - Section 3 of the Act provides for the employer's responsibilities regarding giving compensation to the workers. This section limits the employer's liability to pay compensation and determines that this liability is subject to the provisions. The employer's liability will be subject to the following conditions-

1. Personal injury to the worker,
2. Such injury is caused by an accident,
3. Such accident has occurred due to employment and in the course of employment,

4. Result of injury - (a) in the form of death of the worker or (b) worker being partially and fully disabled for a period of more than 10 days.

In order to hold the employer responsible, the following things must be clearly proved-

1. The accident occurred in the employer's establishment or in any premises connected to it.
2. The accident occurred during the worker's working hours.
3. The accident occurred in the course of work.
4. The worker has become a victim of that accident.
5. The accident has resulted in disability which is partial or complete, permanent or temporary.
6. The worker concerned has no contributory effect- in the occurrence of the accident.

When will the employer not be liable (whether the employer is liable for compensation or not?) - He will not be liable to pay compensation to the worker in the following circumstances-

1. If such personal impairment causes total or partial disablement not to last for more than three days.
2. The employer can take the following defence for any loss suffered by the **worker other than death or permanent disablement-**

(1) The workman was under the influence of liquor or drugs at the time of the accident.

(2) The worker has wilfully disregarded any order or rule made for safety.

(3) The worker has wilfully removed any safety measures which he knew were provided or designed for the protection of the worker.

Responsibility of the employer in case of occupational diseases-Sub-section 2 of section 3 of the Act further provides that where a workman who is employed in any employment contracts a disease which is an occupational disease specified in **Schedule 3**-

(1) The contracting of such disease shall be deemed to be an injury,

(2) Such injury shall be deemed to arise out of and in the course of the employment. **Schedule 3**

Any disease specified in Part E of the Act or injury resulting from accident arising out of employment and not related to employment it will be considered in order. For this, the following provisions are made it.

(i) The person concerned has been in the service of the employer for a period of at least six months, and

(ii) The continuous period of employment is spent in relation to such employment in which

3. The disease contracted is an occupational disease specified in Part B of Schedule the condition in respect of any disease specified in **Part C** of **Schedule III** is continuous service for such period as may be specified by the Central Government in respect of each such employment.

There is no restriction so far on compensation in respect of any disease specified in Part A of the relevant Schedule.

Arising out of and during the course of employment-To recover damages caused to a worker due to an accident, it is necessary that such incident should arise out of employment and should have happened in the course of employment. The expression 'arising out of employment' used in **Section 3** implies finding out or investigating the cause of the accident. Similarly, the expression 'in the course of employment' refers to the place and time of employment. Both these expressions are more important for determining compensation because the worker will have to prove that the incident happened in the 'in the course of employment' that is, it is necessary to establish a direct relationship between the damage caused by an accident and the employment of the worker.

Arising from employment does not mean that the basis of personal injury is only the nature of employment. In fact, it means that the injury is caused in the course of employment due to a risk which is incidental to the nature of employment. If the worker had not participated in the performance of his duties towards his employment, he would not have suffered the injury. In summary, it is very important to establish a cause-effect relationship between the incident and employment.

R.B. Mundada & Co. vs. Bhanwari AIR 1970 Raj 111 - A person was employed as a truck driver by the company. Petrol was being brought by truck. The driver reported that the tank of the truck was leaking. The employer sent the driver

inside the tank for examination but there was no petrol in it at that time. The driver lit a matchstick to find the place inside which caused a fire and the driver died. The court held that the accident happened due to and in the course of the employment.

In the case of **Chairman Madras Port vs. Kamala AIR 1970 Mad 386** it was held that an accident occurring while going for food or refreshment shall be deemed to have occurred in the course of employment and the workman shall be entitled to get compensation.

In the case of **Southern Railway v. Kanagambalam (1995) 11 LLJ 231**, it was held that the death of the pointsman was caused by a culpable homicide by a stranger during the course of his employment. The court held that the death of the worker arose out of and in the course of the employment.

The main difference between 'arising out of employment' and 'in the course of employment' is that sequence indicates time, i.e. it is necessary that the accident occurred at a time when the employer's work was being carried out and 'arising out of employment' indicates that there must be some kind of connection between the employment and the accident caused by that employment as a result of which the worker suffered injury.

Theory of Emotional Expansion or Theory of Imaginary Expansion (Theory of National Extension)-The general principle regarding employment of a worker is that the employment of a worker begins when he reaches the place where he has to work and when he leaves the place of employment, he cannot be said to be engaged in employment. That is, the time taken to reach the place of employment and from that place to home cannot be included in the employment period. If a worker suffers any injury during this time, can he demand compensation from the employer? This principle has been expanded to answer this question.

The purpose of the 'Notional Extension Theory' is to extend the scope of the employer's premises so as to include any injury sustained by a worker by reason of an accident while going to his place of employment and while returning home from such place of employment after the termination of his employment.

Under **Section 3** of the Act, the employer has been made liable to pay such compensation. However, the employer will be liable only if such injury is caused during the employment and due to any accident arising out of the employment.

In the case of **St. Talens Colliery Company vs. Hevilston 1924 AC 59**, an agreement was made between the company and the railway to carry the workers of the factories, in which the workers were given passes to travel at concessional rates. One day, while catching a train, the worker died. A claim for compensation was presented on his behalf. The court invalidated the damage on the ground that the incident of injury did not occur during the employment. Because the workers were not bound to come by the same train.

In the case of **Weaver vs Tredegar Ice and Coal Company,** some workers working in the mine were trying to catch a train from the station of Nickant. One of the workers got injured. The court held that the worker is entitled to get compensation because there was no other means of transportation to and from the workplace that was the only means, so it will be considered a part of employment.

Saurashtra Salt Manufacturing Company v. Bai Bel Raja, (A.I.R. 1958 The decision of the Supreme Court in (Su. 88) serves as a guide in gaining proper understanding of the above principle. Its facts are briefly as follows. There were two ways to reach the salt manufacturing site from Porbandar. One was by boat directly and the other by land route by taking a detour. Workers returning from work in the evening boarded the boat. Due to excess load and storm, the boat sank. A demand for compensation was raised for the seven persons in it. The Compensation Commissioner and the Saurashtra High Court ordered compensation for the above incident of 12 June 1952. Their order was based on the decision that the incident occurred in the course of work. In appeal, the Supreme Court overturned it and formulated an important principle regarding liability. According to the Court, the employment of a worker does not begin until he reaches the place of employment. In this, travel from place of employment to place of employment is excluded.'

In the case of **Works Manager, Carat Wagon Shop v. Mahavir (1954) All India 132** He used to travel from Malhaur to Lucknow by special train. Instead of coming from the over bridge at Lucknow station, he used to cross the railway line from Alambagh workshop. One day at 5:30 am, while crossing the railway line to return from work, his leg was cut by a shunting engine. The court held him entitled to compensation for this and held that the incident occurred during employment.

In the case of **Manager B.E.S.T. vs. Mrs. Agnes AIR 1964 S. C. 193**, the plaintiff's husband was a driver in V.E.S.T. Bombay. He used to leave his bus at the depot and return home by another bus of the depot and for this he had this exemption. One day while returning home he met with an accident in which he died. The court held that the accident happened due to employment and in the course of employment; hence the widow of the deceased is liable to get compensation.

According to the decision of **Pratap Narayan Singh Dev vs. Shri Niwas Savata and others, (AIR 1976 SC 222)**, the liability of the employer begins as soon as the worker suffers physical injury. The liability of the employer is not limited to his establishment only. His liability is also considered to be beyond that. Liability does not arise only when an accident occurs in the establishment or at the place of work. Even if the worker meets with an accident outside it, the employer cannot get rid of his liability by saying that the accident occurred outside the

employer's place. No worker or dependent will be considered entitled to get compensation until he brings out the presence of the necessary elements.
There are two main criteria for the employer's liability to arise in the following circumstances-
1. Did the accident occur at the workplace?
2. Did it happen in sequence?

On further analysis of both the above mentioned criteria, we get to know its extensiveness. For the responsibility of the employer, the following things have to be proved:
(1) The accident occurred in the employer's establishment or in any premises connected with it, (2) the accident occurred during the worker's working hours. (3) The accident occurred in the course of work. (4) The worker has become a victim of that accident. (5) The disability has arisen as a result of the accident. (6) The disability is partial or complete, permanent or temporary. (7) There is no contributory negligence of the worker concerned in the occurrence of the accident.

What is an accident has not been defined, but it means an event over which the employer has no full control, that is, circumstances which are completely beyond the power and control of the employer. In **Janaki Ammal vs Divisional Engineer High Court Key Court (2 M.L.J.)** the meaning of accident was explained as follows: "If an occurrence is unexpected and without design on the part of the workman, it is accident."
if the person has received the wages, then his wages

Question 13. Define deduction. What are the deductions that can be validly deducted under the Payment of Wages Act, 1936?

Answer-What is Deduction? Section 7(1) of the Act states that every payment made by an employed person to an employer or his agent shall be deemed to be a deduction from wages for the purposes of this Act. But the following shall not be deemed to be a deduction-
1. Withholding annual increment or promotion,
2. by promotion to a continuous position or time scale, or by reduction from a continuous position to a time scale,
3. Suspension,

For this it is necessary that it is done as per the rules.

Authorised Deductions - As per **section 7 (2)** of the Act, which of the following deductions can be deducted from the wages of an employed person?

1. Fines - Section 8 provides that if any fine is imposed on an employed person with the prior approval of the State Government, it can be deducted from his wages. But this amount will not exceed 3 percent of the amount payable during the wage period.

If the employed person is below 15 years of age, no fine will be imposed on him. Also, the fine imposed will not be recovered after 60 days have passed

2. Deductions for absence from duty-If an employed person remains absent from work or does not perform his duties as per the terms of employment, his wages can be deducted. In the case of **Surendra Nath vs. Divisional Officer (Railway) 198 (i) L.L.J. 227**, the employees took mass leave to participate in a movement against the railway administration which was not granted. The administration deducted their wages for their absence. The court held that the deduction is valid in these circumstances.

3. Deduction for damages to or loss of goods- Any money loss which is accountable to the employed person and where such loss or damage is directly caused by his negligence, a deduction may be made from his wages. But this deduction shall not be made unless he has been given an opportunity of being heard.

4. Deduction for House Accommodation- A deduction may be made from the wages of an employed person for housing facility provided by the employer or by the Government or under the law in force.

5. Deduction for Amenities and services - If facilities or services are provided to the employed person then deduction can be made for the same.

6. Deduction for recovery of Advances- A deduction can be made for advances paid to an employed person.

7. Deduction for recovery of loans made from the welfare fund- Deduction may be made for recovery of loans made from any fund constituted for labour welfare as per the rules approved by the State Government.

8. Deduction for recovery of loans given for specified purposes for recovery of loan made for specific purpose– Deduction can be made for house construction or for any other purpose as approved by the State Government.

9. Deductor for Income Tax – Deduction of income tax payable by an employed person can be made to the extent of income tax payable.

10. Deduction by the order of the Court- deductions can also be made from the wages of an employed person by an order given by a court or other competent authority.

The following are other deductions which are called authorised deductions-

1. Deductions made towards Provident Fund.
2. Deductions made by any written authority.
3. Deductions made for payments to co-operative societies.
4. Deductions made with the consent of the employed person.
5. Deductions made for labour welfare.
6. Deduction of fees paid for membership of trade association.
7. Deduction for recovery of loss caused due to incorrect return.
8. Deduction for Fidelity Guarantee Wand.
9. Deduction to Prime Minister's Relief Fund.

Extent of deduction - The total amount of deduction under section 7(3) shall not exceed-

1. Up to 75% of the wages in cases where such deductions are made for payments to co-operative societies.
2. Up to 50% of such wages in other cases.