



WORLD TRADE ORGANIZATION



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COMPETITION ACT, 2002



LEARNING OUTCOMES

After reading this chapter, you will be able to understand:

- ❑ About prohibition of agreements and abuse of dominant position which causes or is likely to cause an appreciable adverse effect on competition
- ❑ Regulation of combinations of enterprises and persons
- ❑ About establishment of Competition Commission of India, its composition, duties, powers and functions
- ❑ To address issues to prevent practices having adverse effect on competition, to protect the interest of consumers and for matters connected therewith or incidental thereto.



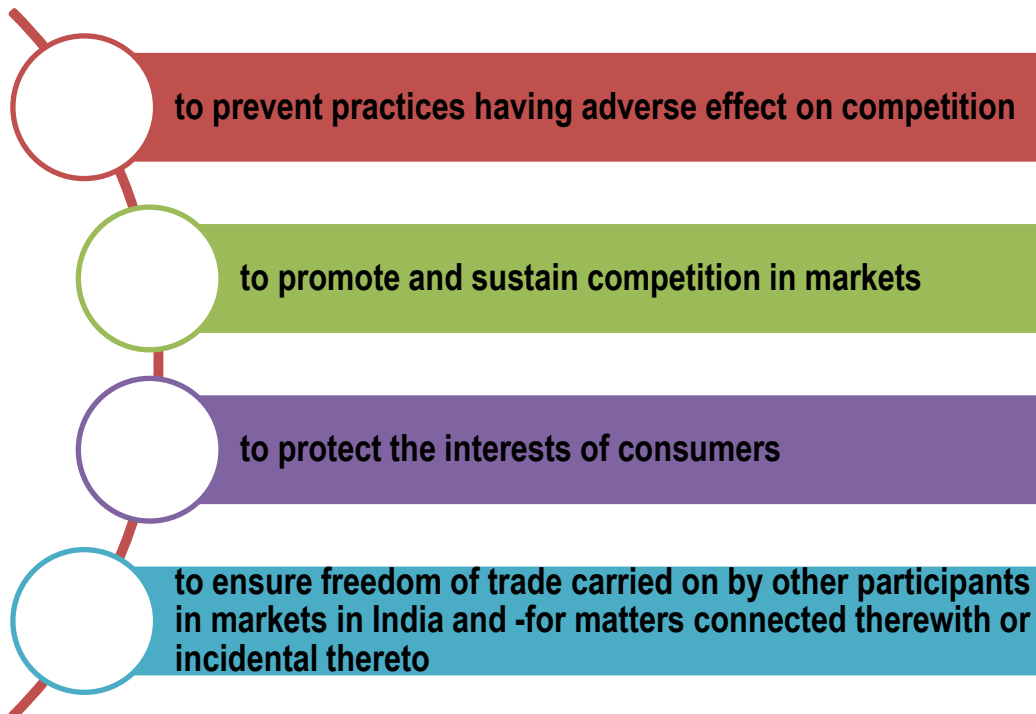
1. INTRODUCTION

Given the fact that the structure of world economy and trade has taken rapid strides and undergone vast changes, India has been taking adequate steps for integrating itself with the new changes and challenges thereby market functioning, positioning becomes effective and competitive. In this regard, Government constituted a High Level Committee on Competition Policy and Law on 15.9.1999 under the Chairmanship of Mr. S.V.S. Raghavan, to recommend a legislative framework relating to Competition Law including mergers and demergers.

The Committee submitted its report on 22nd May 2000. The Government, after considering the report and suggestions from various organizations, institutions and general public, introduced the Competition Bill in the Parliament. This Bill became an Act i.e., the Competition Act, 2002 after receiving assent from the President on 13th January 2003 and all the sections of the Act have already come into force by virtue of separate Government notifications. This Act extends to the whole of India except the State of Jammu and Kashmir.

Object behind the enactment of the Competition Act, 2002

An Act, keeping in view of the economic development of the country, was laid down to provide for an establishment of a commission with the following object:



What is Competition?

A broad definition of Competition is “a situation in a market in which firms or sellers independently stride for the buyers’ patronage in order to achieve a particular business objective, **for example** profit, sales or market share” (World Bank, 1999). A pre-requisite for a good competition is trade, trade is the unrestricted liberty of every man to buy, sell and barter, when, where and how, of whom and to whom he pleases.



For a free market to be in existence the handicap is that for a given distribution of income of those who can pay the highest price will most be able to purchase the goods regardless their relative needs. However, the real culprit is income distribution system and not the competitive system. In an unregulated free market, in certain circumstances it could be of greater benefit to the owner to withhold goods from market in order to extract a higher price. Despite the efforts to regulate prices which have been unsuccessful, the caution in a free market as compared to the problems in an unregulated market can be overcome by posturing competition by which the interest of the consumer can be protected.

Competition Policy and Law

The Competition Policy is regarded as genus, of which, the Competition Law is specie. Competition Law provides necessary powers to the Competition Commission to enforce and implement the Competition Policy. The central economic goal of the Competition Policy is the preservation and promotion of the competitive process. It is a symbolic process, which encourages efficiency in the production and allocation of goods and services over a period of time through its effects on innovation and adjustment to technological change. In conditions of effective competition, competitors will be having equal opportunities to compete for their own economic interest and therefore the quality of their outputs and resource deployment will be given top priority in order to sustain and succeed in the market by meeting consumers’ demand at the lowest possible cost.

Main Ingredients of Competition Law

The focus of the law is towards the following areas affecting competition namely:

Prohibition of certain agreements, which are considered to be anti-competitive in nature.

Such agreements [namely tie in arrangements, exclusive dealings (supply and distribution), refusal to deal and resale price maintenance] shall be presumed as anti-competitive if they cause or are likely to cause an appreciable adverse effect on competition within India.

Prohibition of Abuse of dominant position

by imposing unfair or discriminatory conditions or limiting and restricting production of goods or services or indulging in practices resulting in denial of market access or through in any other mode are prohibited.

Regulation of combinations

which cause or are likely to cause an appreciable adverse effect on competition within the relevant market in India is also considered to be void.



2. DEFINITIONS

Acquisition [Section 2(a)]

"Acquisition" means, directly or indirectly, acquiring or agreeing to acquire—

- (i) shares, voting rights or assets of any enterprise; or
- (ii) control over management or control over assets of any enterprise;

Agreement [Section 2(b)]

"Agreement" includes any arrangement or understanding or action in concert,—

- (i) whether or not, such arrangement, understanding or action is formal or in writing; or
- (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

The objective of the Competition Policy is to promote efficiency and maximising the welfare of nation and to create a business environment, which promotes healthy market competition. An agreement which prohibits an enterprise or person or their association for entering into an agreement in respect of production, supply, distribution, storage, acquisition or control of goods or services, which causes or is likely to cause an appreciable adverse effect on

competition. Such agreements entered in contravention of the above are void. These agreements are presumed to have an appreciable adverse affect on competition.

Example

An understanding has been reached among the manufacturers of cement to control the price of cement, but the understanding is not in writing and it is also not intended to be enforced by legal proceedings.

Examine whether the above understanding can be considered as an 'Agreement' with the meaning of Section 2(b) of the Competition Act, 2002.

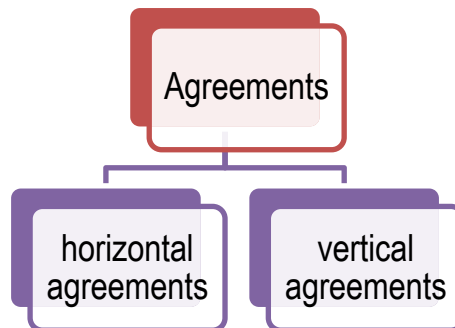
Answer

Agreement

'Agreement' includes any arrangement or understanding or action in concert:

- (i) Whether or not, such arrangement, understanding or action is formal or in writing or
- (ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. [Section 2(b)].

In view of the above definition of 'agreement', an understanding reached by the cement manufacturers to control the price of cement will be an 'agreement' within the meaning of section 2(b) of the Competition Act, 2002 even though the understanding is not in writing and it is not intended to be enforceable by legal proceedings.



Agreements may be horizontal agreements and vertical agreements.

Horizontal agreements refer to agreements among competitors and **vertical agreements** refer to an actual or potential relationship of buying or selling to each other. Horizontal agreements relating to prices, quantities, bids and market sharing are particularly anti-competitive. Vertical agreements like tie in arrangements; exclusive supply/distribution agreements and refusal to deal are also generally anti-competitive. Section 3 of the Competition Act, 2002 regulates and prohibits all types of agreements, which have the effect to restrict competition, and prevent those, which have such likely effect.

Here, **horizontal agreements** are those agreements among competitors operating at the same level in the economic process i.e. enterprises engaged in the same activity.

Example: The agreements between producers or between wholesalers or between retailers, dealing in similar kind of products.

Vertical agreements are those agreements between Non-competing undertakings operating at different levels of manufacturing and distribution process.

Example: The agreements between manufacturers of components, manufacturers of products, between producers and whole-sellers or between producers, whole-sellers and retailers.

Horizontal agreements are agreements between two or more enterprises that are at the same stage of the production chain and in the same market. Horizontal agreements and membership of cartels lead to unreasonable restrictions of competition and may be presumed to have an appreciable adverse effect on competition.

Vertical agreements are agreements between enterprises that are at different stages or levels of the production chain and therefore in different markets. An *example* of this would be an agreement between a producer and a distributor. This includes, Tie in arrangements, Exclusive Supply Agreements, Exclusive Distribution Agreements, Refusal to Deal and Resale Price Maintenance (RPM).

Appellate Tribunal [Section 2 (ba)]

It means the National Company Law Appellate Tribunal referred to in sub-section (1) of section 53A.

Cartel [Section 2(c)]

"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

The term cartel like agreement has been given an inclusive meaning. Thus, an association for the welfare of the trade or formed for any other purpose not mentioned in the aforesaid definition will not be a cartel.

It is only when an association, by agreement amongst themselves, limits control or attempts to control the production, distribution, sale or price of, or, trade in goods or provision of services, that it will be a cartel.



Example

The orange producers of Nagpur have formed an association to control the production of oranges. Examine whether it will be considered as a cartel within the meaning of Section 2(c) of the Competition Act, 2002.

Answer

As per section 2(c) of the Competition Act, 2002 the term “cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

The term “cartel” has an inclusive meaning. Thus an association formed to control the production of oranges is within the aforesaid definition of a cartel. Hence the association of orange producers of Nagpur will be considered as a cartel under the provisions of the Act.

Chairperson [Section 2(d)]

"Chairperson" means the Chairperson of the Commission appointed under sub-section (1) of section 8;

Commission [Section 2(e)]

"Commission" means the Competition Commission of India established under sub-section (1) of section 7;

Consumer [Section 2(f)]

"Consumer" means any person who—

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the



services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

It is noteworthy that the definition of consumer is substantially the same has given to the expression under section 2(d) of the Consumer Protection Act, 1986. The difference is that under clause (i), in the Competition Act, it uses the words “whether such purchase of goods is for the resale or for any commercial purpose or for personal use” in places of the words “but does include a person who obtains such goods for resale or for any commercial purpose”, as in the Consumer Protection Act. Likewise, in clause (ii), the words used in the Competition Act are “whether such hiring or availing of services is for any commercial purpose or for personal use” in place of the words “but does not include a person who avails of such services for any commercial purpose” as in the Consumer Protection Act. Thus, the interpretation of “consumer” in the Consumer Protection Act will be the same as in Competition Act. In the latter Act, “consumer” will also include a person who purchases goods for resale or for any commercial purpose or for personal use.

Example

Examine with reference to the relevant provisions of the Competition Act, 2002 the following:

Whether a person purchasing goods not for personal use, but for resale can be considered as a ‘consumer.’

Answer

Consumer: The term ‘consumer’ is defined in section 2(f) of Competition Act, 2002. Accordingly, ‘consumer’ means any person who buys any goods for a consideration, which has been paid or promised or partly paid and partly promised, whether such purchase of goods is for resale or for any commercial purpose or for personal use.

Hence, it is not necessary that a person must purchase the goods for personal use in order to be considered as a ‘consumer’ under Competition Act, 2002. Even a person purchasing goods for resale or for any commercial purpose will also be considered as a ‘consumer’ within the meaning of Section 2(f) of the Competition Act, 2002.

Director General [Section 2(g)]

"Director General" means the Director General appointed under sub-section (1) of section 16(1) and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section;

Enterprise [Section 2(h)]

"Enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution,

acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

For the purposes of this clause,—

- (a) "activity" includes profession or occupation;
- (b) "article" includes a new article and "service" includes a new service;
- (c) "unit" or "division", in relation to an enterprise, includes—
 - (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
 - (ii) any branch or office established for the provision of any service;

Here, the Department of Central Government is also considered as an enterprise. Hence, it can sue and be sued by others as a juristic person for its right and legal remedies. However, such Central Government Departments having sovereign functions of the Government, which include activities relating to atomic energy, currency, defence and space, are excluded from the definition of an enterprise.

Goods [Section 2(i)]

"Goods" means goods as defined in the Sale of Goods Act, 1930 and includes—

- (A) products manufactured, processed or mined;
- (B) debentures, stocks and shares after allotment;
- (C) in relation to goods supplied, distributed or controlled in India, goods imported into India;

Section 2(7) of the Sale of Goods Act, 1930 defines goods as "every kind of movable property other than actionable claims and money; and include stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

Example

ABC Ltd. made an initial public offer of certain number of equity shares. Examine whether these shares can be considered as 'Goods' under the Competition Act, 2002 before allotment.

Answer

Section 2(i) of Competition Act, 2002 defines 'goods' as follows:

'Goods' means goods as defined the Sale of Goods Act, 1930 and includes –

- (a) products manufactured, processed or mined;
- (b) debentures, stock and shares after allotment;
- (c) in relation to goods supplied, distributed or controlled in India, goods imported into India.

Hence, debentures and shares can be considered as 'goods' within the meaning of section 2(i) of Competition Act, 2002 only after allotment and not before allotment.

Member [Section 2(j)]

"Member" means a Member of the Commission appointed under sub-section (1) of section 8 and includes the Chairperson;

Notification [Section 2(k)]

"Notification" means a notification published in the Official Gazette;

Person [Section 2(l)]

"Person" includes—

- (i) an individual;
- (ii) a Hindu Undivided Family;
- (iii) a company;
- (iv) a firm;
- (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
- (vii) any body corporate incorporated by or under the laws of a country outside India;
- (viii) a co-operative society registered under any law relating to cooperative societies;
- (ix) a local authority;
- (x) every artificial judicial person, not falling within any of the preceding sub-clauses;

Practice [Section 2(m)]

"Practice" includes any practice relating to the carrying on of any trade by a person or an enterprise;

Prescribed [Section 2(n)]

"Prescribed" means prescribed by rules made under this Act;

Price [Section 2(o)]

"Price", in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration, which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing;

Public financial institution [Section 2(p)]

"Public financial institution" means a public financial institution specified under section 4A of the Companies Act, 1956 and includes a State Financial, Industrial or Investment Corporation;

Regulations [Section 2(q)]

"Regulations" means the regulations made by the Commission under section 64;

Relevant Market [Section 2(r)]

"Relevant Market" means the market, which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

It includes all interchangeable or substitutable goods or services of all competitors. The determination of the relevant market is a crucial aspect.

Relevant Geographic Market [Section 2(s)]

"Relevant Geographic Market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

The Relevant Geographic Market is not broad in sense. It could be drawn as narrowly as one metropolitan area or as broad as the nation as a whole. It is the geographic area in which a sole supplier of the product could profitably increase its price without causing outside suppliers to sell in that particular area.

It is an area in which the sellers of particular product or service providers operate. This type of market may be local, national, or international. It involves identification of geographical areas within which competition take place.

Relevant Product Market [Section 2(t)]

"Relevant Product Market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

Service [Section 2(u)]

"Service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;

Shares [Section 2(v)]

"Shares" means shares in the share capital of a company carrying voting rights and includes—

- (i) any security which entitles the holder to receive shares with voting rights;
- (ii) stock except where a distinction between stock and share is expressed or implied;

Statutory Authority [Section 2(w)]

"Statutory authority" means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto;

Trade [Section 2(x)]

"Trade" means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services;

Turnover [Section 2(y)]

"Turnover" includes value of sale of goods or services;

Words and Expressions [Section (z)]

"Words and Expressions" used but not defined in this Act and defined in the Companies Act, 1956 shall have the same meanings respectively assigned to them in that Act.



3. PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT POSITION AND REGULATION OF COMBINATIONS

1. Anti competitive agreements [Section 3]

It shall not be lawful for any enterprise or association of enterprises or person or association of persons to 'enter' into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, shall be presumed to have an appreciable adverse effect on competition, which—

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) directly or indirectly results in bid rigging or collusive bidding.

However, any agreement entered into by way of joint ventures, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, shall not be considered to be an anti-competitive agreement.

Bid-rigging

"Bid rigging" means any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Agreement at different stages in different markets

Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services shall be a void agreement if it causes or is likely

to cause an appreciable adverse effect on competition in India including—

- (a) tie-in arrangement - includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) exclusive supply agreement - includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) exclusive distribution agreement- includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) refusal to deal - includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) resale price maintenance - includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Restriction of rights under some Acts

Nothing contained in this section shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

- (a) the Copyright Act, 1957;
- (b) the Patents Act, 1970;
- (c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
- (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999;
- (e) the Designs Act, 2000;
- (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000;

Prohibition of export of rights

Nothing contained in this section shall restrict the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

2. Abuse of dominant position [Section 4]

Sub-section (1), prohibits abuse of dominant position by any enterprise or group. There shall be abuse of dominant position if an enterprise or a group, -

- (a) directly or indirectly, imposes unfair or discriminatory—
 - (i) condition in purchase or sale of goods or services; or
 - (ii) price in purchase or sale (including predatory price) of goods or service, or

"predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

The *unfair or discriminatory condition in purchase* or sale of goods or service referred to in sub-clause (i) and *unfair or discriminatory price* in purchase or sale of goods (including predatory price) or *service* referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

- (b) limits or restricts—
 - (i) production of goods or provision of services or market therefor; or
 - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) indulges in practice or practices resulting in denial of market access in any manner; or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

- (i) operate independently of competitive forces prevailing in the relevant market; or
- (ii) affect its competitors or consumers or the relevant market in its favour.

3. Combination [Section 5]

The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

- (a) any acquisition where—
 - (i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—

- (A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
- (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
- (ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—
 - (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
- (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—
 - (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—
 - (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
 - (ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—
 - (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or

- (c) any merger or amalgamation in which—
- (i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—
 - (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
 - (ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—
 - (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

Explanation.—For the purposes of this section,—

- (a) “control” includes controlling the affairs or management by—
 - (i) one or more enterprises, either jointly or singly, over another enterprise or group;
 - (ii) one or more groups, either jointly or singly, over another group or enterprise;
- (b) “group” means two or more enterprises which, directly or indirectly, are in a position to—
 - (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or
 - (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
 - (iii) control the management or affairs of the other enterprise;
- (c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark,

registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

Vide Notification dated 8th January 2013, in exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government exempts a banking company in respect of which the Central Government has issued a notification under section 45 of the Banking Regulation Act, 1949, from the application of the provisions of sections 5 and 6 of the Competition Act, 2002, in public interest for a period of five years from the date of publication of this notification in the Official Gazette.

Vide Notification dated 27th March, 2017, in exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002,

- (1) the Central Government, hereby exempts the enterprises being parties to —
 - (a) any acquisition referred to in clause (a) of section 5 of the Competition Act;
 - (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and
 - (c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

Where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

2. Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act.

The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical

indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government, in public interest, hereby rescinds the notification of the Government of India in the Ministry of Corporate Affairs, S.O. 674(E), dated the 4th March, 2016, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), dated the 4th March, 2016, except as respects things done or omitted to be done before such rescission.

4. Regulation of combinations [Section 6]

As per this section, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void. [Sub-section 1].

Any person or enterprise, who or which proposes to enter into a combination shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within 30 days of—

- (a) approval of the proposal relating to merger or amalgamation, referred to in section 5(c), by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
- (b) execution of any agreement or other document for acquisition referred to in section 5(a) or acquiring of control referred to in section 5(b).[Sub-section 2]

No combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders under section 31, whichever is earlier. [Sub-section 2A]

The Commission shall, after receipt of notice, deal with such notice in accordance with the provisions contained in sections 29, 30 and 31. [Sub-section 3].

The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. [Sub-section 4].

The public financial institution, foreign institutional investor, bank or venture capital fund, shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be. [Sub-section 5].

"Foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961, which is as under:

The expression "Foreign Institutional Investor" means such investor as the Central Government may, by notification in the official gazette specify in this behalf.

"Venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of section 10 of the Income-tax Act, 1961, which is as follows:

"venture capital fund" means such fund-

- (i) operating under a trust deed registered under the provisions of the Registration Act, 1908 or operating as a venture capital scheme made by the Unit Trust of India established under the Unit Trust of India Act, 1963;
- (ii) which has been granted a certificate of registration under the Securities and Exchange Board of India Act, 1992 and regulations made thereunder;
- (iii) which fulfils the conditions as may be specified, with the approval of the Central Government, by the Securities and Exchange Board of India, by notification in the Official Gazette, in this behalf;"

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government vide Notification No. S.O. 93(E) dated 8th January, 2013 exempts a banking company from the application of the provisions of sections 5 and 6 of the Competition Act, 2002, in public interest for a period of five years from the date of publication of this notification in the official gazette.

COMPETITION COMMISSION OF INDIA (PROCEDURE IN REGARD TO THE TRANSACTION OF BUSINESS RELATING TO COMBINATIONS) REGULATIONS, 2011

In exercise of the powers conferred by sub-section (1) and clauses (b), (c) and (f) of sub-section (2) of section 64 read with sub-sections (2) and (5) of section 6 of the Competition Act, 2002, the Competition Commission of India hereby makes the Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Combinations) Regulations, 2011.

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018

The Competition Commission of India (CCI), in continuation of its efforts towards simplifying and providing greater clarity on the application of the combination provisions of the Act and the Combination Regulations, has further amended the Combination Regulations on 09th

October 2018. This amendment inter alia provide certainty & transparency and expedites faster disposal of combination cases before CCI.

Vide notification dated 9th October, 2018, in exercise of the powers conferred by section 64 of the Competition Act, 2002, the CCI hereby amends the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2011 by the enforcement of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018.

Form of notice for the proposed combination

5. (1) Any enterprise which proposes to enter into a combination shall give notice of such combination to the Commission in accordance with sub-section (2) of section 6 of the Act and these regulations.

(2) The notice under sub-section (2) of section 6 of the Act, shall ordinarily be filed in Form I as specified in Schedule II to these regulations, duly filled in and accompanied by evidence of payment of requisite fee by the parties to the combination.

(3) Notwithstanding anything contained in sub-regulation (2) and without prejudice to the provisions of sub-regulation (5), the parties to the combination may, at their option, give notice in Form II, as specified in Schedule II to these regulations, preferably in the instances where—

- (a) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than fifteen per cent (15%) in the relevant market;
- (b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than twenty five per cent (25%) in the relevant market.

(3A) The parties to the combination shall give notice in Form I or Form II, as the case may be, in accordance with the notes to Form I and Form II issued by the Commission and published on its official website, from time to time.

(4) Where in the course of inquiry, it is found by the Commission that it requires additional information, the Commission may direct the parties to the combination to file such additional information:

Provided that the time taken by the parties to the combination in filing such additional information shall be excluded from the period provided in sub-section (2A) of section 6 of the Act, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

(5) Having due regard to the provisions of sub-regulations (2) and (4), in cases where the parties to the combination have filed notice in Form I and the Commission requires information in Form II to form its *prima facie* opinion whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market, it shall direct the parties to the combination to file notice in Form II as specified in Schedule II to these regulations:

Provided that the fee already paid by the parties to the combination while filing notice in Form I shall be reduced from the fee payable for filing notice in Form II.

Provided further that the time period mentioned in sub-section (2A) of section 6 of the Act, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations shall commence from the date of receipt of notice in Form II.

(6) If the requisite details are not available for any of the columns in Form I or Form II, the date on which they may be submitted should be clearly indicated against those columns, by the parties to the combination:

Provided that the time taken by the parties to the combination to submit the requisite details shall be excluded from the period provided in *sub-section (2A) of section 6 of the Act*, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

(7) The reference to the 'board of directors' in clause (a) of sub-section (2) of section 6 of the Act, shall mean and include,—

- (a) the individual himself or herself including a sole proprietor of a proprietorship firm;
- (b) the karta in case of a Hindu Undivided Family (HUF);
- (c) the board of directors in case of a company;
- (d) in case of a corporation established by or under any Central, State or an association of persons or a body of individuals, whether incorporated or not, in India or outside India or anybody corporate incorporated by or under the laws of a country outside India or a cooperative society registered under any law relating to cooperative societies or a local authority, the person or the body so empowered by the legal instrument that created the said bodies;
- (e) in the case of a firm, the partner(s) so authorized;
- (f) in the case of any other artificial juridical person not falling within any of the preceding sub-clauses, by that person or by some other person competent to act on his behalf.

(8) The reference to the 'other document' in clause (b) of sub-section (2) of section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets.

Provided that if the acquisition is without the consent of the enterprise being acquired, any

document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights shall be the 'other document'.

Provided further that where a public announcement has been made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the "other document".

(9) Where, in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.

Filing of details of acquisition under sub-section (5) of section 6 of the Act

6. (1) The details of acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan or investment agreement, shall be filed without any fee in Form III, along with a certified copy of the loan agreement or investment agreement referred to in sub-section (5) of section 6 of the Act.

(2) The duly filled in Form III, along with one copy and electronic version thereof, shall be delivered to the Commission at the address published on its official website.

(3) Without prejudice to the provisions of the Act, where details of acquisition filed in Form III under sub-regulation (1) are received in the Commission beyond the time limit mentioned in sub-section (5) of section 6 of the Act, the Commission may admit such details of acquisition in Form III.

Belated notice

7. Where a notice filed in Form I or Form II under sub-regulation (2) or (3) of regulation 5 of these regulations is received in the Commission beyond the time limit mentioned in sub-section (2) of section 6 of the Act, the Commission may, without prejudice to other provisions including that of section 43A of the Act, admit such notice.

Failure to file notice

8. (1) Where the parties to a combination fail to file notice under sub-section (2) of section 6 of the Act, the Commission may under sub-section (1) of section 20 of the Act, upon its own knowledge or information relating to such combination, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition within India.

(2) Where the Commission decides to commence an inquiry, referred to in sub-regulation (1), the Commission, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, shall direct the parties to the combination to file notice in Form I or Form II, as decided by the Commission.

(3) The notice, referred to in sub-regulation (2), shall be filed, within 30 days of receipt of communication from the Commission, by the parties to the combination.

Obligation to file the notice

9. (1) In case of an acquisition or acquiring of control of enterprise(s), the acquirer shall file the notice in Form I or Form II, as the case may be, which shall be duly signed by the person(s) as specified under regulation 11 of the Competition Commission of India (General) Regulations, 2009.

Provided that in case of a company, apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009, Form I or Form II may also be signed by any person duly authorised by the company.

(2) In case the enterprise is being acquired without its consent, the acquirer shall furnish such information as is available to him, in Form I or Form II, as the case may be, relating to the enterprise being acquired.

Provided that all information required to be filed, relating to the enterprise being acquired shall be filed with the Commission within fifteen days from filing of the notice and in case the acquirer is not in a position to furnish all the required information in Form I or Form II, as the case may be, relating to the enterprise being acquired, the Commission may direct the enterprise being acquired to furnish such information as it deems fit and the time taken by the parties to the combination or the acquired enterprise, as the case may be, in furnishing the required information including document(s) shall be excluded from the period provided in sub-section (2A) of section 6 of the Act, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

(3) In case of a merger or an amalgamation, parties to the combination shall jointly file the notice in Form I or Form II, as the case may be, duly signed by the person(s) as specified under regulation 11 of the Competition Commission of India (General) Regulations, 2009.

Provided that in case of a company, apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009, Form I or Form II may also be signed by any person duly authorised by the company.

(4) Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination.

(5) The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded.

Procedure for filing notice

13. (1) The duly filled in notice under regulation 5 or regulation 8 of these regulations along with one copy and an electronic version thereof shall be delivered to the Commission at the address published on its official website.

Provided that if the parties to the combination request confidentiality of information or document(s) under sub-regulation (1) of regulation 30 of these regulations, such request may be filed as per the procedure laid down in the Competition Commission of India (General) Regulations, 2009, along with a duly filed in public version of the notice and an electronic version thereof.

(1A) A summary of the combination, not containing any confidential information, in not less than 2000 words, comprising inter alia the details regarding: (a) the products, services and business(es) of the parties to the combination; (b) the values of assets/turnover for the purpose of section 5 of the Act; (c) the respective markets in which the parties to the combination operate; (d) the details of agreement(s)/other documents and the board resolution(s) executed/passed in relation to the combination; (e) the nature and purpose of the combination; and (f) the likely impact of the combination on the state of the competition in the relevant market(s) in which the parties to the combination operate, along with nine copies and an electronic version thereof shall be separately given while delivering the notice under sub-regulation (1).

(1B) A summary of the combination, not containing any confidential information, in not more than 500 words, comprising details regarding: (a) name of the parties to the combination; (b) the type of the combination; (c) the area of activity of the parties to the combination; and (d) the relevant market(s) to which the combination relates, along with an electronic version thereof shall be separately given while delivering the notice under sub-regulation (1). The summary submitted under this sub-regulation shall be published on the website of the Commission.

(2) All responses or other documents required to be filed before the Commission consequent to the filing of the notice under regulation 5 or regulation 8 of these regulations shall also be filed as per the procedure contained in sub-regulation (1):

Provided that for the purposes of this regulation, the Secretary may through public announcement inform the procedure for electronic filing, increase or decrease the number of copies or vary the format in which the electronic version is to be filed.

Scrutiny of notice

14. (1) The notice filed under regulation 5 or regulation 8 of these regulations shall not be valid and unless it is complete and in conformity with these regulations.

(2) The Secretary shall issue an acknowledgement of the receipt of notice.

(2A) Notwithstanding anything contained in sub-regulation (2), the Commission, may, after recording reasons, invalidate a notice filed under regulation 5 or regulation 8 of these regulations when it comes to the knowledge of the Commission that such notice is not valid as per sub-regulation (1) and, in that case, the Secretary shall convey the decision of the Commission to the parties to the combination within seven working days of such decision of the Commission:

Provided that the Commission may give an opportunity of being heard to the parties to the combination in accordance with regulation 24 of these regulations before deciding to invalidate a notice:

Provided further that the period between the commencement of proceedings under sub-regulation (2A) of regulation 14 of these regulations till the decision of Commission regarding validity of the notice, shall be excluded from the period specified in sub-section (2A) of section 6 of the Act, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

(3) Where the information or document(s) contained in the notice under regulation 5 or regulation 8 of these regulations or any response filed pursuant to these regulations is incomplete in any respect, the parties to the combination may be asked to remove such defect(s) or furnish the required information including document(s).

(4) The Secretary shall place the proof of service of communication as referred to in sub-regulation (3) to the parties to the combination on record.

(5) The parties shall comply with the directions as referred to in sub-regulation (3) within the time specified by the Commission and in the case of the notice filed under regulation 5 the time taken by the parties in removing such defects or furnishing the required information including document(s) shall be excluded from the period provided in sub-section (2A) of section 6 of the Act, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations

(6) In case the parties fail to remove the defects or fail to furnish the required information including documents(s), within the time specified, the notice filed under regulation 5 or regulation 8 of these regulations shall not be treated as a valid notice.

Computation of time limit

15. Subject to the provisions of these regulations, the time period under sub-section (11) of section 31 of the Act shall commence from the date of receipt of notice, in writing, filed under regulation 5 of these regulations.

Intimation of any change

16. (1) The parties to the combination having filed a notice under regulation 5 or regulation 8 of these regulations, shall inform the Commission of any change in the information provided in the notice to the Commission at the earliest during the continuation of the proceedings under the Act.

(2) The Secretary shall place the information relating to any change in the notice before the Commission not later than the third working day of its receipt in the Commission.

(3) The Commission shall assess the significance of the information relating to that change and, if satisfied, take on record the information received.

(4) Where the Commission is of the view that the change is likely to affect the factors for the determination of the appreciable adverse effect on competition significantly, it may, after giving an opportunity of being heard and after recording reasons, treat the notice already filed as not valid.

(5) Where the Commission has held a notice to be not valid under sub-regulation (4), the Secretary shall convey the decision of the Commission to the parties to the combination within seven working days of the decision of the Commission:

Provided that no additional fee shall be payable if a notice is filed again by the parties to the combination for the same transaction within a period of thirty days from the date of communication of the decision of the Commission.

Withdrawal and refiling of notice.

16A. (1) At any time prior to the issuance of notice under sub-section (1) of section 29 of the Act, the Commission may on the request of the parties to the combination allow withdrawal and refiling of the notice given under regulation 5 or regulation 8 of these regulations.

(2) In case of withdrawal of notice under sub-regulation (1), the fee already paid in respect of such notice shall be adjusted against the fee payable in respect of new notice given by the parties to the combination provided the new notice is given within three months from the date of withdrawal.

Termination of proceedings

17. The proceedings under this Act relating to the combinations shall be terminated upon,—

- (a) receiving an intimation from the person(s) or enterprise(s) who filed the notice to the effect that the proposed combination will not take effect;
- (b) passing of an order by the Commission under section 31 of the Act.

Provided that if the approval of the Commission is conditional upon the parties to the combination carrying out modification to the combination, the proceedings shall terminate upon acceptance of the compliance report by the Commission under regulation 26 of these regulations.

Mode of service of notice(s), etc.

18. Save as otherwise provided in the Act or in these regulations, the service of any notice excluding the notice under sub-section (2) of section 6 of the Act, or intimation to any person or enterprise under these regulations shall be effected in the manner as provided in regulation 22 of the Competition Commission of India (General) Regulations, 2009 or by electronic transmission as considered appropriate by the Commission.

Prima facie opinion on the combination

19. (1) The Commission shall form its *prima facie* opinion under sub-section (1) of section 29 of the Act, on the notice filed in Form I or Form II, as the case may be, as to whether the combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India, within thirty working days of receipt of the said notice.

(2) Before the Commission forming an opinion under sub-section (1) of section 29 of the Act, the parties to the combination may offer modification to the combination and on that basis, the Commission may approve the proposed combination under sub-section (1) of section 31 of the Act:

Provided that where modification is offered by the parties to the combination, the additional time, not exceeding fifteen days, needed for evaluation of the offered modification, shall be excluded from the period provided in sub-regulation (1) of this regulation, sub-section (2A) of section 6 of the Act and sub-section (11) of section 31 of the Act.

Calling for a report from the Director General

20. (1) After receipt of the response to the notice to show cause from the parties to the combination under sub-section (1) of section 29 of the Act, the Commission may decide to call for a report from the Director General under sub-section (1A) of section 29 of the Act within the time as specified by the Commission.

(2) The Secretary shall convey the direction of the Commission under sub-regulation (1) to the Director General, along with copy of the notice filed by the parties to the combination with all other documents, materials, affidavits, statements, which have been filed or are otherwise available with the said notice, the notice to show cause to the parties to the combination and response of the parties to the same.

Report by the Director General

21. (1) The Director General shall include in his report the basis of having reached the conclusions therein together with all evidences or documents or statements collected during the investigation and analysis thereof;

(2) Two copies of the report of the Director General duly signed on each page by the Director General, or his authorized officer, along with an electronic version in document format, shall be forwarded to the Secretary within the time specified by the Commission:

Provided that the Secretary may increase or decrease the number of copies of the report and may permit electronic transmission of the same.

Publication of the details of the combination

22. (1) Where the Commission under sub-section (2) of section 29 of the Act is of the *prima facie* opinion that the combination has caused or is likely to cause appreciable adverse effect on competition within the relevant market in India, the Secretary shall, within four working days of such decision convey the direction of the Commission to the parties to the combination, to publish the details of the combination within ten working days of the date of such direction:

(2) The details of combination shall be published by the parties in Form IV, as specified in Schedule II to these regulations.

(3) The parties shall submit the details of combination to be published under sub-regulation (2) to the Commission before its publication and the Commission may host the same on its official website.

(4) The details of the combination to be published under sub-regulation (2) shall, also be hosted by the parties on the websites of their respective enterprises not later than the time specified in sub-regulation (1).

(5) The parties shall publish the details of the combination under sub-regulation (2), not later than the time specified in sub-regulation (1), in all India editions of four leading daily newspapers including at least two business newspapers.

Proof of publication

23. The parties to the combination shall submit copies of publication, referred to in regulation 22, to the Secretary, not later than the fifteenth day of the direction of the Commission for publication of the details of the combination.

Appearance of the parties before the Commission

24. Where the Commission deems it necessary to give an opportunity of being heard to the parties to the combination before deciding to deal with the case in accordance with the

provisions contained in section 31 of the Act, the Secretary shall convey its directions to the said parties, to appear before it by giving a notice of such period as directed by the Commission.

Modification to the proposed combination

25. (1) Where the Commission is of the opinion that combination has or is likely to have appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination to the parties to such combination.

(1A) Along with their response to the notice issued under sub-section (1) of section 29 of the Act, the parties to the combination may offer modification to address the prima facie concerns in the said notice and on that basis, the Commission may approve the proposed combination under sub-section (1) of section 31 of the Act:

Provided that in such a case, the additional time, not exceeding fifteen days, needed for evaluation of the modification offered, shall be excluded from the period provided in sub-section (2A) of section 6 of the Act, sub-section (2) of section 29 of the Act and sub-section (11) of section 31 of the Act.

(2) Where the parties to the combination have accepted the modification proposed by the Commission under sub-section (3) of section 31 of the Act or the Commission agrees with the amendment to the proposed modification by the parties and approves the combination under sub-section (7) of section 31 of the Act or the parties, in terms of the provisions of sub-section (8) of section 31 of the Act, accept the modification proposed by the Commission under sub-section (3) of section 31 of the Act, the parties to the combination shall carry out such modification as per the terms and conditions and within the period as may be specified by the Commission and submit an affidavit to that effect.

(3) Where the parties accept the modification proposed by the Commission under sub-section (3) of section 31 of the Act or the Commission agrees with the amendment submitted by the parties under sub-section (6) of section 31 of the Act, it shall by order, approve the combination.

(4) If the parties to the combination fail to accept the modification proposed by the Commission within the time referred to in sub-section (6) of section 31 of the Act or within a further period referred to in sub-section (8) of section 31 of the Act, the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of the Act.

Compliance by the parties for carrying out modification

26. (1) The modification referred to in regulation 25 of these regulations shall be carried out by the parties to the combination within the period as may be specified by the Commission.

(2) The parties to the combination shall, upon completion of modification, file a compliance report for the actions required for giving effect to the combination before the Secretary within seven days of such completion.

(3) In case the parties to the combination fail to file the compliance report under sub-regulation (2), the Secretary shall place the matter of such non-compliance before the Commission for appropriate directions.

Appointment of independent agencies to oversee modification

27. (1) Where the Commission is of the opinion that the implementation of the modifications to the proposed combination needs supervision, it may appoint agencies to oversee such implementation, on such terms and conditions as may be determined by the Commission (2) The agencies appointed under sub-regulation (1) shall be independent of the parties to the combination having no conflicts of interest. Such independent agencies referred to in this regulation may include an accounting firm, management consultancy, law firm, any other professional organization, or part thereof, or independent practitioners of repute.

(3) The agencies appointed under sub-regulation (1) shall carry out the responsibilities as specified by the Commission from time to time.

(4) The agencies appointed under sub-regulation (1) shall submit a report to the Commission upon completion of each of the actions required for carrying out the modification.

(5) The payment to the agencies appointed under sub-regulation (1) shall be made by the parties to the combination by depositing it with the Commission or as may be directed by the Commission.

Orders of the Commission

28. (1) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India, it shall pass an order under sub-section (2) of section 31 of the Act that the combination shall not take effect.

(2) Where the Commission is of the opinion that the combination does not or is not likely to have an appreciable adverse effect on competition, it shall pass an order under sub-section (1) of section 31 of the Act, approving the combination.

(3) Where the Commission approves the combination with modification, the order of the Commission approving the combination shall specify the terms, conditions and the time-frame for all the actions required for giving effect to the combination.

(4) Where the parties to the combination fail to carry out the modification accepted by them within the stipulated time limit, the Commission shall issue appropriate directions.

(5) The Secretary shall communicate to the parties to the combination, the decision of the Commission under sub-regulation (1) or (2) or (3) or (4) within seven days of such decision.

(6) Having due regard to the provisions contained in sub-section (11) of section 31 of the Act, the Commission shall endeavour to pass an order or issue direction in accordance with sub-section (1) or sub-section (2) or sub-section (7) of section 31 of the Act within one hundred and eighty days of filing of the notice under sub-section (2) of section 6 of the Act.

(7) Subject to the provisions of section 57 of the Act, and regulation 30 of these regulations, the orders passed by the Commission under section 31 of the Act shall be published on its website.

Request for confidentiality

30. (1) Any request for confidentiality of information or documents submitted during the investigation shall be duly considered having due regard to the procedure laid down in the Competition Commission of India (General) Regulations, 2009, as amended from time to time.

(2) The request under sub-regulation (1) shall clearly state the reasons, justification and implications for the business of the parties to the combination so that all relevant factors may be considered by the Commission while taking decision in the matter.

(3) The parties requesting for confidentiality shall file an affidavit as specified in regulation 42 of the Competition Commission of India (General) Regulations, 2009 stating that the conditions prescribed in regulation 35 of the Competition Commission of India (General) Regulations, 2009 are satisfied.

Overriding effect

32. The provisions of these regulations shall have effect in all matters relating to combinations notwithstanding anything inconsistent therewith contained in any other regulations framed under the Act.



4. COMPETITION COMMISSION OF INDIA

Establishment of Commission [Section 7]

Section 7 provides for the establishment of the Competition Commission of India. The Commission shall be a body corporate by the aforesaid name having perpetual succession and a common seal with power to acquire, hold and dispose of property and to contract and shall sue or be sued.

The place of head office of the Commission shall be decided by the Central Government.

Further, the Commission may establish offices at other places in India.

Composition of Commission [Section 8]

The Commission shall consist of the Chairperson and not less than two and not more than six other Members, to be appointed by the Central Government.

The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accounting, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

The Chairperson and other members shall be whole time members.

Selection Committee for Chairperson and other Members of the commission [Section 9]

The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

(a)	the Chief Justice of India or his nominee	----	Chairperson;
(b)	the Secretary in the Ministry of Corporate Affairs	----	Member;
(c)	the Secretary in the Ministry of Law and Justice	----	Member;
(d)	two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy.	----	Members.

The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

Term of office of Chairperson and other Members [Section 10]

The Chairperson and every other Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment.

However, no Chairperson or other Member shall hold office as such after he has attained the age of sixty-five years.

As per sub-section 2, any vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 9.

The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed. [sub-section 3]

In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office. [Sub-section 4]

When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions. [Sub-section 5]

Example

Hon'ble Justice Mr. HCJ, a retired High Court Judge, attained the Age 61 years on 31st December, 2004. The Central Government appointed him as the Chairperson of the Competition Commission of India with effect from 1st January, 2005. You are required to state, with reference to the provisions of the Competition Act, 2002, the term for which he may be appointed as Chairperson of the Competition Commission of India. Whether he can be reappointed as such and till when he can remain as Chairperson of the Competition Commission of India?

Answer

According to section 10(1) of the Competition Act, 2002, the Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment.

Provided that no Chairperson or other Member shall hold office as such after he has attained the age of sixty five years.

Based on the above provisions of the Competition Act, 2002, it can be concluded that Hon'ble retired Justice Mr. HCJ can be appointed as the Chairperson of the Competition Commission of India by the Central Government initially for a period of five years and he can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 65 years as on 31st December, 2008, he will have to step down from the post on his attaining the age of 65 years.

Resignation, removal and suspension of Chairperson and other members [Section 11]

The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office.

However, the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest. [Sub-section 1]

As per Sub-section 2, the Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson or Member, as the case may be,—

(a) is, or at any time has been, adjudged as an insolvent; or

(b) has engaged at any time, during his term of office, in any paid employment, or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or

(f) has become physically or mentally incapable of acting as a Member.

According to Sub-section 3, no Member shall be removed from his office on the ground specified in clause (d) or clause (e) of sub-section 2, unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

Restriction on employment of Chairperson and other Members in certain cases [Section 12]

The Chairperson and other Members shall not for a period of two years from the date on which they cease to hold office, accept any employment in, or be connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission.

However, nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956.

Administrative powers of Chairperson [Section 13]

The Chairperson shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Commission. The Chairperson may also delegate such of his powers relating to administrative matters of the Commission, as he may think fit, to any other Member or officer of the Commission.

Salary and allowances and other terms and conditions of service of Chairperson and other Members [Section 14]

The salary, and the other terms and conditions of service, of the Chairperson and other Members, including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance (expenses of living) and medical facilities shall be such as may be prescribed and the same shall not be varied to their disadvantage after their appointment.

Vacancy, etc. not to invalidate proceedings of Commission [Section 15]

Any act or proceeding of the Commission shall not be invalidated merely on the ground of:

- (a) any vacancy in, or any defect in the constitution of, the Commission; or
- (b) any defect in the appointment of a person acting as a Chairperson or as a Member; or
- (c) any irregularity in the procedure of the Commission not affecting the merits of the case.

Appointment of Director General, etc. [Section 16]

The Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.

The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed.

Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.

The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers or other employees, shall be such as may be prescribed.

The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

Secretary and officers and other employees of Commission [Section 17]

The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

The salaries and allowances payable to, and other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.

The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act.



5. DUTIES, POWERS AND FUNCTIONS OF COMMISSION

Duties of Commission [Section 18]

Duty of the Commission

to eliminate practices having adverse effect on competition,

to promote and sustain competition in markets in India,

to protect the interests of consumers and

to ensure freedom of trade carried on by other participants in markets in India.

The Commission may for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country.

Inquiry into certain agreements and dominant position of enterprise [Section 19]

The Commission is empowered to inquire into any alleged contravention of the provisions contained in section 3(1) or section 4(1) either on its own motion or on:—

- (a) receipt of any information in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
- (b) a reference made to it by the Central Government or a State Government or a statutory authority.

Powers and Functions of the Commission

1. **Appreciable Adverse effect:** The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition, have due regard to all or any of the following factors, namely:—
 - (a) creation of barriers to new entrants in the market;
 - (b) driving existing competitors out of the market;
 - (c) foreclosure of competition by hindering entry into the market;
 - (d) accrual of benefits to consumers;
 - (e) improvements in production or distribution of goods or provision of services;
 - (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

2. **Dominant position of enterprise:** The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not, have due regard to all or any of the following factors, namely:—
 - (a) market share of the enterprise;
 - (b) size and resources of the enterprise;
 - (c) size and importance of the competitors;
 - (d) economic power of the enterprise including commercial advantages over competitors;
 - (e) vertical integration of the enterprises or sale or service network of such enterprises;
 - (f) dependence of consumers on the enterprise;
 - (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
 - (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
 - (i) countervailing buying power;
 - (j) market structure and size of market;
 - (k) social obligations and social costs;

- (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
 - (m) any other factor which the Commission may consider relevant for the inquiry.
- (3) **Relevant Market:** For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".
- (4) **Relevant Geographic Market:** The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—
- (a) regulatory trade barriers;
 - (b) local specification requirements;
 - (c) national procurement policies;
 - (d) adequate distribution facilities;
 - (e) transport costs;
 - (f) language;
 - (g) consumer preferences;
 - (h) need for secure or regular supplies or rapid after-sales services.
- (5) **Relevant Product Market:** While determining the "relevant product market", the Commission shall have due regard to all or any of the following factors, namely:—
- (a) physical characteristics or end-use of goods;
 - (b) price of goods or service;
 - (c) consumer preferences;
 - (d) exclusion of in-house production;
 - (e) existence of specialised producers;
 - (f) classification of industrial products.

Inquiry into combination by Commission [Section 20]

The Commission may, upon its own knowledge or information relating to acquisition referred to in section 5(a) or acquiring of control referred to in section 5(b) or merger or amalgamation referred to in section 5(c), inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India.

Further, the Commission shall not initiate any inquiry after the expiry of one year from the date on which such combination has taken effect.

The Commission shall, on receipt of a notice under section 6(2) inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.

Notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, by notification, enhance or reduce, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover, for the purposes of that section.

The Ministry of Corporate Affairs vide Notification No. S.O. 480(E) dated 4th March, 2011 enhanced on the basis of the wholesale price index, the value of assets and the value of turnover, by fifty percent for the purposes of Section 5 of the Competition Act, 2002.

Revised threshold for the purpose of section 5 of the Competition Act, 2002 was made vide Notification No. S.O. 675(E) dated March 4, 2016. Accordingly, at present revised thresholds are as under:

		Assets		Turnover
Enterprise level	India	> INR 2000 crore	OR	> INR 6000 crore
	Worldwide (with India component)	>USD 1 bn with at least INR 1000 crore in India		>USD 3 bn with at least INR 3000 crore in India
	OR			
Group Level	India	> INR 8000 crore	OR	> INR 24000 crore
	Worldwide (with India component)	> USD 4 bn with at least INR 1000 crore in India		> USD 12 bn with at least INR 3000 crore in India

For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:—

- (a) actual and potential level of competition through imports in the market;
- (b) extent of barriers to entry into the market;
- (c) level of combination in the market;

- (d) degree of countervailing power in the market;
- (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- (f) extent of effective competition likely to sustain in a market;
- (g) extent to which substitutes are available or are likely to be available in the market;
- (h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- (i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- (j) nature and extent of vertical integration in the market;
- (k) possibility of a failing business;
- (l) nature and extent of innovation;
- (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Reference by statutory authority [Section 21]

It provides that in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.

Also any statutory authority may suo motu make such a reference to the Commission.

On receipt of a reference the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion.

Reference by Commission [Section 21 A]

Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority.

The Commission may, *suo motu*, make such a reference to the statutory authority.

On receipt of a reference the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefore on the issues referred to in the said opinion.

Meetings of Commission [Section 22]

The Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations.

The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting.

All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote provided that the quorum for such meeting shall be three Members.

Procedure for inquiry under Section 19 [Section 26]

This section lays down the detailed procedure for any inquiry initiated *suo motu* by the Commission and various complaints and references referred to in section 19 of the Act.

The detailed procedure is as follows:

- (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter.

If the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

- (2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- (3) The Director General shall, on receipt of direction submit a report on his findings within such period as may be specified by the Commission.

- (4) The Commission may forward a copy of the report to the parties concerned.
- In case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report to the Central Government or the State Government or the statutory authority, as the case may be.
- (5) If the report of the Director General recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.
- (6) If, after consideration of the objections and suggestions if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- (7) If, after consideration of the objections or suggestions if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
- (8) If the report of the Director General recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

Orders by Commission after inquiry into agreements or abuse of dominant position [Section 27]

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

- (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
- (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

In case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

- (c) Omitted
- (d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- (e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any:
- (f) Omitted
- (g) pass such other order or issue such directions as it may deem fit.

While passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

Division of enterprise enjoying dominant position [Section 28]

The Commission, may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. The order may provide for all or any of the following matters, namely:—

- (a) the transfer or vesting of property, rights, liabilities or obligations;
- (b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
- (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) Omitted.
- (e) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
- (f) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
- (g) any other matter which may be necessary to give effect to the division of the enterprise.

Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.

Procedure for investigation of combination [Section 29]

- (1) **Notice to parties:** Where the Commission is of the *prima-facie* opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

After receipt of the response of the parties to the combination under sub-section (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.

- (2) **Directions to parties to publish details:** The Commission, if it is *prima facie* of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, or the receipt of the report from the Director General whichever is later direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. [Sub-section 2].
- (3) **Invitation to affected party:** The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published.
- (4) **Additional information:** The Commission may, within fifteen working days from the expiry of the period specified before, call for such additional or other information as it may deem fit from the parties to the said combination.

The additional or other information called for by the Commission shall be furnished by the parties to the combination within fifteen days from the expiry of the above specified period.

After receipt of all information and within a period of forty-five working days from the expiry of the period for additional information, the Commission shall proceed to deal with the case of accordance within the provisions contained in Section 31.

Procedure in case of notice under sub-section 2 of section 6 [Section 30]

Where any person or enterprise has given a notice under 6(2), the Commission shall examine such notice and form its *prime facie* opinion and proceed as per provisions contained in Section 29.

Orders of Commission on certain combinations [Section 31]

The Commission can issue orders on certain combinations.

- (1) **Approval of combination:** Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given of section 6(2). [Sub-section 1]
- (2) **Direction:** Where the Commission is of the opinion that the combination has, or is likely to have an appreciable adverse effect on competition, it shall direct that the combination shall not take effect. [Sub-section 2]
- (3) **Modification:** Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination. [Sub-section 3]

The parties, who accept the modification proposed by the Commission under sub-section (3), shall carry out such modification within the period specified by the Commission. [Sub-section 4]

If the parties to the combination, who have accepted the modification, fail to carry out the modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and the Commission shall deal with such combination in accordance with the provisions of this Act. [Sub-section 5]

- (4) **Amendment to modification:** If the parties to the combination do not accept the modification proposed by the Commission under sub-section (3), such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission under that sub-section. [Sub-section (6)]

If the Commission agrees with the amendment submitted by the parties under sub-section (6), it shall, by order, approve the combination. [Sub-section 7]

If the Commission does not accept the amendment submitted under sub-section (6), then, the parties shall be allowed a further period of thirty working days within which

such parties shall accept the modification proposed by the Commission under Sub-section (3). [Sub-section 8]

- (5) **Consequence of non-acceptance of the modification:** If the parties fail to accept the modification proposed by the Commission within thirty working days as referred above or within a further period of thirty working days referred to in sub-section (8) the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act. [Sub-section 9]

As per Sub-section 10 where the Commission has directed under sub-section (2) that the combination shall not take effect or the combination is deemed to have an appreciable adverse effect on competition under sub-section (9), then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that

- (a) the acquisition referred to in clause (a) of section 5; or
- (b) the acquiring of control referred to in clause (b) of section 5; or
- (c) the merger or amalgamation referred to in clause (c) of section 5,

shall not be given effect to. The Commission may however, if it considers appropriate, frame a scheme to implement its order.

- (6) **Deemed approval by Commission:** If the Commission does not, on the expiry of a period of 210 days from the date of notice given to the Commission referred to in section 29(2), pass an order or issue direction in accordance with the provisions of sub-section (1) or (2) or (7), the combination shall be deemed to have been approved by the Commission. For the purpose of determining the period of 210 days specified in this sub-section, the period of thirty working days specified in sub-section (6) and a further period of thirty working days specified in sub-section (8) shall be excluded. Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties. [Sub-section 12]

- (7) **Consequence of a combination declared void by Commission:** Where the Commission has ordered a combination to be void, the acquisition or acquiring of control or merger or amalgamation referred to in section 5, shall be dealt with by the authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly. [Sub-section 13]

As per Sub-section 14, nothing contained in this Chapter shall affect any proceeding initiated or which may be initiated under any other law for the time being in force.

Acts taking place outside India but having an effect on competition in India [Section 32]

The Commission shall, notwithstanding that,—

- (a) an agreement referred to in section 3 has been entered into outside India; or
- (b) any party to such agreement is outside India; or
- (c) any enterprise abusing the dominant position is outside India; or
- (d) a combination has taken place outside India; or
- (e) any party to combination is outside India; or
- (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India;

have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

Power to issue interim orders [Section 33]

Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

Appearance before Commission [Section 35]

A person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

Power of Commission to regulate its own procedure [Section 36]

In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavit;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such of record or document from any office.

The Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.

The Commission may direct any person:

- (a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
- (b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

Rectification of orders [Section 38]

With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act. [sub-section (1)]

Subject to the other provisions of this Act, the Commission may make—

- (a) an amendment under sub-section (1) of its own motion;
- (b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.

However, the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

Execution of orders of Commission imposing monetary penalty [Section 39]

If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations.

In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961,

it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine, and interest under the Income-tax Act, 1961 and to the Commission instead of the Assessing Officer.

Explanation 1: Any reference to sub-section (2) or sub-section (6) of section 220 of the Income-tax Act, 1961, in the said provisions of that Act or the rules made thereunder shall be construed as references to sections 43 to 45 of this Act.

Explanation 2: The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act, 1961 shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

Explanation 3 Any reference to appeal in Chapter XVIIID and the Second Schedule to the Income-tax Act, 1961, shall be construed as a reference to appeal before the Competition Appellate Tribunal under section 53B of this Act.

The court to which the order is so sent shall execute the order as if it were a decree or order sent to it for execution.



6. DUTIES OF DIRECTOR GENERAL

Director General to investigate contravention [Section 41]

The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder. The Director General shall have all the powers as are conferred upon the Commission under section 36(2). Without prejudice to this power, the provisions of sections 240 and 240A of the Companies Act, 1956, so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

For the purposes of this section,

- (a) the words “the Central Government” under section 240 of the Companies Act, 1956 shall be construed as “the Commission”;
- (b) the word “Magistrate” under section 240A of the Companies Act, 1956 shall be construed as “the Chief Metropolitan Magistrate, Delhi”.



7. PENALTIES

Contravention of orders of Commission [Section 42]

The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act. If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit.

The Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

Compensation in case of contravention of orders of Commission [Section 42A]

Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

Penalty for failure to comply with directions of Commission and Director General [Section 43]

If any person fails to comply with a direction given by

- (a) the Commission under of section 36(2) and (4); or

(b) the Director General while exercising powers referred to in section 41(2)

the Commission may impose on such person a penalty of rupees one lakh for each day during which such failure continues, subject to a maximum of rupees one crore.

Power to impose penalty for non-furnishing of information on combinations [Section 43A]

If any person or enterprise fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination.

Penalty for making false statement or omission to furnish material information [Section 44]

If any person, being a party to a combination

- (a) makes a statement which is false in any material particular, or knowing it to be false; or
- (b) omits to state any material particular knowing it to be material,

such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

Penalty for offences in relation to furnishing of information [Section 45]

Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information,

- (a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or
- (b) omits to state any material fact knowing it to be material; or
- (c) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid,

such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission. Without prejudice to the above provisions, the Commission may also pass such other order as it deems fit.

Power to impose lesser penalty [Section 46]

The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose

upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations.

However, lesser penalty shall not be imposed by the Commission in cases where report of investigation directed under section 26 has been received before making such disclosure.

Further, lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who first made the full, true and vital disclosures under this section.

Lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.

The Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
- (b) had given false evidence; or
- (c) the disclosure made is not vital and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

Crediting sums realised by way of penalties to Consolidated Fund of India [Section 47]

All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

Contravention by companies [Section 48]

Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

Where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that

the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

For the purposes of this section,—

- (a) "company" means a body corporate and includes a firm or other association of individuals: and
- (b) "director", in relation to a firm, means a partner in the firm.



8. COMPETITION ADVOCACY

Competition advocacy [Section 49]

The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.

The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government; as the case may be, in formulating such policy.

The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.



9. FINANCE, ACCOUNTS AND AUDIT

Grants by Central Government [Section 50]

The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Commission grants of such sums of money as the Government may think fit for being utilised for the purposes of this Act.

Constitution of Fund [Section 51]

There shall be constituted a fund to be called the "Competition Fund" and there shall be credited thereto—

- (a) all Government grants received by the Commission;

- (b) Omitted;
- (d) the fees received under this Act;
- (e) the interest accrued on the amounts referred to in clauses (a) and (c).

The Fund shall be applied for meeting:—

- (a) the salaries and allowances payable to the Chairperson and other Members and the administrative expenses including the salaries, allowances and pension payable to the Director General, Additional, Joint, Deputy or Assistant Directors General, the Registrar and officers and other employees of the Commission;
- (b) the other expenses of the Commission in connection with the discharge of its functions and for the purposes of this Act.

The Fund shall be administered by a committee of such Members of the Commission as may be determined by the Chairperson.

The committee shall spend monies out of the Fund for carrying out the objects for which the Fund has been constituted.

Accounts and Audit [Section 52]

The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

The accounts of the Commission shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General of India.

However, the orders of the Commission, being matters appealable to the Appellate Tribunal or Supreme Court, shall not be subject to audit under this section.

The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Commission shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has, in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

The accounts of the Commission as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

Furnishing of returns, etc., to Central Government [Section 53]

The Commission shall furnish to the Central Government at such time and in such form and manner as may be prescribed or as the Central Government may direct, such returns and statements and such particulars in regard to any proposed or existing measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues, as the Central Government may, from time to time, require.

The Commission shall prepare once in every year, in such form and at such time as may be prescribed, an annual report giving a true and full account of its activities during the previous year and copies of the report shall be forwarded to the Central Government.

A copy of the report received shall be laid, as soon as may be after it is received, before each House of Parliament.



10. APPELLATE TRIBUNAL

Appellate Tribunal [Section 53A]

The National Company Law Appellate Tribunal constituted under section 410 of the Companies Act, 2013 shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall—

- (a) hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of this Act; and
- (b) adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section (2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

Appeal to Appellate Tribunal [Section 53B]

The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed.

The Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

Awarding compensation [Section 53N]

Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section (2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

Every application made under sub-section (1) shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed.

The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise. The Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation.

Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Appellate Tribunal, make an application under that sub-section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908, shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.

Explanation: For the removal of doubts, it is hereby declared that—

- (a) an application may be made for compensation before the Appellate Tribunal only after either the Commission or the Appellate Tribunal on appeal under clause (a) of sub-section (1) of section 53A of the Act, has determined in a proceeding before it that violation of the provisions of the Act has taken place, or if provisions of section 42A or sub-section (2) of section 53Q of the Act are attracted.
- (b) enquiry to be conducted under sub-section (3) shall be for the purpose of determining the eligibility and quantum of compensation due to a person applying for the same, and not for examining afresh the findings of the Commission or the Appellate Tribunal on whether any violation of the Act has taken place.

Procedures and powers of Appellate Tribunal [Section 53 O]

The Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Appellate Tribunal shall have power to regulate its own procedure including the places at which they shall have their sittings. The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Procedure, 1908 while trying a suit in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavit;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) reviewing its decisions;
- (g) dismissing a representation for default or deciding it *ex parte*;
- (h) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*;
- (i) any other matter which may be prescribed.

Every proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

Execution of orders of Appellate Tribunal (Section 53P)

Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,-

- (a) in the case of an order against a company, the registered office of the company is situated; or
- (b) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated.

The Appellate Tribunal may also transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

Contravention of orders of Appellate Tribunal [Section 53Q]

Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit.

The Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence punishable under this sub-section, save on a complaint made by an officer authorized by the Appellate Tribunal.

Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise contravening, without any reasonable ground, any order of the Appellate Tribunal or delaying in carrying out such orders of the Appellate Tribunal.

Right to legal representation [Section 53S]

A person preferring an appeal to the Appellate Tribunal may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal.

The Central Government or a State Government or a local authority or any enterprise preferring an appeal to the Appellate Tribunal may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

The Commission may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and

every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

Appeal to Supreme Court [Section 53T]

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them.

The Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

Power to Punish for contempt [Section 53U]

The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 shall have effect subject to modifications that,-

- (a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;
- (b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf.

COMPETITION APPELLATE TRIBUNAL (PROCEDURE) REGULATIONS, 2011

In exercise of the powers conferred by sub-section (1) of section 53-O of the Competition Act, 2002, the Competition Appellate Tribunal hereby makes the following regulations or regulating the procedure of appeals and applications, namely:—

Language of Tribunal

3. (1) The proceedings of the Tribunal shall be conducted in English.
- (2) No appeal, application, document or other papers contained in any language other than English, shall be accepted by the Tribunal unless the same is accompanied by a translation thereof in English attested by a translator and countersigned by the party concerned.

Sittings of Tribunal

4. The Tribunal shall ordinarily have sittings at its headquarters at New Delhi and at such places as the Chairperson may by general or special order direct.

Functions of Registrar

6. The Registrar shall—
- (a) receive and register appeals, applications, interlocutory and all other miscellaneous applications relating to such appeals or applications, as the case may be;
 - (b) maintain all records of the Tribunal;
 - (c) represent the Tribunal before the Supreme Court in the event of an appeal under section 53T of the Act, and
 - (d) perform such other functions as the Chairperson may, from time to time, direct.

Registration of appeal or application

7. (1) Every appeal or application supported by an affidavit and a certified copy of the impugned direction, decision or order of the Commission, shall be verified and if found to be in order, be registered by the Registrar and shall be given a serial number.
- (2) If the appeal, on scrutiny, is found to be defective, the appellant shall be advised to rectify the defects and after rectification of the defects by the appellant, the appeal shall be registered.
- (3) The appeal registered shall be put up for hearing before the Tribunal with a notice to the appellant and the Tribunal, after hearing the appellant, may either dismiss it summarily or direct issue of notice to all necessary parties or may make such orders as the circumstances of the case may require.
- (4) In case, the Tribunal directs issuance of notice to the concerned parties, the Registrar shall issue notice, along with the order of the Tribunal and copy of the appeal to all the respondents.
- (5) Where at any stage prior to the hearing of the appeal, the appellant desires to withdraw his appeal, he shall make an application to that effect to the Tribunal.

Pleadings before Tribunal

8. (1) Appeal or application, counters, rejoinders, supplemental pleadings or other documents, as the case may be, shall be accompanied by four copies thereof for the Tribunal's record and such additional number of copies thereof for being served on respondents.
- (2) No pleadings, subsequent to the reply, shall be presented except by the leave of the Tribunal upon such terms as the Tribunal may think fit.

Service of notice or other documents

9. Every notice or other document, required to be served on or delivered to any person, may be sent by the Registrar by speed post or by courier or by e-mail to the person or his agent empowered to accept service.

Adjournment of hearings

10. The Tribunal may, if sufficient cause is shown at any stage of any proceeding, adjourn the hearing for such time or date as it may consider appropriate provided that in any case, the Tribunal shall not grant more than three adjournments during the course of the whole proceeding.

Ex parte hearings

11. If a party to the proceeding does not appear on the day fixed for hearing, the Tribunal may continue with the proceedings in the absence of such party.

Custody of records

12. The Registrar shall maintain the records of the Tribunal and no record or document filed in any case or matter shall be allowed to be taken out of the custody of the Tribunal without the leave of the Tribunal.

Inspection and certified copies of documents and other papers

13. (1) A party to any proceeding before the Tribunal may, subject to the provisions of the Act, on an application made by it or on its behalf, addressed to the Registrar, be allowed to inspect or obtain copies of pleadings and other documents or records in the proceeding on payment of fees and charges specified in the Rules.

(2) An inspection shall be allowed only in the presence of the Registrar.

(3) Copies of the proceedings, required under sub-regulation (1) or (2), may be certified, as true copies, by the Registrar.

(4) Every authorised officer, not below the rank of Under Secretary to the Central Government or the State Government or the Competition Commission of India shall, at all reasonable times, be entitled free of charge inspection of the file of proceedings of the Tribunal and the Tribunal shall provide such copies or extracts to the aforesaid officers, as they may request in writing.

Order of judgment of Tribunal

14. Every order, or judgment of the Tribunal shall be signed and dated by the Chairperson and Members who have heard the case:

Provided that the Chairperson or a Member who dissents with the final conclusion, shall record his reasons separately under his signature and date.

Rectification of errors

15. Any clerical or arithmetical mistakes in any proceeding, amendment of proceeding, declaration or order of the Tribunal or error may, at any time, be corrected by the Tribunal, either on its own motion or on the application of any party.

Interpretation

16. In case of any doubt as to the interpretation to these regulations, the matter shall be placed before the Chairperson who shall have the power to modify, waive and exempt the operation of any of these procedures by specific or general order and for reasons to be recorded in writing.



11. MISCELLANEOUS

Power to exempt [Section 54]

The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—

- (a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;
- (b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;
- (c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government.

In case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.

Power of Central Government to issue directions [Section 55]

Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time.

However, the Commission shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

The decision of the Central Government whether a question is one of policy or not shall be final.

Power of Central Government to supersede Commission [Section 56]

As per sub-section (1), if at any time the Central Government is of the opinion—

- (a) that on account of circumstances beyond the control of the Commission, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
- (b) that the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Commission or the administration of the Commission has suffered; or

(c) that circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification and for reasons to be specified therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification.

Before issuing any such notification, the Central Government shall give a reasonable opportunity to the Commission to make representations against the proposed supersession and shall consider representations, if any, of the Commission. Sub-section (2) provides that upon the publication of a notification under sub-section (1) superseding the Commission,—

- (a) the Chairperson and other Members shall as from the date of supersession, vacate their offices as such;
- (b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Commission shall, until the Commission is reconstituted under sub-section (3), be exercised and discharged by the Central Government or such authority as the Central Government may specify in its behalf;
- (c) all properties owned or controlled by the Commission shall, until the Commission is reconstituted under sub-section (3), vest in the Central Government.

According to Sub-section (3), on or before the expiration of the period of supersession specified in the notification issued under subsection (1), the Central Government shall reconstitute the Commission by a fresh appointment of its Chairperson and other Members and in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment.

Sub-section (4) provides that the Central Government shall cause a notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

Restriction on disclosure of information [Section 57]

No information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

Chairperson, Members, Director General, Registrar, officers and other employees, etc. of Commission to be public servants [Section 58]

The Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Secretary and officers and other employees of the Commission and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed, while acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code.

Protection of action taken in good faith [Section 59]

No suit, prosecution or other legal proceedings shall lie against the Central Government or Commission or any officer of the Central Government or the Chairperson or any Member or the Director-General, Additional, Joint, Deputy or Assistant Directors General or Secretary or officers or other employees of the Commission or the Chairperson, Members, officers and other employees of the Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

Act to have overriding effect [Section 60]

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Exclusion of jurisdiction of civil courts [Section 61]

This section provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Application of other laws not barred [Section 62]

This section seeks to provide that the provisions of this legislation shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Power to make rules [Section 63]

The Central Government may, by notification, make rules to carry out the provisions of this Act.

In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

- (a) the term of the selection committee and the manner of selection of panel of names under section 9(2);
- (b) the form and manner in which and the authority before whom the oath of office and of secrecy shall be made and subscribed to under sub-section (3) of section 10;
- (c) Omitted
- (d) the salary and the other terms and conditions of service including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities to be provided to the Chairperson and other Members under sub-section (1) of section 14;
- (da) the number of Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner in which such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees may be appointed under sub-section (1A) of section 16;
- (e) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under sub-section (3) of section 16;
- (f) the qualifications for appointment of the Directors-General, Additional, Joint, Deputy or Assistant Directors-General or such officers or other employees under sub-section (4) of section 16;
- (g) the salaries and allowances and other terms and conditions of service of the Secretary and officers and other employees payable, and the number of such officers and employees under sub-section (2) of section 17;
- (h) Omitted
- (i) Omitted
- (j) Omitted

- (k) the form in which the annual statement of accounts shall be prepared under sub-section (1) of section 52;
- (l) the time within which and the form and manner in which the Commission may furnish returns, statements and such particulars as the Central Government may require under sub-section (1) of section 53;
- (m) the form in which and the time within which the annual report shall be prepared under sub-section (2) of section 53;
- (ma) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (2) of section 53B and the fees payable in respect of such appeal;
- (mb) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of section 53E;
- (mc) the salaries and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub-section (1) of section 53G;
- (md) the salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal under sub-section (3) of section 53M;
- (n) the manner in which the monies transferred to the Competition Commission of India or the Appellate Tribunal shall be dealt with by the Commission or the Appellate Tribunal, as the case may be, under the fourth proviso to sub-section (2) of section 66;
- (o) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

Every notification issued under sub-section (3) of section 20 and section 54 and every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or rule, or both Houses agree that the notification should not be issued or rule should not be made, the notification or rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule, as the case may be.

Power to make regulations [Section 64]

The Commission may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

In particular, and without prejudice to the generality of the foregoing provisions, such regulations may provide for all or any of the following matters, namely:—

- (a) the cost of production to be determined under clause (b) of the Explanation to section 4;
- (b) the form of notice as may be specified and the fee which may be determined under sub-section (2) of section 6;
- (c) the form in which details of the acquisition shall be filed under sub-section (5) of Section 6;
- (d) the procedures to be followed for engaging the experts and professionals under sub-section (3) of section 17;
- (e) the fee which may be determined under clause (a) of sub-section (1) of section 19;
- (f) the rules of procedure in regard to the transaction of business at the meetings of the Commission under sub-section (1) of section 22;
- (g) the manner in which penalty shall be recovered under sub-section (1) of section 39;
- (h) any other matter in respect of which provision is to be, or may be, made by regulations.

Every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

Power to remove difficulties [Section 65]

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty.

However, no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Repeal and saving [Section 66]

The Monopolies and Restrictive Trade Practices Act, 1969 is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under section 5(1) of the said Act shall stand dissolved.

The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 shall, however, not affect

- (a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or
- (b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or
- (c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or
- (d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service.

The Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission appointed on deputation basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be.

The Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly

terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be.

Notwithstanding anything contained in the Industrial Disputes Act, 1947 or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority.

Where the Monopolies and Restrictive Trade Practices Commission has established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in, the Competition Commission of India or the Appellate Tribunal as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be prescribed.

All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 referred to in the proviso to sub-section (1) stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

All cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission immediately before the commencement of the Competition (Amendment) Act, 2009 shall stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 and the National Commission shall dispose of such cases as if they were cases filed under that Act.

Further that all the cases relating to the unfair trade practices pending, before the National Commission under this sub-section, on or before the date on which the Competition

(Amendment) Bill, 2009 receives the assent of the President, shall, on and from that date, stand transferred to the Appellate Tribunal and be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

The National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established under section 9 of the Consumer Protection Act, 1986 and that State Commission shall dispose of such case as if it was filed under that Act.

All cases pertaining to unfair trade practices referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 referred to in the proviso to sub-section (1) stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under that Act. For the removal of doubts, it is hereby declared that all cases referred to in this sub-section, sub-section (4) and sub-section (5) shall be deemed to include all applications made for the losses or damages under section 12B of the Monopolies and Restrictive Trade Practices Act, 1969 as it stood before its repeal.

All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

All investigations or proceedings, relating to unfair trade practices, other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

All investigations or proceedings relating to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit. Further, that all investigations or proceedings, relating to unfair trade practices pending before the National Commission, on or before the date on which the Competition (Amendment) Bill, 2009 receives the assent of the President shall, on and from that date, stand transferred to the Appellate Tribunal and the Appellate Tribunal may conduct or order for conduct of such investigation or

proceedings in the manner as it deems fit. All cases or proceedings pending before the Monopolies and Restrictive Trade Practices Commission shall abate.

The mention of the particular matters referred to in sub-sections (3) to (8) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.



INSOLVENCY AND BANKRUPTCY CODE, 2016



LEARNING OUTCOMES

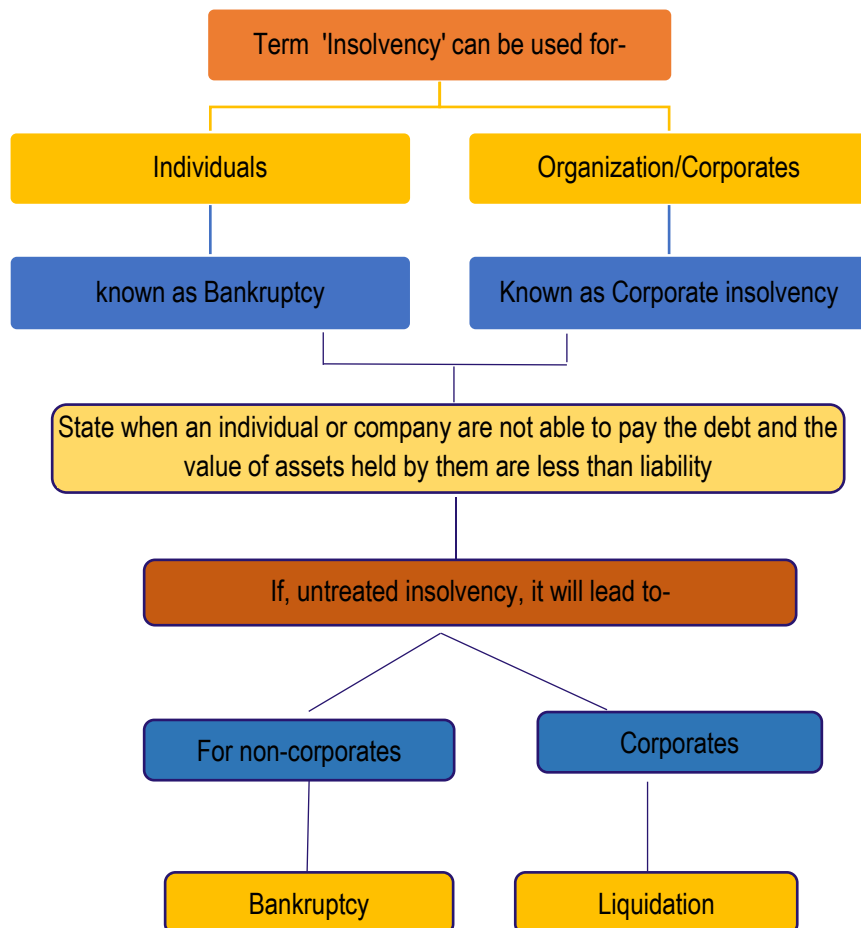
At the end of this Chapter, you will be able to:

- Explain the concepts of Insolvency and Bankruptcy
- Explain the Relationship between bankruptcy, insolvency and liquidation
- Explain the important terminologies used in the Code.
- Identify the structure and applicability of the Code.
- Understand the manner and process of Insolvency Resolution Process.
- Understand the manner of Fast track resolution corporate process.
- Know the process of Voluntary liquidation of corporate person.
- Know of the adjudicating Authority and the manner for the disposal of applications
- Know about the various offences and penalties committed and falling within the purview of this Code
- Know the manner of regulation of insolvency professionals, agencies and information utilities
- Identify the constitution of Insolvency and Bankruptcy Board of India and its powers and functions.
- Know of miscellaneous provisions covering management of Insolvency and Bankruptcy Fund, Delegation of powers, Bar of jurisdiction, Enabling provisions under the Code for cross border transactions, Trial of Offences, and the Regulation of Powers to make Rules and Regulations under the Code.

1. INTRODUCTION

Concept of Insolvency and Bankruptcy

- The term insolvency is used for both individuals and organizations. For individuals, it is known as bankruptcy and for corporate it is called corporate insolvency. Both refer to a situation when an individual or company are not able to pay the debt in present or near future and the value of assets held by them are less than liability.
- Insolvency in this Code is regarded as a “state” where assets are insufficient to meet the liabilities. Untreated insolvency will lead to bankruptcy for non-corporates and liquidation of corporates.



- While insolvency is a situation which arises due to inability to pay off the debts due to insufficient assets, bankruptcy is a situation wherein application is made to an authority

declaring insolvency and seeking to be declared as bankrupt, which will continue until discharge.

- From the above it is evident that insolvency is a state and bankruptcy is a conclusion. A bankrupt would be a conclusive insolvent whereas all insolvencies will not lead to bankruptcies. Typically insolvency situations have two options – resolution and recovery or liquidation

Relationship between Bankruptcy, Insolvency & Liquidation

Bankruptcy is a legal proceeding involving a person or business that is unable to repay outstanding debts. The bankruptcy process begins with a petition filed by the debtor, or by the creditors. All of the debtor's assets are measured and evaluated, and the assets may be used to repay a portion of outstanding debt.

In lucid language, if any person or entity is unable to pay off the debts, it owes, to their creditor, on time or as and when they became due and payable, then such person or entity is regarded as “insolvent”.

Liquidation is the winding up of a corporation or incorporated entity. There are many entities that can initiate proceedings to cause the Liquidation, those being:-

- The Regulatory Bodies;
- The Directors of a Company;
- The Shareholders of a Company; and
- An Unpaid Creditor of a Company

In nut shell, **insolvency** is common to both bankruptcy and liquidation. Not being able to pay debts as and when they became due and payable are the leading cause of Liquidations and is the only way that can cause a natural person to become a bankrupt.

Objectives: A sound legal framework of bankruptcy law was required for achieving the following objectives:-

- **Improved handling of conflicts between creditors and the debtor:** It can provide procedural certainty about the process of negotiation, in such a way as to reduce problems of common property and reduce information asymmetry for all economic participants.
- **Avoid destruction of value:** It can also provide flexibility for parties to arrive at the most efficient solution to maximise value during negotiations. The bankruptcy law will create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.
- **Drawing the line between malfeasance and business failure:** Under a weak insolvency regime, the stereotype of “rich promoters of defaulting entities” generates two strands of thinking:

- (a) the idea that all default involves malfeasance and
 - (b) the idea that promoters should be held personally financially responsible for defaults of the firms that they control.
- **Clearly allocate losses in macroeconomic downturns:** With a sound bankruptcy framework, these losses are clearly allocated to some people. Loss allocation could take place through taxes, inflation, currency depreciation, expropriation, or wage or consumption suppression. These could fall upon foreign creditors, small business owners, savers, workers, owners of financial and non-financial assets, importers, exporters.

The Code seeks to provide an effective legal framework for timely resolution of insolvency and bankruptcy which would support development of credit markets and encourage entrepreneurship, and facilitate more investments leading to higher economic growth and development.

Structure of the Code

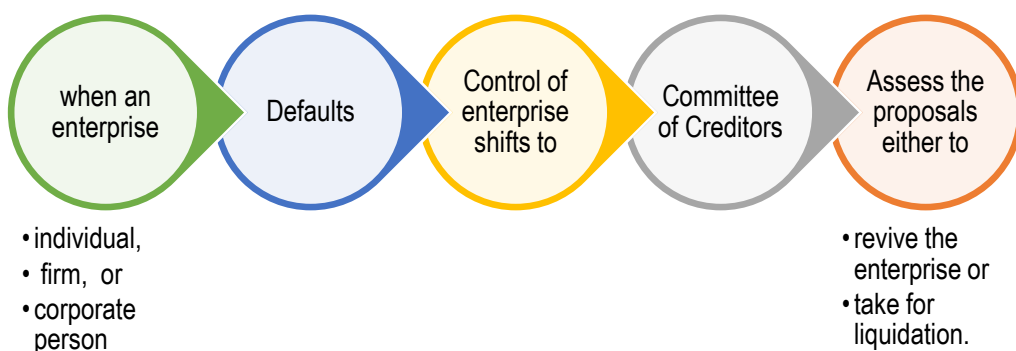
The Code is structured into 5 parts comprising of 255 sections and 11 Schedules. Each part deals with a distinct aspect of the insolvency resolution process.

Part	Part Content	Chapters and Sections	Chapter / Contents
I	Preliminary	(1-3)	<ol style="list-style-type: none"> 1. Short title, extent & Commencement 2. Application 3. Definitions
II	Insolvency Resolutions and Liquidation for Corporate Persons	I-VII (4-77)	<ol style="list-style-type: none"> 1. Preliminary (Application & Definitions) 2. Corporate Insolvency Resolution Process 3. Liquidation Process 4. Fast Track Corporate Insolvency Resolution Process 5. Voluntary Liquidation of Corporate Persons 6. Adjudicating Authority for Corporate Persons 7. Offences & Penalties
III	Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms	I – VII (78-187)	<ol style="list-style-type: none"> 1. Preliminary (Application & Definitions) 2. Fresh Start Process 3. Insolvency Resolution Process 4. Bankruptcy Order for Individuals & Partnership Firms

Part	Part Content	Chapters and Sections	Chapter / Contents
			5. Administration & Distribution of the Estate of the Bankrupt 6. Adjudicating Authority 7. Offences & Penalties
IV	Regulation of Insolvency Professionals, Agencies and Information Utilities	I – VII (188–223)	1. The Insolvency and Bankruptcy Board of India 2. Powers & Functions of the Board 3. Insolvency Professional Agencies 4. Insolvency Professionals 5. Information Utilities 6. Inspection & Investigation 7. Finance, Accounts & Audit
V	Miscellaneous	(224 – 255)	Miscellaneous
	Schedules		

An **Insolvency and Bankruptcy Board of India (IBBI)** is established to administer the work of insolvency and bankruptcy of corporate persons, firms and individuals.

Foundation of Code:



Decisions are required to be taken in a time bound manner so that there are greater chances that the enterprise is saved as a going concern and productive resources of economy can be put to best use.

Insolvency of corporate persons - Part II of the Code, deals with insolvency resolution and liquidation for corporate persons.

At first instance, **corporate insolvency process will be initiated**.

Insolvency professional will form a committee of creditors and with their consensus, efforts will be made to develop finalise plan to revive the corporate person.

This process will last for 180 days, extendable by further maximum 90 days.

'**Resolution plan**' will be drafted to restore the corporate.

A Fast Track Corporate Insolvency Resolution will be available to small corporate persons.

If the efforts fails to rehabilitate the enterprise, the corporate person will be liquidated in time bound manner.

NCLT will be Adjudicating Authority and NCLAT will be appellate authority for corporate persons.

Provisions relating to Corporate Insolvency Resolution Process (section 4 to section 32 of Insolvency Code) will be applicable.

Provisions relating to Liquidation Process of Corporates (section 33 to section 59 of Insolvency Code) will be effective in case where the enterprise is taken for liquidation.

Winding up of companies - In most of the cases, winding up of companies will be through the Insolvency Resolution Process only. Direct winding up process under Companies Act, 2013 will be used very rarely.

Bankruptcy of individuals and firms - Part III of Insolvency Code 2016 deals with insolvency resolution and liquidation for individuals and firms. For individuals and firms, there are two distinct processes - fresh start and insolvency resolution. These are followed by bankruptcy order. Debt Recovery Tribunal (DRT) will be adjudicating authority and DRAT will be appellate authority for individuals and firms. These provisions are not yet effective as not notified [as on 30th April, 2019].

In case of other individuals and firms, the process is similar to that applicable to corporate persons.

Flow of insolvency process-

- The process will be managed by 'resolution professional' under direction of 'Adjudicating Authority'.
- Insolvency Resolution Process will be initiated.
- Finalise 'payment plan' with concurrence of debtor and committee of creditors.
- On consensus on payment plan.

- the individual or firm will get a discharge order.
- On failure to finalize the payment plan, the person will be declared 'bankrupt'.
- The resolution professional will take over estate of the bankrupt. He will sell or dispose it off and satisfy payments of creditors to the extent possible.
- After that, the bankrupt will get a 'discharge order'.
- The discharge order will be registered with Board (IBBI) in a register maintained under section 196 of the Insolvency & Bankruptcy Code, 2016.

Provisions of this Code to override other laws: Section 238 of the Code, 2016 states that the Code shall have overriding effect over other laws.

For example, sections 53 and 178 of Insolvency Code, 2016 provide that distribution from sale of assets will be as specified in that section, notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force.

However, many tax laws (including GST) provide for first charge on assets of the taxable person. This is also an overriding provision.

Extent and Commencement of the Code:

As per section 1 of the Insolvency and Bankruptcy Code, it extends to the whole of India except Part III (Insolvency Resolution and Bankruptcy for Individuals and Partnership Firm) which excludes the state of Jammu and Kashmir.

This Code came into an enforcement on 28th May 2016, however, the Central Government appointed different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

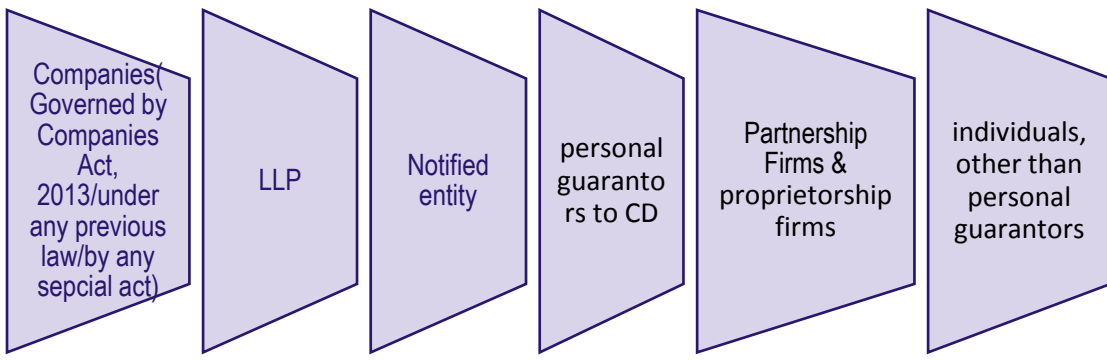
Significant amendments: The Code has been first amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2017, passed on November 23, 2017. This Ordinance became an Act on January 18, 2018. It was known as the Insolvency and Bankruptcy Code (Amendment) Act, 2018. It was made applicable from November 23, 2017.

The second amendment was made vide the **Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, on June 6, 2018**. Further, the said ordinance, in the form of the Insolvency and Bankruptcy (Second Amendment) Bill received the assent of the President on the 17th August, 2018 and thus the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** was promulgated.

¹Applicability of the Code [Section 2]

The provisions of the Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

- (a) Any company incorporated under the Companies Act, 2013 or under any previous law.
- (b) Any other company governed by any special act for the time being in force, except in so far as the said provision is inconsistent with the provisions of such Special Act.
- (c) Any Limited Liability Partnership under the LLP Act 2008.
- (d) Any other body incorporated under any law for the time being in force, as the Central Government may by notification specify in this behalf.
- (e) ²personal guarantors to corporate debtors (CD);
- (f) partnership firms and proprietorship firms; and
- (g) individuals, other than persons referred to in clause (e)



Non-applicability of the Code: The Code is not applicable to corporates in finance sector. Section 3(7) of Insolvency & Bankruptcy Code, 2016 states that "Corporate person" shall not include any financial service provider.

Thus, the Code does not cover Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

However, NBFC is engaged in various activities and hence NBFC is not ipso facto excluded from definition of 'corporate person' under section 3(7) of Insolvency Code. NBFC can be a 'corporate debtor' [*Jindal Saxena Financial Services v. Mayfair Capital (2018)*]

¹ Said section have been amended by Vide Insolvency and Bankruptcy Code (Amendment) Act, 2018 vide notification dated 19th January, 2018. W.e.f 23rd day of November 2017.

² Personal guarantors of corporate debtors have been treated as a separate class. The application for bankruptcy of individual personal guarantor will have to be filed before NCLT as per section 60(2) of the IBC, 2016. Insolvency Code has been made applicable to personal guarantors of corporates w.e.f. 23-11-2017

"Financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator [section 3(17)].

However, section 227 of the Code, which was notified on 1-5-2018 provided that , Central Government can notify financial service providers for purpose of insolvency and liquidation proceedings, which may be conducted under the Insolvency & Bankruptcy Code, in consultation with appropriate financial sector regulator .



2. IMPORTANT DEFINITIONS [SECTIONS 3 AND 5]

- (1) **Board** means the Insolvency and Bankruptcy Board of India (IBBI) established under section 188(1) [Section 3(1)]

The board will have powers of civil court as to the issue of summons, discovery and production of books, inspection of books/registers and issue of commissions for examination of witnesses [Section 196(2) of the Code]
- (2) **Charge** means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage; [Section 3(4)]
- (3) **Claim** means (a) **a right to payment**, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) **right to remedy for breach of contract** under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured; [Section 3(6)]
- (4) **Corporate Person** means
 - (a) a company as defined under section 2(20) of the Companies Act, 2013;
 - (b) a Limited Liability Partnership as defined in 2(1)(n) of Limited Liability Act, 2008; or,
 - (c) any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. [Section 3(7)]
- (5) **Corporate Debtor** means a corporate person who owes a debt to any person. [Section 3(8)]
- (6) **Core services** means services rendered by an information utility for—
 - (a) accepting electronic submission of financial information
 - (b) safe and accurate recording of financial information;
 - (c) authenticating and verifying the financial information submitted by a person; and
 - (d) providing access to information stored with the information utility to persons

(7) **Creditor** means any person to whom a debt is owed and includes –

- a financial creditor,
- an operational creditor,
- a secured creditor,
- an unsecured creditor, and
- a decree holder. [Section 3(10)]

(8) **Debt** means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. [Section 3(11)]

Financial Debt - "Financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest.
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent.
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument.
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed.
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis.
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.

³Explanation.— For the purposes of this sub-clause - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in section 2(d) and 2(zn) of the Real Estate (Regulation and Development) Act, 2016 .

- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account.
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution.

³ Explanation inserted w.e.f. 6-6-2018

- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause [Section 5(8) of Code, 2016]

Subscription money for purchase of shares is not financial debt - Subscription money for purchase of shares is not financial debt - *ACPC Enterprises v. Affinity Beauty Saloon (2018)*

Operational debt as per section 5(21) of the Code means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

Operational debt is normally based on agreement to pay to goods or services, it does not mean that interest cannot be claimed in the times to come.

Difference in financial and operational debt: Financial debt is given to get interest over money, whereas in the operational debt happens in the business transactions, In both cases money is involved, as days go by after truncation, the time value of money will be there. [*Uttam Galva Steel Ltd. DF Deutsche Forfait AG and Misr Bank Europe GmbH*]

- (9) **Default** means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. [Section 3(12)]
- (10) **Financial information**, in relation to a person, means one or more of the following categories of information, namely:—
- (a) records of the debt of the person;
 - (b) records of liabilities when the person is solvent;
 - (c) records of assets of person over which security interest has been created;
 - (d) records, if any, of instances of default by the person against any debt;
 - (e) records of the balance sheet and cash-flow statements of the person; and
 - (f) such other information as may be specified. [Section 3(13)]
- (11) **Financial Product** means securities, contracts of insurance, deposits, credit arrangements including loans and advances by banks and financial institutions, retirement benefit plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be settled immediately, or any other instrument. [Section 3(15)]
- (12) **Financial service** includes any of the following services, namely:—
- (a) accepting of deposits;

- (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
 - (c) effecting contracts of insurance;
 - (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
 - (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—
 - (i) buying, selling, or subscribing to, a financial product;
 - (ii) availing a financial service; or
 - (iii) exercising any right associated with a financial product or financial service;
 - (f) establishing or operating an investment scheme;
 - (g) maintaining or transferring records of ownership of a financial product;
 - (h) underwriting the issuance or subscription of a financial product; or
 - (i) selling, providing, or issuing stored value or payment instruments or providing payment services; [Section 3(16)]
- (13) **Financial Service Provider** means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator e.g. banks, financial institutions, insurance companies, mutual funds etc. [Section 3(17)]
- (14) **Financial Sector Regulator** means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes-
- the Reserve Bank of India,
 - the Securities and Exchange Board of India,
 - the Insurance Regulatory and Development Authority of India,
 - the Pension Fund Regulatory Authority, and
 - such other regulatory authorities as may be notified by the Central Government; [Section 3(18)]
- (15) **Insolvency professional** (IP) means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207; [Section 3(19)]

Insolvency Professional is required to play a key role in implementation of Insolvency Code.

The word 'person', used refers to an individual to be IP. A LLP, partnership firm or a company can only be recognized as 'Insolvency Professional Entity' (IPE).

The Insolvency Professional should follow code of conduct as specified in section 208(2) of Insolvency Code and in First Schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

- (16) **"Insolvency professional agency"** means any person registered with the Board under section 201 as an insolvency professional agency; [Section 3(20)]

Work relating to insolvency resolution is expected to be handled by 'Insolvency Professionals' (IP). These professionals are required to be registered with 'Insolvency Professional Agency' (IPA).

The Insolvency Professional Agencies (IPA) will develop professional standards, code of ethics and be first level regulator for insolvency professionals members. This will lead to development of a competitive industry for such professionals.

- (17) **"Information utility"** means a person who is registered with the Board as an information utility under section 210; [Section 3(21)]

The Insolvency and Bankruptcy processes are expected to function on basis of financial information available electronically.

Information Utility will collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.

- (18) A **person** includes:-

- an individual
- a Hindu Undivided Family
- a company
- a trust
- a partnership
- A limited liability partnership, and
- any other entity established under a Statute.

And includes a person resident outside India [Section 3(23)]

"Person resident outside India" means a person other than a person resident in India [section 3(25)].

"Person resident in India" shall have the meaning as assigned to such term in section 2(v) of FEMA [Section 3(24)]

- (19) **Property** includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property; [Section 3(27)]

- (20) **Secured creditor** means a creditor in favour of whom security interest is created; [Section 3(30)]
- (22) **Security Interest** means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. [Section 3(31)]
- (23) A **transaction** includes an agreement or arrangement in writing for transfer of assets, or funds, goods or services, from or to the corporate debtor. [Section 3(33)]
- (24) **Transfer** includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. In case of property- transfer of property means transfer of any property. [Section 3(34)]
- (25) **Transfer of property** means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property; [Section 3(35)]
- (26) **Adjudicating Authority-** National Company Law Tribunal (NCLT) constituted under section 408 of Companies Act, 2013 is the Adjudicating Authority (AA) for purpose of insolvency resolution and liquidation for corporate persons [section 5(1) read with section 60(1) of Code, 2016]

National Company Law Appellate Tribunal (NCLAT) is the appellate authority over decisions of NCLT [section 61 of the Code, 2016]

Appeal against order of NCLAT can be filed to Supreme Court on question of law arising out of such order, within 45 days [section 62 of the Code, 2016]

Debt Recovery Tribunal (DRT) will be adjudicating authority for individuals and firms – [section 179(1) of the Code, 2016]

- (27) **Corporate applicant means—**
- (a) corporate debtor; or
 - (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
 - (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
 - (d) a person who has the control and supervision over the financial affairs of the corporate debtor; [Section 5(5)]
- (28) **Dispute** includes a suit or arbitration proceedings relating to—

- (a) the existence of the amount of debt;
 - (b) the quality of goods or service; or
 - (c) the breach of a representation or warranty; [Section 5(6)]
- (29) **Financial creditor** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;[section 5(7)]
- (30) **Financial position**, in relation to any person, means the financial information of a person as on a certain date; [Section 5(9)]
- (31) **Initiation date** means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process; [Section 5(11)]
- (32) **Insolvency commencement date** means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;[Section 5(12)]
- ⁴Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;
- (33) **Insolvency resolution process period** means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;[Section 5(14)]
- (34) **Liquidation commencement date** means the date on which proceedings for liquidation commence in accordance with section 33 (Initiation of Liquidation) or section 59 (Voluntary Liquidation of corporate persons), as the case may be; [Section 5(17)]
- (35) **Liquidator** means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be;
- (36) **Operational creditor** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;[Section 5(20)]
- (37) **Related party**, in relation to a corporate debtor, means—
- (a) **a director or partner or a relative** of a director or partner of the corporate debtor
 - (b) **a key managerial personnel or a relative** of a key managerial personnel of the corporate debtor;

⁴ Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**.

- (c) **a limited liability partnership or a partnership firm** in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- (d) **a private company** in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;
- (e) **a public company** in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
- (f) **any body corporate** whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- (g) **any limited liability partnership or a partnership firm** whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- (h) **any person** on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
- (i) **a body corporate which is a holding, subsidiary or an associate company** of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
- (j) **any person who controls** more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;
- (k) **any person in whom the corporate debtor controls** more than twenty per cent. of voting rights on account of ownership or a voting agreement;
- (l) **any person who can control the composition** of the board of directors or corresponding governing body of the corporate debtor;
- (m) **any person who is associated with the corporate debtor** on account of—
 - (i) participation in policy making processes of the corporate debtor; or
 - (ii) having more than two directors in common between the corporate debtor and such person; or
 - (iii) interchange of managerial personnel between the corporate debtor and such person;
 - (iv) provision of essential technical information to, or from, the corporate debtor; [Section 5(24)]

⁵(38) **"related party"**, in relation to an individual, means—

- (a) a person who is a relative of the individual or a relative of the spouse of the individual;
- (b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;
- (c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;
- (d) a private company in which the individual is a director and holds along with his relatives, more than two per cent of its share capital;
- (e) a public company in which the individual is a director and holds along with relatives, more than two per cent of its paid-up share capital;
- (f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;
- (g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;
- (h) a person on whose advice, directions or instructions, the individual is accustomed to act;
- (i) a company, where the individual or the individual along with its related party, own more than fifty per cent of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause,—

- (a) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely:—
 - (i) members of a Hindu Undivided Family,
 - (ii) husband,
 - (iii) wife,
 - (iv) father,
 - (v) mother,
 - (vi) son,

⁵ Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018.

- (vii) daughter,
 - (viii) son's daughter and son,
 - (ix) daughter's daughter and son,
 - (x) grandson's daughter and son,
 - (xi) granddaughter's daughter and son,
 - (xii) brother,
 - (xiii) sister,
 - (xiv) brother's son and daughter,
 - (xv) sister's son and daughter,
 - (xvi) father's father and mother,
 - (xvii) mother's father and mother,
 - (xviii) father's brother and sister,
 - (xix) mother's brother and sister, and
- (b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included; [Section 5(24A)]

⁶(38) **"Resolution applicant"** means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under section 25(2)(h) [Section 5(25)]

(39) **"Resolution plan"** means a plan proposed by ⁷resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II; [Section 5(26)]

(40) **Resolution professional**, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; [Section 5(27)]

(41) **Voting share** means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor. [Section 5(28)]

⁶ Substituted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.r.e.f. **23-11-2017**.

⁷ Substituted for "any person" by the Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.r.e.f. **23-11-2017**.



3. CORPORATE INSOLVENCY RESOLUTION PROCESS [SECTIONS 4, 6-32]

Provisions related to Insolvency Resolution and Liquidation process for Corporate Persons are covered in Part II of the Code. This part comprises of seven chapters with section 4 to 77 of the Code. Each chapter deals with different issues relating to Insolvency Resolution and liquidation of corporate persons.

Corporate Insolvency Resolution is a process during which financial creditors assess whether the debtor's business is viable to continue and the options for its rescue and revival, if any. If the insolvency resolution process fails or financial creditors decide that the business of debtor cannot be carried on in a profitable manner and it should be wound up, the debtor will undergo liquidation process and the assets of the debtor shall be realized and distributed by the liquidator.

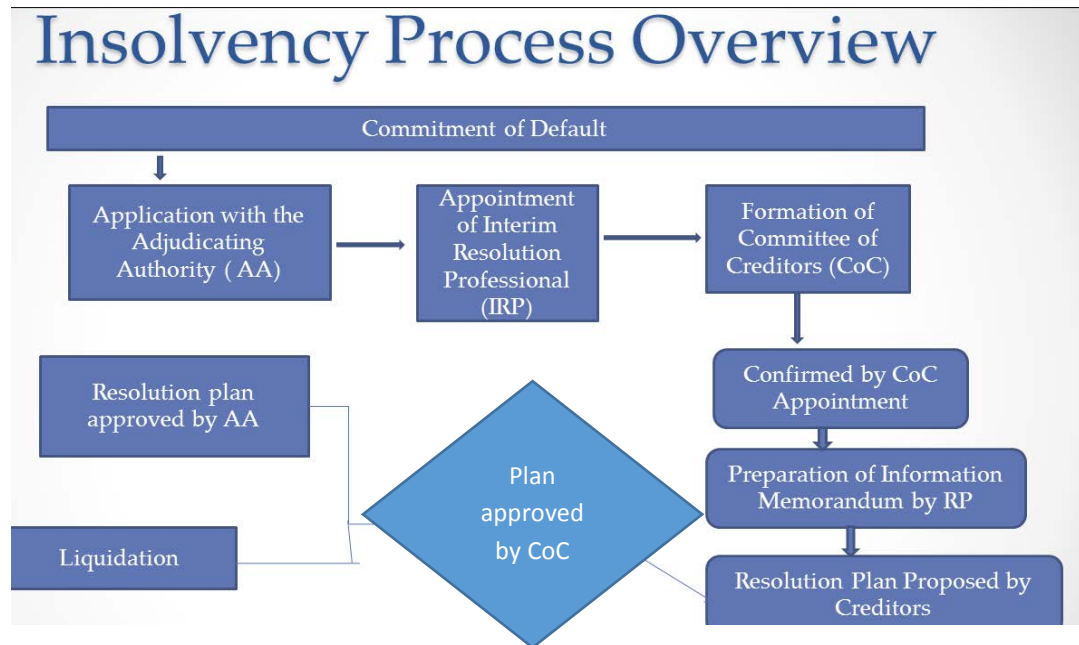
The Insolvency Resolution Process provides a collective mechanism to lenders to deal with the overall distressed position of a corporate debtor. This is a significant departure from the existing legal framework under which the primary onus to initiate a re-organization process lies with the debtor, and lenders may pursue distinct actions for recovery, security enforcement and debt restructuring.

The Code creates time-bound processes for insolvency resolution of companies and individuals. These processes will be completed within 180 days, extendable by 90 days. It also provides for fast-track resolution of corporate insolvency within 90 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.

Process Flow

A comprehensive process that covers the gamut of insolvency resolution framework for Corporates and includes processes relating to:-

- Filing of application before NCLT
- Adjudication: Admission or Rejection of application
- Moratorium and Public Announcement
- Appointment of Interim Resolution Professional
- Formation of the Committee of Creditors
- Preparation and approval of the Resolution Plan
- Consequences of non-submission of the Resolution Plan



(I) Application to National Company Law Tribunal

The process of insolvency is triggered by occurrence of default. As per Section 3 (12) of the Code, default means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor.

The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when the amount of the default is one lakh rupees or more. However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees. [Section 4]

Filing of application before NCLT

The corporate insolvency process may be initiated against any defaulting corporate debtor by making an application for corporate insolvency resolution before NCLT.

Who can initiate insolvency resolution process?

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter (Chapter II of part II) [Section 6].

Provisions and procedures relating to each initiator are different.

Accordingly, the application may be made by:-

Financial creditor any person to whom a financial debt is owed &

- Includes a person to whom such debt is legally assigned or transferred to

Operational creditor any person to whom a operational debt is owed &

- Includes a person to whom such debt is legally assigned or transferred

Corporate debtor A corporate person who owes a debt to any person

(A) Initiation of corporate insolvency resolution process by financial creditor

- (1) **Filing of application before adjudicating authority:** A financial creditor either by itself or jointly with other financial creditors, or ⁸any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

A default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

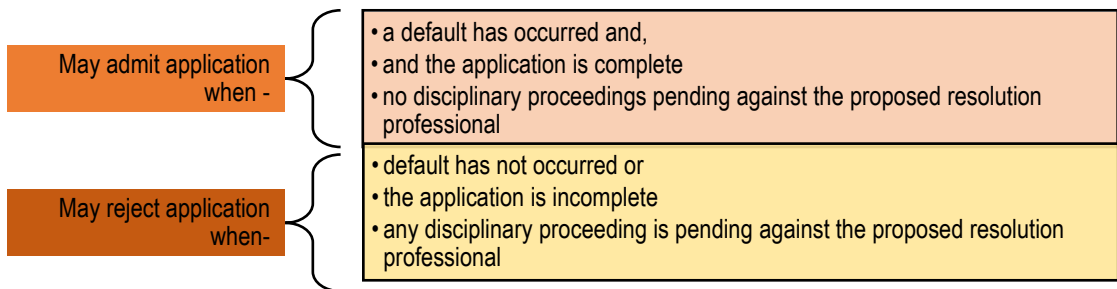
Vide Notification S.O.1091(E) dated 27th February, 2019, the Central government hereby notifies following persons who may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority, on behalf of the Financial Creditor:-

- (i) a guardian;
 - (ii) an executor or administrator of an estate of a financial creditor;
 - (iii) a trustee (including a debenture trustee); and
 - (iv) a person duly authorized by the Board of Directors of a Company.
- (2) **Procedure to be followed by the Financial creditor:** The financial creditor shall file an application by itself / jointly against a corporate debtor before NCLT in accordance with the provisions contained in Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016., Copy of such an application shall be forwarded to registered office of corporate debtor by registered post/speed post.

⁸ Substituted for "other financial creditors" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018.

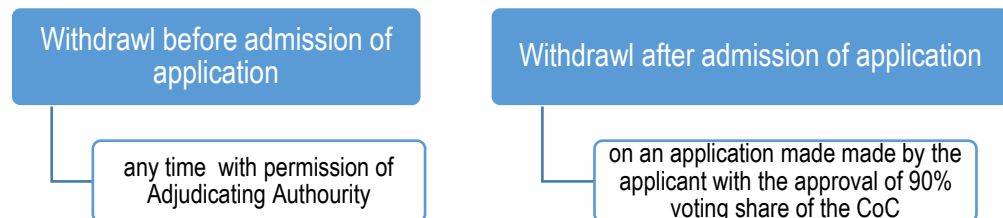
Financial creditor shall along with the application furnish—

- (a) **record of the default** recorded with the information utility or such other record or evidence of default as may be specified;
 - (b) **the name of the resolution professional** proposed to act as an interim resolution professional; and
 - (c) **any other information** as may be specified by the Board.
- (3) **Time period for determination of default:** The Adjudicating Authority shall, within fourteen days of the receipt of the application, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.
- (iv) **Order:** Where the Adjudicating Authority is satisfied, either—



Notice to rectify the defect in the application: Provided that the Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect in his application **within seven days** of receipt of such notice from the Adjudicating Authority.

- (5) **Commencement of corporate insolvency resolution process:** The corporate insolvency resolution process shall commence from the date of admission of the application.
- (6) **Communication of Order:** The Adjudicating Authority shall communicate order of admission or rejection of such application within seven days, as the case may be —
 - (1) in case of admission, to the financial creditor and the corporate debtor;
 - (2) In case of rejection, to the financial creditor [Section 7]
- (7) **Withdrawal of application:** Any application can be withdrawn before or after admission.



(B) Insolvency resolution by operational creditor

- (1) Serving of demand Notice:** On the occurrence of default, an operational creditor shall first send a demand notice and a copy of invoice to the corporate debtor.

"Demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.

On receipt of demand notice by corporate debtor: The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about-

- (a) **existence of a dispute about debt,** ⁹if any, record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
 - (b) **the payment of unpaid operational debt—** It is possible that corporate debtor might have already paid the unpaid operational debt, there in such situation, corporate debtor will inform within 10 days -
 - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
 - (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor. [Section 8]
- (2) Application for initiation of corporate insolvency resolution process by operational creditor after issue of demand notice:**
- (i) **Filing of application by operational creditor:** If no reply is received or payment or notice of the dispute under section 8(2) from the corporate debtor within ten days from the date of delivery of the notice or invoice demanding payment, operational creditor can file application before Adjudicating Authority (NCLT) for initiating a corporate insolvency resolution process.
 - (ii) ¹⁰**Providing of documents/ information:** The operational creditor shall, along with the application filed in prescribed form, furnish the following documents—

⁹ Substituted for "if any, and" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

¹⁰ This has been amended vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

a copy of the invoice , or demand notice

- demanding payment, or delivered by the operational creditor to the corporate debtor

an affidavit

- to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt

a copy of the certificate

- from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

a copy of a record with information utility

- confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

any other proof

- confirming that there is no payment of an unpaid operational debt by the corporate debtor, or

such other information,

- as may be prescribed.

- (3) **Appointment of IRP:** An operational creditor initiating a corporate insolvency resolution process, may propose a resolution professional to act as an interim resolution professional.
- (4) **Order of an adjudicating authority:** The Adjudicating Authority shall, within fourteen days of the receipt of the application, by an order—

admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

- (a) the application made is complete; (b) there is no payment of the unpaid operational debt; (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor; (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and (e) there is no

reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

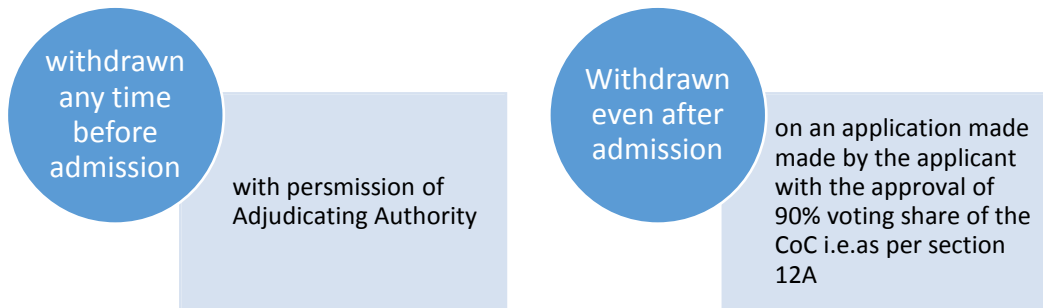
- (a) the application made is incomplete; (b) there has been payment of the unpaid operational debt; (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor; (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or (e) any disciplinary

disciplinary proceeding pending against any resolution professional proposed, if any.

proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application which is incomplete, give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(5) **Withdrawal of application before or after admission:**



(6) **Commencement of insolvency resolution process:** The corporate insolvency resolution process shall commence from the date of admission of the application [**Section 9**]

(C) **Initiation of corporate insolvency resolution process by corporate applicant.**

- (1) **Commission of default:** Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

"Corporate applicant means – (a) Corporate debtor, or (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or (d) a person who has the control and supervision over the financial affairs of the corporate debtor;

"constitutional document", in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership;

- (2) **Furnishing of information:** The corporate applicant shall, along with the application furnish the information relating to—

- (a) its **books of account and such other documents** relating to such period as may be specified; and
 - (b) the **resolution professional** proposed to be appointed as an interim resolution professional.
 - (c) **special resolution** passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.
- (3) **¹¹Admission/rejection of application:** The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—
- (a) admit the application, if it is complete; and no disciplinary proceeding is pending against the proposed resolution professional
 - (b) reject the application, if it is incomplete or any disciplinary proceeding is pending against the proposed resolution professional
- Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.
- (4) **Commencement of insolvency resolution process:** The corporate insolvency resolution process shall commence from the date of admission of the application. [Section 10]

Persons not entitled to initiate insolvency process

Following persons shall not be entitled to initiate the corporate insolvency process:-

- (a) A corporate debtor (which includes a corporate applicant in respect of such corporate debtor) undergoing an insolvency resolution process; or
- (b) A corporate debtor (which includes a corporate applicant in respect of such corporate debtor) having completed corporate insolvency resolution process 12 (twelve) months preceding the date of making of the application; or
- (c) A corporate debtor (which includes a corporate applicant in respect of such corporate debtor) or a financial creditor who has violated any of the terms of resolution plan which was approved 12 (twelve) months before the date of making of an application;
- (d) A corporate debtor (which includes a corporate applicant in respect of such corporate debtor) in respect of whom a liquidation order has been made. [Section 11]

¹¹ This sub-section have been amended vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

Following categories of Corporate debtors not entitled to file an application under section 11

Corporate debtor undergoing the CIRP	Corporate debtor filing an application within 12 months from the date of of an application	Corporate debtor violating the term of resolution plan	Corporate debtor in respect of whom a liquidation order has been made
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Example: Suppose a ABC Pvt. Ltd. has committed a default, and is undergoing a corporate insolvency resolution process. Mr. X and Mr. Y, are partners of the ABC Pvt. Ltd. However, Mr. X under the constitutional document of the Company, is being authorized to make an application for the corporate insolvency resolution process. Being a partner of ABC Pvt. Ltd. Mr. Y filed an application on behalf of Mr. X for initiation of corporate insolvency process. State the validity of the act of Mr. Y for initiating corporate insolvency resolution process with the Adjudicating Authority?

Answer: According to section 11, a corporate debtor includes a corporate applicant in respect of such corporate debtor. Whereas as Corporate applicant means as per the definition given in section 5(15) corporate applicant can also be a member or partner of the corporate debtor who is authorized to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor. Since in the given case, Mr. X is the authorized person not Mr. Y, so his act is invalid as to filing of an application to Adjudicating authority to initiate corporate insolvency resolution process.

(II) Adjudication: Admission or Rejection of Application

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application. However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

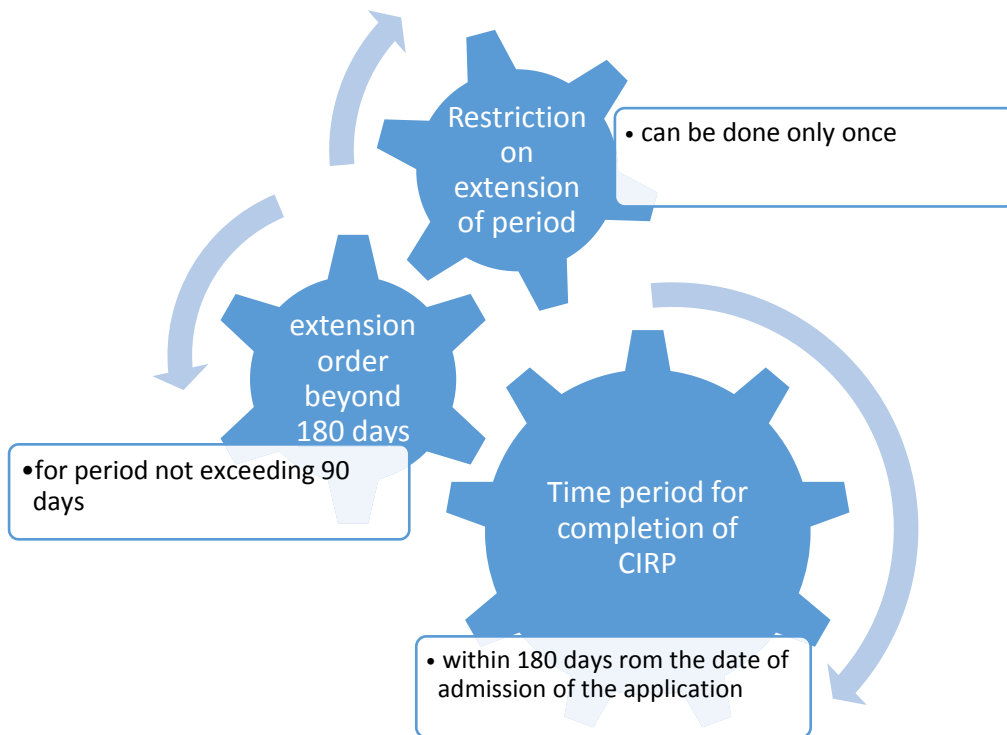
The insolvency resolution process shall commence from the date of admission of application by the Adjudicating Authority. It is referred to as the Corporate Insolvency Resolution Date.

Time-limit for completion of insolvency resolution process

- (1) **Period for completion of insolvency process:** The corporate insolvency resolution process shall be completed within a period of **one hundred and eighty days** from the date of admission of the application to initiate such process.
- (2) **Filing of application for extension of period:** The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution

passed at a meeting of the committee of creditors by a vote of ¹²sixty- six per cent. of the voting shares.

- (3) **Period of extension:** On receipt of an application , if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, **but not exceeding ninety days:** Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once. [Section 12]



Appointment of Interim Resolution Professional

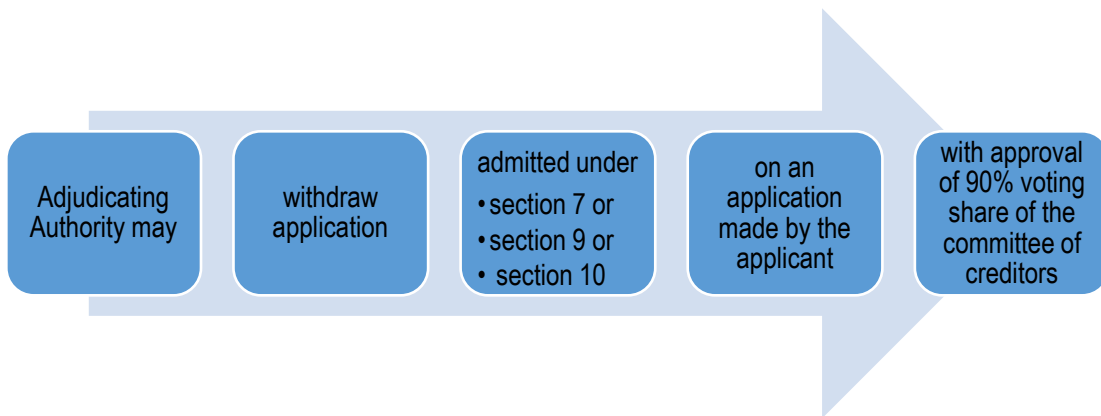
"resolution professional", means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional.

¹² Substituted for "seventy-five" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

If applicant proposes for appointment of Insolvency professional

- obtain written communication from insolvency professional
- for appointment as interim resolution professional

Withdrawal of application admitted under section 7, 9 or 10 [Section 12A]



(III) Declaration of moratorium and public announcement:

After admission of application, the Adjudicating Authority shall pass following order—

- declare a moratorium under section 14;
- cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15, and
- appoint an interim resolution professional in the manner as laid down in section 16.

The public announcement as referred above, shall be made immediately after the appointment of the interim resolution professional. **[Section 13]**

Moratorium:

Moratorium is a delay or suspension of an activity. In a legal context, it may refer to the temporary suspension of a law to allow a legal challenge to be carried out.

After the commencement of corporate insolvency resolution a calm period for 180 days is declared, during which all suits and legal proceedings etc. against the Corporate Debtor are held in abeyance to give time to the entity to resolve its status. It is called the Moratorium Period.

- (1) **Declaration of moratorium period:** According to the section 14(1) of the Code, on the insolvency commencement date, the Adjudicating Authority shall by order, declare moratorium prohibiting all of the following, acts—
- (a) **the institution of suits or continuation of pending suits or proceedings** against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) **transferring, encumbering, alienating or disposing** of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) **any action to foreclose, recover or enforce any security interest** created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - (d) **the recovery of any property** by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (2) **The supply of essential goods or services:** to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.
- (3) **¹³Prohibited Acts:** Acts prohibited during Moratorium period, shall not apply to-
- (a) Such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - (b) A surety in a contract of guarantee to a corporate debtor.
- (4) **Effect of the order of moratorium:** The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

The provision of section 14(1) of the Code is not applicable on a surety in a contract of guarantee to a corporate debtor. Thus, recovery proceedings, insolvency resolution process or bankruptcy proceedings against surety (guarantor) can be initiated even if moratorium is granted to corporate debtor.

When Moratorium period shall cease to have effect: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan or passes an order for liquidation of corporate debtor, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be [Section 14]

Example: After commencement of Corporate Insolvency Resolution, NCLT declared Moratorium against the corporate debtor. Within a month of declaration, corporate debtor disposed of his property. State validity of the act of corporate debtor.

¹³ Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

Answer: As per section 14 of the Code, any transaction/disposal/ of any assets of Corporate Debtor during the moratorium period which is 180 days from date of commencement of corporate insolvency resolution, is prohibited. So such an act of corporate debtor is not valid.

Public Announcement

Interim Resolution Professional shall make the Public Announcement immediately after his appointment. "Immediately" refers to not more than three days from the date of appointment of the Interim Resolution Professional.

Particulars of the Public announcement: As per **Section 15** of the Code, public announcement shall include the following:-

- a) Name & Address of Corporate Debtor under the Corporate Insolvency Resolution Process.
- b) Name of the authority with which the corporate debtor is incorporated or registered.
- c) Details of interim resolution Professional who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
- d) Penalties for false or misleading Claims.
- e) The last date for the submission of the claims as may be specified.
- f) The date on which the Corporate Insolvency Resolution Process ends.

The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent it ratifies them.

(IV) Appointment, Term and Powers of Interim Resolution Professional (IRP)

Appointment of IRP: Adjudicating authority shall appoint an Interim Resolution Professional within 14 days from the commencement date. Section 16 of the Code lays down the procedure for appointment of an Interim Resolution Professional.

Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, the resolution professional as proposed in the application shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

Where the application for corporate insolvency resolution process is made by an operational creditor and

- (a) **No proposal for an interim resolution professional is made.** The Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional.
- (b) **A proposal for an interim resolution professional is made** the proposed resolution professional shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

The Board shall recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

¹⁴Period of appointment of IRP: The term of Interim Resolution Professional shall continue till the date of appointment of the resolution professional under section 22. **[Section 16]**

The key roles to be performed by the Interim Resolution Professional are:-

- (a) Issuance of public notice of the Corporate Insolvency Resolution process
- (b) Collation of claims received
- (c) Constitution of the Committee of Creditors
- (d) Conduct of the first meeting of the Committee of Creditors
- (e) File information collected with the information utility
- (f) Control on assets over which corporate debtor has ownership rights
- (g) Perform other duties as specified by the Board **[Section 18]**

Powers of IRP: As per section 17 of the Code, from the date of appointment of the interim resolution professional, the management of the affairs of the Corporate debtor shall vest in the IRP—

- ¹⁵(a) The management of the affairs of the corporate debtor shall vest in the interim resolution professional. IRP shall be authorized to do the following:
 - act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
 - take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
 - have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
 - have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and
 - be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

¹⁴ Substituted for "shall not exceed thirty days from date of his appointment" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**.

¹⁵ Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**

- (b) **Exercise of Power of BoD/ partners:** The powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.
- (c) **Reporting of officers/managers:** The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.
- (d) **Instructions to financial institutions:** The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

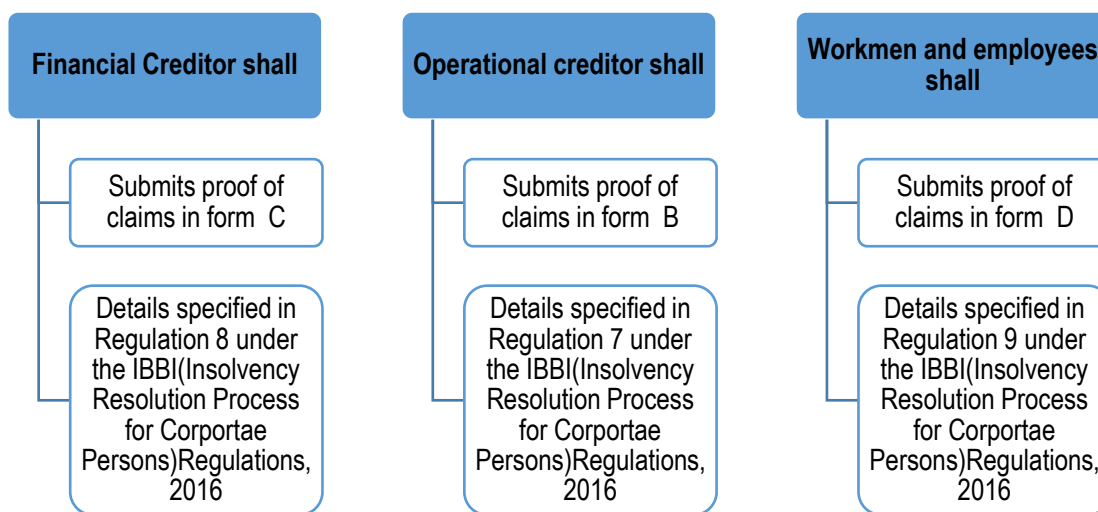
Management of operations of corporate debtor as going concern: The IRP shall make every endeavor to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

The interim resolution professional shall have the authority—

- (a) to appoint accountants, legal or other professionals as may be necessary;
- (b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;
- (c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:

Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.
- (d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and
- (e) to take all such actions as are necessary to keep the corporate debtor as a going concern.

Manner of submission of proof of claims to IRP: Proofs of claim shall be committed to IRP as follows:



A creditor shall submit claim with proof on or before the last date mentioned in the public announcement. However, can be submitted later any time before approval of resolution plan by the committee. IRP or the RP, as the case may be, shall verify every claim and thereupon maintain a list of creditors.

(V) Resolution Professional (RP)

Appointment: As per Section 22 of the Code the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

The Committee of Creditors in the first meeting by majority vote of not less than ¹⁶66% of the Voting Share of the Financial Creditors either-

- resolve to appoint the interim resolution professional as a Resolution Professional, or
- to replace the interim resolution professional by another Resolution Professional.

Where the committee of creditors resolves—

- to continue the interim resolution professional as resolution professional subject to a written consent from the interim resolution professional in the specified form, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or
- to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form.

¹⁶ Substituted for "seventy-five" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

The Adjudicating Authority shall forward the name of the resolution professional proposed to the Board for its confirmation and shall make such appointment after confirmation by the Board.

Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

Role and Duties of RP: The primary role and duty of RP is to conduct corporate insolvency resolution process and to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

- (1) RP shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period.
- (2) RP shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.
- (3) In case of any appointment of a resolution professional, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional. **[Section 23]**

Duties: The resolution professional shall undertake the following actions to protect the assets of the corporate debtor, namely:—

- (a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
- (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
- (c) raise interim finances subject to the approval of the committee of creditors;
- (d) appoint accountants, legal or other professionals in the manner as specified by Board;
- (e) maintain an updated list of claims;
- (f) convene and attend all meetings of the committee of creditors;
- (g) prepare the information memorandum;
- (h) ¹⁷invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;

¹⁷ Substituted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.r.e.f. 23-11-2017

- (i) present all resolution plans at the meetings of the committee of creditors;
- (j) file application for avoidance of transactions in accordance with Chapter III, if any; and
- (k) such other actions as may be specified by the Board. **[Section 25]**

Eligibility of an insolvency Professional to be appointed as a Resolution Professional : As per Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution process for corporate persons) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency process if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor:-

- (a) He is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company.
- (b) He is not a related party of the corporate debtor.
- (c) He is not an employee or proprietor or a partner of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor in the last three financial years.
- (d) He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm in the last three financial years.

Fees of Resolution Professional: As per Section 5(13) of the Code, the fees payable to any person acting as a resolution professional and any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern shall be included in the insolvency resolution process costs. It shall have priority over other costs in the event of winding up of the corporate debtor.

Replacement of Resolution Professional: As per the Section 27 of the Code, RP shall be replaced in the following manner:

- If a debtor or a creditor is of the opinion that the resolution professional appointed is required to be replaced, he may apply to the Adjudicating Authority for replacement of such professional.
- The Adjudicating Authority within seven days of receipt of the application may make reference to the Board for Replacement of Resolution Professional.
- ¹⁸As per Section 27 of the Code, the committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

¹⁸ Substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**

- The Committee of Creditors shall forward the name of the new proposed Insolvency Professional to the Adjudicating Authority, and Adjudicating Authority shall forward such name to the Board for confirmation.
- After the confirmation of the proposed insolvency resolution professional by the Board he shall be appointed in the same manner as laid down in Section 16 which deals with the Appointment of IRP.
- Where any disciplinary proceedings are pending against the proposed resolution professional, the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional.

Example: Mr. Z was continuing as Interim resolution professional (IRP) in XY Company. The committee of creditors by majority vote of financial creditors proposed to appoint Mr. Final as Resolution professional (RP) of the XY Company. The said proposal was confirmed by the Board after the 10 days. State whether Mr. Final is appointed as Resolution professional.

Answer: No, as per the Code, if Board does not confirm the proposed name as RP within 10 days of receipt of proposal, the Adjudicating authority shall direct IRP to continue as RP for such time as the Board would have confirmed for the appointment of Proposed RP.

Preparation of information memorandum: (1) The resolution professional shall prepare an information memorandum containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—

- (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;
- (b) to protect any intellectual property of the corporate debtor it may have access to; and
- (c) not to share relevant information with third parties unless clauses (a) and (b) above are complied with.

"Relevant information" means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified. **[Section 29]**

(VI) Committee of Creditors

Constitution of CoC: As per section 21, the interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors (CoC).

The committee of creditors shall comprise of all the financial creditors of the corporate debtor.

When FC/authorized representative is not entitled to participate in the CoC: for the financial creditor or the authorised representative of the financial creditor referred to in section 24(6), 24(6A), or 24(5), if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

In case where debts owed to 2/more FC: The corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

In case, any person is a financial creditor as well as an operational creditor,—

- (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
- (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

In case of consortium arrangement of FC: Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

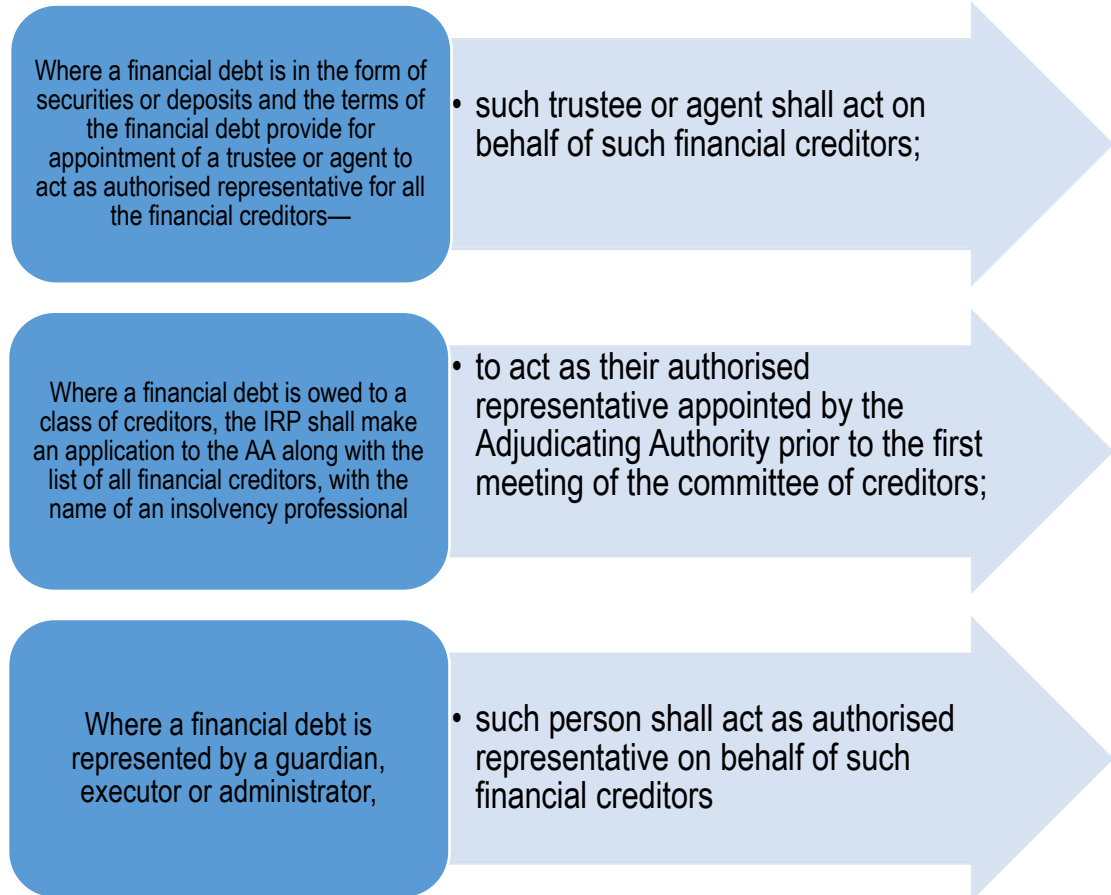
- (a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
- (b) represent himself in the committee of creditors to the extent of his voting share;
- (c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
- (d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

¹⁹ Substituted for "related party to whom a corporate debtor owes a financial debt" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**.

²⁰ Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**.

Voting by authorised representative of class of FC : As per section 21(6A), if a financial debt is owned by a class of creditors, an insolvency professional can be appointed by adjudicating authority on receipt of application from interim Resolution professional.

Who can act as an authorised representative?



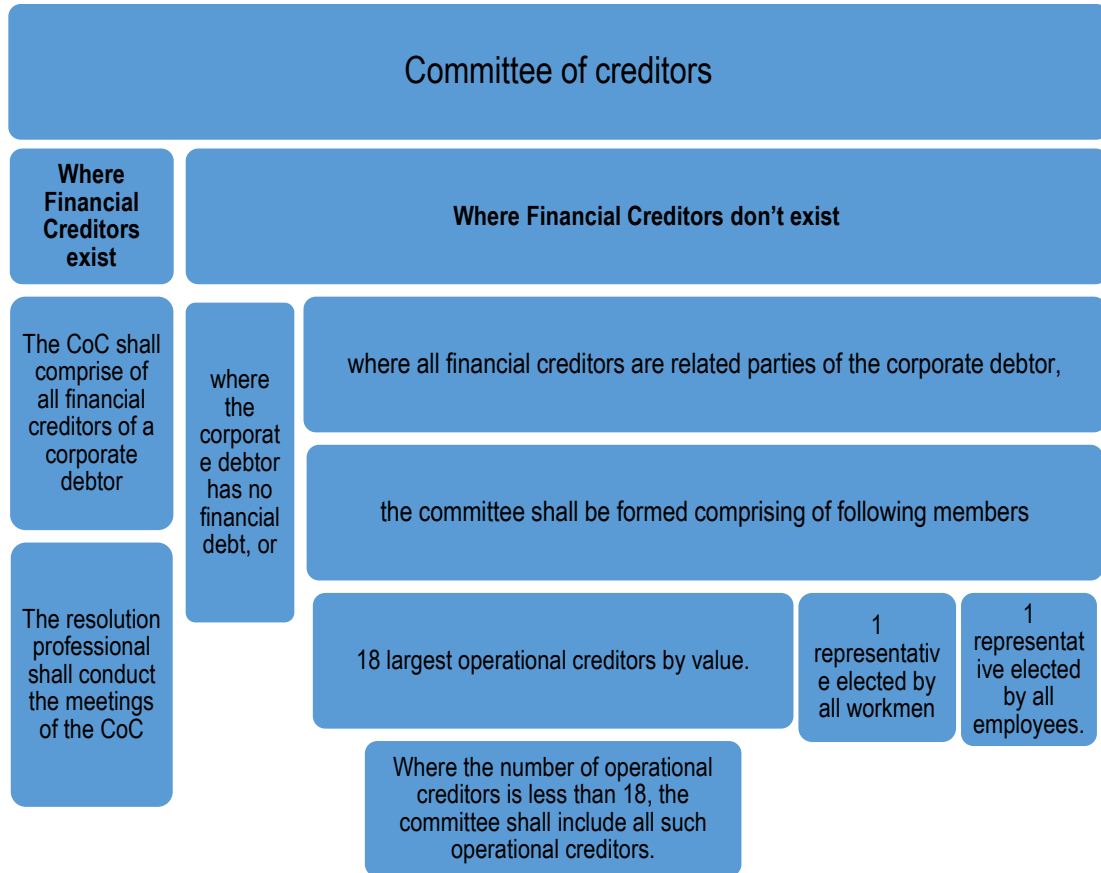
Rights of Authorised representative: Above Authorised representative shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

All decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors.

(VII) Meeting of committee of creditors

The provisions related to the meeting of committee of creditors are being dealt under the section 24 of the Code.

Composition: The composition of the committee shall be as follows:-



Procedure for conduct of meeting of CoC: The members of the committee of creditors may meet in person or by such electronic means. All the meeting of CoC shall be conducted by the RP. Notice of meeting shall be served to the following:

- (a) members of Committee of creditors, including the authorised representatives;
- (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
- (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

The directors, partners and one representative of operational creditors, as referred above, may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings. And their absence, shall not invalidate proceedings of such meeting. Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor. Voting rights of each financial creditor will be in proportion to debt due to each

creditor to “total debt”. Whereas total debt will be equal to debts due to creditors, workmen and employees. [Regulation 16(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016].

Approval of committee of creditors: All the decisions of the committee of creditors shall be taken by vote of **minimum sixty six of the voting share of the financial creditors**. The voting share is determined based on the value of the debt of the creditor in proportion to the total debt. Where any action is taken without seeking the approval of the committee of creditors, such action shall be void.

First Meeting of Creditors: The first meeting of the committee of creditors shall be held **within seven days of the constitution of the committee** of creditors. The committee shall be constituted within 30 days from the date of appointment of RP under regulation 17 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Notice for meetings of the committee

- (1) A meeting of the committee shall be called by giving not less than five days' notice in writing to every participant.
- (2) The committee may reduce the notice period from five days to such other period of not less than twenty-four hours, as it deems fit:

Provided that the committee may reduce the period to such other period of not less than forty-eight hours if there is any authorised representative. [Regulation 19 of the of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.]

Quorum for the Meeting

- A meeting of committee of creditors shall quorate if members of the **committee of creditors representing at least thirty three percent of the voting rights are present** either in person or by video/audio means.
- If the **requisite quorum for committee of creditors is not fulfilled** the meeting cannot be held and the meeting shall automatically stand adjourned at the same time and place on the next day.
- The adjourned meeting shall quorate with the members of the committee attending the meeting.

Approval of committee of creditors for certain actions:

- (1) According to section 28 of the Code, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:—
 - (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

- (b) create any security interest over the assets of the corporate debtor;
 - (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
 - (d) record any change in the ownership interest of the corporate debtor;
 - (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
 - (f) undertake any related party transaction;
 - (g) amend any constitutional documents of the corporate debtor;
 - (h) delegate its authority to any other person;
 - (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
 - (j) make any change in the management of the corporate debtor or its subsidiary;
 - (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
 - (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
 - (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.
- (2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the above actions.
- (3) No action shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.
- (4) Where any action is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.
- (5) The committee of creditors may report the actions of the resolution professional to the Board for taking necessary actions against him under this Code.

(VIII) Persons not eligible to be resolution applicant

The first and foremost duty of Resolution Professional is to get resolution plan /s by Resolution Applicants.

Grounds of ineligibility to be a resolution applicant: Section 29A states that a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person is a/an —

- (a) is an undischarged insolvent;
- (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- (c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Exception : Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan:

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.—For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.—For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

- (d) has been **convicted for any offence** punishable with imprisonment—
 - (i) for two years or more under any Act specified under the Twelfth Schedule; or
 - (ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;]

- (e) is **disqualified to act as a director** under the Companies Act, 2013 (18 of 2013):

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

- (f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- (g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

- (h) has **executed a guarantee in favour of a creditor in respect of a corporate debtor** against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part ;
- (i) is subject to **any disability**, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
- (j) has a **connected person** not eligible under clauses (a) to (i).

Explanation I—For the purposes of this clause, the expression "connected person" means—

- (i) any person who is the promoter or in the management or control of the resolution applicant; or
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

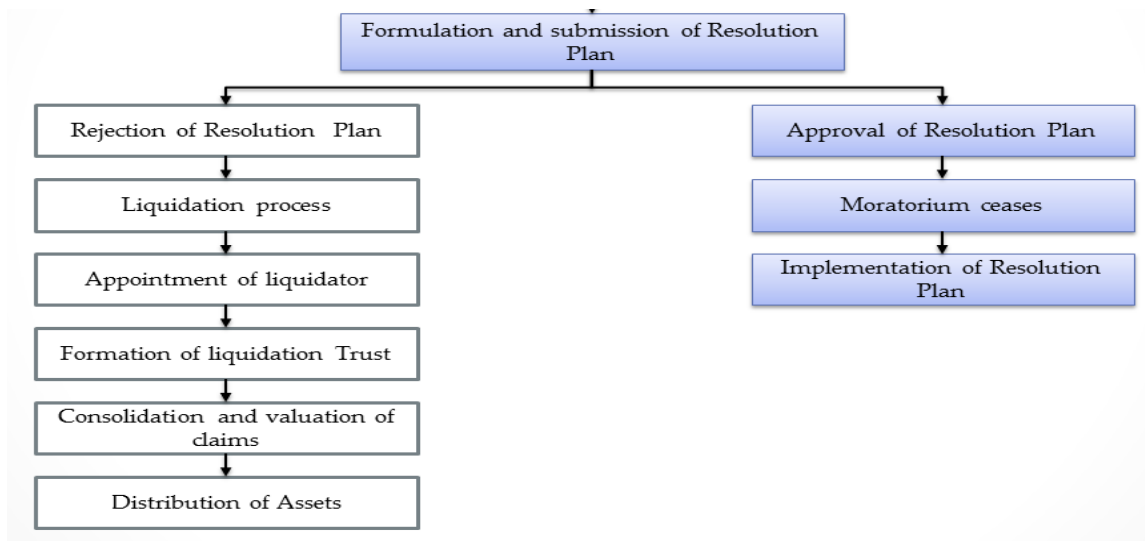
Provided further that the expression "**related party**" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

Explanation II.—For the purposes of this section, "**financial entity**" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

- (a) a scheduled bank;
- (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
- (c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999;
- (d) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;
- (f) such categories of persons as may be notified by the Central Government.

(IX) Resolution Plan

A resolution plan is a proposal agreed to by the Debtors and Creditors of an entity in a collective mechanism to propose a time bound solution to resolve the situation of insolvency. Provision given in **sections 30 and 31 of the Code** deals with resolution plan. A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.



Duty of resolution professional on submission of Resolution plan: The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

- (a) Provides the manner for the payment of insolvency resolution process costs in priority to the payment of other debts of the corporate debtor;
- (b) provides for the payment of the debts of operational creditors as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;"
- (c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
- (d) the implementation and supervision of the resolution plan;
- (e) does not contravene any of the provisions of the law for the time being in force.
- (f) Conforms to such other requirements as may be specified by the Board.

Seeking approval of CoC: The resolution professional shall present such resolution plans to the committee of creditors for its approval by a vote of not less than ²¹sixty-six per cent of voting share of the financial creditors.

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where

²¹ Substituted for "seventy-five" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018.

the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it.

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A.

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to section 12(3), and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.

Attending of meeting by resolution applicant: The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered.

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

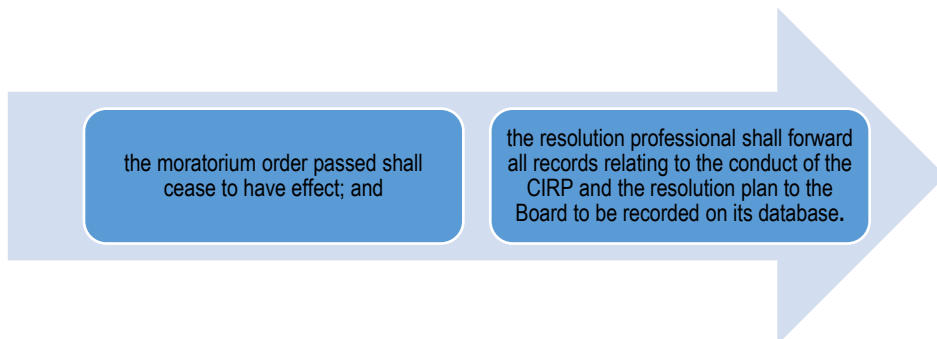
Submission of the resolution plan: The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority. [Section 30]

Approval of resolution plan: If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements as per section 30(2), it shall by order approve the resolution plan which shall be binding on the following:

- corporate debtor and its employees,
- members, creditors, guarantors, and
- other stakeholders involved in the resolution plan

Rejection of the resolution plan: Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the above requirements, it may, by an order, reject the resolution plan.

Consequences of approval: After the order of approval,—



²²The resolution applicant shall obtain the necessary approval pursuant to the resolution plan approved, within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority or within such period as provided for in such law, whichever is later.

Provided that where the resolution plan contains a provision for combination, as per section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors. **[Section 31]**

Appeal against Approval of Resolution Plan: Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61

As per Section 61(3) of the Code, an appeal against an order of Adjudicating Authority for approving the resolution plan may be filed on the following grounds:-

- (a) The approved resolution plan is in contravention of the provisions of any law for the time being in force.
- (b) There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period.
- (c) The debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board.
- (d) The insolvency resolution process costs have not been provided for repayment in priority to all other debts.
- (e) The resolution plan does not comply with any other criteria specified by the Board.

Consequences of non-submission of a Resolution Plan: When the Resolution Plan is not filed within 180 days of the Commencement date or such other extended period the Adjudicating Authority may pass orders for the liquidation of the corporate debtor.



4. LIQUIDATION PROCESS

The Code concerns itself only with those corporate debtors which have defaulted in payment of debts. The corporate debtor, at the first stage, is put into resolution mode. The process is called

²² Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**.

the corporate insolvency resolution process. However, if attempts to resolve the insolvency of the corporate debtor fail, then only the liquidation provisions of the Code are triggered.

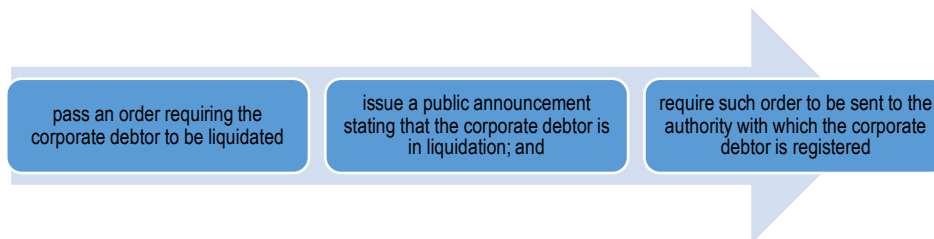
Where no plan is presented or where the plan presented is not approved by the Adjudicating Authority it shall pass an order requiring the Corporate Debtor to be liquidated in the manner as laid down in Chapter III of the Act.

Section 33 to 54 of the Code provides the law related to the liquidation process.

(I) Initiation of liquidation:

Section 33 of the Code provides that where the Adjudicating Authority, —

- (a) **Not received a Resolution plan:** Before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process or the fast track corporate insolvency resolution process, as the case may be, does not receive a resolution plan; or
- (b) **rejects the resolution plan** for the non-compliance of the requirements specified therein, it shall—



Intimation of the decision of the committee of creditors to liquidate to Adjudicating authority:

Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors ²³approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order.

Contravention of resolution plan as approved by the Adjudicating Authority: Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order.

Determination of contravention of the provisions of the resolution plan: On receipt of an application, if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order.

Bar to filing to suits and legal proceedings: Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate

²³ Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018.

debtor. A suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

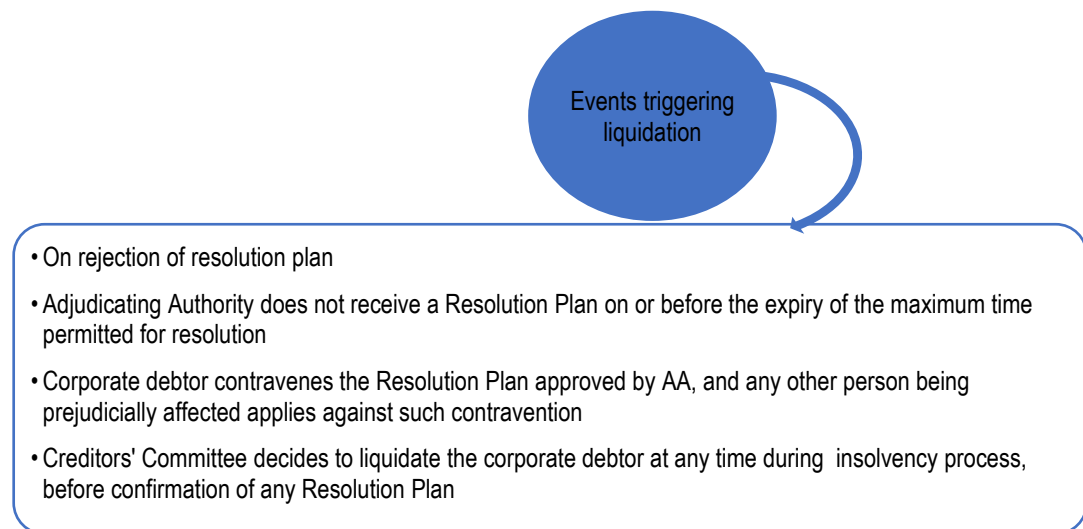
Exception: Restrictions on filing of suits and legal proceedings shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

Order to be deemed to be notice of discharge: The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

So, from above it can be concluded that under the Code, a corporate debtor may be put into liquidation in the following scenarios:

- (i) A 66% majority of the creditor's committee resolves to liquidate the corporate debtor at any time during the insolvency resolution process;
- (ii) The creditor's committee does not approve a resolution plan within 180 days (or within the extended 90 days);
- (iii) The NCLT rejects the resolution plan submitted to it on technical grounds; or
- (iv) The debtor contravenes the agreed resolution plan and an affected person makes an application to the NCLT to liquidate the corporate debtor.

Once the NCLT passes an order of liquidation, a moratorium is imposed on the pending legal proceedings against the corporate debtor, and the assets of the debtor (including the proceeds of liquidation) vest in the liquidation estate.



(II) Appointment of liquidator

Section 34 of the Code provides of appointment of liquidator.

Resolution professional to act as liquidator: It states that where the Adjudicating Authority passes an order for liquidation of the corporate debtor, the resolution professional appointed for the corporate insolvency resolution process under ²⁴Chapter II shall, subject to submission of a written consent by the resolution professional to the Adjudicating Authority in specified form, shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority.

Powers of BoD/ KMP vested in liquidator: On the appointment of a liquidator, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

Personnel to extend cooperation to liquidator: The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

Order to replace the resolution professional: The Adjudicating Authority shall by order replace the resolution professional, if—

Ground for replacement
of RP

- the resolution plan submitted by the resolution professional was rejected for failure to meet the requirements; or
- the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing, or
- the resolution professional fails to submit written consent

On rejection of resolution plan due to failure to meet the requirements, the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

The Board shall propose the name of another insolvency professional ²⁵along with written consent from the insolvency professional in the specified form within ten days of the direction issued by the Adjudicating Authority.

Adjudicating Authority to appoint insolvency professional as the liquidator: The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

²⁴ Substituted for "Chapter II shall" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

²⁵ along with written consent from the insolvency professional in the specified form

Charge of fees for conduct of liquidation proceedings: An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be ²⁶specified by the Board.

Payment of fees: The fees for the conduct of the liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.

(III) Powers and duties of liquidator

Section 35 of the Code specifies the following power and duties of liquidator-

- (a) to **verify claims** of the creditors;
 - (b) to **take into his custody or control** all the assets, property, effects and actionable claims of the corporate debtor;
 - (c) to **evaluate the assets and property** of the corporate debtor as may be specified by the Board and **prepare a report**;
 - (d) to take **measures to protect and preserve the assets and properties** of the corporate debtor;
 - (e) **to carry on the business** of the corporate debtor for its beneficial liquidation;
 - (f) to **sell the immovable and movable property and actionable claims** of the corporate debtor in liquidation by –
 - public auction or private contract,
 - with power to transfer such property to any person or body corporate, or
 - to sell the same in parcels in such manner as may be specified;
- ²⁷However, the liquidator shall not sell the above said properties of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.
- (g) to **draw, accept, make and endorse any negotiable instruments** in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;
 - (h) **to take out, in his official name, letter of administration to any deceased contributory** and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor.

²⁶ Regulations 3, 4 and 12 of the IBBI (Liquidation Process) Regulations, 2016

²⁷ Inserted vide Insolvency and Bankruptcy Code(Amendment)Act, 2018 w.r.e.f. 23.11.17

And in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

- (i) to **obtain any professional assistance** from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;
- (j) to **invite and settle claims** of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;
- (k) to **institute or defend any suit, prosecution or other legal proceedings**, civil or criminal, in the name of on behalf of the corporate debtor;
- (l) to **investigate the financial affairs** of the corporate debtor to determine undervalued or preferential transactions;
- (m) to **take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument** and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
- (n) to **apply to the Adjudicating Authority for such orders or directions** as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and
- (o) to **perform such other functions** as may be specified by the Board.

The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds. Any such consultation shall not be binding on the liquidator. Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.

Powers of liquidator to access information:

The liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor. The creditors may require the liquidator to provide them any financial information relating to the corporate debtor. The liquidator shall provide information to such creditors who have requested for such information within a period of seven days from the date of such request or provide reasons for not providing such information [Section 37].

(IV) Liquidation estate:

According to section 36 of the Code, for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor.

The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

Comprising of liquidation estate: The liquidation estate shall comprise all liquidation estate assets which shall include the following:—

- (a) **any assets over which the corporate debtor has ownership rights**, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
- (b) **assets that may or may not be in possession of the corporate debtor** including but not limited to encumbered assets;
- (c) **tangible assets**, whether movable or immovable;
- (d) **intangible assets** including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
- (e) assets subject to the **determination of ownership by the court or authority**;
- (f) any **assets or their value recovered through proceedings** for avoidance of transactions in accordance with this Chapter;
- (g) **any asset of the corporate debtor** in respect of which a secured creditor has relinquished security interest;
- (h) **any other property** belonging to or vested in the corporate debtor at the insolvency commencement date; and
- (i) **all proceeds of liquidation** as and when they are realised.

Exceptions to the assets from inclusion in the liquidation estate assets: The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

- (a) **assets owned by a third party** which are in possession of the corporate debtor, including—
 - (i) assets held in trust for any third party;
 - (ii) bailment contracts;
 - (iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;
 - (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
 - (v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

- (b) **assets in security collateral held by financial services providers** and are subject to acquiring and set-off in multi-lateral trading or clearing transactions;
- (c) **personal assets of any shareholder or partner of a corporate debtor** as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
- (d) **assets of any Indian or foreign subsidiary** of the corporate debtor; or
- (e) **any other assets as may be specified by the Board**, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

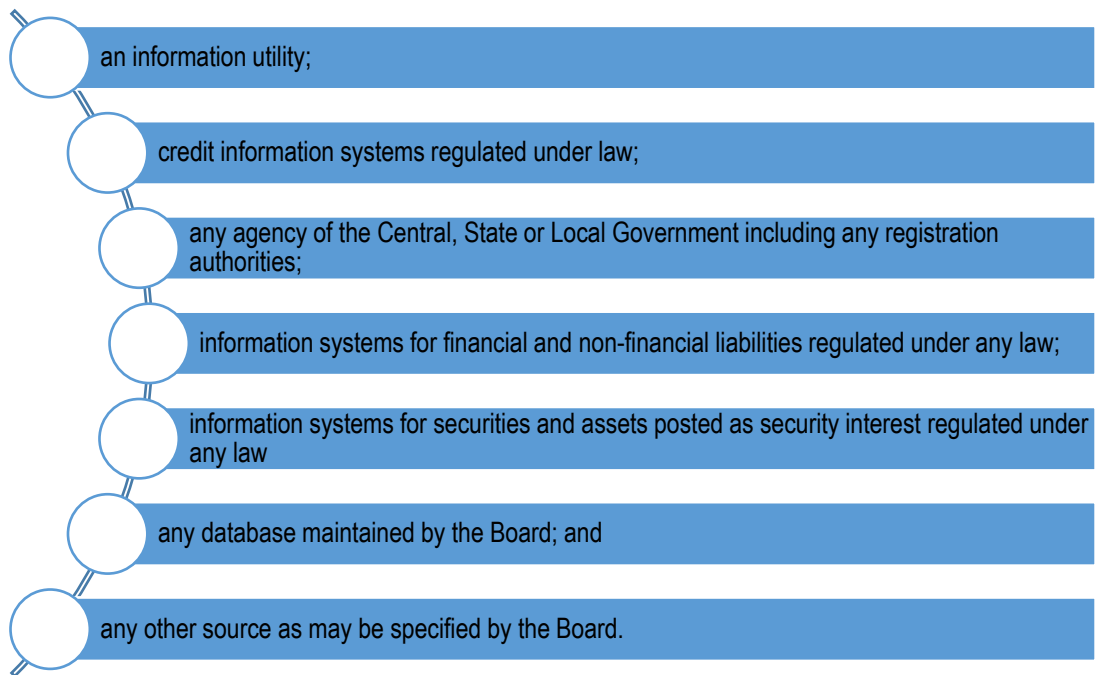
Inclusions
[Section 36(3)]

- any assets over which the corporate debtor has ownership rights;
- encumbered assets;
- tangible and intangible assets;
- ownership of assets determined by the court/authority
- assets or their value recovered through proceedings
- assets issued as collateral over which creditors have relinquished rights;
- property belonging to or vested in the corporate debtor at the insolvency commencement date
- all proceeds of liquidation as and when they are realized

Exclusions
[Section 36(4)]

- assets owned by a third party which are in possession of the corporate debtor;
- assets in security collateral held by financial services providers
- personal assets of any shareholder /partner of a corporate debtor, are not held on account of avoidance transactions;
- assets of any Indian or foreign subsidiary of the corporate debtor
- any other assets as may be specified by the Board

According to section 37 of the Code, the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following sources:



The liquidator shall provide information to creditors (who have requested) of any financial information relating to the corporate debtor, within a period of seven days from the date of such request or provide reasons for not providing such information.

(V) Consolidation of claims:

Section 38 of the Code deals with provisions related to the consolidation of claims. Accordingly-

- (1) **Collection of claims by liquidator:** The liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process.
- (2) **Submission of claims:** A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility. Where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner as provided for the submission of claims for the operational creditor.
- (3) **Supportive documents:** An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board.
- (4) **Extent of claims to be submitted:** A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt and to the extent of his operational debt.
- (5) **Alteration in claim:** A creditor may withdraw or vary his claim under this section within fourteen days of its submission.

Verification of claims: The liquidator shall verify the claims submitted within such time as specified by the Board. The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim [Section 39]

Admission or rejection of claims: The liquidator may, after verification of claims, either admit or reject the claim, in whole or in part. Provided that where the liquidator rejects a claim, he shall record in writing the reasons for such rejection.

The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims [Section 40]

Determination of valuation of claims: The liquidator shall determine the value of claims admitted in such manner as may be specified by the Board. [Section 41]

Appeal against the decision of liquidator: A creditor may appeal to the Adjudicating Authority against the decision of the liquidator ²⁸accepting or rejecting the claims within fourteen days of the receipt of such decision. [Section 42]

(VI) Preferential transactions & Extortionate Credit Transactions

According to section 43 of the Code, where the liquidator or the resolution professional (RP), is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions to any of the following persons:

- (a) A related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date.
- (b) A person other than a related party during the period of one year preceding the insolvency commencement date. [Sub-section (4)]

In such case, the liquidator or RP shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

circumstances under which transactions will be referred to as preferential transactions	circumstances under which transactions will not be referred to as preferential transactions
<p>A corporate debtor shall be deemed to have given a preference in the following circumstances:-</p> <ol style="list-style-type: none"> a) If there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or 	<p>Following transfers shall not be referred to as a preference transaction:-</p> <ol style="list-style-type: none"> a) The transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee.

²⁸ Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

operational debt or other liabilities owed by the corporate debtor.

b) If the transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53 of the Code.

b) Any transfer creating a security interest in property acquired by the corporate debtor to the extent that-

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property.

Further, any transfer made in pursuance of the order of a Court shall not preclude such transfer to be deemed as giving of preference by the corporate debtor.

The term “**new value**” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

Deemed preferences - A preference shall be deemed to be given at a relevant time, if—

- (a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date, or
- (b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date [section 43(4) of Insolvency Code, 2016]

If sale deed was executed prior to one year preceding commencement of insolvency proceedings, application under section 43 of Insolvency Code is not maintainable [*V Nagarajan (Liquidator) v. Asset Reconstruction Co. (2018)*]

Orders in case of preferential transactions

The Adjudicating Authority, may, on an application made by the resolution professional or liquidator, by an order :

- a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;
- b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

- c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;
- d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;
- e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;
- f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and
- g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:

Provided that an order under this section shall not—

- a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;
- b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional. [Section 44]

Explanation I—For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference, —

- (i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;
- (ii) is a related party,

it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the contrary is shown.

Explanation II—A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13.

Avoidance of undervalued transactions: If the liquidator or the RP, on an examination of the transactions of the corporate debtor, determines that certain transactions were made during the relevant period under section 46, were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction.

A transaction shall be considered undervalued where the corporate debtor —

- (a) makes a gift to a person; or
- (b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor. [Section 45]

Relevant period for avoidable transactions: In an application for avoiding a transaction at undervalue, the liquidator or resolution professional shall determine :

- a) That the transaction was entered within the period of one year preceding the insolvency commencement date; or
- b) That the transaction was made with a related party within a period of two years preceding the insolvency commencement date. [Section 46]

The adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions .

In case where liquidator or RP has not reported to the adjudicating authority of the undervalued transaction: Section 47 of the Code states that where an undervalued transaction has taken place and the liquidator or the resolution professional has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect.

Where the Adjudicating Authority, after examination of the application is satisfied that-

undervalued transactions had occurred; and liquidator or the resolution professional, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority,

shall pass an order-

restoring the position as it existed before such transactions and reversing the effects thereof requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional

Order in cases of undervalued transactions: As per Section 48, following order of the adjudicating authority may be passed:

Required any property so transferred as part of the transaction,

- to be vested in the corporate debtor

Any security interest granted by the corporate debtor;

- to be released or discharged

Require any person to pay such sums, in respect of benefits received by such person,

- to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct; or

Require the payment of such consideration for the transaction

- as may be determined by an independent expert.

Transactions defrauding creditors: As per section 49 of the Code, where the corporate debtor has entered into an undervalued transaction under section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor—

- (a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or
- (b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order—
 - (i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and
 - (ii) protecting the interests of persons who are victims of such transactions:

However, an order passed under this section—

- (1) **shall not affect any interest in property which was acquired from a person other than the corporate debtor** and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and
- (2) **shall not require a person who received a benefit from the transaction** in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

Extortionate credit transactions:

As per the regulation 5 of the *Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution process for corporate persons) Regulations, 2017*, a transaction shall be considered an extortionate credit transaction under section 50(2) where the terms:

- (a) require the corporate debtor to make exorbitant payments in respect of the credit provided; or
- (b) are unconscionable under the principles of law relating to contracts.

(1) According to section 50 of the Code, where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

(2) The Board may specify the circumstances in which the said transactions shall be considered as an extortionate credit transaction as given above.

Exception: Where any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

Order of Adjudicating authority: As per Section 51 of the Code, if an Adjudicating Authority after examining the application is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order:-

- (a) Restore the position as it existed prior to such transaction;
- (b) Set aside the debt created on account of the extortionate credit transaction;
- (c) Modify the terms of the transaction;
- (d) Require any person who is/ was, a party to the transaction to repay any amount received by such person; or
- (e) Require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

(VII) Secured creditor in liquidation proceedings

- (1) **Rights of secured creditor:** A secured creditor in the liquidation proceedings may—
- (a) **relinquish its security interest to the liquidation estate** and receive proceeds from the sale of assets by the liquidator, or
 - (b) **realise its security interest** in the manner specified in this section.

- (2) **To inform the liquidator of realise security interest:** Where the secured creditor realises security interest under clause (b) above, he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.
- (3) **Verification by liquidator of security interest:** Before any security interest is realised by the secured creditor, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—
 - (a) by the records of such security interest maintained by an information utility; or
 - (b) by such other means as may be specified by the Board.
- (4) **Rights of secured creditor related to secured assets:** A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.
- (5) **Restriction in realising of a secured asset:** If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.
- (6) **Passing of order by Adjudicating Authority :** The Adjudicating Authority, on the receipt of an application from a secured creditor may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.
- (7) **Yield of surplus :** Where the enforcement of the security interest yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—
 - (a) account to the liquidator for such surplus; and
 - (b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.
- (8) **Amount of insolvency resolution process to be included in the liquidation estate:** The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.
- (9) **Unpaid debts to be paid by liquidator:** Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator [Section 52]

(VIII) Distribution of assets

Section 53 of the Code lays the provisions related to distribution of assets or the proceeds from the sale of the liquidation assets.

- (1) **Distribution of proceeds from the sale of the liquidation assets:** The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority —
 - (a) the insolvency resolution process costs and the liquidation costs paid in full;
 - (b) the following debts which shall rank equally between and among the following :—
 - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
 - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
 - (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
 - (d) financial debts owed to unsecured creditors;
 - (e) the following dues shall rank equally between and among the following:—
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
 - (f) any remaining debts and dues;
 - (g) preference shareholders, if any; and
 - (h) equity shareholders or partners, as the case may be.
- (2) **Disregard of order of priority:** Any contractual arrangements between recipients with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.
- (3) **Fees to liquidator:** The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients, and the proceeds to the relevant recipient shall be distributed after such deduction.

At each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and the term "workmen's

dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 [Section 53]

Requirements for commencement of distribution: (1) Subject to the provisions of section 53, the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority.

(2) The liquidator shall distribute the proceeds from realization within six months from the receipt of the amount to the stakeholders.

(3) The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made.

[Regulation 42 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016]

(IX) Dissolution of corporate debtor

Application by liquidator dissolution: Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

Date of dissolution: The Adjudicating Authority shall on application filed by the liquidator order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

Submission of order copy: A copy of an order shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered. [Section 54]

Completion of liquidation: (1) The liquidator shall liquidate the corporate debtor within a period of two years.

(2) If the liquidator fails to liquidate the corporate debtor within two years, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation.

[Regulation 44 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016]



5. FAST TRACK INSOLVENCY RESOLUTION FOR CORPORATE PERSONS

A fast track insolvency resolution, as the name suggests, is a process wherein the insolvency resolution process shall be completed in an expeditious manner i.e., with 90 (ninety) days from the insolvency commencement date. The provisions of the *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* shall, *mutatis*

mutandis, apply to the conduct of a fast track corporate insolvency resolution process. The provisions related to the fast track insolvency resolution are being covered under sections 55 to 58 of the Code.

Who may apply?

An application under this category can be made by any corporate debtor falling under any of the below mentioned category:-

- (a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or
- (b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or
- (c) such other category of corporate persons as may be notified by the Central Government.

Vide notification no. SO 1911(E) dated 14-6-2017, the Central Government prescribed the following class of corporate debtors on whom the provisions pertaining to the fast track corporate insolvency resolution process are applicable –

- (a) small company under section 2(85) of Companies Act
- (b) a start-up (other than partnership firm) as defined by Ministry of Commerce and Industry notification No. GSR 501(E) dated 23-5-2017
- (c) an unlisted company with total assets not exceeding ₹ one crore as per financial statement immediately preceding the financial year - SO 1911(E) dated 14-6-2017.

Time period for completion of fast track corporate insolvency resolution process

The fast track corporate insolvency resolution process shall be completed within a period of ninety days from the insolvency commencement date.

"Fast track commencement date" means the date of admission of an application by the Adjudicating Authority for initiating the fast track process under Chapter IV of Part II of the Code;

Extension: The Adjudicating Authority may extend time period for fast track corporate insolvency resolution process.

The resolution professional shall file an application to the Adjudicating Authority to extend the period of the fast track corporate insolvency resolution process beyond ninety days if instructed to do so by a resolution passed at a meeting of the committee of creditors and supported by a vote of seventy five percent of the voting share.

And if Adjudicating Authority is satisfied that the fast track corporate insolvency resolution process cannot be completed within a period of ninety days, it may, by order; extend the duration of such process to a further period which shall not be exceeding forty-five days.

The extension of the fast track corporate insolvency resolution process under this section shall not be granted more than once.

Manner of initiating fast track corporate insolvency resolution process: An application for fast track corporate insolvency resolution process may be filed by a creditor or corporate debtor as the case may be, along with—

- (a) the proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board; and
- (b) such other information as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process. Manner of initiating fast track corporate insolvency resolution process.

Applicability of Chapter II to this chapter: The process for conducting a corporate insolvency resolution process under Chapter II and the provisions relating to offences and penalties under Chapter VII shall apply to this Chapter as the context may require.



6. VOLUNTARY LIQUIDATION OF CORPORATE PERSONS [SECTION 59]

- (1) **Person who may initiate voluntary liquidation proceeding:** A corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of this Chapter V of Part II of the Code.
- (2) **Requirements for voluntary liquidation to be specified by the Board:** The voluntary liquidation of a corporate person shall meet such conditions and procedural requirements as may be specified by the Board.
- (3) **Conditions of initiation of voluntary liquidation proceedings:** Voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:—
 - (a) a declaration from majority of the directors of the company verified by an affidavit stating that—
 - (i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
 - (ii) the company is not being liquidated to defraud any person;
 - (b) the declaration given above shall be accompanied with the following documents, namely:—

- (i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
- (ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;
- (c) within four weeks of a declaration, there shall be—
 - (i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or
 - (ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles, or
 - (iii) on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Provided that the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

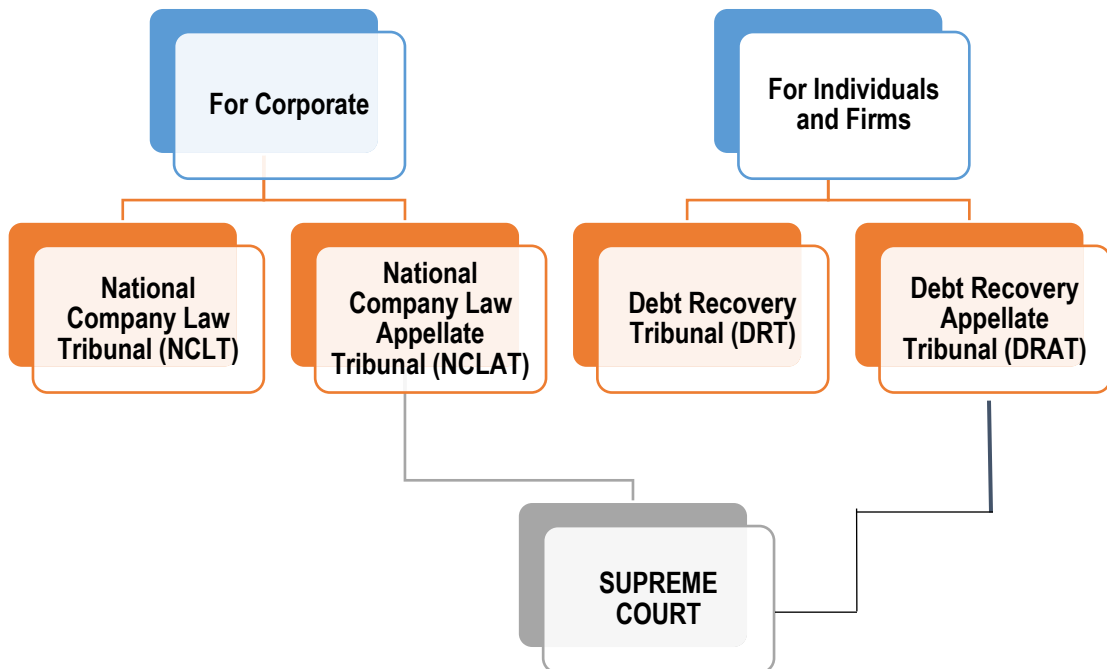
- (4) **Notification to Registrar of company and the Board:** The Company shall notify the Registrar of Companies and the Board about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.
- (5) **Commencement of liquidation proceeding:** The voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution.
- (6) **Application of provisions of this Code:** The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.
- (7) **Application to adjudicating authority on complete wound up of the corporate person:** Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.
- (8) **Passing of an order of dissolution:** The Adjudicating Authority shall on an application filed by the liquidator, pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

- (9) **Forward of copy of order:** A copy of an order shall within fourteen days from the date of such order, be forwarded to the authority with which the corporate person is registered.

7. ADJUDICATING AUTHORITY FOR CORPORATE PERSONS

Sections 60 to 77 of the Code deals with the provisions related to the adjudicating authority for corporate persons.

The National Company Law Tribunal ('NCLT') and Debt Recovery Tribunal ('DRT') shall act as Adjudicatory Authority for corporate insolvency and non-corporate insolvency respectively. These bodies shall entertain or dispose any insolvency application, approve or reject resolution plans, decide in respect of claims or matters of law or facts.



Appeals from NCLT orders lie to the National Company Law Appellate Tribunal and thereafter to the Supreme Court of India where as appeals from DRT orders lie to the Debt Recovery Appellate Tribunal and thereafter to the Supreme Court.

(I) Adjudicating Authority for corporate persons: As per section 60 of the Code, the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law

Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

Where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution²⁹ or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before such National Company Law Tribunal.

An insolvency resolution process or³⁰ liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code.

The National Company Law Tribunal shall have **jurisdiction** to entertain or dispose of—

- (a) any application or proceeding by or against the corporate debtor or corporate person;
- (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and
- (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

Period of moratorium excluded for purpose of limitation: Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in **computing the period of limitation** specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded. [Section 60]. This provision overrides provision of Limitation Act or any other law.

(II) Appeals and Appellate Authority: Any person aggrieved by the order of the **Adjudicating Authority** may prefer an appeal to the National Company Law Appellate Tribunal. It shall be filed within thirty days before the National Company Law Appellate Tribunal.

However, National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days. [Section 61]

²⁹ Substituted for "bankruptcy of a personal guarantor of such corporate debtor" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**.

³⁰ Substituted for "bankruptcy proceeding of a personal guarantor of the corporate debtor" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. **6-6-2018**

An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

- (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;
- (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
- (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
- (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
- (v) the resolution plan does not comply with any other criteria specified by the Board.

An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.

(III) Appeal to Supreme Court on a question of law: Any person aggrieved by an order of the National Company Law

Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order within forty-five days from the date of receipt of such order.

The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days [Section 62]

Civil Court is prohibited to entertain any suit or proceedings: No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.[Section 63]

(IV) Expeditious disposal of applications: Where an application is not disposed of or an order is not passed within the period specified in this Code, the National Company Law Tribunal or the National Company Law Appellate Tribunal, as the case may be, shall record the reasons for not doing so within the period so specified; and the President of the National Company Law Tribunal or the Chairperson of the National Company Law Appellate Tribunal, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days. No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Tribunal under this Code. [Section 64]

Hence, the Code specify strict time limits for each action. If action is not completed within specified time, the National Company Law Tribunal or the National Company Law Appellate Tribunal can grant extension upto ten days.

(V) Fraudulent or malicious initiation of proceedings: If, any person initiates the insolvency resolution process or liquidation proceedings **fraudulently or with malicious intent for any purpose** other than for the resolution of insolvency, or liquidation, as the case may be,

And where if, any person initiates **voluntary liquidation proceedings with the intent to defraud any person-**

then in such cases, Adjudicating Authority may impose upon such persons a penalty varying from one lakh rupees to one crore rupees.

(VI) Fraudulent trading or wrongful trading: If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose- the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

NCLT can order contribution to assets by defrauding director or partner - The Adjudicating Authority may by an order direct that-

- a director, or
- partner of the corporate debtor

shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

- (a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor, and
- (b) such **director or partner did not exercise due diligence** in minimising the potential loss to the creditors of the corporate debtor .

A director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Proceedings under section 66:

If the Adjudicating Authority has passed an order under section 66, it may give such further directions as it may deem appropriate for giving effect to the order.

In particular, the Adjudicating Authority may—

- (a) provide for the liability of any person under the order to be a charge on any debt or obligation due from the corporate debtor to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the corporate debtor held by or vested in him, or any person

on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf; and

- (b) from time to time, make such further directions as may be necessary for enforcing any charge imposed under section 67 of the Code.

The term "**Assignee**" includes a person to whom or in whose favour, by the directions of the person held liable under clause (a) the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds on which the directions have been made.

Even if the Adjudicating Authority has passed an order under section 66, as the case may be, in relation to a person who is a creditor of the corporate debtor, the whole or any part of any debt owed by the corporate debtor to that person and any interest thereon shall rank in the order of priority of payment after all other debts owed by the corporate debtor [Section 67]. Thus, there is no relief to creditor who has been defrauded. Creditor can get only after all other debts are paid off.

8. OFFENCES AND PENALTIES

Types of offence	Commission of offences	Punishment
Concealment of property [Section 68]	Where any officer of the corporate debtor has,— (i) within the twelve months immediately preceding the insolvency commencement date,— (a) wilfully concealed any property of the corporate debtor or concealed any debt due to, or from, the corporate debtor, of the value of ten thousand rupees or more; or (b) fraudulently removed the property of the corporate debtor of the value of ten thousand rupees or more; or (c) wilfully concealed, destroyed, mutilated or falsified any book or paper relating to the property of the corporate debtor or its affairs; or (d) wilfully made any false entry in any book or paper relating to the	Such officer shall be punishable with— <ul style="list-style-type: none"> • imprisonment for a term 3 to 5 years, or • with fine ranging from one lakh rupees to one crore rupees, or • with both Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to defraud or to conceal the state of affairs of the corporate debtor.

	<p>property of the corporate debtor or its affairs; or</p> <p>(e) fraudulently parted with, altered or made any omission in any document relating to the property of the corporate debtor or its affairs; or</p> <p>(f) wilfully created any security interest over, transferred or disposed of any property of the corporate debtor which has been obtained on credit and has not been paid for unless such creation, transfer or disposal was in the ordinary course of the business of the corporate debtor; or</p> <p>(g) wilfully concealed the knowledge of the doing by others of any of the acts mentioned in clauses (c), (d) or clause (e); or</p> <p>(ii) at any time after the insolvency commencement date, committed any of the acts mentioned in sub-clauses (a) to (f) of clause (i) or has the knowledge of the doing by others of any of the things mentioned in sub-clauses (c) to (e) of clause (i); or</p> <p>(iii) at any time after the insolvency commencement date, taken in pawn or pledge, or otherwise received the property knowing it to be so secured, transferred or disposed,</p>	
<p>Transactions defrauding creditors [Section 69]</p>	<p>On or after the insolvency commencement date, if an officer of the corporate debtor or the corporate debtor—</p> <p>(a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived in the execution of a decree or order against, the property of the corporate debtor;</p> <p>(b) has concealed or removed any part of the property of the corporate debtor within two months before the date of any unsatisfied judgment, decree or order for</p>	<p>Such officer of the corporate debtor or the corporate debtor, as the case may be, shall be punishable with- imprisonment for a term of 1 to 5 years, or with fine levying from lakh rupees to one crore rupees, or with both: Provided that a person shall not be punishable under this</p>

	<p>payment of money obtained against the corporate debtor,</p>	<p>section if the acts mentioned in clause (a) were committed more than five years before the insolvency commencement date; or if he proves that, at the time of commission of those acts, he had no intent to defraud the creditors of the corporate debtor.</p>
<p>Misconduct in courses of corporate insolvency resolution process [Section 70]</p>	<p>(1) On or after the insolvency commencement date, where an officer of the corporate debtor—</p> <p>(a) does not disclose to the resolution professional all the details of property of the corporate debtor, and details of transactions thereof, or any such other information as the resolution professional may require; or</p> <p>(b) does not deliver to the resolution professional all or part of the property of the corporate debtor in his control or custody and which he is required to deliver; or</p> <p>(c) does not deliver to the resolution professional all books and papers in his control or custody belonging to the corporate debtor and which he is required to deliver; or</p> <p>(d) fails to inform the resolution professional the information in his knowledge that a debt has been falsely proved by any person during the corporate insolvency resolution process; or</p> <p>(e) prevents the production of any book or paper affecting or relating to the property or affairs of the corporate debtor; or</p> <p>(f) accounts for any part of the property of the corporate debtor by fictitious losses or expenses, or if</p>	<p>Such officer shall be punishable with-</p> <ul style="list-style-type: none"> • imprisonment for a term of three to five years, or • with fine varying from one lakh rupees to one crore rupees, or • with both <p>Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to do so in relation to the state of affairs of the corporate debtor.</p> <p>If an insolvency professional deliberately contravenes the provisions of this Part- he shall be punishable with imprisonment for a term which may extend to six months, or with fine which shall not be less than one lakh rupees, but may extend to five lakhs rupees, or with both.</p>

	he has so attempted at any meeting of the creditors of the corporate debtor within the twelve months immediately preceding the insolvency commencement date,	
Falsification of books of corporate debtor [Section 71]	On and after the insolvency commencement date, where any person destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is in the knowledge of making of any false or fraudulent entry in any register, book of account or document belonging to the corporate debtor with intent to defraud or deceive any person	he shall be punishable with- <ul style="list-style-type: none"> • imprisonment for a term three years to five years, or • with fine from one lakh to one crore rupees, or • with both.
Wilful and material omissions from statements relating to affairs of corporate debtor [Section 72]	Where an officer of the corporate debtor makes any material and wilful omission in any statement relating to the affairs of the corporate debtor	he shall be punishable with- <ul style="list-style-type: none"> • imprisonment for a term three years to five years, or • with fine from one lakh rupees to one crore rupees, or • with both.
False representations to creditors [Section 73]	Where any officer of the corporate debtor— <p>(a) on or after the insolvency commencement date, makes a false representation or commits any fraud for the purpose of obtaining the consent of the creditors of the corporate debtor or any of them to an agreement with reference to the affairs of the corporate debtor, during the corporate insolvency resolution process, or the liquidation process;</p> <p>(b) prior to the insolvency commencement date, has made any false representation, or committed any fraud, for that purpose,</p>	he shall be punishable with- <ul style="list-style-type: none"> • imprisonment for a term three years to five years, or • with fine of one lakh rupees to one crore rupees, or • with both.
Contravention of moratorium or the resolution plan [Section 74]	Where the corporate debtor or any of its officer violates the provisions of section 14,	(1) any such officer who knowingly or wilfully committed or authorised or permitted

	<p>Where any creditor violates the provisions of section 14</p> <p>(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention,</p>	<p>such contravention shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to three lakh rupees, or with both.</p> <p>(2) any person who knowingly and wilfully authorised or permitted such contravention by a creditor shall be punishable with imprisonment for a term which shall not be less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.</p> <p>Such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.</p>
<p>False information furnished in application [Section 75]</p>	<p>Where any person furnishes information in the application made under section 7, which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material,</p>	<p>Such person shall be punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees.</p>

<p>Non-disclosure of dispute or repayment of debt by operational creditor [Section 76]</p>	<p>Where—</p> <p>(a) an operational creditor has wilfully or knowingly concealed in an application under section 9 the fact that the corporate debtor had notified him of a dispute in respect of the unpaid operational debt or the full and final repayment of the unpaid operational debt; or</p> <p>(b) any person who knowingly and wilfully authorised or permitted such concealment under clause (a),</p>	<p>Such operational creditor or person, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one year but may extend to five years or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or with both.</p>
<p>Providing false information in application made by corporate debtor [Section 77]</p>	<p>Where—</p> <p>(a) a corporate debtor provides information in the application under section 10 which is false in material particulars, knowing it to be false and omits any material fact, knowing it to be material; or</p> <p>(b) any person who knowingly and wilfully authorised or permitted the furnishing of such information under sub-clause (a),</p> <p>An application shall be deemed to be false in material particulars in case the facts mentioned or omitted in the application, if true, or not omitted from the application as the case may be, would have been sufficient to determine the existence of a default under this Code.</p>	<p>Such corporate debtor or person, as the case may be, shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both.</p>



9. INSOLVENCY RESOLUTION AND BANKRUPTCY FOR INDIVIDUALS AND PARTNERSHIP FIRMS

Part III of Insolvency and Bankruptcy Code, 2016 deal with provisions relating to Bankruptcy for Individuals and partnership firms. It comprises of sections 78 to 187. These provisions will replace Present Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. These provisions are not yet notified and not in force [as on 30th of April, 2019]

Application of the provisions of the Bankruptcy to personal guarantors of Corporate Debtors and for others in phases w.e.f. 23.11.2017

Though provisions relating to bankruptcy of individuals have not been notified, Insolvency Code has been made applicable to personal guarantors of corporate debtors. Here the matters will go before NCLT and not before DRT.

As per section 2 of the Code it has been provided that the Code will apply to personal guarantors of corporate debtors as a category different from individuals.

10. REGULATION OF INSOLVENCY PROFESSIONALS, AGENCIES AND INFORMATION UTILITIES

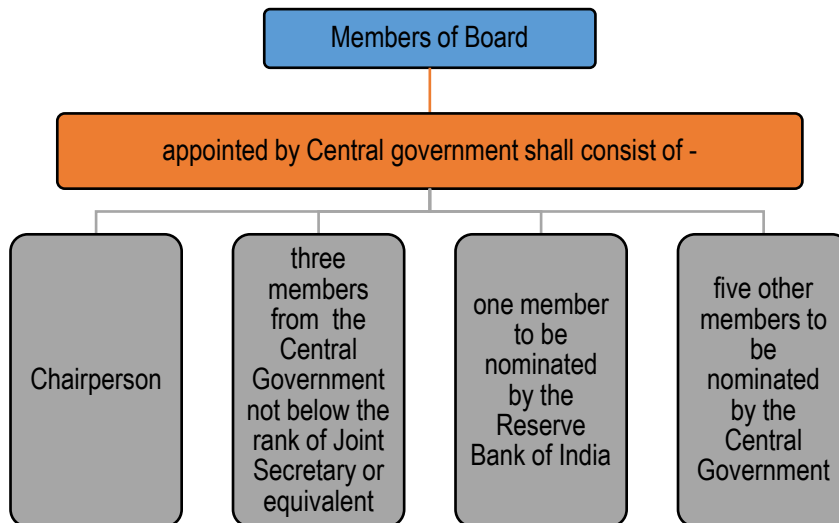
(I) The Insolvency and Bankruptcy Board of India

Establishment and incorporation of Board

The Central Government hereby appoints 01st October, 2016 as the date of establishment of Insolvency and Bankruptcy Board of India. The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. The head office of the Insolvency and Bankruptcy Board of India shall be at New Delhi. The Board may establish offices at other places in India. [Section 188]

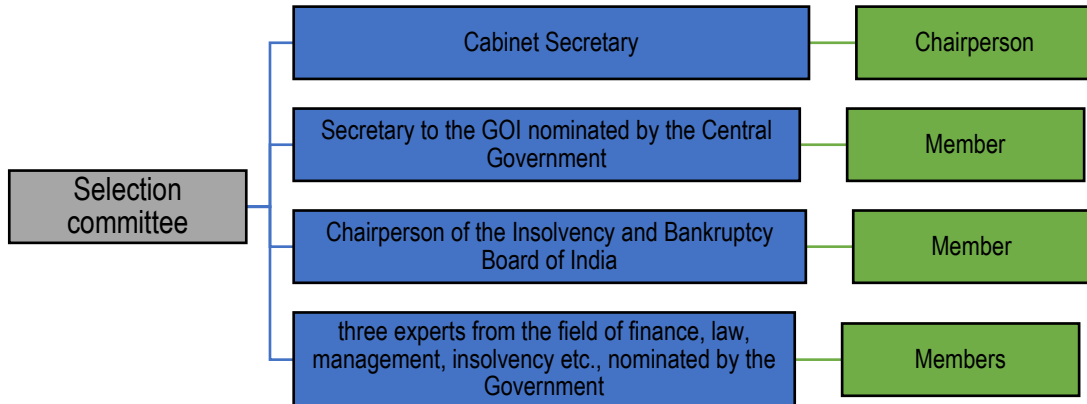
Constitution of Board

(1) **Appointment of Members:** The Board shall consist of the following members who shall be appointed by the Central Government, namely:—



(2) **Eligibility:** The Chairperson and the other members shall be persons of ability, integrity and standing, who have shown capacity in dealing with problems relating to insolvency or bankruptcy and have special knowledge and experience in the field of law, finance, economics, accountancy or administration.

(3) **Appointment on recommendation of a selection committee:** The appointment of the Chairperson and the members of the Board other than the appointment of an *ex officio* member under this section shall be made after obtaining the recommendation of a selection committee consisting of—



(4) **Term of offices:** The term of office of the Chairperson and members (other than *ex officio* members) shall be five years or till they attain the age of sixty five years, whichever is earlier, and they shall be eligible for re-appointment.

(5) **Payment of salaries:** The salaries and allowances payable to, and other terms and conditions of service of, the Chairperson and members (other than the *ex officio* members) shall be such as may be prescribed. [Section 189]

Removal of member from office

The Central Government may remove a member from office if he—

- is an undischarged bankrupt as defined under Part III;
- has become physically or mentally incapable of acting as a member;
- has been convicted of an offence, which in the opinion of Central Government involves moral turpitude;
- has, so abused his position as to render his continuation in office detrimental to the public interest.

Provided that no member shall be removed under clause (d) unless he has been given a reasonable opportunity of being heard in the matter. [Section 190]

Meetings of Board

- The Board shall meet at such times and places, and observe such rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) as may be determined by regulations.

- (2) The Chairperson, or if, for any reason, the Chairperson is unable to attend any meeting of the Board, any other member chosen by the members present at the meeting shall preside at the meeting.
- (3) All questions which come up before any meeting of the Board shall be decided by a majority votes of the members present and voting, and, in the event of an equality of votes, the Chairperson, or in his absence, the person presiding, shall have a second or casting vote.[Section 192]

Member not to participate in meetings in certain cases

Any member, who is a director of a company and who as such director has any pecuniary interest in any matter coming up for consideration at a meeting of the Board, shall –

- disclose the nature of his interest at such meeting, and
- such disclosure shall be recorded in the proceedings of the Board, and
- the member shall not take any part in any deliberation or decision of the Board with respect to that matter.[Section 193]

Vacancies, etc., not to invalidate proceedings of Board, Officers and employees of Board

- (1) No act or proceeding of the Board shall be invalid merely by reason of—
 - (a) any vacancy in, or any defect in the constitution of, the Board; or
 - (b) any defect in the appointment of a person acting as a member of the Board; or
 - (c) any irregularity in the procedure of the Board not affecting the merits of the case.
- (2) The Board may appoint such other officers and employees as it considers necessary for the efficient discharge of its functions in such manner as may be specified.
- (3) The salaries and allowances payable to, and other terms and conditions of service of, officers and employees of the Board appointed under sub-section (2) shall be such as may be specified by regulations.[Section 194]

Powers and Functions of the Board

- (1) The Board shall, on the basis to the general direction of the Central Government, perform all or any of the following functions namely :—
 - (a) register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations;
 - (b) specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities;

- (c) levy fee or other charges for the registration of insolvency professional agencies, insolvency professionals and information utilities;
- (d) specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities;
- (e) lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies;
- (f) carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder;
- (g) monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder;
- (h) call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities;
- (i) publish such information, data, research studies and other information as may be specified by regulations;
- (j) specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data;
- (k) collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases;
- (l) constitute such committees as may be required including in particular the committees laid down in section 197;
- (m) promote transparency and best practices in its governance;
- (n) maintain websites and such other universally accessible repositories of electronic information as may be necessary;
- (o) enter into memorandum of understanding with any other statutory authorities;
- (p) issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities;
- (q) specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued hereunder;

- (r) conduct periodic study, research and audit the functioning and performance of to the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board;
 - (s) specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations;
 - (t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and
 - (u) perform such other functions as may be prescribed.
- (2) The Board may make model bye-laws to be adopted by insolvency professional agencies which may provide for —
- (a) the minimum standards of professional competence of the members of insolvency professional agencies;
 - (b) the standards for professional and ethical conduct of the members of insolvency professional agencies;
 - (c) requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory.

Explanation.— For the purposes of this clause, the term "non-discriminatory" means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified;

- (d) the manner of granting membership;
- (e) setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board;
- (f) the information required to be submitted by members including the form and the time for submitting such information;
- (g) the specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members;
- (h) the grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof;
- (i) a fair and transparent mechanism for redressal of grievances against the members of insolvency professional agencies;
- (j) the grounds under which the insolvency professionals may be expelled from the membership of insolvency professional agencies;
- (k) the quantum of fee and the manner of collecting fee for inducting persons as its members;

- (l) the procedure for enrolment of persons as members of insolvency professional agency;
 - (m) the manner of conducting examination for enrolment of insolvency professionals;
 - (n) the manner of monitoring and reviewing the working of insolvency professional who are members;
 - (o) the duties and other activities to be performed by members;
 - (p) the manner of conducting disciplinary proceedings against its members and imposing penalties;
 - (q) the manner of utilising the amount received as penalty imposed against any insolvency professional.
- (3) Board shall have the same powers as are vested in a civil court while trying a suit, in respect of the following matters, namely:—
- (i) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;
 - (ii) summoning and enforcing the attendance of persons and examining them on oath;
 - (iii) inspection of any books, registers and other documents of any person at any place;
 - (iv) issuing of commissions for the examination of witnesses or documents. [Section 196]

Constitution of advisory committee, executive committee or other committee.

The Board may, for the efficient discharge of its functions, may constitute advisory and executive committees or such other committees, as it may deem fit, consisting of a Chairperson and such other members as may be specified by regulations. [Section 197]

Condonation of delay

Where the Board does not perform any act within the period specified under this Code, the relevant Adjudicating Authority may, for reasons to be recorded in writing, condone the delay. [Section 198]

[II] Insolvency Professional Agencies

Provisions related to insolvency professional agencies (IPA) are covered under sections 199 to 205 of the Code. Relevant provisions related to IPA are as follows:

No person to function as insolvency professional agency without valid certificate of registration.

No person shall carry on its business as insolvency professional agencies under this Code and enrol insolvency professionals as its members except under and in accordance with a certificate of registration issued in this behalf by the Board. [Section 199]

Principles governing registration of insolvency professional agency

The Board shall have regard to the following principles while registering the insolvency professional agencies under this Code, namely:—

to promote the professional development

- of and regulation of insolvency professionals

to promote the services of competent insolvency professionals

- to cater to the needs of debtors, creditors and such other persons as may be specified

to promote good professional and ethical conduct

- amongst insolvency professionals

to protect the interests

- of debtors, creditors and such other persons as may be specified

to promote the growth of insolvency professional agencies

- for the effective resolution of insolvency and bankruptcy processes under this Code

Manner of registration of insolvency professional agency

Filing of application to the Board

Grant of certificate of registration to the applicant

Board may renew the certificate of registration from time to time

Board may, by order, suspend or cancel the certificate of registration granted to an insolvency professional agency-

obtained registration by making a false statement / misrepresentation / by any other unlawful means;

failed to comply with the requirements of the regulations made by the Board / bye-laws made by the insolvency professional agency;

contravened any of the provisions of the Act or the rules or the regulations made thereunder;

on any other ground as may be specified by regulations.

(1) **Application to be made to the Board:** Every application for registration shall be made to the Board containing such particulars, and accompanied by such fee, as may be specified by regulations.

Every application received by the Board shall be acknowledged within seven days of its receipt.

(2) **Grant of certificate of registration:** On receipt of the application, the Board may, on being satisfied that the application conforms with all requirements, grant a certificate of registration to the applicant or else, reject, by order, such application:

However an order rejecting the application shall be made by giving an opportunity of being heard to the applicant:

Every such order so made shall be communicated to the applicant within a period of fifteen days.

(3) **Board may specify the terms and conditions:** The Board may issue a certificate of registration to the applicant in such form and manner and subject to such terms and conditions as may be specified.

(4) **Renewal of certificate:** The Board may renew the certificate of registration from time to time in such manner and on payment of such fee as may be specified.

(5) **Suspension or cancellation of certificate :** The Board may, by order, suspend or cancel the certificate of registration granted to an insolvency professional agency on any of the following grounds, namely:—

- (a) that it has obtained registration by making a **false statement or misrepresentation** or by any **other unlawful means**;
- (b) that it has **failed to comply with the requirements of the regulations** made by the Board or bye-laws made by the insolvency professional agency;
- (c) that it has **contravened any of the provisions of the Act or the rules or the regulations** made thereunder;
- (d) on any **other ground** as may be specified by regulations.

No order shall be made under this sub-section unless the insolvency professional agency concerned has been given a reasonable opportunity of being heard. Further that such order shall not be passed by any member except whole-time members of the Board. [Section 201]

Appeal to National Company Law Appellate Tribunal

As per section 202 of the Code, any insolvency professional agency which is aggrieved by the order of the Board made under section 201 may prefer an appeal to the National Company Law Appellate Tribunal in such form, within such period, and in such manner, as may be specified by regulations.

Governing Board of insolvency professional agency

The Board may make regulations, for the purposes of ensuring that every insolvency professional agency takes into account the objectives sought to be achieved under this Code, to specify—

- (a) the setting up of a governing board of an insolvency professional agency;

- (b) the minimum number of independent members to be on the governing board of the insolvency professional agency; and
- (c) the number of the insolvency professionals being its members who shall be on the governing board of the insolvency professional agency. [Section 203]

Functions of insolvency professional agencies.

As per the section 204, an insolvency professional agency shall perform the following functions, namely:—

grant membership to persons who fulfil all requirements on payment of fee

lay down standards of professional conduct

suspend or cancel the membership of insolvency professionals

monitor the performance of its member

safeguard the rights, privileges and interests of insolvency professionals who are its members

redress the grievances of consumers against insolvency professionals

publish information about its functions, list of its members, performance of its members and such other informations

every insolvency professional agency shall make bye-laws consistent with the model bye-laws specified by the Board as per section 205.

[III] Insolvency Professionals

Sections 206 to 208 of the Code specify the relevant sections related to the Insolvency professionals.

Who may act as insolvency professionals?

As per section 206, person shall render his services as insolvency professional under this Code only when he is enrolled as a member of an insolvency professional agency and registered with the Board.

Registration of insolvency professionals

According to section 207, every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by the IBBI (Insolvency Professional) Regulations, 2016.

The Board may specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit.

Eligibility: No individual shall be eligible to be registered as an insolvency professional if he—

- (a) is a minor;
- (b) is not a person resident in India;
- (c) does not have the qualification and experience specified in Regulation 5 or Regulation 9, as the case may be;
- (d) has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;

- (e) he is an undischarged insolvent, or has applied to be adjudicated as an insolvent;
- (f) he has been declared to be of unsound mind; or
- (g) he is not a fit and proper person;

Explanation: For determining whether an individual is fit and proper under these Regulations, the Board may take account of any consideration as it deems fit, including but not limited to the following criteria—

- (i) integrity, reputation and character,
- (ii) absence of convictions and restraint orders, and

(iii) competence, including financial solvency and net worth.

[Regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016]

Functions and obligations of insolvency professionals (IP)

Section 208 specifies the following functions and obligations of the IP:

(1) Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely: —

- (a) a fresh start order process under Chapter II of Part III;
- (b) individual insolvency resolution process under Chapter III of Part III;
- (c) corporate insolvency resolution process under Chapter II of Part II;
- (d) individual bankruptcy process under Chapter IV of Part III; and
- (e) liquidation of a corporate debtor firm under Chapter III of Part II.

Note: Matters given in point no. (a), (b) & (d) are not yet notified as on 30th April, 2019.

(2) Every insolvency professional shall abide by the following code of conduct:—

- (a) to take reasonable care and diligence while performing his duties;
- (b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- (c) to allow the insolvency professional agency to inspect his records;
- (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
- (e) to perform his functions in such manner and subject to such conditions as may be specified.

[IV] Information Utilities

Provisions related to information utilities are covered under sections 209 to 216 of the Code.

Who shall carry on the business as information utility?

Person with a certificate of registration issued in that behalf by the Board shall carry on its business as information utility under this Code.[Section 209]

Manner of registration of information utility

Section 210 lays the procedure for the registration of the information utility. It states that every application for registration shall be made to the Board containing such particulars, and accompanied by such fee, as may be specified by regulations.

Every application received by the Board shall be acknowledged within seven days of its receipt.

On receipt of the application, the Board may, on being satisfied that the application conforms to all requirements, grant a certificate of registration to the applicant or else, reject, by order, such application.

The Board may issue a certificate of registration to the applicant.

The Board may renew the certificate of registration on payment of such fee as may be specified by regulations.

The Board may, by order, suspend or cancel the certificate of registration granted to an information utility on any of the following grounds, namely:—

- (a) that it has obtained registration by making a false statement or misrepresentation or any other unlawful means;
- (b) that it has failed to comply with the requirements of the regulations made by the Board;
- (c) that it has contravened any of the provisions of the Act or the rules or the regulations made thereunder;
- (d) on any other ground as may be specified by regulations:

However, no order shall be made unless the information utility concerned has been given a reasonable opportunity of being heard. Further that no such order shall be passed by any member except whole-time members of the Board.

Eligibility for registration: No person shall be eligible to be registered as an information utility unless it is a public company and—

- (a) its sole object is to provide core services and other services under these Regulations, and discharge such functions as may be necessary for providing these services;
- (b) its shareholding and governance is in accordance with Chapter III;
- (c) its bye-laws are in accordance with Chapter IV;
- (d) it has a minimum net worth of fifty crore rupees;
- (e) Omitted
- (f) Omitted
- (g) the person itself, its promoters, its directors, its key managerial personnel, and persons holding more than 5%, directly or indirectly, of its paid-up equity share capital or its total voting power, are fit and proper persons:

Explanation: For determining whether a person is fit and proper under these Regulations, the Board may take account of relevant considerations, including—

- (i) integrity, reputation and character,

(ii) absence of conviction by a court for an offence:

Provided that a person may be considered 'fit and proper' if he has been sentenced to imprisonment for a period of less than six months;

Provided that a person shall not be considered 'fit and proper' if he has been sentenced to imprisonment for a period (a) of not less than six months, but less than seven years and a period of five years has not elapsed from the date of expiry of the sentence, or (b) of seven years or more.

(iii) absence of restraint order, in force, issued by a financial sector regulator or the Adjudicating Authority, and

(iv) financial solvency.

[Regulation 3 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017]

Appeal to National Company Law Appellate Tribunal

Any information utility which is aggrieved by the order of the Board may prefer an appeal to the National Company Law Appellate Tribunal as may be specified by regulations.[Section 211]

Governing Board of information utility

The Board may require every information utility to set up a governing board. It may contain such number of independent members, as may be specified by regulations, for ensuring that an information utility takes into account the objectives sought to be achieved under this Code. [Section 212]

³¹Composition of the Governing Board.

(1) The Governing Board shall consist of —

- (a) managing director;
- (b) independent directors; and
- (c) shareholder directors:

Provided that more than half of the directors shall be citizens of India and shall be residents in India.

(2) The managing director shall not be considered either an independent director or a shareholder director.

³¹ Regulation 9 substituted by the IBBI (Information Utilities) (Second Amendment) Regulations, 2018, w.e.f. 11-10-2018.

(3) Any employee of an information utility may be appointed as a director on its Governing Board in addition to the managing director, but such director shall be deemed to be a shareholder director.

(4) The number of independent directors shall not be less than the number of shareholder directors:

Provided that no meeting of the Governing Board shall be held without the presence of at least one independent director.

(5) An independent director shall be an individual—

(a) who is a person of ability and integrity;

(b) who has expertise in the field of finance, law, management or insolvency;

(c) who is not a relative of the directors of the Governing Board;

(d) who has or had no pecuniary relationship with the information utility, or any of its directors, or any of its shareholders holding more than ten per cent of its share capital, during the immediately preceding two financial years or during the current financial year;

(e) who is not a shareholder of the information utility; and

(f) who is not a member of the Board of Directors of any of the shareholders holding more than ten per cent of the share capital of the information utility.

(6) An independent director shall be nominated by the Board from amongst the list of names proposed by the information utility.

(7) An individual may serve as an independent director for a maximum of two terms of three years each or part thereof, or up to the age of seventy years, whichever is earlier.

(8) The second term referred to in sub-regulation (7) may be subject to a satisfactory performance review of the first term by the Governing Board.

(9) A cooling off period of three years shall be applicable for an independent director to become a shareholder director in the same or another information utility.

(10) The directors shall elect an independent director as the Chairperson of the Governing Board.

(11) A director, who has any interest, direct or indirect, pecuniary or otherwise, in any matter coming up for consideration at a meeting of the Governing Board or any of its Committees, shall as soon as possible after relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Governing Board or the Committee, as the case may be, and the director shall not take part in any deliberation or decision of the Governing Board or the Committee with respect to that matter.

[Regulation 9 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017]

Obligations of information utility

For the purposes of providing core services to any person, every information utility shall have following obligations as per the section 214 of the Code—

- (a) create and store financial information in a universally accessible format;
- (b) accept electronic submissions of financial information from persons who are under obligations to submit financial information under sub-section (1) of section 215, in such form and manner as may be specified by regulations;
- (c) accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;
- (d) meet such minimum service quality standards as may be specified by regulations;
- (e) get the information received from various persons authenticated by all concerned parties before storing such information;
- (f) provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;
- (g) publish such statistical information as may be specified by regulations;
- (h) have inter-operatability with other information utilities.

Procedure for submission, etc., of financial information.

- (1) Any person who intends to submit financial information to the information utility or access the information from the information utility shall pay such fee and submit information as may be specified by regulations.
- (2) A financial creditor shall submit financial information and information relating to assets in relation to which any security interest has been created, in such form and manner as may be specified by regulations.
- (3) An operational creditor may submit financial information to the information utility in such form and manner as may be specified.[Section 215]

Rights and obligations of persons submitting financial information

- (1) A person who intends to update or modify or rectify errors in the financial information, he may make an application to the information utility with the reasons therefor, in such manner and within such time, as may be specified.
- (2) A person who submits financial information to an information utility shall not provide such information to any other person, except to such extent, under such circumstances, and in such manner, as may be specified [Section 216]

(V) Inspection and Investigation

Provisions given under sections 217 to 220 of the Code deals with the manner of inspection and investigation against insolvency professional agency, its members, information utility. It also provides of appointment of disciplinary committee.

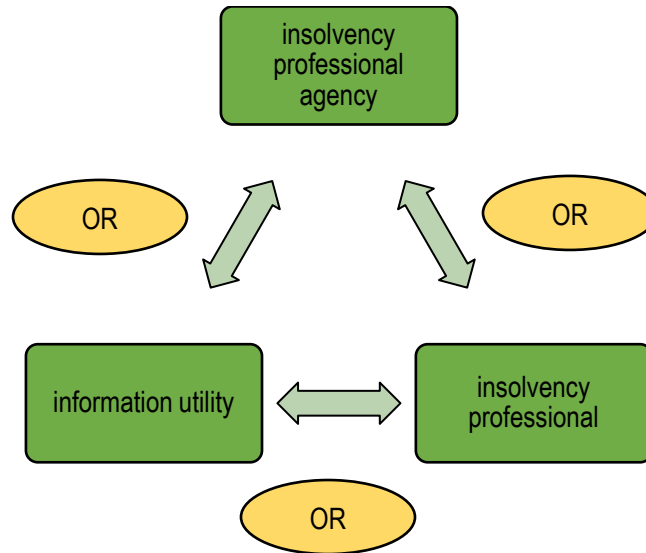
"Investigating Authority" means an officer or a team of officers of the Board, which has been directed by the Board, to conduct the investigation of a service provider;

"Inspecting Authority" means an officer or a team of officers of the Board, which has been directed by the Board, to conduct the inspection of a service provider;

Relevant provisions are as follows:

Complaints against insolvency professional agency or its member or information utility.

According to section 217, any person aggrieved by the functioning of an-



may file a complaint to the Board in such form, within such time and in such manner as may be specified.

Investigation of insolvency professional agency or its member or information utility.

(1) **Board to direct any person or persons to act as an investigating authority:** Where the Board, on receipt of a complaint or has reasonable grounds to believe that any insolvency professional agency or insolvency professional or an information utility has contravened any of the provisions of the Code or the rules or regulations made or directions issued by the Board thereunder, it may, at any time by an order in writing, direct any person or persons to act as an investigating authority to conduct an inspection or investigation of the insolvency professional agency or insolvency professional or an information utility.

- (2) The inspection or investigation carried out, shall be conducted by regulations.
- (3) **Investigating Authority may bound to furnish the relevant documents:** The Investigating Authority may require any person who is likely to have any relevant document, record or information to furnish the same, and such person shall be bound to furnish such document, record or information.
- (4) **Seizure of relevant documentations:** During the course of its inspection or investigation, the Investigating Authority may enter any building or place where they may have reasons to believe that any such document, record or information relating to the subject-matter of the inquiry may be found and may seize any such document, record or information or take extracts or copies therefrom, subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, in so far as they may be applicable.
- (5) **To take custody of the documents:** The Investigating Authority shall keep in its custody the books, registers, other documents and records seized for such period not later than the conclusion of the investigation and thereafter shall return the same to the concerned person from whose custody or power they were seized with an identification marks on them or any part thereof.
- (6) **Submission of detailed reports:** A detailed report of inspection or investigation shall be submitted to the Board by the Investigating Authority. [Section 218]

Show cause notice to insolvency professional agency or its member or information utility

The Board may, upon completion of an inspection or investigation, issue a show cause notice to such insolvency professional agency or insolvency professional or information utility, and carry out inspection of such insolvency professional agency or insolvency professional or information utility in such manner, giving such time for giving reply, as may be specified by regulations. [Section 219]

Disposal of Show-cause notice: (1) The Disciplinary Committee, after providing an opportunity of being heard to the notice, shall dispose of the show-cause notice by a reasoned order.

- (2) The Disciplinary Committee shall dispose of the show-cause notice within a period of 180 days of the issue of the show-cause notice.
- (3) The order under sub-regulation (1) may provide for—
- (a) closure of show-cause notice without any direction;
 - (b) warning;
 - (c) any of the actions under sub-sections (2), (3) and (4) of section 220;
 - (d) a reference to the Board to take any action under sub-section (5) of section 220 or sub-section (2) of section 236; or

- (e) any other action or direction as may be considered appropriate.
- (4) The order under sub-regulation (1) shall not become effective until thirty days have elapsed from the date of issue of the order, unless the Disciplinary Committee states otherwise in the order along with the reasons for the same.
- (5) The order under sub-regulation (1) shall be issued to the noticee immediately, and be published on the website of the Board.
- (6) If the order under sub-regulation (1) suspends or cancels the registration of a service provider, the Disciplinary Committee may, if it considers fit, require the service provider to—
- (a) discharge pending obligations, if any;
 - (b) continue its functions till such time as may be directed, only to enable clients to shift to another service provider; and
 - (c) comply with any other directions.

[Regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017]

Appointment of disciplinary committee

- To consider the submitted reports of the investigating Authority, the Board shall constitute a disciplinary committee consisting of whole-time members of the Board only.
- On the examination of the report, if the disciplinary committee is satisfied that sufficient cause exists, it may-
 - ◆ impose penalty, or
 - ◆ suspend or cancel the registration of the insolvency professional or, suspend or cancel the registration of insolvency professional agency or information utility as the case may be.
- In case of contravention of any provision of this Code or rules or regulations made thereunder, the disciplinary committee may impose penalty which shall be—
 - (i) three times the amount of the loss caused, or likely to have been caused, to persons concerned on account of such contravention; or
 - (ii) three times the amount of the unlawful gain made on account of such contravention, whichever is higher.
- **In case**, where such loss or unlawful gain is not quantifiable, the total amount of the penalty imposed shall not exceed more than one crore rupees.

- the Board may direct any person who has made unlawful gain or averted loss by indulging in any activity in contravention of this Code, or the rules or regulations made thereunder, to disgorge an amount equivalent to such unlawful gain or aversion of loss.
- The Board may take such action as may be required to provide restitution to the person who suffered loss on account of any contravention from the amount so disgorged, if the person who suffered such loss is identifiable and the loss so suffered is directly attributable to such person.
- The Board may make regulations to specify—
 - (a) the procedure for claiming restitution under sub-section (5) ;
 - (b) the period within which such restitution may be claimed; and
 - (c) the manner in which restitution of amount may be made.

(VI) Finance, Accounts and Audit

Following are the relevant provisions of the Code that deals with the matter related to the management of finance, accounts and audit by the Board under the Code:

Grants by Central Government : The Central Government may, after due appropriation made by Parliament by law, make to the Board grants of such sums of money as that Government may think fit for being utilised for the purposes of this Code. [Section 221]

Board's Fund : Section 222 of the Code, shall be constitutes a Fund to be called the Fund of the Insolvency and Bankruptcy Board and there shall be credited thereto —

- (a) all grants, fees and charges received by the Board under this Code;
- (b) all sums received by the Board from such other sources as may be decided upon by the Central Government;
- (c) such other funds as may be specified by the Board or prescribed by the Central Government.

The Fund shall be applied for meeting —

- (a) the salaries, allowances and other remuneration of the members, officers and other employees of the Board;
- (b) the expenses of the Board in the discharge of its functions under section 196;
- (c) the expenses on objects and for purposes authorised by this Code.
- (d) such other purposes as may be prescribed.

Accounts and audit: According to section 223 of the Code, the Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

Audit of Accounts by the CAG: The accounts of the Board shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Board to the Comptroller and Auditor-General of India.

Right and privileges: The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Board shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Board.

Presentation of certified copy of the accounts and audit report to CG: The accounts of the Board as certified by the Comptroller and Auditor General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.



11. ³²MISCELLANEOUS

(I) **Power of Central Government to issue directions:** Section 225 of the Code states that the Board shall, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time. However, the Board shall be given an opportunity to express its views before any direction is given. The decision of the Central Government as to whether a question is one of policy or not shall be final.

(II) **Power of Central Government to supersede Board:** If at any time the Central Government is of opinion that—

- (a) on account of grave emergency, the Board is unable to discharge the functions and duties imposed on it by or under the provisions of this Code; or
- (b) the Board has persistently not complied with any direction issued by the Central Government under this Code or in the discharge of the functions and duties imposed on it by or under the provisions of this Code and as a result of such non-compliance the financial position of the Board or the administration of the Board has deteriorated; or
- (c) circumstances exist which render it necessary in the public interest so to do,

-the Central Government may, by notification, supersede the Board for such period, not exceeding six months, as may be specified in the notification.

Upon the publication of a notification - (a) all the members shall, as from the date of supersession, vacate their offices as such; (b) all the powers, functions and duties which may, by

³² Section 224, 239 (partially), 240(2) (partially), 243, 245 & 249 are yet to be notified.

or under the provisions of this Code, be exercised or discharged by or on behalf of the Board, shall until the Board is reconstituted be exercised and discharged by such person or persons as the Central Government may direct; and (c) all property owned or controlled by the Board shall, until the Board is reconstituted, vest in the Central Government.

On the expiration of the period of supersession: The Central Government may reconstitute the Board by a fresh appointment and in such case any person or persons who vacated their offices, shall not be deemed disqualified for appointment.

Provided that the Central Government may, at any time, before the expiration of the period of supersession, take action under this sub-section.

The Central Government shall cause a notification issued and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest. [Section 226]

(III) Power of Central Government to notify financial service providers, etc.

³³Notwithstanding anything to the contrary examined in this Code or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed. [Section 227]

(IV) Delegation: The Board may, by general or special order in writing delegate to any member or officer of the Board subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Code (except the powers under section 240 as it may deem necessary).[Section 230]

(V) Bar of jurisdiction: No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority or Board is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority or the Board under this Code. [Section 231]

(VI) Members, officers and employees of Board to the public servants: The Chairperson, Members, officers and other employees of the Board shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Code, to be public servants within the meaning of section 21 of the Indian Penal Code. [Section 232]

(VII) Protection of action taken in good faith: No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government, or the Chairperson, Member,

³³ Notification NO. SO. 1817(E) [F.N.30/23/2018-Insolvency Section], New Delhi, the 1st May, 2018.—In exercise of the powers conferred by sub-section (3) of section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 1st day of May, 2018 as the date on which the provisions of section 227 to section 229 (both inclusive) of the said Code shall come into force.

officer or other employee of the Board or an insolvency professional or liquidator for anything which is done or intended to be done in good faith under this Code or the rules or regulations made thereunder. [Section 233]

(VIII) Enabling provisions for cross border transactions: India is no more an isolated business place. India is now part of global business hub. Indian businesses have investments outside India while many businesses outside India have presence in India. India is now a global village. Enabling provisions in the Code are sections 234 and 235 for this purpose.

Agreements with Foreign Countries: The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified. [Section 234]

Letter of request to a country outside India in respect of assets: If, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234 of Insolvency Code, 2016, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

The Adjudicating Authority on receipt of an application and, on being satisfied that evidence or action relating to assets, is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request. [Section 235]

³⁴Punishment where no specific penalty or punishment is provided:

If any person contravenes any of the provisions of this Code or the rules or regulations made thereunder for which no penalty or punishment is provided in this Code, such person shall be punishable with fine which shall not be less than one lakh rupees but which may extend to two crore rupees. [Section 235A]

(IX) Trial of offences by Special Court: Offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013.

Cognizance of an offence committed under this code: No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

³⁴ Section 235A inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.r.e.f. 23-11-2017.

The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

In case of a complaint, the presence of the person authorised by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial. [Section 236].

(X) Appeal and revision: The High Court may exercise, all the powers conferred by Chapters XXIX (Appeals) and XXX (Reference and Revision) of the Code of Criminal Procedure, 1973 on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court. [Section 237].

(XI) Provisions of this Code to override other laws: The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law [Section 238].

(XII) Limitation: The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be [Section 238A]

(XIII) Power to make rules: The Central Government may, by notification, make rules for carrying out the provisions of this Code. The Central Government may make rules for any of the matters given under section 239 of the Code. [Section 239].

(XIV) Power to make regulations: The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code. In particular, such regulations may provide for all or any of the matters given in section 240 of the Code. [Section 240]

(XV) Application of this Code to micro, small and medium enterprises

(1) The provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

(2) The Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—

(a) not apply to micro, small and medium enterprises; or

(b) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

(3) A draft of every notification proposed to be issued, shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(4) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(5) The period of thirty days shall not include any period during which the House is prorogued or adjourned for more than four consecutive days.

(6) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.

The expression here "micro, small and medium enterprises" means any class or classes of enterprises classified as such under section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006. [Section 240 A]



PREVENTION OF MONEY LAUNDERING ACT, 2002



LEARNING OUTCOMES

After reading this chapter, you will be able to:

- Learn the measures to prevent and control money laundering
- Know when the property obtained from the laundered money be confiscated and seized
- Know the penalties imposed and the adjudication process in money laundering cases

1. INTRODUCTION

Money Laundering

It is a highly sophisticated act to cover up or camouflage the identity or origin of illegally obtained earnings so that they appear to have derived from lawful sources.

It is the process by which illegal funds and assets are converted into legitimate funds and assets. In other words, it is basically the process of converting illegal or black money of a person in a legal or white money. It is the process used by criminals to wash their “tainted” money to make it “clean.”



The **Prevention of Money Laundering Act, 2002** is known to have been legislated basically to sub-serve twin purpose firstly, is to prevent money laundering and secondly to provide for confiscation of property derived from, or involved in money laundering, and to ensure of the curbing of the tendency of committing scheduled offences.

Money laundering is a single process however; its cycle can be broken down into three distinct stages

1. **Placement:** It is the first and the initial stage when the crime money is injected into the formal financial System.
2. **Layering:** Then under the second stage, money injected into the system is layered and moved or spread over various transactions in different accounts and different countries. Thus, it will become difficult to detect the origin of the money.
3. **Integration:** Under the third and final stage, money enters the financial system in such a way that original association with the crime is sought to be obliterated so that the money can then be used by the offender or person receiving as clean money.



There are multiple methods through which money can be laundered and huge profit is being made, some of them are:

- Cash Smuggling: Moving cash from one location to another or depositing the cash in Swiss Bank Account;
- Structuring: Cash is broken down into formal receipts to buy money orders etc., smaller amounts are hard to detect;
- Laundering via Real Estate: Buying a land for money and then selling it making the profits legal.
- Stock Markets scams
- By creating bogus companies.
- Drug Trafficking;
- Bribery and Corruption;
- Kidnapping and Extortion.

If left unchecked, money laundering can erode a nation's economy by changing the demand for cash, making interest and exchange rates more volatile, and by causing high inflation in countries where criminal elements are operating. The draining of huge amounts of money a year from normal economic growth poses a real danger for the financial health of every country which in turn adversely affects the global market.

In view of an urgent need for the enactment of a comprehensive legislation for preventing money laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the Prevention of Money Laundering Bill 1998 was introduced in the Parliament on 4th August, 1998. The Bill received the assent of the President and became the Prevention of Money Laundering Act, 2002 on 17th January 2003. The Act has come into force with effect from 1st July 2005.

The objective of the Act is to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

Understanding Money Laundering

Let us understand Money Laundering with the example of Hawala.

How Hawala Works: Hawala system works with a network of operators called Hawaladars or Hawala agents. For a Hawala transaction a customer contacts a Hawala agent at the source location. The Hawala agent at that end collects money from the person who wishes to make a transfer. The agent then calls up his counterpart in the country where the transfer has to be made.

This counterpart then hands over the cash to the recipient after deducting a commission. The source agent promises to settle the debt to the destination agent through an informal settlement.

For example, a person in country 'A' who wants to transfer some money to someone in country 'B' gives the money to the Hawala broker in country 'A'. The agent accepts it and calls up his colleague in country 'B'. His colleague gives the money in country 'B's' currency to the person in country 'B' to whom it has to be transferred. An identification code is requested, ensuring the authenticity of the receiver.

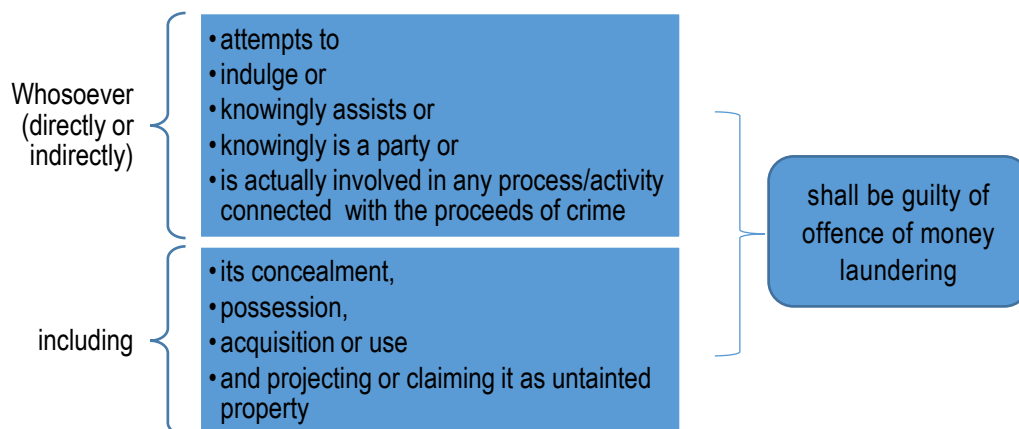
In a Hawala transfer, the money enters the hawala system in local currency and leaves as foreign currency. The currency exchange happens at a rate set by the agents and not the official rates. This way they make an addition profit than the commission.

Then, if anybody does the act which is in contravention to above, or in contravention to the provision of the Act will be liable for the punishment under section 4 of the Act.

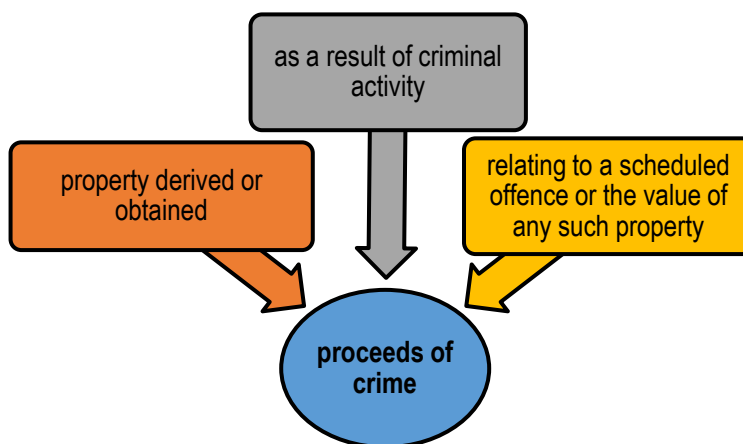
2. DEFINITIONS

To understand the meaning of money – laundering it is essential to define proceeds of crime, property and scheduled offence. Infact, all the above definitions have to be read together.

- I. Clause (p) of sub section (1) of section 2 provides that "**money-laundering**" has the meaning assigned to it in section 3. Moving to section 3, it is observed that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money laundering.



II. Section 2(1)(u) defines "**proceeds of crime**" as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country or abroad.



III. Now, let us understand what is this **Property** as talked above. In terms of clause (v) of sub – section (1) of section 2, "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Further definition clarifies that the term “property” includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences.

IV. In terms of clause (rb) of sub – section (1) of section 2 "**payment system**" means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them.

It includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations;

V. The term "**scheduled offence**" has been defined in clause (y) of sub-section (1) of section 2. It means –

- (a) the offences specified under Part A of the Schedule; or
- (b) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or
- (c) The offences specified under Part C of the Schedule.

The Schedule to the Act gives a list of all the above offences. The Schedule is divided into three parts- Part A, Part B and Part C, which are given in Annexure to the Chapter.

VI. "**Transfer**" includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Other Definitions

"**Authorised person**" means an authorised person as defined in clause (c) of section 2 of the Foreign Exchange Management Act, 1999. [Section 2(1)(da)]

"**Banking company**" means a banking company or a co-operative bank to which the Banking Regulation Act, 1949 applies and includes any bank or banking institution referred to in section 51 of that Act. [Section 2(1)(e)]

"**Beneficial owner**" means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person. [Section 2(1)(fa)]

"**Client**" means a person who is engaged in a financial transaction or activity with a reporting entity and includes a person on whose behalf the person who engaged in the transaction or activity, is acting. [Section 2(1)(ha)]

"**Financial institution**" means a financial institution as defined in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 and includes a chit fund company, a housing finance institution, an authorised person, a payment system operator, a non-banking financial company and the Department of Posts in the Government of India. [Section 2(1)(l)]

"**Intermediary**" means,

- (i) a stock-broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager,

- investment adviser or any other intermediary associated with securities market and registered under section 12 of the Securities and Exchange Board of India Act, 1992; or
- (ii) an association recognised or registered under the Forward Contracts (Regulation) Act, 1952 or any member of such association; or
 - (iii) intermediary registered by the Pension Fund Regulatory and Development Authority; or
 - (iv) a recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956. [Section 2(1)(n)]

"Investigation" includes all the proceedings under this Act conducted by the Director or by an authority authorised by the Central Government under this Act for the collection of evidence. [Section 2(1)(na)]

"Non-banking financial company" shall have the same meaning as assigned to it in clause (f) of section 45-I of the Reserve Bank of India Act, 1934. [Section 2(1)(q)]

"Payment system operator" means a person who operates a payment system and such person includes his overseas principal.

Explanation — For the purposes of this clause, "overseas principal" means,—

- (A) in the case of a person, being an individual, such individual residing outside India, who owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;
- (B) in the case of a Hindu undivided family, Karta of such Hindu undivided family residing outside India who owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;
- (C) in the case of a company, a firm, an association of persons, a body of individuals, an artificial juridical person, whether incorporated or not, such company, firm, association of persons, body of individuals, artificial juridical person incorporated or registered outside India or existing as such and which owns or controls or manages, directly or indirectly, the activities or functions of payment system in India. [Section 2(1)(rc)]

"Person" includes—

- (i) an individual,
- (ii) a Hindu undivided family,
- (iii) a company,
- (iv) a firm,
- (v) an association of persons or a body of individuals, whether incorporated or not,
- (vi) every artificial juridical person not falling within any of the preceding sub-clauses, and

(vii) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses; [Section 2(1)(s)]

"Person carrying on designated business or profession" means,—

- (i) a person carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino;
- (ii) a Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908, as may be notified by the Central Government;
- (iii) real estate agent, as may be notified by the Central Government;
- (iv) dealer in precious metals, precious stones and other high value goods, as may be notified by the Central Government;
- (v) person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons, as may be notified by the Central Government; or
- (vi) person carrying on such other activities as the Central Government may, by notification, so designate, from time to time. [Section 2(1)(sa)]

"Records" include the records maintained in the form of books or stored in a computer or such other form as may be prescribed. [Section 2(1)(w)]

"Reporting entity" means a banking company, financial institution, intermediary or a person carrying on a designated business or profession. [Section 2(1)(wa)]

"Value" means the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person. [Section 2(1)(zb)]

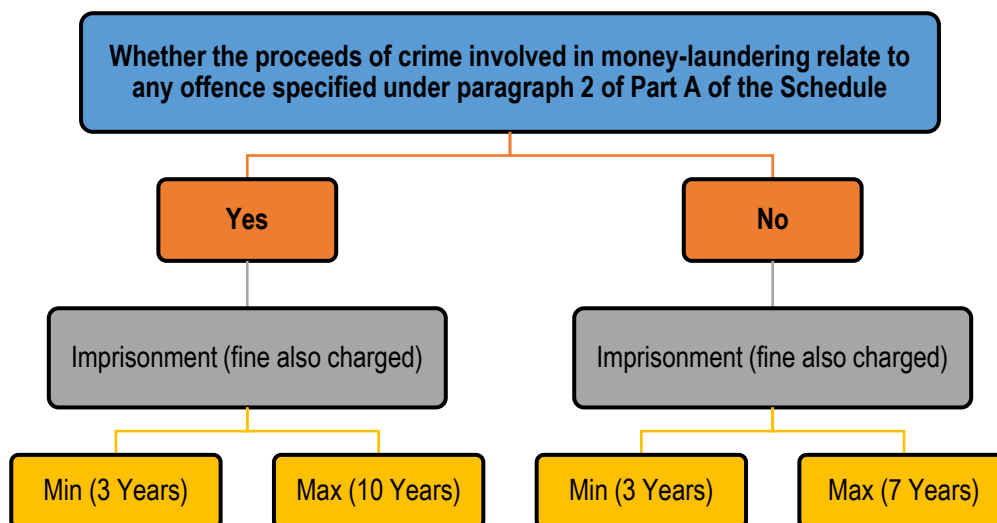
3. PUNISHMENT FOR THE OFFENCE OF MONEY LAUNDERING [SECTION 3 AND 4]

Section 3 deals with the offence of money laundering which has been discussed in the definition part above.

Section 4 provides for the Punishment for Money-Laundering - Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule (i.e. Offences under the Narcotic Drugs and

Psychotropic Substances Act, 1985)¹, the maximum punishment may extend to ten years instead of seven years.



4. ATTACHMENT, ADJUDICATION AND CONFISCATION

“**Attachment**” means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III of the Act.

“**Adjudicating Authority**” means an Adjudicating Authority appointed under sub-section (1) of section 6.

The Prevention of Money Laundering Act gives extremely wide powers to the authorities to attach properties suspected to be involved in Money Laundering.

Attachment of property involved in money-laundering [Section 5]

1. Where the Director or any other officer (not below the rank of Deputy Director authorised by the Director) for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—
 - (a) any person is in possession of any proceeds of crime; and

¹ Paragraph 2 of Part A of the Schedule deals with Offences under the Narcotics Drugs and Psychotropic Substances Act, 1985, which mainly consist of contravention in relation to poppy straw, opium, cannabis plant, cannabis, psychotropic substances, manufactured drugs. For details see the Annexure.

- (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

Condition for attachment: Provided that no such order of attachment shall be made unless, in relation to the scheduled offence:

- a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or
- a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or
- a similar report or complaint has been made or filed under the corresponding law of any other country.

Provided further that, notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

2. The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1) (i.e. point 1 above), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.
3. Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (3) (i.e. point 2 above) of section 8, whichever is earlier.

4. Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation- For the purposes of this sub-section, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

5. The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

Adjudicating Authorities, composition, powers, etc. [Section 6]

1. **Appointment of Adjudicating Authority (AO):** The Central Government shall, by notification, appoint an Adjudicating Authority to exercise jurisdiction, powers and authority conferred by or under this Act.

2. **Composition of AO:** An Adjudicating Authority shall consist of a Chairperson and two other Members:

However, one Member each shall be a person having experience in the field of law, administration, finance or accountancy.

3. **Eligibility:** A person shall, however, not be qualified for appointment as Member of an Adjudicating Authority:-

(a) in the field of law, unless he—

(i) is qualified for appointment as District Judge; or

(ii) has been a Member of the Indian Legal Service and has held a post in Grade I of that service;

(b) in the field of finance, accountancy or administration unless he possesses such qualifications, as may be prescribed.

4. **Appointment of Chairperson of the AO:** The Central Government shall appoint a Member to be the Chairperson of the Adjudicating Authority.

5. **Jurisdiction:** Subject to the provisions of this Act,—

(a) the jurisdiction of the Adjudicating Authority may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority may deem fit;

- (c) the Benches of the Adjudicating Authority shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, by notification, specify;
 - (d) the Central Government shall, by notification, specify the areas in relation to which each Bench of the Adjudicating Authority may exercise jurisdiction. [Sub-section (5)]
6. **Transfer of Member:** Notwithstanding anything contained in sub-section (5), the Chairperson may transfer a Member from one Bench to another Bench.
7. **Transfer of Case/matter:** If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.
8. **Term of Office:** The Chairperson and every Member shall hold office as such for a term of five years from the date on which he enters upon his office:
- However, no Chairperson or other Member shall hold office as such after he has attained the age of 65 years.
9. **Payment of Salary and Allowances:** The salary and allowances payable to and the other terms and conditions of service of the Member shall be such as may be prescribed:
- However, neither the salary and allowances nor the other terms and conditions of service of the Members shall be varied to his disadvantage after appointment.
10. **Filling of Vacancies:** If, for reasons other than temporary absence, any vacancy occurs in the office of the Chairperson or any other Member, then, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Adjudicating Authority from the stage at which the vacancy is filled.
11. **Resign from Office:** The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:
- However, the Chairperson or any other Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

12. **Removal:** The Chairperson or any other Member shall not be removed from his office except by an order made by the Central Government after giving necessary opportunity of hearing.
13. **Occurrence of Vacancy:** In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.
14. **Discharge of function in absence of chairperson of AO:** When the Chairperson of the Adjudicating Authority is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson of the Adjudicating Authority until the date on which the Chairperson of the Adjudicating Authority resumes his duties.
15. **Powers of AO to regulate its own procedure:** The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Adjudicating Authority shall have powers to regulate its own procedure.

Staff of Adjudicating Authorities [Section 7]

1. The Central Government shall provide each Adjudicating Authority with such officers and employees as that Government may think fit.
2. The officers and employees of the Adjudicating Authority shall discharge their functions under the general superintendence of the Chairperson of the Adjudicating Authority.
3. The salaries and allowances and other conditions of service of the officers and employees of the Adjudicating Authority shall be such as may be prescribed.

Adjudication [Section 8]

- (1) **Serving of Notice by AO:** On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than 30 days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government.

Where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:

Where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

- (2) **Order Passed:** The Adjudicating Authority shall, after—
- (a) considering the reply, if any, to the notice issued under sub-section (1);
 - (b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and
 - (c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering.

If the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

- (3) **Confirmation of Execution of Passed order:** Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—
- (a) continue during investigation for a period not exceeding 365 days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
 - (b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court.

Explanation.—For the purposes of computing the period of 365 days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

- (4) **In case of Provisional order:** Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

- (5) **Property involved be confiscated to the Central Government:** Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.
- (6) **Order of release:** Where on conclusion of a trial under this Act, the Special Court finds that the offence of money laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.
- (7) **Passing of an appropriate order in case where trial cannot be concluded:** Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.
- (8) **Direction to CG by the Special Court:** Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.

Vesting of property in Central Government [Section 9]

Where an order of confiscation has been made under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances.

However, where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest.

Further, nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages.

Management of properties confiscated under this Chapter [Section 10]

1. The Central Government may, by order published in the Official Gazette, appoint as many of its officers (not below the rank of a Joint Secretary to the Government of India) as it thinks fit, to perform the functions of an Administrator.
2. The Administrator appointed under sub-section (1) shall receive and manage the property in relation to which an order has been made under sub-section (5) or sub-section (6) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in such manner and subject to such conditions as may be prescribed.
3. The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under section 9.

Power regarding summons, production of documents and evidence, etc. [Section 11]

1. The Adjudicating Authority shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:-
 - (a) discovery and inspection;
 - (b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath;
 - (c) compelling the production of records;
 - (d) receiving evidence on affidavits;
 - (e) issuing commissions for examination of witnesses and documents; and
 - (f) any other matter which may be prescribed.
2. All the persons so summoned shall be bound to attend in person or through authorised agents, as the Adjudicating Authority may direct, and shall be bound to state the truth

upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

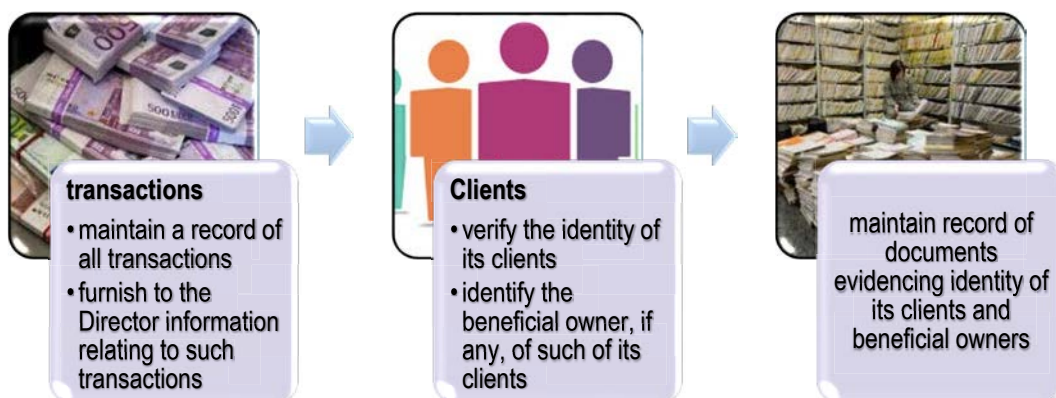
3. Every proceeding under this section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code.

5. OBLIGATION OF BANKING COMPANIES, FINANCIAL INSTITUTIONS AND INTERMEDIARIES

Reporting entity to maintain records

Section 12 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries.

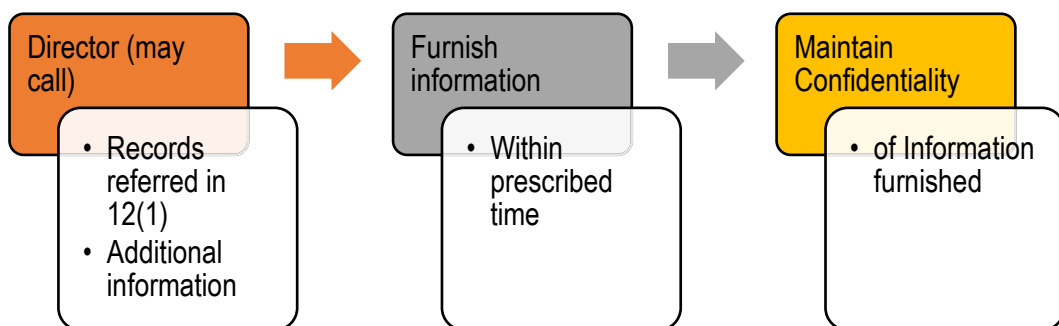
1. **Maintenance of records:** According to sub-section (1), every reporting entity shall –
 - (a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;
 - (b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;
 - (c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;
 - (d) identify the beneficial owner, if any, of such of its clients, as may be prescribed;
 - (e) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.



2. **Confidentiality:** Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force shall be kept confidential.
3. **Maintenance of records (for clause a):** The records referred to in clause (a) of sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.
4. **Maintenance of records (for clause e):** The records referred to in clause (e) of sub-section (1) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.
5. **Exemption by the Central Government:** The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this chapter.

Access to information [Section 12A]

1. The Director may call for from any reporting entity any of the records referred to in sub-section (1) of section 12 and any additional information as he considers necessary for the purposes of this Act.
2. Every reporting entity shall furnish to the Director such information as may be required by him under sub-section (1) within such time and in such manner as he may specify.
3. Save as otherwise provided under any law for the time being in force, every information sought by the Director under sub-section (1), shall be kept confidential.

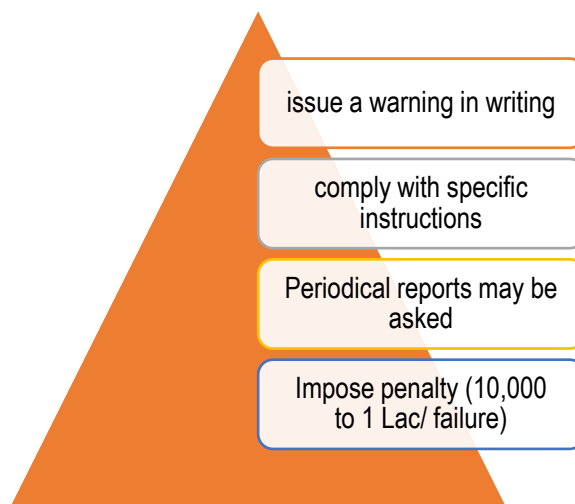


Power of director to impose fine [Section 13]

The section deals with the powers of the Director.

1. **Inquiry from Director:** The Director may, either of his own motion or on an application made by any authority, officer or person, may make such inquiry or cause such inquiry to be made, as he thinks fit to be necessary, with regard to the obligations of the reporting entity, under this chapter.

2. **Audit of records on direction of director:** If at any stage of inquiry or any other proceedings before him, the Director having regard to the nature and complexity of the case, is of the opinion that it is necessary to do so, he may direct the concerned reporting entity to get its records, as may be specified, audited by an accountant from amongst a panel of accountants, maintained by the Central Government for this purpose.
3. **Bearing of expenses:** The expenses of, and incidental to, any audit specified above shall be borne by the Central Government.
4. **Failure in compliance with the obligations:** If the Director, in the course of any inquiry, finds that a reporting entity or its designated director on the Board or any of its employees has failed to comply with the obligations under this Chapter, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may
 - (a) issue a warning in writing; or
 - (b) direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific instructions; or
 - (c) direct such reporting entity or its designated director on the Board or any of its employees, to send reports at such interval as may be prescribed on the measures it is taking; or
 - (d) by an order, impose a monetary penalty on such reporting entity or its designated director on the Board or any of its employees, which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.



5. **Forwarding of copy of order:** The Director shall forward a copy of the order passed under sub-section (2) to every banking company, financial institution or intermediary or person who is a party to the proceedings under that sub-section.

For the purpose of this section, "accountant" shall mean a chartered accountant within the meaning of the Chartered Accountants Act, 1949.

No civil or criminal proceedings against reporting entity, its directors and employees in certain cases [Section 14]

This section gives immunity to reporting entity, its directors and employees etc., against civil or criminal proceedings for furnishing information under clause (b) of sub-section (1) of section 12.

According to the section, save as otherwise provided in section 13, the reporting entity, its directors and employees shall not be liable to any civil or criminal proceedings against them for furnishing information under clause (b) of sub-section (1) of section 12.

Procedure and manner of furnishing information by reporting entities [Section 15]

It provides for prescribing the procedure and manner of furnishing information by reporting entities. The Central Government may, in consultation with the Reserve Bank of India, prescribe the procedure and the manner of maintaining and furnishing information under sub-section (1) of section 12 for the purpose of implementing the provisions of this Act.



6. SUMMONS, SEARCHES AND SEIZURES, ETC.

Power of survey [Section 16]

1. **Power of authority to make survey:** Notwithstanding anything contained in any other provisions of this Act, where an authority, on the basis of material in his possession, has reason to believe (the reasons for such belief to be recorded in writing) that an offence under section 3 has been committed, he may enter any place—

- (i) within the limits of the area assigned to him; or
- (ii) in respect of which he is authorised for the purposes of this section by such other authority, who is assigned the area within which such place is situated,

at which any act constituting the commission of such offence is carried on, and may require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, such act so as to, -

- (i) afford him the necessary facility to inspect such records as he may require and which may be available at such place;

- (ii) afford him the necessary facility to check or verify the proceeds of crime or any transaction related to proceeds of crime which may be found therein; and
- (iii) furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceedings under this Act.

Explanation. - For the purposes of this sub-section, a place, where an act which constitutes the commission of the offence is carried on, shall also include any other place, whether any activity is carried on therein or not, in which the person carrying on such activity states that any of his records or any part of his property relating to such act are or is kept.

2. **Copy of recorded reasons of survey to be forwarded to AO:** The authority referred to in sub-section (1) shall, after entering any place referred to in that sub-section immediately after completion of survey, forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope in the manner as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period as may be prescribed.
3. **Course of action by concerned authority:** An authority acting under this section may—
 - (i) place marks of identification on the records inspected by him and make or cause to be made extracts or copies therefrom,
 - (ii) make an inventory of any property checked or verified by him, and
 - (iii) record the statement of any person present in the place which may be useful for, or relevant to, any proceeding under this Act.

Search and seizure [Section 17]

1. **Power to Director or other Officer for Search and Seizure:** Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person—
 - (i) has committed any act which constitutes money-laundering, or
 - (ii) is in possession of any proceeds of crime involved in money-laundering, or
 - (iii) is in possession of any records relating to money-laundering, or
 - (iv) is in possession of any property related to crime,then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

- (a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;
- (b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;
- (c) seize any record or property found as a result of such search;
- (d) place marks of identification on such record or property, if required or] make or cause to be made extracts or copies therefrom;
- (e) make a note or an inventory of such record or property;
- (f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:

Exceptions: However, no search shall be conducted unless, (i) in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973, or (ii) a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or (iii) in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or (iv) any other officer who may be authorised by the Central Government, by notification, for this purpose. [Sub- section (1)]

2. **Order to freeze property by an authorized officer:** Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

However if, at any time before its confiscation under sub-section (5) or (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property. [Sub-section (1A)]

3. **Forward of recorded reasons to AA:** The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure or upon issuance of a freezing order, forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed

envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

4. **Authorisation for Search and Seizure of evidence:** Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence:

However, no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

5. **Filing of an application for retention of record etc.:** The authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating Authority.

Search of persons [Section 18]

1. **Authorisation for search of Pension:** If an authority, authorised in this behalf by the Central Government by general or special order, has reason to believe (the reason for such belief to be recorded in writing) that any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

However, no search of any person shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose. [Sub-section (1)]

2. **Forward of copy of records of Search & Seizure to AA:** The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure, forward a copy of the reasons so recorded along with material in his possession, referred to in

that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed, and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

3. **Presentation of person within 24 Hrs:** Where an authority is about to search any person, he shall, if such person so requires, take such person within twenty-four hours to the nearest Gazetted Officer, superior in rank to him, or a Magistrate.

However, the period of 24 hours shall exclude the time necessary for the journey undertaken to take such person to the nearest Gazetted Officer, superior in rank to him, or Magistrate's Court. [Sub- section (3)]

4. **Period of detention of person:** If the requisition under sub-section (3) is made, the authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, superior in rank to him, or the Magistrate referred to in that sub-section.

However, the period of 24 hours shall exclude the time necessary for the journey from the place of detention to the office of the Gazetted Officer, superior in rank to him, or the Magistrate's Court.

5. **Discharge of Person in absence of reasonable ground for search:** The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made. [Sub- section (5)]

6. **Witness to attend the search:** Before making the search under sub-section (1) or sub-section (5), the authority shall call upon two or more persons to attend and witness the search, and the search shall be made in the presence of such persons.

7. **Preparation of list of record/property seized:** The authority shall prepare a list of record or property seized in the course of the search and obtain the signatures of the witnesses on the list.

8. No female shall be searched by anyone except a female.

9. **Reading of statement:** The authority shall record the statement of the person searched under sub-section (1) or sub-section (5) in respect of the records or proceeds of crime found or seized in the course of the search:

10. **Filing of an application for retention of record:** The authority, seizing any record or property under sub-section (1) shall, within a period of thirty days from such seizure, file an application requesting for retention of such record or property, before the Adjudicating Authority.

Power to arrest [Section 19]

1. **Arrest of person:** If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. [Sub- section (1)]
2. **Forwarding copy of the order to AA:** The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.
3. **Presenting of arrested person before Competent Authority:** Every person arrested under sub-section (1) shall, within 24 hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction.

However, the period of 24 hours shall exclude the time necessary for the journey from the place of arrest to the Special Court or Magistrate's Court

Retention of property [Section 20]

1. **Time period for Retention of Property:** Where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be. [Sub- section (1)]
2. **Forwarding of Copy of Order to AA:** The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for purposes of adjudication under section 8, forward a copy of the order along with the material in his possession, referred to in sub-section (1), to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.
3. **Return of Property:** On the expiry of the period specified in sub-section (1), the property shall be returned to the person from whom such property was seized or whose

property was ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period.

4. **Retention of property beyond the period:** The Adjudicating Authority, before authorising the retention or continuation of freezing of such property beyond the period specified in sub-section (1), shall satisfy himself that the property is prima facie involved in money-laundering and the property is required for the purposes of adjudication under section 8.
5. **Release of Property:** After passing the order of confiscation under sub-section (5) or sub-section (7) of section 8, Special Court, shall direct the release of all property other than the property involved in money-laundering to the person from whom such property was seized or the persons entitled to receive it.
6. **Withholding of Released property:** Where an order releasing the property has been made by the Special Court under sub-section (6) of section 8 or by the Adjudicating Authority under section 58B or sub-section (2A) of section 60, the Director or any officer authorised by him in this behalf may withhold the release of any such property for a period of ninety days from the date of receipt of such order, if he is of the opinion that such property is relevant for the appeal proceedings under this Act.

Retention of records [Section 21]

1. **Time period for retention of records:** Where any records have been seized, under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the Investigating Officer or any other officer authorised by the Director in this behalf has reason to believe that any of such records are required to be retained for any inquiry under this Act, such records may if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding 180 days from the day on which such records were seized or frozen, as the case may be. [Sub-section (1)]
2. **Person may obtain copies of records:** The person, from whom records seized or frozen, shall be entitled to obtain copies of records.
3. **Return of records:** On the expiry of the period specified under sub-section (1), the records shall be returned to the person from whom such records were seized or whose records were ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such records beyond the said period.
4. **Retention of Records beyond the period:** The Adjudicating Authority, before authorising the retention or continuation of freezing of such records beyond the period specified in sub-section (1), shall satisfy himself that the records are required for the purposes of adjudication under section 8.

5. **Release of records:** After passing of an order of confiscation or release under sub-section (5) or sub-section (6) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, the Adjudicating Authority shall direct the release of the records to the person from whom such records were seized.
6. **Withhold release of records:** Where an order releasing the records has been made by the Court Adjudicating Authority under sub-section (5) of section 21, the Director or any other officer authorised by him in this behalf may withhold the release of any such record for a period of 90 days from the date of receipt of such order, if he is of the opinion that such record is relevant for the appeal proceedings under this Act.

Presumption as to records or property in certain cases [Section 22]

1. Where any records or property are or is found in the possession or control of any person in the course of a survey or a search, or where any record or property is produced by any person or has been resumed or seized from the custody or control of any person or has been frozen under this Act or under any other law for the time being in force, it shall be presumed that—
 - (i) such records or property belong or belongs to such person;
 - (ii) the contents of such records are true; and
 - (iii) the signature and every other part of such records which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a record, stamped, executed or attested, that it was executed or attested by the person by whom it purports to have been so stamped, executed or attested.
2. Where any records have been received from any place outside India, duly authenticated by such authority or person and in such manner as may be prescribed, in the course of proceedings under this Act, the Special Court, the Appellate Tribunal or the Adjudicating Authority, as the case may be, shall—
 - (a) presume, that the signature and every other part of such record which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a record executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;
 - (b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

Presumption in inter-connected transactions [Section 23]

Where money-laundering involves two or more inter-connected transactions and one or more such transactions is or are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation under section 8 or for the trial of the money-laundering offence, it shall unless otherwise proved to the satisfaction of the Adjudicating Authority or the Special Court, be presumed that the remaining transactions form part of such inter-connected transactions.

Burden of proof [Section 24]

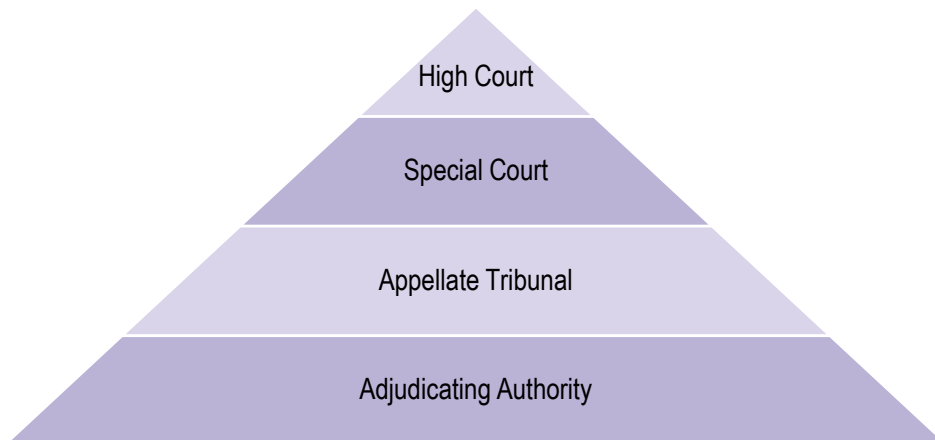
In any proceeding relating to proceeds of crime under this Act, -

- (a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and
- (b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.



7. APPELLATE TRIBUNAL

Hierarchy under the Prevention of Money Laundering Act, 2002



Section 48 provides for the following classes of authorities for the purposes of this Act, namely:-

1. Director or Additional Director or Joint Director,
2. Deputy Director,
3. Assistant Director, and

4. such other class of officers as may be appointed for the purposes of this Act.

As per section 2(1) clause (b), **Appellate Tribunal** means the Appellate Tribunal referred to in section 25.

Establishment of Appellate Tribunal [Section 25]

The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.

Appeals to Appellate Tribunal [Section 26]

Section 26 deals with the right and time frame to make an appeal to the Appellate Tribunal.

1. **Appeal by Director or any other person:** The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act may prefer an appeal to the Appellate Tribunal.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and it shall be in such form and be accompanied by prescribed fees.

2. **Appeal by reporting entity:** Any reporting entity aggrieved by any order of the Director made under sub-section (2) of section 13 may prefer an appeal to the Appellate Tribunal.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Director is received and it shall be in such form and be accompanied by prescribed fees.

3. **Condonation of delay:** The Appellate Tribunal may, after giving an opportunity of being heard, entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

4. **Passing of Order:** On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

5. **Copy of Order:** The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Director, as the case may be.

6. **Time frame for disposing off appeal:** The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within 6 months from the date of filing of the appeal.

Procedures & Powers of the Appellate Tribunal [Section 35]

1. The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.
2. The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:-
 - (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) requiring the discovery and production of documents;
 - (c) receiving evidence on affidavits;
 - (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
 - (e) issuing commissions for the examination of witnesses or documents;
 - (f) reviewing its decisions;
 - (g) dismissing a representation for default or deciding it ex parte;
 - (h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
 - (i) any other matter, which may be, prescribed by the Central Government.
3. An order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court. [Sub-section 3]
4. Notwithstanding anything contained in sub-section (3), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.
5. All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code and the Appellate Tribunal shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973.

Distribution of business amongst Benches [Section 36]

Where any Benches are constituted, the Chairman may, from time to time, by notification, make provisions as to the distribution of the business of the Appellate Tribunal amongst the Benches and also provide for the matters which may be dealt with by each Bench.

Power of Chairman to transfer cases [Section 37]

On the application of any of the parties and after notice to the parties, and after hearing such of them as he may desire to be heard, or on his own motion without such notice, the Chairman may transfer any case pending before one Bench, for disposal, to any other Bench.

Decision to be by majority [Section 38]

If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by third Member of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.

Right of appellant to take assistance of authorised representative and of Government to appoint presenting officers [Section 39]

1. A person preferring an appeal to the Appellate Tribunal under this Act may either appear in person or take the assistance of an authorised representative of his choice to present his case before the Appellate Tribunal.

Explanation.—For the purposes of this sub-section, the expression "authorised representative" shall have the same meaning as assigned to it under sub-section (2) of section 288 of the Income-tax Act, 1961.

2. The Central Government or the Director may authorise one or more authorised representatives or any of its officers to act as presenting officers and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal.

Members, etc., to be public servants [Section 40]

The Chairman, Members and other officers and employees of the Appellate Tribunal, the Adjudicating Authority, Director and the officers subordinate to him shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Civil court not to have jurisdiction [Section 41]

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Director, an Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Appeal to High Court [Section 42]

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order.

The High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Here, “High Court” means—

- (i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
- (ii) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

8. SPECIAL COURTS

“**Special Court**” means a Court of Session designated as Special Court under sub-section (1) of section 43.

Sections 43 – 47 deals with provision relating to Special Courts.

Section 43 empowers the Central Government in consultation with the Chief Justice of the High Court for trial of offence of money laundering (offence punishable under section 4), to designate one or more Courts of Sessions as Special Court or Special Courts for such area or areas or for such cases as may be prescribed in the notification to this effect.

Section 44 clearly provides for the offences triable by Special Courts. It overrides the provisions of the Code of Criminal Procedure, 1973 and provides that –



- (i) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed. The Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or
- (ii) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial; or
- (iii) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed; or
- (iv) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973, as it applies to a trial before a Court of Session.

The provisions of Section 44 shall not be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 43.

Offences to be cognizable and non-bailable [Section 45]

Section 45 provides that the offences under the Act shall be cognizable and non-bailable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence under this Act shall be released on bail or on his own bond unless—

- (i) The Public Prosecutor has been given an opportunity to oppose the application for such release and
- (ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, the Special Court can direct the release of such person on bail.

The Special Court cannot take cognizance of any offence under the Act, unless a complaint in writing is made by:-

- (a) The Director or
- (b) Any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.

Application of Code of Criminal Procedure, 1973 to proceedings before Special Court [Section 46]

1. It provides that the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bails or bonds) shall apply to the proceedings before a Special Court and the Special Court shall be deemed to be a Court of Session and the persons conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor.

However, the Central Government may also appoint for any case or class or group of cases a Special Public Prosecutor.

2. A person shall not be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor under this section unless he has been in practice as an Advocate for not less than 7 years, under the Union or a State, requiring special knowledge of law.
3. Every person appointed as a Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973 and the provisions of that Code shall have effect accordingly.

Appeal and revision [Section 47]

The section empowers the High Court to exercise (so far as applicable) all the powers granted by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure 1973 on Special Court within its jurisdiction, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.



9. RECIPROCAL ARRANGEMENT FOR ASSISTANCE IN CERTAIN MATTERS

Definitions

“**Corresponding law**” means any law of any foreign country corresponding to any of the provisions of this Act or dealing with offences in that country corresponding to any of the scheduled offences

“**Offence of cross border implications**”, means— (i) any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person 2 [transfers in any manner] the proceeds of such conduct or part thereof to India; or (ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

Explanation.—Nothing contained in this clause shall adversely affect any investigation, enquiry, trial or proceeding before any authority in respect of the offences specified in Part A or Part B of the Schedule to the Act before the commencement of the Prevention of Money laundering (Amendment) Act, 2009.

According to **section 55**, unless the context otherwise requires-

“**Contracting State**” means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;

Contracting State	any country or place outside India
	arrangement is made by CG with the other country
	Through Treaty or otherwise

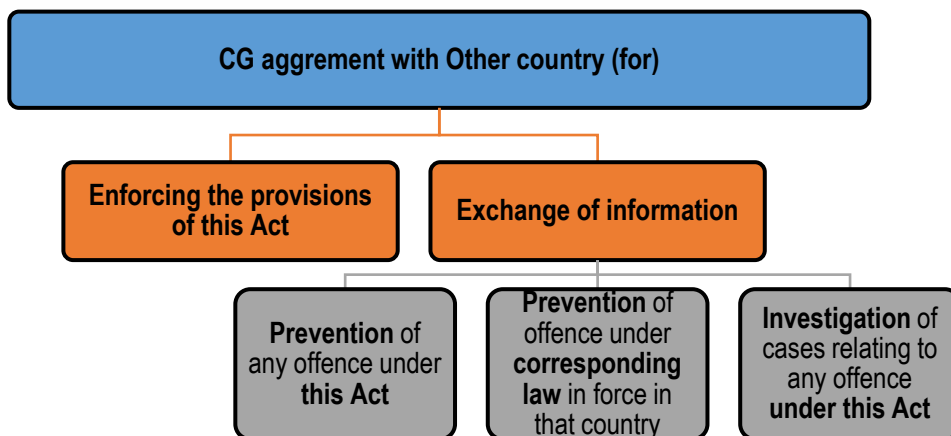
Agreements with foreign countries [Section 56]

1. The Central Government may enter into an agreement with the Government of any country outside India for—
 - (a) enforcing the provisions of this Act;

- (b) exchange of information for the prevention of any offence under this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under this Act,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

2. The Central Government may, by notification in the Official Gazette, direct that the application of this Chapter in relation to a contracting State with which reciprocal arrangements have been made, shall be subject to such conditions, exceptions or qualifications as are specified in the said notification.



Letter of request to a contracting State in certain cases [Section 57]

1. Notwithstanding anything contained in this Act or the Code of Criminal Procedure, 1973, if, in the course of an investigation into an offence or other proceedings under this Act, an application is made to a Special Court by the Investigating Officer or any officer superior in rank to the Investigating Officer that any evidence is required in connection with investigation into an offence or proceedings under this Act and he is of the opinion that such evidence may be available in any place in a contracting State, and the Special Court, on being satisfied that such evidence is required in connection with the investigation into an offence or proceedings under this Act, may issue a letter of request to a court or an authority in the contracting State competent to deal with such request to-
- (i) examine facts and circumstances of the case,
 - (ii) take such steps as the Special Court may specify in such letter of request, and
 - (iii) forward all the evidence so taken or collected to the Special Court issuing such letter of request.

2. The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.
3. Every statement recorded or document or thing received shall be deemed to be the evidence collected during the course of investigation.

Letter of request to contracting state

When: When an application is received by Special court that any evidence is required in respect of investigation

From whom: (i) by the **Investigating Officer** or
(ii) any officer **superior** in rank to the Investigating Office

Opinion of officer: That such evidence may be available with contracting state

Satisfaction of Special Court: is necessary

Letter to whom: to a **court** or an **authority in the contracting State** competent to deal with such request

Assistance to a contracting State in certain cases [Section 58]

Where a letter of request is received by the Central Government from a court or authority in a contracting State requesting for investigation into an offence or proceedings under this Act and forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority under the Act as it thinks fit for execution of such request in accordance with the provisions of this Act or, as the case may be, any other law for the time being in force.

Letter of request from Contracting state

Received by: CG

From: Contracting State

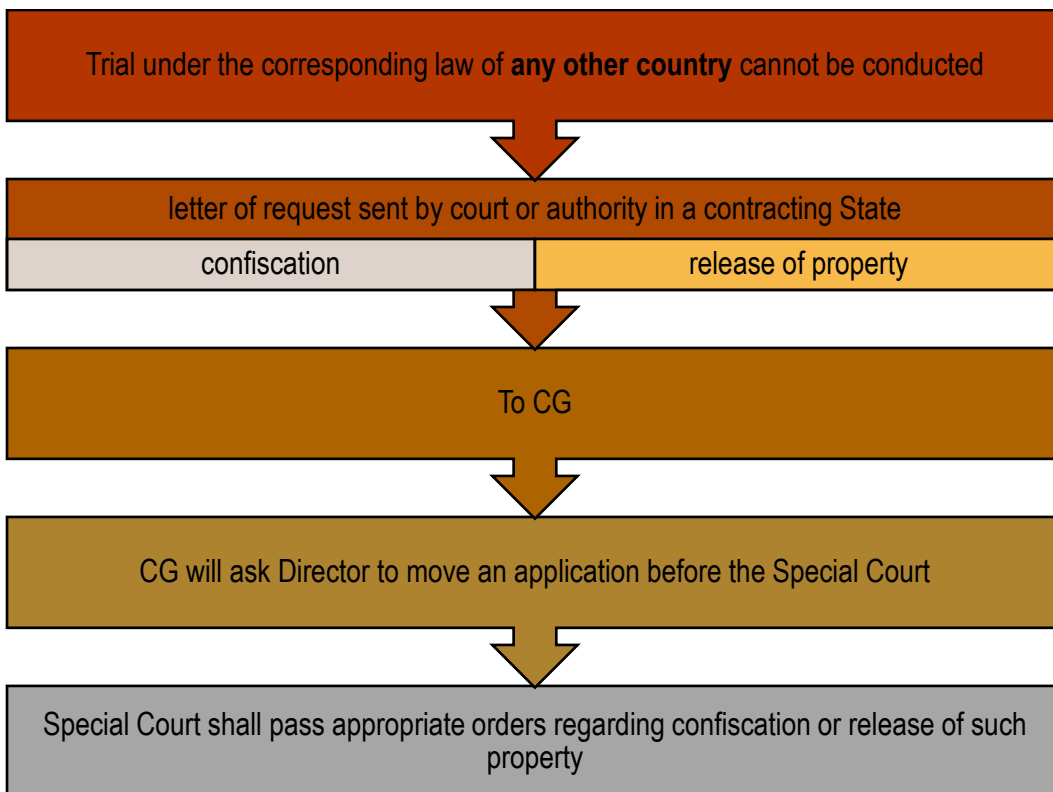
For: request for investigation into an offence or proceedings under this Act

Forward to: CG forward the request to: (i) Special Court
(ii) to any authority under the Act as it thinks fit for execution of such request

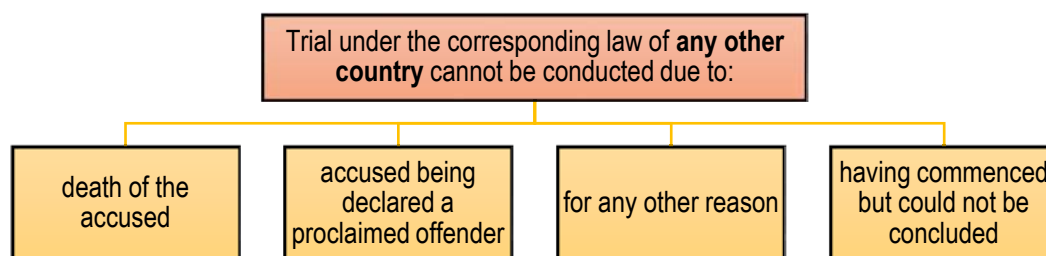
Special Court to release the property [Section 58A]

Where on closure of the criminal case or conclusion of a trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering has not taken place or the property in India is not involved in money-laundering, the Special Court may, on an application moved by the concerned person or the Director, after notice to the other party, order release of such property to the person entitled to receive it.

Letter of request of a contracting State or authority for confiscation or release the property [Section 58B]



Where the trial under the corresponding law of any other country cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Central Government (CG) shall, on receipt of a letter of request from a court or authority in a contracting State requesting for confiscation or release of property, as the case may be, forward the same to the Director to move an application before the Special Court and upon such application the Special Court shall pass appropriate orders regarding confiscation or release of such property involved in the offence of money-laundering.



Reciprocal arrangements for processes and assistance for transfer of accused persons [Section 59]

1. Where a Special Court, in relation to an offence punishable under section 4, desires that-
 - (a) a summons to an accused person, or
 - (b) a warrant for the arrest of an accused person, or
 - (c) a summons to any person requiring him to attend and produce a document or other thing or to produce it, or
 - (d) a search warrant,

issued by it shall be served or executed at any place in any contracting State, it shall send such summons or warrant in duplicate in such form, to such Court, Judge or Magistrate through such authorities, as the Central Government may, by notification, specify in this behalf and that Court, Judge or Magistrate, as the case may be, shall cause the same to be executed.
2. Where a Special Court, in relation to an offence punishable under section 4 has received for service or execution-
 - (a) a summons to an accused person, or
 - (b) a warrant for the arrest of an accused person, or
 - (c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or
 - (d) a search warrant,

issued by a Court, Judge or Magistrate in a contracting State, it shall, cause the same to be served or executed as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its local jurisdiction; and where-

 - (i) a warrant of arrest has been executed, the person arrested shall be dealt with in accordance with the procedure specified under section 19;

- (ii) a search warrant has been executed, the things found in this search shall, so far as possible, be dealt with in accordance with the procedure specified under sections 17 and 18.

However, in a case where a summon or search warrant received from a contracting State has been executed, the documents or other things produced or things found in the search shall be forwarded to the Court issuing the summons or search-warrant through such authority as the Central Government may, by notification, specify in this behalf.

3. Where a person transferred to a contracting State pursuant to sub-section (2) is a prisoner in India, the Special Court or the Central Government may impose such conditions as that Court or Government deems fit.
4. Where the person transferred to India pursuant to sub-section (1) is a prisoner in a contracting State, the Special Court in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.

Attachment, seizure and confiscation, etc., of property in a contracting State or India [Section 60]

1. Where the Director has made an order for attachment of any property under section 5 or for freezing under sub-section (1A) of section 17 or where an Adjudicating Authority has made an order relating to a property under section 8 or where a Special Court has made an order of confiscation relating to a property under sub-section (5) or sub-section (6) of section 8 and such property is suspected to be in a contracting State, the Special Court, on an application by the Director or the Administrator appointed under sub-section (1) of section 10, as the case may be, may issue a letter of request to a court or an authority in the contracting State for execution of such order.
2. Where a letter of request is received by the Central Government from a court or an authority in a contracting State requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence under a corresponding law committed in that contracting State, the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.
3. Where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering under the corresponding law of that country has been committed, the Special Court shall, on receipt of an application from the Director for execution of confiscation under sub-section (2), order, after giving notice to the affected persons, that such property involved in money-laundering or which has been used for

commission of the offence of money-laundering stand confiscated to the Central Government.

4. The Director shall, on receipt of a letter of request under section 58 or section 59, direct any authority under this Act to take all steps necessary for tracing and identifying such property.
5. The steps referred to in sub-section (3) may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.
6. Any inquiry, investigation or survey referred to in sub-section (4) shall be carried out by an authority mentioned in sub-section (3) in accordance with such directions issued in accordance with the provisions of this Act.
7. The provisions of this Act relating to attachment, adjudication, confiscation and vesting of property in the Central Government contained in Chapter III and survey, searches and seizures contained in Chapter V shall apply to the property in respect of which letter of request is received from a court or contracting State for attachment or confiscation of property.
8. When any property in India is confiscated as a result of execution of a request from a contracting State in accordance with the provisions of this Act, the Central Government may either return such property to the requesting State or compensate that State by disposal of such property on mutually agreed terms that would take into account deduction for reasonable expenses incurred in investigation, prosecution or judicial proceedings leading to the return or disposal of confiscated property.

Procedure in respect of letter of request [Section 61]

Every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a contracting State under this Chapter shall be transmitted to a contracting State or, as the case may be, sent to the concerned Court in India and in such form and in such manner as the Central Government may, by notification, specify in this behalf.



10. RECOVERY OF FINE OR PENALTY

Punishment for vexatious search [Section 62]

Any authority or officer exercising powers under this Act or any rules made thereunder, who, without reasons recorded in writing,-

- (a) searches or causes to be searched any building or place; or

(b) detains or searches or arrests any person,

shall for every such offence be liable on conviction for imprisonment for a term which may extend to two years or fine which may extend to fifty thousand rupees or both.

Punishment for false information or failure to give information, etc. [Section 63]

1. Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.
2. If any person,-
 - (a) being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any question put to him by an authority in the exercise of its powers under this Act; or
 - (b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or
 - (c) to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time,he shall pay, by way of penalty, a sum which shall not be less than 500 rupees but which may extend to 10,000 rupees for each such default or failure.
3. No order under this section shall be passed by an authority referred to in sub-section (2) (i.e. point 2 above) unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such authority.
4. Notwithstanding anything contained in clause (c) of sub-section (2), a person who intentionally disobeys any direction issued under section 50 shall also be liable to be proceeded against under section 174 of the Indian Penal Code.

Cognizance of offences [Section 64]

1. No court shall take cognizance of any offence under section 62 or sub-section (1) of section 63 except with the previous sanction of the Central Government.
2. The Central Government shall, by an order, either give sanction or refuse to give sanction within ninety days of the receipt of the request in this behalf.

Code of Criminal Procedure, 1973 to apply [Section 65]

The provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation investigation, prosecution and all other proceedings under this Act.

11. MISCELLANEOUS

Disclosure of Information [Section 66]

- (1) The Director or any other authority specified by him by a general or special order in this behalf may furnish or cause to be furnished to-
 - (i) any officer, authority or body performing any functions under any law relating to imposition of any tax, duty or cess or to dealings in foreign exchange, or prevention of illicit traffic in the narcotic drugs and psychotropic substances under the Narcotic Drugs and Psychotropic Substances Act, 1985 or
 - (ii) such other officer, authority or body performing functions under any other law as the Central Government may, if in its opinion it is necessary so to do in the public interest, specify by notification in the Official Gazette in this behalf, any information received or obtained by such Director or any other authority, specified by him in the performance of their functions under this Act, as may, in the opinion of the Director or the other authority so specified by him, be necessary for the purpose of the officer, authority or body specified in clause (i) or clause (ii) to perform his or its functions under that law.
- (2) If the Director or other authority specified under sub-section (1) is of the opinion, on the basis of information or material in his possession, that the provisions of any other law for the time being in force are contravened, then the Director or such other authority shall share the information with the concerned agency for necessary action.

Bar of suits in civil courts [Section 67]

No suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything done or intended to be done in good faith under this Act.

Notice, etc., not to be invalid on certain grounds [Section 68]

No notice, summons, order, document or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of his Act shall be invalid, or shall be deemed to be invalid merely by reason of

any mistake, defect or omission in such notice, summons, order, document or other proceeding if such notice, summons, order, document or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

Recovery of fine or penalty [Section 69]

Where any fine or penalty imposed on any person under section 13 or section 63 is not paid within 6 months from the day of imposition of fine or penalty, the Director or any other officer authorised by him in this behalf may proceed to recover the amount from the said person in the same manner as prescribed in Schedule II of the Income-tax Act, 1961 for the recovery of arrears and he or any officer authorised by him in this behalf shall have all the powers of the Tax Recovery Officer mentioned in the said Schedule for the said purpose.

Offences by companies [Section 70]

1. Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of and was responsible to the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

2. Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of any company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation 1- For the purposes of this section,

- (i) "Company" means any body corporate and includes a firm or other association of individuals; and
- (ii) "Director", in relation to a firm, means a partner in the firm.

Explanation 2- For the removal of doubts, it is hereby clarified that a company may be prosecuted, notwithstanding whether the prosecution or conviction of any legal juridical person shall be contingent on the prosecution or conviction of any individual.

Act to have overriding effect [Section 71]

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Continuation of proceedings in the event of death or insolvency [Section 72]

1. Where-

- (a) any property of a person has been attached under section 8 and no appeal against the order attaching such property has been preferred; or
- (b) any appeal has been preferred to the Appellate Tribunal, and-
 - (i) in a case referred to in clause (a), such person dies or is adjudicated an insolvent before preferring an appeal to the Appellate Tribunal; or
 - (ii) in a case referred to in clause (b), such person dies or is adjudicated an insolvent during the pendency of the appeal,

then, it shall be lawful for the legal representatives of such person or the official assignee or the official receiver, as the case may be, to prefer an appeal to the Appellate Tribunal or as the case may be, to continue the appeal before the Appellate Tribunal, in place of such person and the provisions of section 26 shall, so far as may be, apply, or continue to apply, to such appeal.

2. Where-

- (a) after passing of a decision or order by the Appellate Tribunal, no appeal has been preferred to the High court under section 42; or
- (b) any such appeal has been preferred to the High Court,-

then-

- (i) in a case referred to in clause (a), the person entitled to file the appeal dies or is adjudicated an insolvent before preferring an appeal to the High Court, or
- (ii) in a case referred to in clause (b), the person who had filed the appeal dies or is adjudicated an insolvent during the pendency of the appeal before the High Court,

then, it shall be lawful for the legal representatives of such person, or the official assignee or the official receiver, as the case may be, to prefer an appeal to the High Court or to continue the appeal before the High Court in place of such person and the provisions of section 42 shall, so far as may be, apply, or continue to apply, to such appeal.

3. The powers of the official assignee or the official receiver under sub-section (1) or sub-section (2) shall be exercised by him subject to the provisions of the Presidency-towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be.

Power to make rules [Section 73]

1. The Central Government may, by notification, make rules for carrying out the provisions of this Act.
2. In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-
 - (a) the form in which records referred to in this Act may be maintained;
 - (aa) the manner of provisional attachment of property under sub-section (1) of section 5;
 - (b) the manner in which the order and the material referred to in sub-section (2) of section 5 to be maintained;
 - (c) matters in respect of experience of Members under sub-section (3) of section 6;
 - (d) the salaries and allowances payable to and other terms and conditions of service of Members of the Adjudicating Authority under sub-section (9) of section 6;
 - (e) the salaries and allowances payable to and other terms and conditions of service of the officers and employees of the Adjudicating Authority under sub-section (3) of section 7;
 - (ee) the manner of seizing or taking possession of property attached under section 5 or frozen under sub-section (1A) of section 17 or under sub-section (4) of section 8;
 - (f) the manner in which and the conditions subject to which the properties confiscated may be received and managed under sub-section (2) of section 10;
 - (g) the additional matters in respect of which the Adjudicating Authority may exercise the powers of a civil court under clause (f) of sub-section (1) of section 11;
 - (i) the nature and value of transactions and the time within which the information of transactions under clause (b) of sub-section (1) of section 12 shall be furnished;
 - (j) the manner and the conditions in which identity of clients shall be verified by the reporting entities under clause (c) of sub-section (1) of section 12;
 - (jj) the manner of identifying beneficial owner, if any, from the clients by the reporting entities under clause (d) of sub-section (1) of section 12;
 - (jjj) the period of interval in which the reports are sent by the reporting entities or any of its employees under clause (c) of sub-section (2) of section 13;
 - (k) the procedure and the manner of maintaining and furnishing information under sub-section (1) of section 12 as required under section 15;
 - (l) the manner in which the reasons and the material referred to in sub-section (2) of section 16 shall be maintained;
 - (m) the rules relating to search and seizure under sub-section (1) of section 17;
 - (n) the manner in which the reasons and the material referred to in sub-section (2) of section 17 shall be maintained;

- (o) the manner in which the reasons and the material referred to in sub-section (2) of section 18 shall be maintained;
- (p) the manner in which the order and the material referred to in sub-section (2) of section 19 shall be maintained;
- (pp) the manner in which the forwarding of the order for retention or continuation of freezing of the property and the period of keeping such order and material under sub-section (2) of section 20;
- (q) the manner in which records authenticated outside India may be received under sub-section (2) of section 22;
- (r) the form of appeal and the fee for filing such appeal, under sub-section (3) of section 26;
- (u) the additional matters in respect of which the Appellate Tribunal may exercise the powers of a civil court under clause (i) of sub-section (2) of section 35;
- (ua) conditions subject to which a police officer may be authorised to investigate into an offence under sub-section (1A) of section 45;
- (v) the additional matters in respect of which the authorities may exercise powers of a civil court under clause (f) of sub-section (1) of section 50;
- (w) the rules relating to impounding and custody of records under sub-section (5) of section 50;
- (x) any other matter which is required to be, or may be, prescribed.

Rules to be laid before Parliament [Section 74]

Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Power to remove difficulties [Section 75]

1. If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty: Provided that no order shall be made under this section after the expiry of 2 years from the commencement of this Act.
2. Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Annexure**SCHEDULE**

[See section 2(y)]

PART A**PARAGRAPH 1****OFFENCES UNDER THE INDIAN PENAL CODE**

<i>Section</i>	<i>Description of offence</i>
120B	Criminal conspiracy.
121	Waging or attempting to wage war or abetting waging of war, against the Government of India.
121A	Conspiracy to commit offences punishable by section 121 against the State.
255	Counterfeiting Government stamp.
257	Making or selling instrument for counterfeiting Government stamp.
258	Sale of counterfeit Government stamp.
259	Having possession of counterfeit Government stamp.
260	Using as genuine a Government stamp known to be counterfeit.
302	Murder.
304	Punishment for culpable homicide not amounting to murder.
307	Attempt to murder.
308	Attempt to commit culpable homicide.
327	Voluntarily causing hurt to extort property, or to constrain to an illegal act.
329	Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.
364A	Kidnapping for ransom, etc.
384 to 389	Offences relating to extortion.
392 to 402	Offences relating to robbery and dacoity.
411	Dishonestly receiving stolen property.
412	Dishonestly receiving property stolen in the commission of a dacoity.
413	Habitually dealing in stolen property.

- 414 Assisting in concealment of stolen property.
- 417 Punishment for cheating.
- 418 Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.
- 419 Punishment for cheating by personation.
- 420 Cheating and dishonestly inducing delivery of property.
- 421 Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.
- 422 Dishonestly or fraudulently preventing debt being available for creditors.
- 423 Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.
- 424 Dishonest or fraudulent removal or concealment of property.
- 467 Forgery of valuable security, will, etc.
- 471 Using as genuine a forged document or electronic record.
- 472 and 473 Making or possessing counterfeit seal, etc., with intent to commit forgery.
- 475 and 476 Counterfeiting device or mark.
- 481 Using a false property mark.
- 482 Punishment for using a false property mark.
- 483 Counterfeiting a property mark used by another.
- 484 Counterfeiting a mark used by a public servant.
- 485 Making or possession of any instrument for counterfeiting a property mark.
- 486 Selling goods marked with a counterfeit property mark.
- 487 Making a false mark upon any receptacle containing goods.
- 488 Punishment for making use of any such false mark.
- 489A Counterfeiting currency notes or bank notes.
- 489B Using as genuine, forged or counterfeit currency notes or bank notes.

PARAGRAPH 2

OFFENCES UNDER THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

<i>Section</i>	<i>Description of offence</i>
15	Contravention in relation to poppy straw.
16	Contravention in relation to coca plant and coca leaves.
17	Contravention in relation to prepared opium.
18	Contravention in relation to opium poppy and opium.
19	Embezzlement of opium by cultivator.
20	Contravention in relation to cannabis plant and cannabis.
21	Contravention in relation to manufactured drugs and preparations.
22	Contravention in relation to psychotropic substances.
23	Illegal import into India, export from India to transshipment of narcotic drugs and psychotropic substances.
24	External dealings in narcotic drugs and psychotropic substances in contravention of section 12 of the Narcotic Drugs and Psychotropic Substances Act, 1985.
25A	Contravention of orders made under section 9A of the Narcotic Drugs and Psychotropic Substances Act, 1985.
27A	Financing illicit traffic and harbouring offenders.
29	Abetment and criminal conspiracy.

PARAGRAPH 3

OFFENCES UNDER THE EXPLOSIVE SUBSTANCES ACT, 1908

<i>Section</i>	<i>Description of offence</i>
3	Causing explosion likely to endanger life or property.
4	Attempt to cause explosion, or for making or keeping explosives with intent to endanger life or property.
5	Making or possessing explosives under suspicious circumstances.

PARAGRAPH 4

OFFENCES UNDER THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

<i>Section</i>	<i>Description of offence</i>
10 read with	Penalty for being member of an unlawful association, etc.

section 3

11 read with section 3 Penalty for dealing with funds of an unlawful association.

13 read with section 3 Punishment for unlawful activities.

16 read with section 15 Punishment for terrorist act.

16A Punishment for making demands of radioactive substances, nuclear devices, etc.

17 Punishment for raising fund for terrorist act.

18 Punishment for conspiracy, etc.

18A Punishment for organising of terrorist camps.

18B Punishment for recruiting of any person or persons for terrorist act.

19 Punishment for harbouring, etc.

20 Punishment for being member of terrorist gang or organisation.

21 Punishment for holding proceeds of terrorism.

38 Offence relating to membership of a terrorist organisation.

39 Offence relating to support given to a terrorist organisation.

40 Offence of raising fund for a terrorist organisation.

PARAGRAPH 5

OFFENCES UNDER THE ARMS ACT, 1959

Section Description of offence

25 To manufacture, sell, transfer, convert, repair or test or prove or expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition to contravention of section 5 of the Arms Act, 1959.

To acquire, have in possession or carry any prohibited arms or prohibited ammunition in contravention of section 7 of the Arms Act, 1959.

Contravention of section 24A of the Arms Act, 1959 relating to prohibition as to possession of notified arms in disturbed areas, etc.

Contravention of section 24B of the Arms Act, 1959 relating to prohibition as to

carrying of notified arms in or through public places in disturbed areas.

Other offences specified in section 25.

26 To do any act in contravention of any provisions of section 3, 4, 10 or section 12 of the Arms Act, 1959 in such manner as specified in sub-section (1) of section 26 of the said Act.

To do any act in contravention of any provisions of section 5, 6, 7 or section 11 of the Arms Act, 1959 in such manner as specified in sub-section (2) of section 26 of the said Act.

Other offences specified in section 26.

27 Use of arms or ammunition in contravention of section 5 or use of any arms or ammunition in contravention of section 7 of the Arms Act, 1959.

28 Use and possession of fire arms or imitation fire arms in certain cases.

29 Knowingly purchasing arms from unlicensed person or for delivering arms, etc., to person not entitled to possess the same.

30 Contravention of any condition of a licence or any provisions of the Arms Act, 1959 or any rule made thereunder.

PARAGRAPH 6

OFFENCES UNDER THE WILD LIFE (PROTECTION) ACT, 1972

<i>Section</i>	<i>Description of offence</i>
51 read with section 9	Hunting of wild animals.
51 read with section 17A	Contravention of provisions of section 17A relating to prohibition of picking, uprooting, etc., of specified plants.
51 read with section 39	Contravention of provisions of section 39 relating to wild animals, etc., to be Government property.
51 read with section 44	Contravention of provisions of section 44 relating to dealings in trophy and animal articles without licence prohibited.
51 read with section 48	Contravention of provisions of section 48 relating to purchase of animal, etc., by licensee.
51 read with section 49B	Contravention of provisions of section 49B relating to prohibition of dealings in trophies, animals articles, etc., derived from scheduled animals.

PARAGRAPH 7

OFFENCES UNDER THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956

<i>Section</i>	<i>Description of offence</i>
5	Procuring, inducing or taking person for the sake of prostitution.
6	Detaining a person in premises where prostitution is carried on.
8	Seducing or soliciting for purpose of prostitution.
9	Seduction of a person in custody.

PARAGRAPH 8

OFFENCES UNDER THE PREVENTION OF CORRUPTION ACT, 1988

7.	Offence relating to public servant being bribed.
7A.	Taking undue advantage to influence public servant by corrupt or illegal means or by exercise of personal influence.
8.	Offence relating to bribing a public servant.
9.	Offence relating to bribing a public servant by a commercial organisation.
10.	Person in charge of commercial organisation to be guilty of offence.
11.	Public servant obtaining undue advantage, without consideration from person concerned in proceeding or business transacted by such public servant.
12.	Punishment for abetment of offences.
13.	Criminal misconduct by a public servant.
14.	Punishment for habitual offender.

PARAGRAPH 9

OFFENCES UNDER THE EXPLOSIVES ACT, 1884

<i>Section</i>	<i>Description of offence</i>
9B	Punishment for certain offences.
9C	Offences by companies.

PARAGRAPH 10

OFFENCES UNDER THE ANTIQUITIES AND ARTS TREASURES ACT, 1972

<i>Section</i>	<i>Description of offence</i>
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25 read with section 3 Contravention of export trade in antiquities and art treasures.

28 Offences by companies.

PARAGRAPH 11

OFFENCES UNDER THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

Section Description of offence

12A read with section 24 Prohibition of manipulative and deceptive devices, insider trading and substantial.

24 Acquisition of securities or control.

PARAGRAPH 12

OFFENCES UNDER THE CUSTOMS ACT, 1962

Section Description of offence

135 Evasion of duty or prohibitions.

PARAGRAPH 13

OFFENCES UNDER THE BONDED LABOUR SYSTEM (ABOLITION) ACT, 1976

Section Description of offence

16 Punishment for enforcement of bonded labour.

18 Punishment for extracting bonded labour under the bonded labour system.

20 Abetment to be an offence.

PARAGRAPH 14

OFFENCES UNDER THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

Section Description of offence

14 Punishment for employment of any child to work in contravention of the provisions of section 3.

PARAGRAPH 15

OFFENCES UNDER THE TRANSPLANTATION OF HUMAN ORGANS ACT, 1994

<i>Section</i>	<i>Description of offence</i>
18	Punishment for removal of human organ without authority.
19	Punishment for commercial dealings in human organs.
20	Punishment for contravention of any other provisions of this Act.

PARAGRAPH 16**OFFENCES UNDER THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000**

<i>Section</i>	<i>Description of offence</i>
23	Punishment for cruelty to juvenile or child.
24	Employment of juvenile or child for begging.
25	Penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to juvenile or child.
26	Exploitation of juvenile or child employee.

PARAGRAPH 17**OFFENCES UNDER THE EMIGRATION ACT, 1983**

<i>Section</i>	<i>Description of offence</i>
24	Offences and penalties.

PARAGRAPH 18**OFFENCES UNDER THE PASSPORTS ACT, 1967**

<i>Section</i>	<i>Description of offence</i>
12	Offences and penalties.

PARAGRAPH 19**OFFENCES UNDER THE FOREIGNERS ACT, 1946**

<i>Section</i>	<i>Description of offence</i>
14	Penalty for contravention of provisions of the Act, etc.
14B	Penalty for using forged passport.
14C	Penalty for abetment.

PARAGRAPH 20**OFFENCES UNDER THE COPYRIGHT ACT, 1957**

<i>Section</i>	<i>Description of offence</i>
63	Offence of infringement of copyright or other rights conferred by this Act.
63A	Enhanced penalty on second and subsequent convictions.
63B	Knowing use of infringing copy of computer programme.
68A	Penalty for contravention of section 52A.

PARAGRAPH 21

OFFENCES UNDER THE TRADE MARKS ACT, 1999

<i>Section</i>	<i>Description of offence</i>
103	Penalty for applying false trade marks, trade descriptions, etc.
104	Penalty for selling goods or providing services to which false trade mark or false trade description is applied.
105	Enhanced penalty on second or subsequent conviction.
107	Penalty for falsely representing a trade mark as registered.
120	Punishment of abetment in India of acts done out of India.

PARAGRAPH 22

OFFENCES UNDER THE INFORMATION TECHNOLOGY ACT, 2000

<i>Section</i>	<i>Description of offence</i>
72	Penalty for breach of confidentiality and privacy.
75	Act to apply for offence or contravention committed outside India.

PARAGRAPH 23

OFFENCES UNDER THE BIOLOGICAL DIVERSITY ACT, 2002

<i>Section</i>	<i>Description of offence</i>
55 read with section 6	Penalties for contravention of section 6, etc.

PARAGRAPH 24

OFFENCES UNDER THE PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT, 2001

<i>Section</i>	<i>Description of offence</i>
70 read with	Penalty for applying false denomination, etc.

section 68

71 read with section 68 Penalty for selling varieties to which false denomination is applied.

72 read with section 68 Penalty for falsely representing a variety as registered.

73 read with section 68 Penalty for subsequent offence.

PARAGRAPH 25

OFFENCES UNDER THE ENVIRONMENT PROTECTION ACT, 1986

Section Description of offence

15 read with section 7 Penalty for discharging environmental pollutants, etc., in excess of prescribed standards.

15 read with section 8 Penalty for handling hazardous substances without complying with procedural safeguards.

PARAGRAPH 26

OFFENCES UNDER THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974

Section Description of offence

41(2) Penalty for pollution of stream or well.

43 Penalty for contravention of provisions of section 24.

PARAGRAPH 27

OFFENCES UNDER THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981

Section Description of offence

37 Failure to comply with the provisions for operating industrial plant.

PARAGRAPH 28

OFFENCES UNDER THE SUPPRESSION OF UNLAWFUL ACTS AGAINST SAFETY OF MARITIME NAVIGATION AND FIXED PLATFORMS ON CONTINENTAL SHELF ACT, 2002

Section Description of offence

3 Offences against ship, fixed platform, cargo of a ship, maritime navigational

facilities, etc.]

PARAGRAPH 29

OFFENCES UNDER THE COMPANIES ACT, 2013

Section Description of offence

447 Punishment for fraud

PART B

OFFENCE UNDER THE CUSTOMS ACT, 1962

Section Description of offence

132 *False declaration, false documents, etc.*

PART C

An offence which is the offence of cross border implications and is specified in,—

- (1) Part A; or
- (2) the offences against property under Chapter XVII of the Indian Penal Code.
- (3) The offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.



PROHIBITION OF BENAMI PROPERTY TRANSACTIONS ACT, 1988



LEARNING OUTCOMES

After reading this chapter, you will be able to understand:

- ❑ About transactions which are Benami in nature and persons who are Benamidar
- ❑ Regarding ascertainment of Fair market value in relation to a property
- ❑ The provisions regarding prohibition of Benami Transactions
- ❑ The composition of Adjudication Authority, qualification for appointment of chairperson and members and their removal
- ❑ To address the issues regarding Attachment, Adjudication and Confiscation of property involved in Benami transactions
- ❑ The establishment and composition of Appellate Tribunal and qualification for appointment of chairperson and members and their removal



1. INTRODUCTION

Benami is a Persian term which essentially means something “without a name”. However, in the present context, it means proxy. So, a benami property is a property bought by the original owner using a proxy. This helps him park his unaccounted money safely while avoiding paying taxes to the government at the same time. Benami transactions are quite prevalent in land purchases, where unaccounted money is used to make the purchase.

In this Act, the word “benami” is used to refer to a property/asset with no name attached to it i.e. the actual owner is not the person who has the legal title to the property. Here, property, shares, debentures, fixed deposits and bank accounts are held by one person for another. The former lends his name to the latter and is called a benamidar; he does not have any beneficial interest in the property/asset.

Benami transactions have been practised in India since the late nineteenth century. These transactions gained momentum when the land reform movements entailed the abolition of the zamindari system, giving tillers rights to own the land as well as imposition of agricultural land ceilings. On the other hand, benami deals proliferated in the urban areas after the passage of the Urban Land (Ceiling and Regulation) Act, 1976 (now scrapped). Most of the Benami dealings are illegal in nature and hence the practice got a judicial recognition.

The Benami Transactions (Prohibition) Act, 1988 was enacted to prohibit benami transactions and the right to recover properly held benami and for matters corrected therewith or incidental thereto. It extends to the whole of India except the State of Jammu and Kashmir.

The Benami Transactions (Prohibition) Amendment Act, 2016

With a view to providing effective regime for prohibition of benami transactions, the said Act was amended through the Benami Transactions (Prohibition) Amendment Act, 2016. The amended law empowers the specified authorities to provisionally attach benami properties which can eventually be confiscated. Besides, if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

The Benami Transactions (Prohibition) Amendment Act, 2016 came into effect from 1st November, 2016. After coming into effect of the Benami Transactions (Prohibition) Amendment Act, the existing Benami Transactions (Prohibition) Act, 1988 shall be renamed as Prohibition of Benami Property Transactions Act, 1988 (PBPT Act). Several benami transactions have been identified since the coming into effect of the amended law. The benami properties attached include deposits in bank accounts and immovable properties.

An appellate mechanism has been provided under the PBPT Act in the form of Adjudicating Authority and Appellate Tribunal. The Adjudicating Authority referred to in section 6(1) of the

Prevention of Money Laundering Act, 2002 (PMLA) and the Appellate Tribunal referred to in section 25 of the PMLA have been notified as the Adjudicating Authority and Appellate Tribunal, respectively, for the purposes of the PBPT Act.

The Government has put in place empowered institutions for efficient implementation of the amended law. In exercise of powers conferred under sub-section (2) of section 28 read with section 59 of the amended Prohibition of Benami Property Transactions Act, 1988, vide Notification No. SO 3290E, dated 25.10.2016 the Central Government has notified specified Income-tax authorities to act as Initiating Officer, Approving Authority and Administrator in respect of benami transactions. Further, vide Notification No. SO 3288E, dated 25.10.2016, the Adjudicating Authority has been notified.

Structure of the Act:

Chapters	Matters	Sections
I	Preliminary	1 – 2
II	Prohibition Of Benami Transactions	3 – 6
III	Authorities	7 – 23
IV	Attachment, Adjudication And Confiscation	24- 29
V	Appellate Tribunal	30-49
VI	Special Courts	50-52
VII	Offences and Prosecution	53- 55
VIII	Miscellaneous	56- 72



2. PRELIMINARY [Section 2]

Definitions –

Adjudicating Authority [Section 2(1)]

"Adjudicating Authority" means the Adjudicating Authority appointed under Section 7 of this Act.

Administrator [Section 2(2)]

"Administrator" means an Income-tax Officer as defined in clause (25) of Section 2 of the Income-Tax Act, 1961.

As per Section 2(25) of the Income Tax Act, 1961, Income-tax Officer means a person appointed to be an Income-tax Officer under section 117 of the Income Tax Act, 1961. As per Section 117 of the Income Tax Act, 1961 on "Appointment of income-tax authorities", the Central Government may appoint such persons as it thinks fit to be income-tax authorities subject to the rules and orders of the Central Government regulating the conditions of service of persons in public services and posts, it may authorise the Board, or a Principal Director

General or Director-General, a Principal Chief Commissioner or Chief Commissioner or a Principal Director or Director or a Principal Commissioner or Commissioner to appoint income-tax authorities below the rank of an Assistant Commissioner or Deputy Commissioner. Subject to the rules and orders of the Central Government regulating the conditions of service of persons in public services and posts, an income-tax authority authorised in this behalf by the Board may appoint such executive or ministerial staff as may be necessary to assist it in the execution of its functions.

Appellate Tribunal [Section 2(3)]

"Appellate Tribunal" means the Appellate Tribunal established under Section 30.

Approving Authority [Section 2(4)]

"Approving Authority" means an Additional Commissioner or a Joint Commissioner as defined in clauses (1C) and (28C) respectively of Section 2 of the Income-tax Act, 1961.

Attachment [Section 2(5)]

"Attachment" means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under this Act.

Authority [Section 2(6)]

"Authority" means an authority referred to in Sub-section (1) of Section 18.

Banking Company [Section 2(7)]

"Banking company" means a company to which the provisions of the Banking Regulation Act, 1949, applies and includes any bank or banking institution referred to in section 51 of that Act.

Benami Property [Section 2(8)]

"Benami property" means any property which is the subject matter of a benami transaction and also includes the proceeds from such property.

Benami property means property without a name. Here, the person who pays for the property does not buy it under his own name. The person who finances the deal is the real owner of the property. The person in whose name the property has been purchased is called the benamidar.

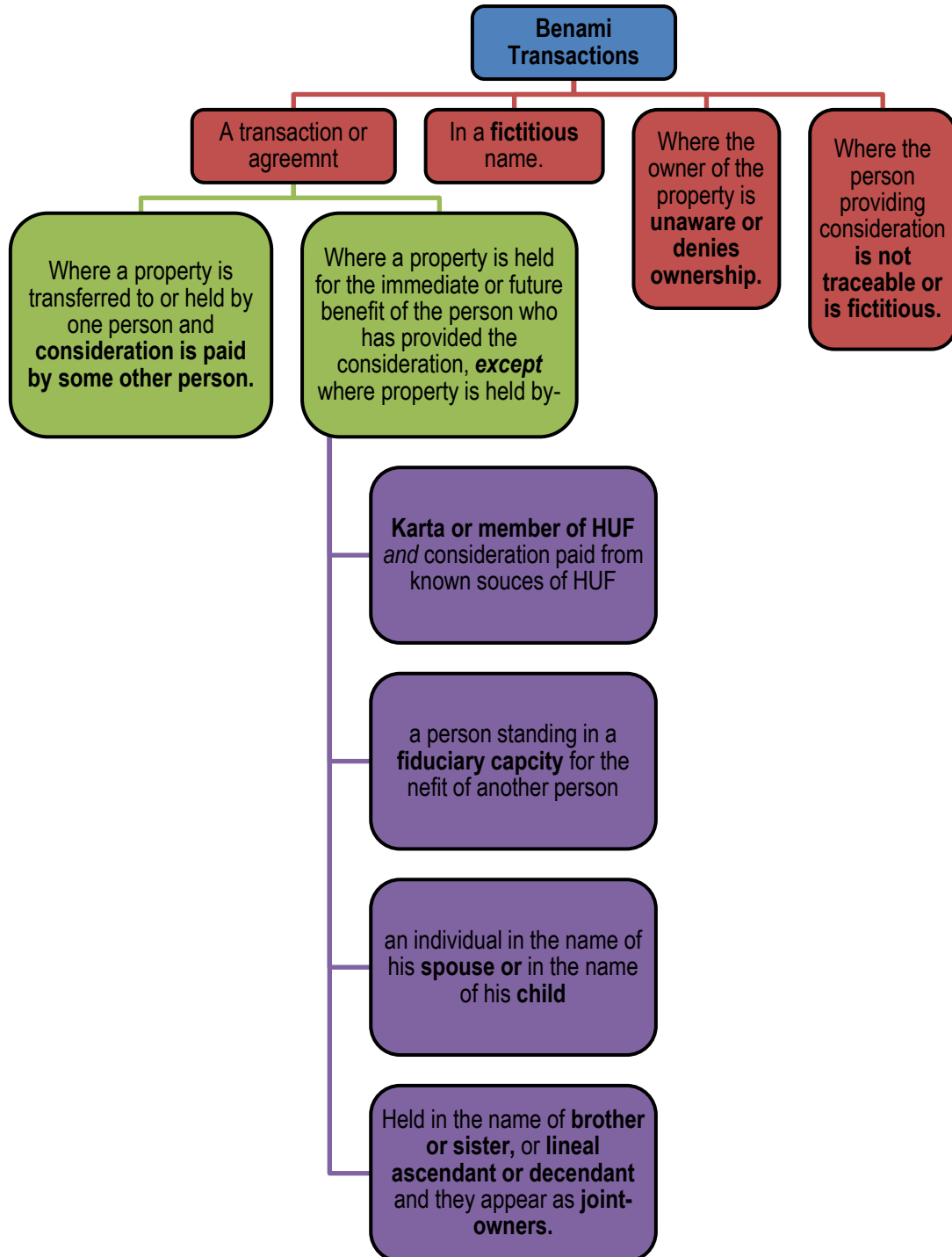
In case of *CIT vs. Daulat Ram Rawatmull (1 (1973) 87 ITR 349 (SC)* their Lordships held:

That the onus of proving that the apparent was not the real was on the party who claimed it to be so. As it was the Department which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of B, the burden lay on the Department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of B.

Benami Transaction [Section 2(9)]

"Benami transaction" means,—

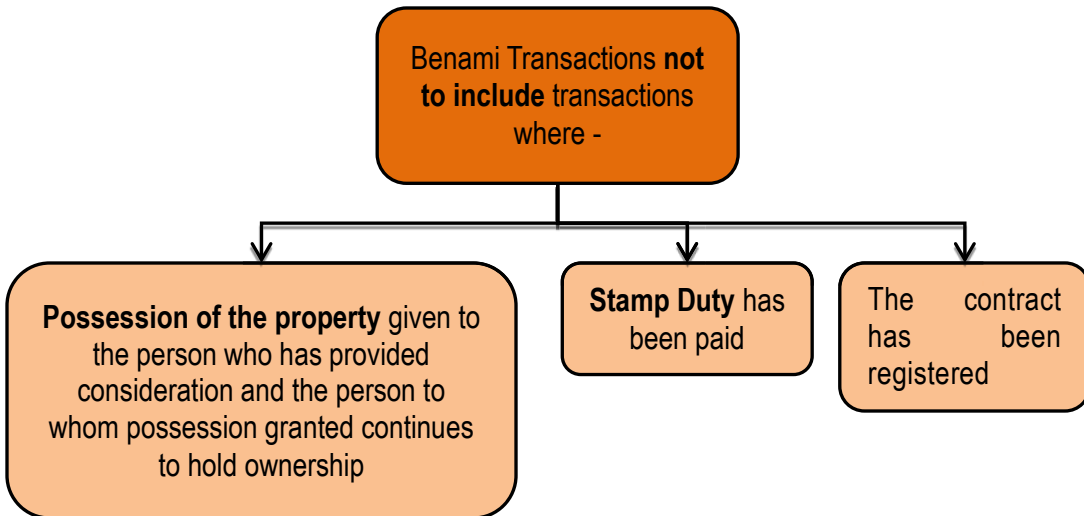
- (A) a transaction or an arrangement—
 - (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
 - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—
 - (i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;
 - (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;
 - (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
 - (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or
- (B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
- (C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
- (D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;



Benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in Section

53A of the Transfer of Property Act, 1882, if, under any law for the time being in force, where—

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
- (ii) stamp duty on such transaction or arrangement has been paid; and
- (iii) the contract has been registered



Thus, acquisition of a property in the name of a person other than the one paying the consideration thereof may result into a Benami Transaction.

Examples of Benami Transactions:

	Example	Whether a Benami Transaction?
1.	Mr. X, a non resident Indian, purchased a flat for ₹ 10,00,000 in the joint name of his brother and himself from his NRE account.	No
2.	Mr. X, a non resident Indian, purchased a flat for ₹ 10,00,000 and paid 5,00,000 in by account payee cheque of his own account and rest in cash. The registry was done at a value of Rs 5,00,000 which was paid by cheque.	Since the property is in the name of Mr. X and not in others name, it is not a Benami Transaction.
3.	Mr. X, a non resident Indian, purchased a flat for ₹ 10,00,000 in the joint name of his brother and himself and made the payment from unknown source.	Yes

4.	Mr. X, a resident Indian is holding a property which is in the name of unknown person.	Yes
5.	Mr. X, a non resident Indian, purchased a flat for ₹ 10,00,000 in the name of his wife from his NRE account.	No
6.	Mr. X, a non resident Indian, purchased a flat for ₹ 10,00,000 and paid 5,00,000 in by account payee cheque of his own account and ₹ 2,50,000 cheque of other unknown person and rest Rs 2,50,000 in cash. The registry was done at a value of Rs7,50,000 which was paid by his own cheque and others cheque.	Since the cheque for ₹ 2,50,000 is from unknown person cheque, to that extent it may be a Benami Transaction.
7.	Mr. X, a resident Indian, purchased a flat for ₹ 10,00,000 in the name of his son a USA resident but he denies the ownership of the flat.	Yes
8.	Mr. X, a resident Indian sold a flat which was not in his name and was in unknown person name. But deposited the sale proceeds in his own account.	Yes
9.	Mr. X, a resident Indian, a flat was purchased for ₹ 10,00,000 and payment was made by unknown person.	Yes

Judicial pronouncements on tests for determination of a benami transaction:

Case 1

In the matter of Bhim Singh & Anr vs Kan Singh (And Vice Versa) 1980 AIR 727, 1980 SCR (2) 628, the Hon'ble Supreme Court of India, observed –

The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus:

- (a) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction;
- (b) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is *prima facie* assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary;
- (c) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and
- (d) the question as to what his intention was has to be decided on

- (i) the basis of the surrounding circumstances,
- (ii) the relationship of the parties,
- (iii) the motives governing their action in bringing about the transaction and
- (iv) their subsequent conduct etc.

All the four factors stated above may have to be considered cumulatively (O P Sharma vs. Rajendra Prasad Shewda & Ors. (CA 8609-8610 of 2009) (SC).

Case 2

Onus of proof -

A Constitution Bench of the Apex Court in the judgment in ***Surasabailini Vs. Phanindra Mohan Majumdar*** 1965 AIR 1364, 1965 SCR (1) 861 reiterated the proposition of law as to the onus to establish the benami transaction.

Case 3

"In every benami transaction, the intention of the parties is the essence. The true test to determine whether the transaction is benami or not is to look to the intention of the parties viz., whether it was intended to operate as such or whether it was only meant to be colourable; if colourable, the transaction is benami, otherwise the transaction is not benami. On the other hand, if the parties intended that it should take effect, the transaction cannot be said to be benami." *George Thomas vs Smt. Srividya And The Tax Recovery (2003) 1 MLJ 823 (Madras High Court).*

Case 4

In the matter of *Valliammal (D) By LRS. v. Subramaniam and Others [(2004) 7 SCC 233]*, the Hon'ble Supreme Court observed:

"The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof."

Benamidar [Section 2(10)]

"Benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

**Bench [Section 2(11)]**

"Bench" means a Bench of the Adjudicating Authority or the Appellate Tribunal, as the case may be.

Beneficial Owner [Section 2(12)]

"Beneficial owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.

Board [Section 2(13)]

"Board" means the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963.

Director [Section 2(14)]

"Director" shall have the same meaning as assigned to it in clause (34) of Section 2 of the Companies Act, 2013.

Executor [Section 2(15)]

"Executor" shall have the same meaning as assigned to it in clause (c) of Section 2 of the Indian Succession Act, 1925.

Fair Market Value [Section 2(16)]

"Fair market value (FMV)", in relation to a property, means—

- (i) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and
- (ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with such manner as prescribed in Rule 3 of *Prohibition of Benami Transactions Rules, 2016*.

Rule 3 of Prohibition of Benami Transactions Rules, 2016, the price shall be determined as follows –The price of unquoted equity shares shall be the higher of,—

- (I) its cost of acquisition;
- (II) the fair market value of such equity shares determined, on the date of transaction, by a merchant banker or an accountant as per the Discounted Free Cash Flow method; and
- (III) the value, on the date of transaction, of such equity shares as determined in the following manner, namely:—

The fair market value of unquoted equity shares = $(A+B - L) \times (PV)/(PE)$ where,

A= book value of all the assets (other than bullion, jewellery, precious stone, artistic work, shares, securities and immovable property) as reduced by,-

- (i) any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any, and
- (ii) any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

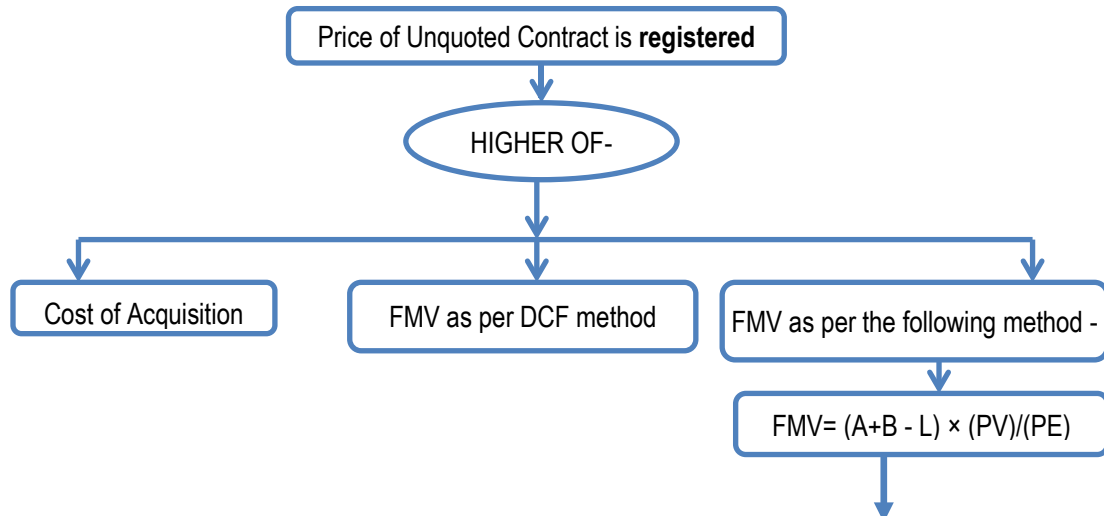
B= the price that the bullion, jewellery, precious stone, artistic work, shares, securities and immovable property would ordinarily fetch on sale in the open market on the date of transaction;

L= book value of liabilities, but not including the following amounts, namely:—

- (i) the paid-up capital in respect of equity shares;
- (ii) the amount set apart for payment of dividends on preference shares and equity shares;
- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
- (iv) any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balance-sheet;

PV= the paid up value of such equity shares;



A		B	L	
BV of all assets(except bullion, jewellery etc.)	XXX	Price that the bullion, jewellery etc. would ordinarily fetch on sale in the open market on the date of transaction .	Book value of Liabilities	XXX
Less: Income Tax Paidless refund, if any	XXX		Less: Paid-up capital of E/S	XXX
Less: Amt. shown as asset including unamortized amt. of any deferred expenditure	XXX		Less: Amt. set apart for payment of dividend	XXX
			Less: Reserves and Surplus (except those for depreciation)	XXX
			Less: Provision for tax (-) Tax paid less refund claimed, if any (-) Tax payable as per book profits	XXX
A	XXX		Less: Provision for liabilities other than ascertained liabilities	XXX
			Less: Contingent liabilities other than arrears of dividend of Cum. Pref. Shares	XXX
			L	XXX
PE = total amount of paid up equity share capital as shown in the balance-sheet				
PV = the paid up value of such equity shares				

Firm [Section 2(17)]

"Firm" shall have the same meaning as assigned to it in Section 4 of the Indian Partnership

Act, 1932 and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008.

High Court [Section 2(18)]

"High Court" means—

- (i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
- (ii) where the Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

Initiating Officer [Section 2(19)]

"Initiating Officer" means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961.

Section 2(9A) and section 2(19A) of the Income Tax Act, 1961 require the appointment of an Assistant Commissioner or a Deputy Commissioner, as the case may be, as per the provisions of section 117 of the Income Tax Act, 1961 (as detailed above).

Member [Section 2(20)]

"Member" means the Chairperson or the Member of the Adjudicating Authority or the Appellate Tribunal, as the case may be.

Notification [Section 2(21)]

"Notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly.

Partner [Section 2(22)]

"Partner" shall have the same meaning as assigned to it in Section 4 of the Indian Partnership Act, 1932, and shall include —

- (a) any person who, being a minor, has been admitted to the benefit of partnership; and
- (b) a partner of a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008.

Partnership [Section 2(23)]

"Partnership" shall have the same meaning as assigned to it in Section 4 of the Indian Partnership Act, 1932, and shall include a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008.

Person [Section 2(24)]

"person" shall include—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not;

(vi) every artificial juridical person, not falling under sub-clauses (i) to (v).

Prescribed [Section 2(25)]

"Prescribed" means prescribed by rules made under this Act.

Property [Section 2(26)]

"Property" means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

Public Financial Institution [Section 2(27)]

"Public financial institution" shall have the same meaning as assigned to it in clause (72) of Section 2 of the Companies Act, 2013.

Special Court [Section 2(28)]

"Special Court" means a Court of Session designated as Special Court under Sub-section (1) of Section 50.

Transfer [Section 2(29)]

"Transfer" includes sale, purchase or any other form of transfer of right, title, possession or lien.

Trustee [Section 2(30)]

"Trustee" means the trustee as defined in the Section 3 of the Indian Trusts Act, 1882.

As per the Indian Trusts Act, 1882, trustee refers to the person who accepts confidence reposed by the author of the trust.

[Section 2(31)]

Words and expressions used herein and not defined in this Act but defined in the Indian

Trusts Act, 1882, the Indian Succession Act, 1925, the Indian Partnership Act, 1932, the Income-tax Act, 1961, the Depositories Act, 1996, the Prevention of Money-Laundering Act, 2002, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the same meanings respectively assigned to them in those Acts.



3. PROHIBITION OF BENAMI TRANSACTIONS

Prohibition of benami transactions [Section 3]

- (1) No person shall enter into any benami transaction.
- (2) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.
- (3) Whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII.

Prohibition of the right to recover property held benami [Section 4]

- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
- (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

Property held Benami liable to confiscation [Section 5]

Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.

Prohibition on retransfer of property by benamidar [Section 6]

No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf. In cases where any property is re-transferred in contravention of the aforesaid provision, the transaction of such property shall be deemed to be null and void. The above provisions shall not apply to a transfer made in accordance with the provisions of Section 190 of the Finance Act, 2016.



4. AUTHORITIES

Adjudicating Authority [Section 7]

The Central Government shall, by notification, appoint one or more Adjudicating Authorities to exercise jurisdiction, powers and authority conferred by or under this Act.

Composition of Authority [Section 8]

An Adjudicating Authority shall consist of a Chairperson and at least two other Members.

Qualifications for appointment of Chairperson and Members [Section 9]

A person shall not be qualified for appointment as the Chairperson or a Member of the Adjudicating Authority unless he —

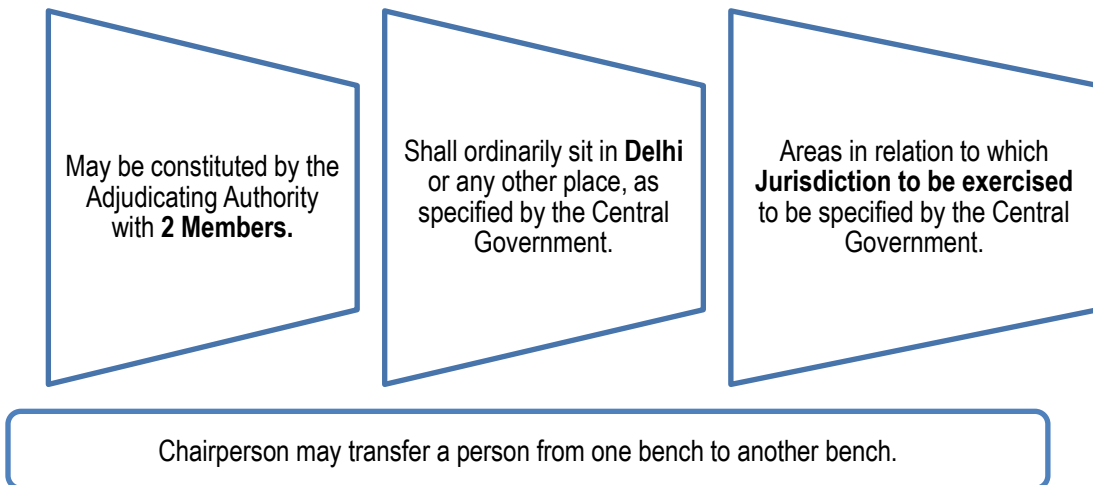
- (a) has been a member of the Indian Revenue Service and has held the post of Commissioner of Income-tax or equivalent post in that Service; or
- (b) has been a member of the Indian Legal Service and has held the post of Joint Secretary or equivalent post in that Service.

The Chairperson and other Members of the Adjudicating Authority shall be appointed by the Central Government in such manner as may be prescribed. The Central Government shall appoint the senior most member to be the Chairperson of the Adjudicating Authority.

Constitution of Benches of the Adjudicating Authority [Section 10]

The jurisdiction of the Adjudicating Authority may be exercised by Benches thereof. A Bench may be constituted by the Chairperson of the Adjudicating Authority with two Members, as the Chairperson may deem fit. The Benches of the Adjudicating Authority shall ordinarily sit in the National Capital Territory of Delhi and at such other places as the Central Government may, in consultation with the Chairperson, by notification, specify. The Central Government shall, by notification, specify the areas in relation to which each Bench of the Adjudicating Authority may exercise jurisdiction.

Notwithstanding anything of the aforesaid provision, the Chairperson may transfer a Member from one Bench to another Bench.



Power of the Adjudicating Authority to regulate its own procedure [Section 11]

The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Authority shall have powers to regulate its own procedure.

Term of Office of Chairperson and Members of Adjudicating Authority [Section 12]

The Chairperson and Members of the Adjudicating Authority shall hold office for –

- (i) a term **not exceeding five years** from the date on which they enter upon their office, or
- (ii) until they attain the **age of sixty-two years**,

whichever is earlier and shall not be eligible for reappointment.

Terms and conditions of services of Chairperson and Members of Adjudicating Authority [Section 13]

The salary and allowances payable to, and the other terms and conditions of service of the Chairperson and other Members of the Adjudicating Authority shall be such as may be prescribed.

Any vacancy caused to the office of the Chairperson or any other Member shall be filled up within a period of three months from the date on which such vacancy occurs.

Removal of Chairperson and Members of Adjudicating Authority [Section 14]

The Central Government may, by order, remove from office, the Chairperson or other Members of the Adjudicating Authority, if the Chairperson or such other Member, as the case may be –

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence, involving moral turpitude; or

(c) has become physically or mentally incapable of acting as a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or

(e) has so abused his position as to render his continuance in office is prejudicial to the public interest.

No Chairperson or Member shall be removed from his office under clause (d) or clause (e) of the aforesaid unless he has been given a reasonable opportunity of being heard in the matter.

Member to act as Chairperson in certain circumstances [Section 15]

In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

Vacancies, etc., not to invalidate proceedings of Adjudicating Authority [Section 16]

No act or proceeding of the Adjudicating Authority shall be invalid merely by reason of—

- a) any vacancy in, or any defect in the constitution of the Authority; or
- b) any defect in the appointment of a person acting as a Member of the Authority; or
- c) any irregularity in the procedure of the Authority not affecting the merits of the case.

Officers and employees of Adjudicating Authority [Section 17]

The Central Government shall provide each Adjudicating Authority with such officers and employees as that Government may think fit. The officers and employees of the Adjudicating Authority shall discharge their functions under the general superintendence of the Chairperson of the Adjudicating Authority.


Authorities and jurisdiction [Section 18]

The following Authorities shall be there for the purposes of this Act, namely:—

- a) the Initiating Officer;

- b) the Approving Authority;
- c) the Administrator; and
- d) the Adjudicating Authority.

The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to it under this Act or in accordance with such rules as may be prescribed.



Authority	Functions
Initiating Officer	Notice and Attachment of the property
Approving Authority	Notice to furnish evidence
Adjudicating Authority	Confiscation and vesting of property
Administrator	Possession and Management of confiscated property
Appellate Tribunal	Hears Appeals against orders of Adjudicating Officer

Powers of authorities [Section 19]

The authorities under this Act shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—

- a) discovery and inspection;
- b) enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;
- c) compelling the production of books of account and other documents;
- d) issuing commissions;
- e) receiving evidence on affidavits; and
- f) any other matter which may be prescribed.

All the persons summoned above shall be bound to attend in person or through authorised agents, as any authority under this Act may direct. They shall also be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

Every proceeding under the aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code. Any authority under this Act may requisition the service of any police officer or of any officer of the Central Government or State Government or of both to assist him for all or any of the purposes specified above. It shall be the duty of every such officer to comply with the requisition or direction.

"Reporting entity" means any intermediary or any authority or of the Central or the State Government or any other person as may be notified in this behalf.

"Intermediary" shall have the same meaning as assigned to it in clause (n) of Sub-section (1) of Section 2 of the Prevention of Money-Laundering Act, 2002.

Certain officers to assist in inquiry, etc. [Section 20]

The following officers shall assist the authorities in the enforcement of this Act, namely:—

- a) income-tax authorities appointed under Sub-section (1) of Section 117 of the Income-tax Act, 1961;
- b) officers of the Customs and Central Excise Departments;
- c) officers appointed under Sub-section (1) of Section 5 of the Narcotic Drugs and Psychotropic Substances Act, 1985;
- d) officers of the stock exchange recognised under Section 4 of the Securities Contracts (Regulation) Act, 1956;
- e) officers of the Reserve Bank of India constituted under Sub-section (1) of section 3 of the Reserve Bank of India Act, 1934;
- f) police;
- g) officers of enforcement appointed under Sub-section (1) of Section 36 of the Foreign Exchange Management Act, 1999;
- h) officers of the Securities and Exchange Board of India established under Section 3 of the Securities and Exchange Board of India Act, 1992;
- i) officers of any other body corporate constituted or established under a Central or a State Act; and
- j) such other officers of the Central Government, State Government, local authorities or banking companies as the Central Government may, by notification, specify, in this behalf.

Power to call for information [Section 21]

The Initiating Officer or the Approving Authority or the Adjudicating Authority shall have power to require any officer of the Central Government or State Government or a local body or any person or officer who is responsible for registering and maintaining books of account or other

documents containing a record of any transaction relating to any property or any other person to furnish any information in relation to any person, point or matter as in his opinion shall be useful for or relevant for the purposes of this Act.

Every such officer or person referred to above shall furnish such information to any authority under this Act in such form and manner as prescribed in Rule 4 of *Benami Transactions Prohibition Rules, 2016*.

Rule 4 of *Benami Transactions Prohibition Rules, 2016* provides that the income-tax authority referred to in sub-section (1) of the section 285BA of Income-tax Act, 1961 (43 of 1961) or such other authority or agency which is prescribed under sub-section (1) of section 285BA shall electronically transmit a copy of statement received by it under sub-section (1) of section 285BA of that Act to the Initiating Officer or such authority or agency authorised by the Initiating Officer on or before fifteen days from the end of the month in which said statement is received.

Power to impound documents [Section 22]

Where any books of account or other documents are produced before the authority in any proceedings under this Act and the authority in this behalf has reason to believe that any of the books of account or other documents are required to be impounded and retained for any inquiry under this Act, it may impound and retain the books of account or other documents for a period not exceeding three months from the date of order of attachment made by the Adjudicating Authority under Sub-section (3) of Section 26.

Provided that the period for retention of the books of account or other documents may be extended beyond a period exceeding three months from the date of order of attachment made by the Adjudicating Authority under Sub-section (3) of Section 26 where the authority records in writing the reasons for extending the same.

Where the authority impounding and retaining the books of account or other documents, under the aforesaid is the Initiating Officer, he shall obtain approval of the Approving Authority within a period of fifteen days from the date of initial impounding and seek further approval of the Approving Authority for extending the period of initial retention, before the expiry of the period of initial retention, if so required.

The period of retention of the books of account or other documents shall in no case exceed a period of thirty days from the date of conclusion of all the proceedings under this Act. The person, from whom the books of account or other documents were impounded, shall be entitled to obtain copies thereof. On the expiry of the period specified, the books of account or other documents shall be returned to the person from whom such books of account or other documents were impounded unless the Approving Authority or the Adjudicating Authority permits their release to any other person.

Power of authority to conduct inquiry, etc. [Section 23]

The Initiating Officer, after obtaining prior approval of the Approving Authority, shall have power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act.

¹“Explanation.—For the removal of doubts, it is hereby clarified that nothing contained in this section shall apply and shall be deemed to have ever applied where a notice under sub-section (1) of section 24 has been issued by the Initiating Officer.”



5. ATTACHMENT, ADJUDICATION AND CONFISCATION

Notice and attachment of property involved in benami transaction [Section 24]

Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

Where the notice specifies any property as being held by a benamidar, a copy of the notice shall also be issued to the beneficial owner if his identity is known. Where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as prescribed in Rule 4 of the *Benami Transactions Prohibition Rules, 2016*, for a period not exceeding ninety days from the date of issue of notice.

The Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice —

- (a) where the provisional attachment has been made —
 - (i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
 - (ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;

¹ The following Explanation shall be inserted and shall be deemed to have been inserted with effect from the 1st day of November, 2016

- (b) where provisional attachment has not been made—
- (i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
 - (ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

Where the Initiating Officer passes an order continuing the provisional attachment of the property or passes an order provisionally attaching the property, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

Rule 4 prescribes that the Initiating Officer shall provisionally attach any property in the manner provided in the Second Schedule of Income-tax Act, 1961.

Manner of service of notice [Section 25]

A notice under Section 24 may be served on the person named therein either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908.

Any such notice may be addressed as follows –

	In case of -	Notice to be addressed to -
(i)	An individual	such individual
(ii)	A firm	managing partner or the manager of the firm
(iii)	A Hindu Undivided Family	Karta or any member of such family
(iv)	A company	principal officer thereof
(v)	Any other association or body of individuals	principal officer or any member thereof
(vi)	Any other person (not being an individual)	person who manages or controls his affairs

Adjudication of benami property [Section 26]

(1) Parties to be issued notice: On receipt of a reference under Section 24, the Adjudicating Authority shall issue notice, to furnish such documents, particulars or evidence as is considered necessary on a date to be specified therein, on the following persons, namely:—

- a) the person specified as a benamidar therein;
- b) any person referred to as the beneficial owner therein or identified as such;
- c) any interested party, including a banking company;
- d) any person who has made a claim in respect of the property,

(2) Time period for issue of Notice: *Provided* that the Adjudicating Authority shall issue notice within a period of thirty days from the date on which a reference has been received;

Provided also that the notice shall provide a period of not less than thirty days to the person to whom the notice is issued to furnish the information sought.

Where the property is held jointly by more than one person, the Adjudicating Authority shall make all endeavours to serve notice to all persons holding the property,

Provided that where the notice is served on anyone of the persons, the service of notice shall not be invalid on the ground that the said notice was not served to all the persons holding the property.

(3) Further action by Adjudicating Authority after issue of notice: The Adjudicating Authority shall, after—

- a) considering the reply, if any, to the notice issued;
- b) making or causing to be made such inquiries and calling for such reports or evidence as it deems fit; and
- c) taking into account all relevant materials, provide an opportunity of being heard to the person specified as a benamidar therein, the Initiating Officer, and any other person who claims to be the owner of the property, and, thereafter, pass an order—
 - (i) holding the property not to be a benami property and revoking the attachment order; or
 - (ii) holding the property to be a benami property and confirming the attachment order, in all other cases.

Where the Adjudicating Authority is satisfied that some part of the properties in respect of which reference has been made to him is benami property, but is not able to specifically identify such part, he shall record a finding to the best of his judgment as to which part of the properties is held benami.

Where in the course of proceedings before it, the Adjudicating Authority has reason to believe that a property, other than a property referred to it by the Initiating Officer is benami property, it shall provisionally attach the property and the property shall be deemed to be a property referred to it on the date of receipt of the reference under Section 24.

The Adjudicating Authority may, at any stage of the proceedings, either on the application of any party, or suo motu, strike out the name of any party improperly joined or add the name of any person whose presence before the Adjudicating Authority may be necessary to enable him to adjudicate upon and settle all the questions involved in the reference.

No order shall be passed after the expiry of one year from the end of the month in which the reference under section 24 was received. The benamidar or any other person who claims to

be the owner of the property may either appear in person or take the assistance of an authorised representative of his choice to present his case.

(4) Authorised Representative: “*Authorised representative*” means a person authorised in writing, being—

- (i) a person related to the benamidar or such other person in any manner, or a person regularly employed by the benamidar or such other person as the case may be; or
- (ii) any officer of a scheduled bank with which the benamidar or such other person maintains an account or has other regular dealings; or
- (iii) any legal practitioner who is entitled to practice in any civil court in India; or
- (iv) any person who has passed any accountancy examination recognised in this behalf by Board; or
- (v) any person who has acquired such educational qualifications as the Board may prescribe for this purpose.

Confiscation and vesting of benami property [Section 27]

Where an order is passed in respect of any property under section 26 holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property.

Provided that where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46.

Provided further that the confiscation of the property shall be made in accordance with such procedure as prescribed in Rule 6 of Benami Transactions Prohibition Rules, 2016.

None of the aforesaid shall apply to a property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under section 24 without his having knowledge of the benami transaction. Where an order of confiscation has been made, all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation. Any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void. Where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

Rule 6 of *Benami Transactions Prohibition Rules, 2016* prescribes as following –

- (1) Where an order of confiscation of property under Section 27 has been made, the Adjudicating Authority shall send a copy of the order to the Authorised Officer.

- (2) Where an order referred to in sub-rule (1) has been received by the Authorised Officer in respect of any immovable property, he shall,-
- (i) forthwith issue notice to the authority of the Central Government or a State Government, as case may be, having jurisdiction for the purposes of registration of such immovable property, intimating about the confiscation of the property;
 - (ii) arrange to place copy of the notice at some conspicuous part of the immovable property for the benefit of general public mentioning clearly therein, in English and in vernacular language, that the property has been confiscated under the Act and vests absolutely in the Central Government;
 - (iii) arrange to make a proclamation for the confiscation of immovable property at some place on or near such property by beat of drum or other customary mode.
- (3) Where an order referred to in sub-rule (1) has been received by the Authorised Officer in respect of any movable property, he shall,-
- (i) forthwith issue a notice to the authority or person having the custody of such movable property informing him about the confiscation of such property; or
 - (ii) sell the property, if the property is liable to speedy and natural decay or the expenses for maintenance is likely to exceed its value, with the leave of the concerned Adjudicating Authority, and deposit the sale proceeds in the nearest Government Treasury or branch of the State Bank of India or its subsidiaries or in any nationalised bank in fixed deposit and retain the receipt thereof:

Provided that where the owner of the property furnishes the fixed deposit receipt of State Bank of India or its subsidiaries or a nationalised bank equivalent to the value of property in the name of Administrator, the authorised officer may accept and retain such fixed deposit receipt as security:

Provided further that where the movable property is a mode of conveyance of any description, the authorised officer, after obtaining its valuation report from the Motor Licensing Authority or any other authority, as the case may be, may accept and retain the fixed deposit receipt of State Bank of India or its subsidiaries or a nationalised bank, equivalent to the value of the movable property as security in the name of Administrator;

- (i) cause to deposit the property consisting of cash, Government or other securities or bullion or jewellery or other valuables in a locker in the name of the Administrator or in the form of fixed deposit, as the case may be, in State Bank of India or its subsidiaries or in any nationalised bank and retain the receipt thereof;
- (ii) cause to get the property in the form of shares, debentures, units of Mutual Fund or instruments to be transferred in favour of Administrator;

- (iii) issue a direction to the bank or financial institution, as the case may be, to transfer and credit the money to the account of the Administrator, where the property is in the form of money lying in a bank or a financial institution.

Explanation- For the purposes of this rule, an “Authorised Officer” means an Income Tax Officer who is authorised by the Adjudicating Authority in this behalf.

Management of properties confiscated [Section 28]

The Administrator shall have the power to receive and manage the property, in relation to which an order of confiscation under Section 27 has been made, in such manner and subject to such conditions as prescribed in Rule 7 and Rule 8 of *Benami Transactions Prohibition Rules, 2016*. The Central Government may, by order published in the Official Gazette, notify as many of its officers as it thinks fit, to perform the functions of Administrators.

The Administrator shall also take such measures, as directed by the Central Government, to dispose of the property which is vested in the Central Government under Section 27, in such manner and subject to such conditions as prescribed in Rule 9 of *Benami Transactions Prohibition Rules, 2016*.

Rule 7 of the *Benami Transactions Prohibition Rules, 2016* states that the Administrator shall, at the time of receiving the confiscated property, ensure proper identification of such property with reference to its particulars mentioned in the order made under section 27.

Rule 8 of the *Benami Transactions Prohibition Rules, 2016* prescribes the following –

- (1) Where the property confiscated is of such a nature that its removal from the place of attachment is impracticable or its removal involves expenditure out of proportion to the value of the property, the Administrator shall arrange for the proper maintenance and custody of the property at the place of its attachment.
- (2) If the property confiscated consists of cash, Government or other securities, bullion, jewellery or other valuables, the Administrator shall cause to deposit them for safe custody in the nearest Government Treasury or a branch of the Reserve Bank of India or the State Bank of India or its subsidiaries or in any authorised bank.
- (3) The Administrator shall maintain a register containing the details in *Form No. 1*(Annexure) annexed to these rules for recording entries in respect of moveable property, such as cash, Government or other securities, bullion, jewellery or other valuables.
- (4) The Administrator shall obtain a receipt from the Treasury or the bank, as the case may be, against the deposit of moveable properties stated in sub-rule (2).
- (5) The Administrator shall maintain a register containing the details in *Form No. 2* (Annexure) annexed to these rules for recording entries in respect of property other than the properties referred to in sub-rule (2).

Rule 9 of *Benami Transactions Prohibition Rules, 2016* states that where the Central Government directs that the property vested in it in section 27 be disposed of, then, the administrator shall arrange to dispose of the property in the manner provided in the Second Schedule to the Income-tax Act, 1961.

Possession of the property [Section 29]

Where an order of confiscation in respect of a property under section 27, has been made, the Administrator shall proceed to take the possession of the property. The Administrator shall—

- (a) by notice in writing, order within seven days of the date of the service of notice to any person, who may be in possession of the benami property, to surrender or deliver possession thereof to the Administrator or any other person duly authorised in writing by him in this behalf;
- (b) in the event of non-compliance of the order referred to above, or if in his opinion, taking over of immediate possession is warranted, for the purpose of forcibly taking over possession, requisition the service of any police officer to assist him and it shall be the duty of the officer to comply with the requisition.



6. APPELLATE TRIBUNAL

Establishment of Appellate Tribunal [Section 30]

The Central Government shall, by notification, establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority under this Act.

Composition, etc., of Appellate Tribunal [Section 31]

The Appellate Tribunal shall consist of a Chairperson and at least two other Members of which one shall be a Judicial Member and other shall be an Administrative Member.

Subject to the provisions of this Act—

- (a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;
- (b) a Bench may be constituted by the Chairperson with two Members as the Chairperson may deem fit;
- (c) the Benches of the Appellate Tribunal shall ordinarily sit in the National Capital Territory of Delhi and at such other places as the Central Government may, in consultation with the Chairperson, by notification, specify;
- (d) the Central Government shall, by notification, specify the areas in relation to which each Bench of the Appellate Tribunal may exercise its jurisdiction.

The Chairperson may transfer a Member from one Bench to another Bench.

Qualifications for appointment of Chairperson and Members of Appellate Tribunal [Section 32]

A person shall not be qualified for appointment as Chairperson of the Appellate Tribunal unless –

- (a) he is a sitting or retired Judge of a High Court, and
- (b) who has completed not less than five years' of service.

A person shall not be qualified for appointment as a Member unless he—

- (a) in the case of a Judicial Member, has been a Member of the Indian Legal Service and has held the post of Additional Secretary or equivalent post in that Service;
- (b) in the case of an Administrative Member, has been a Member of the Indian Revenue Service and has held the post of Chief Commissioner of Income tax or equivalent post in that Service.

A sitting Judge of a High Court cannot be appointed under this section except after consultation with the Chief Justice of the High Court.

The Chairperson or a Member holding a post as such in any other Tribunal, established under any law for the time being in force, may also be appointed as the Chairperson or Member, as the case maybe, of the Appellate Tribunal under this Act.

Qualifications for appointment as Chairperson	Qualifications for appointment as a Member		Other remarks
	Judicial	Administrative	
Sitting or retired judge of a High Court	Member of Indian Legal Service (ILS)	Member of Indian Revenue Service (IRS)	<ul style="list-style-type: none"> ▪ Sitting judge of a High Court can be appointed only after consultation with the Chief Justice of the High Court. ▪ Chairperson or Member of any other Tribunal may also be appointed in the Appellate Tribunal
And	<i>And</i>	<i>And</i>	
Completed not less than 5 years of service	Held the post of Additional Secretary or equivalent post	Held the post of Chief Commissioner of Income Tax or equivalent post	

Terms and conditions of services of Chairperson and Members of Appellate Tribunal [Section 33]

The salary and allowances payable to, and the other terms and conditions of service of the Chairperson and other Members shall be such as may be prescribed and shall not be varied to

their disadvantage during their tenure. Any vacancy caused to the office of the Chairperson or any other Member shall be filled up within a period of three months from the date on which such vacancy occurs.

Term of office of Chairperson and Members [Section 34]

The Chairperson and Members of the Appellate Tribunal shall hold office for –

- (a) a term not exceeding five years from the date on which they enter upon their office, or
- (b) until they attain the age of sixty-five years,

whichever is earlier, and shall not be eligible for reappointment.

Removal of Chairperson and Member from office in certain circumstances [Section 35]

In consultation with the Chief Justice of High Court, the Central Government may remove from office of the Chairperson or any Member, who—

- (a) has been adjudged as an insolvent; or
- (b) has been convicted of an offence which, in the opinion of the Central Government involves moral turpitude; or
- (c) has become physically or mentally incapable; or
- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or
- (e) has so abused his position as to render his continuance in office prejudicial to the public interest.

The Chairperson or Judicial Member shall not be removed from his office except by an order made by the Central Government after an inquiry made by Chief Justice of the High Court in which the Chairperson or Judicial Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

The Central Government may suspend from office the Chairperson or Judicial Member in respect of whom a reference of conducting an inquiry has been made to the Chief Justice of the High Court, until the Central Government passes an order on receipt of the report of inquiry made by Chief Justice of the High Court on the reference.

The Central Government may regulate the procedure for inquiry referred to above in the manner as may be prescribed.

The Administrative Member may be removed from his office by an order of the Central Government on the grounds specified above and in accordance with the procedure notified by the Central Government: Provided that the Administrative Member shall not be removed unless he has been given an opportunity of being heard in the matter.

Vacancies, etc., not to invalidate proceedings of Appellate Tribunal [Section 36]

No act or proceeding of the Appellate Tribunal shall be invalid merely by reason of—

- (a) any vacancy in, or any defect in the constitution of the Tribunal; or
- (b) any defect in the appointment of a person acting as a Member of the Tribunal; or
- (c) any irregularity in the procedure of the Tribunal not affecting the merits of the case.

Resignation and removal [Section 37]

The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or any other Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office

- (a) until the expiry of three months from the date of receipt of the notice, or
- (b) until a person duly appointed as his successor enters upon his office, or
- (c) until the expiry of his term of office,

whichever is earlier.

Member to act as Chairperson in certain circumstances [Section 38]

In the event of the occurrence of any vacancy in the office of the Chairperson of the Appellate Tribunal by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

Staff of Appellate Tribunal [Section 39]

The Central Government shall provide the Appellate Tribunal with such officers and employees as it may think fit. The officers and employees of the Appellate Tribunal shall discharge their functions under the general superintendence of the Chairperson. The salaries and allowances and other conditions of service of the officers and employees of the Appellate Tribunal shall be such, as may be prescribed.

Procedure and powers of Appellate Tribunal [Section 40]

The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

The Appellate Tribunal shall, for the purposes of discharging its functions under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) reviewing its decisions;
- (g) dismissing a representation for default or deciding it *ex parte*;
- (h) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*; and
- (i) any other matter, which may be, prescribed by the Central Government.

An order made by the Appellate Tribunal under this Act shall be executable by it as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court. The Appellate Tribunal may transmit any order made by it to a civil court having jurisdiction and the civil court shall execute the order as if it were a decree made by that court.

All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code and the Appellate Tribunal shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973.

Distribution of business amongst Benches of Appellate Tribunal [Section 41]

Where any Benches are constituted, the Chairperson may, from time to time, by notification, make provision as to the distribution of the business of the Appellate Tribunal amongst the Benches and also provide for the matters which may be dealt with by each Bench.

Power of Chairperson of Appellate Tribunal to transfer cases [Section 42]

On the application of any of the parties and notice to the parties, and after hearing them, or on his own motion without any notice, the Chairperson of the Appellate Tribunal may transfer any case pending before one Bench, for disposal, to any other Bench.

Decision to be by majority [Section 43]

If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing on the point or points by one or more of the other Members and the point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.

Members, etc., to be public servants [Section 44]

The Chairperson, Members and other officers and employees of the Appellate Tribunal, the Adjudicating Authority, Approving Authority, Initiating Officer, Administrator and the officers subordinate to all of them shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code, 1860.

Bar of jurisdiction of civil courts [Section 45]

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which any of the authorities, an Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine, and no injunction shall be granted by any court or other forum in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act

Appeals to Appellate Tribunal [Section 46]

Any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal in such form and along with such fees, as may be prescribed, to the Appellate Tribunal against the order passed by the Adjudicating Authority under Section 26, within a period of forty-five days from the date of the order.

The Appellate Tribunal may entertain any appeal after the said period of forty-five days, if it is satisfied that the appellant was prevented, by sufficient cause, from filing the appeal in time. On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

An Appellate Tribunal while deciding the appeal shall have the power—

- (a) to determine a case finally, where the evidence on record is sufficient;
- (b) to take additional evidence or to require any evidence to be taken by the Adjudicating Authority, where the Adjudicating Authority has refused to admit evidence, which ought to have been admitted;
- (c) to require any document to be produced or any witness to be examined for the purposes of proceeding before it;

- (d) to frame issues which appear to the Appellate Tribunal essential for adjudication of the case and refer them to the Adjudicating Authority for determination;
- (e) to pass final order and affirm, vary or reverse an order of adjudication passed by the Adjudicating Authority and pass such other order or orders as may be necessary to meet the ends of justice.

The Appellate Tribunal, as far as possible, may hear and finally decide the appeal within a period of one year from the last date of the month in which the appeal is filed.

Rule 10 of the *Benami Transactions Prohibition Rules, 2016* prescribes the following –

- (1) An appeal to the Appellate Tribunal under section 46 of the Act shall be filed in Form No. 3 annexed to these rules.
- (2) At the time of filing, every appeal shall be accompanied by a fee of ten thousand rupees.
- (3) The appeal shall set forth concisely and under distinct head the grounds of objection to the order appealed against and such grounds shall be numbered consecutively; and shall specify the address of service at which notice or other processes of the Appellate Tribunal may be served on the appellant and the date on which the order appealed against was served on the appellant.
- (4) Where the appeal is preferred after the expiry of the period of forty-five days referred to in section 46, it shall be accompanied by a petition, in quadruplicate, duly verified and supported by the documents, if any, relied upon by the appellant, showing cause as to how the appellant had been prevented from preferring the appeal within the period of forty-five days.

Rectification of mistakes [Section 47]

The Appellate Tribunal or the Adjudicating Authority may, in order to rectify any mistake apparent on the face of the record, amend any order made by it under section 26 and section 46 respectively, within a period of one year from the end of the month in which the order was passed.

No amendment shall be made under sub-section (1), if the amendment is likely to affect any person prejudicially, unless he has been given notice of intention to do so and has been given an opportunity of being heard.

Right to representation (Section 48)

²A person, including the initiating Officer, who is a party to any proceedings before the

² Amended vide enforcement of Prohibition of Benami Property Transactions (Removal of Difficulties) Order, 2018 dated 9th October, 2018.

Appellate Tribunal under this Act may either appear in person or take the assistance of an authorised representative of his choice to present his case before the Appellate Tribunal.

The Central Government may authorise one or more of its officers to act as presenting officers on its behalf, and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal.

³Here, "Authorised representative" means "in relation to-

- (i) the Initiating Officer, means a person authorised by the Central Government;
- (ii) any other party to the proceedings, means a person authorised by the Central Government;

in writing to appear on his behalf, being—

- (i) a person related to ⁴the party in any manner, or a person regularly employed by the party; or
- (ii) any officer of a scheduled bank with which ⁵the party maintains an account or has other regular dealings; or
- (iii) any legal practitioner who is entitled to practice in any civil court in India; or
- (iv) any person who has passed any accountancy examination recognised in this behalf by the Board; or
- (v) any person who has acquired such educational qualifications as the Board may prescribe for this purpose.

Appeal to High Court [Section 49]

Any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

The High Court may entertain any appeal after the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period specified above.

Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

³ Amended vide enforcement of Prohibition of Benami Property Transactions (Removal of Difficulties) Order, 2018 dated 9th October, 2018.

⁴ Amended vide enforcement of Prohibition of Benami Property Transactions (Removal of Difficulties) Order, 2018 dated 9th October, 2018.

⁵ Amended vide enforcement of Prohibition of Benami Property Transactions (Removal of Difficulties) Order, 2018 dated 9th October, 2018.

The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

The High Court shall decide the question of law so formulated and deliver the judgment thereon containing the grounds on which any decision is founded and may award any cost as it deems fit.

The High Court may determine any issue which—

- (a) has not been determined by the Appellate Tribunal; or
- (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to above.

Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

7. SPECIAL COURTS

Special Courts [Section 50]

The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of an offence punishable under this Act, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.

While trying an offence under this Act, a Special Court shall also try an offence other than an offence referred to above, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

The Special Court shall not take cognizance of any offence punishable under this Act except upon a complaint in writing made by—

- (i) the authority; or
- (ii) any officer of the Central Government or State Government authorised in writing by that Government by a general or special order made in this behalf.

Every trial under this section shall be conducted as expeditiously as possible and every endeavour shall be made by the Special Court to conclude the trial within six months from the date of filing of the complaint.

Application of Code of Criminal Procedure, 1973 to proceedings before Special Court [Section 51]

The provisions of the Code of Criminal Procedure, 1973, shall apply to the proceedings before a Special Court and the persons conducting the prosecution before the Special Court, shall be deemed to be Public Prosecutors.

The Central Government may also appoint for any case or class or group of cases, a Special Public Prosecutor.

A person shall not be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor under this section unless, the Public Prosecutor has been in practice as an advocate for not less than seven years, and the Special Public Prosecutor has been in practice as an advocate for not less than ten years in any court. Every person appointed as a Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of Section 2(u) of the Code of Criminal Procedure, 1973 and the provisions of that Code shall have effect accordingly.

Appeal and revision [Section 52]

The High Court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973, on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.



8. OFFENCES AND PROSECUTION

Penalty for benami transaction [Section 53]

Where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.

Whoever is found guilty of the offence of benami transaction referred to above shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent of the fair market value of the property.

Offence	Where any person enters into <i>benami</i> Transaction
Motive	(a) to defeat the provisions of any law or (b) to avoid payment of statutory dues or (c) to avoid payment to creditors.
Who is punishable	(a) the beneficial owner,

	(b) benamidar and (c) any other person who abets or induces any person to enter into the benami business Shall be guilty of the offence of benami transaction.
Shall be punishable with	(a) rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and (b) shall also be liable to fine which may extend to 25% of the fair market value of the property.
Sanction	Prosecution shall be instituted only after the previous sanction of the CBDT. (Section 55)

Penalty for false information [Section 54]

Any person who is required to furnish information under this Act knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine which may extend to ten per cent of the fair market value of the property.

Previous sanction [Section 55]

No prosecution shall be instituted against any person in respect of any offence under Sections 3, 53 or 54 without the previous sanction of the Board.



9. MISCELLANEOUS

Repeal of provisions of certain Acts [Section 56]

Sections 81, 82 and 94 of the Indian Trusts Act, 1882, Section 66 of the Code of Civil Procedure, 1908 and Section 281A of the Income-tax Act, 1961, are hereby repealed. For the removal of doubts, it is hereby declared that nothing stated above shall affect the continued operation of Section 281A of the Income-tax Act, 1961 in the State of Jammu and Kashmir.

Certain transfers to be null and void [Section 57]

Notwithstanding anything contained in the Transfer of the Property Act, 1882 or any other law for the time being in force, where, after the issue of a notice under Section 24, any property referred to in the said notice is transferred by any mode whatsoever, the transfer shall, for the purposes of the proceedings under this Act, be ignored and if the property is subsequently confiscated by the Central Government under Section 27, then, the transfer of the property shall be deemed to be null and void.

Exemption [Section 58]

The Central Government may, by notification, exempt any property relating to charitable or

religious trusts from the operation of this Act. Every such notification issued shall be laid before each House of Parliament.

Power of Central Government to issue directions, etc. [Section 59]

The Central Government may, from time to time, issue such orders, instructions or directions to the authorities or require any person to furnish information as it may deem fit for the proper administration of this Act and such authorities and all other persons employed in execution of this Act shall observe and follow the orders, instructions and directions of the Central Government.

In issuing the directions or orders referred to above, the Central Government may have regard to anyone or more of the following criteria, namely:—

- (a) territorial area;
- (b) classes of persons;
- (c) classes of cases; and
- (d) any other criterion that may be specified by the Central Government in this behalf.

No orders, instructions or directions as per the aforesaid shall be issued so as to—

- (a) require any authority to decide a particular case in a particular manner; or
- (b) interfere with the discretion of the Adjudicating Authority in the discharge of its functions.

Application of other laws not barred [Section 60]

The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of any other law for the time being in force.

Offences to be non-cognizable [Section 61]

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this Act shall be non-cognizable.

Offences by companies [Section 62]

Where a person committing contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. None of the aforesaid shall render any person liable to punishment if he proves that the contravention took place without his knowledge.

Notwithstanding anything specified above, where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company

and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, the director, manager secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Here,

- (a) "company" means a body corporate, and includes—
 - (i) a firm; and
 - (ii) an association of persons or a body of individuals whether incorporated or not; and
- (b) "director", in relation to—
 - (i) A firm, means a partner in the firm;
 - (ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.

Notice, etc., not to be invalid on certain grounds [Section 63]

No notice, summons, order, document or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid, or shall be deemed to be invalid merely by reason of any mistake, defect or omission in the notice, summons, order, document or other proceeding if the notice, summons, order, document or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

Protection of action taken in good faith [Section 64]

No prosecution, suit or other proceeding shall lie against the Government or any officer of the Government or the Appellate Tribunal or the Adjudicating Authority established under this Act, for anything done or intended to be done in good faith under this Act.

Transfer of pending cases [Section 65]

Every suit or proceeding in respect of a benami transaction pending in any Court (other than a High Court) or Tribunal or before any forum on the date of the commencement of this Act shall stand transferred to the Adjudicating Authority or the Appellate Tribunal, as the case may be, having jurisdiction in the matter.

Where any suit, or other proceeding stands transferred to the Adjudicating Authority or the Appellate Tribunal —

- (a) the court, Tribunal or other forum shall, as soon as may be, after the transfer, forward the records of the suit, or other proceeding to the Adjudicating Authority or the Appellate Tribunal, as the case may be;
- (b) the Adjudicating Authority may, on receipt of the records, proceed to deal with the suit, or other proceeding, so far as may be, in the same manner as in the case of a reference made under Section 24, from the stage which was reached before the transfer or from any earlier stage or de novo as the Adjudicating Authority may deem fit.

Proceedings, etc., against legal representative [Section 66]

Where a person dies during the course of any proceeding under this Act, any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased.

Any proceeding which could have been taken against the deceased if he had survived may be taken against the legal representative and all the provisions of this Act, except Sub-section (2) of Section 3 and the provisions of related to offences & prosecution shall apply accordingly.

Where any property of a person has been held benami under Section 26, then, it shall be lawful for the legal representative of the person to prefer an appeal to the Appellate Tribunal, in place of the person and the provisions of Section 46 shall, so far as may be, apply, or continue to apply, to the appeal.

Act to have overriding effect [Section 67]

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Power to make rules [Section 68]

The Central Government may, by notification, make rules for carrying out the provisions of this Act. In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

- (a) manner of ascertaining the fair market value under section 2(16);
- (b) the manner of appointing the Chairperson and the Member of the Adjudicating Authorities under section 9(2);
- (c) the salaries and allowances payable to the Chairperson and the Members of the Adjudicating Authority under section 13(1);
- (d) the powers and functions of the authorities under section 18(2);
- (e) other powers of the authorities under 19(1)(f);
- (f) the form and manner of furnishing any information to the authority under section 21(2);

- (g) the manner of provisional attachment of property under section 24(3);
- (h) the procedure for confiscation of benami property under the second proviso to section 27(1);
- (i) the manner and conditions to receive and manage the property under section 28(1);
- (j) the manner and conditions of disposal of property vested in the Central Government under section 28(3);
- (k) the salaries and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under section 33(1);
- (l) the manner of prescribing procedure for removal of Chairperson or Member under section 35(4);
- (m) the salaries and allowances payable to and the other terms and conditions of service of the officers and employees of the Appellate Tribunal under section 39(3);
- (n) any power of the Appellate Tribunal under section 40(2)(i);
- (o) the form in which appeal shall be filed and the fee for filing the appeal under section 46(1);
- (p) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

Laying of rules and notifications before Parliament [Section 69]

Every rule made and notification issued under this Act shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rules or notifications, as the case may be, both Houses agree that the rules or notifications, as the case may be, should not be made or issued, the rule or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification, as the case may be.

Power to remove difficulties [Section 70]

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty.

No order shall be made under this section after the expiry of two years from the commencement of this Act.

Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Transitional provision [Section 71]

The Central Government may, by notification, provide that until the Adjudicating Authorities are appointed and the Appellate Tribunal is established under this Act, the Adjudicating Authority appointed under section 6(1) of the Money-Laundering Act, 2002 and the Appellate Tribunal established under section 25 of that Act may discharge the functions of the Adjudicating Authority and Appellate Tribunal, respectively, under this Act.

Repeal and saving [Section 72]

The Benami Transactions (Prohibition of the Right of Recover Property) Ordinance, 1988 (Ord.2 of 1988.) is repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been or taken under the corresponding provisions of this Act.



THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999



LEARNING OUTCOMES

After reading this chapter, you will be able to understand:

- The meaning of person resident in India for the purposes of the Foreign Exchange Management Act, 1999
- The meaning of Current and Capital Account Transactions along with the liberalisation scheme
- The penalties imposed and the adjudication process

1. INTRODUCTION

Need for the Act

The change in the economic scenario, globalisation of capital, free trade across the globe, necessitated the need for managing foreign exchange in the country in an orderly manner. To facilitate cross border trade and cross border capital flows, exchange control law was required. Foreign exchange control led to introduction of exchange control law through Defense of India rules by the Britishers in 1939. Subsequently, Foreign Exchange Regulation Act (FERA) was enacted in 1947 which was later replaced with 'the Foreign Exchange Regulation Act, 1973' (FERA).



Government through the introduction of process of liberalisation of Indian economy in 1991, permitted Foreign Investment in various sectors. This increased flow of foreign exchange to India and foreign exchange reserves increased substantially. As of today, FERA has been repealed and FEMA (Foreign Exchange Management Act) has been passed. The Act has been made effective from 1st June, 2000. This Act enables management of foreign exchange reserves for the country.

Broad Structure of FEMA

Now Let us have a glance at the broad structure of the Act. The Act consists of 7 Chapters dealing with following areas:

Chapters	Matters	Sections
I	Preliminary	1 – 2
II	Regulation and Management of Foreign Exchange	3 – 9
III	Authorised Person	10 – 12
IV	Contravention and Penalties	13 – 15
V	Adjudication and Appeal	16 – 35
VI	Directorate of Enforcement	36 – 38
VII	Miscellaneous	39 – 49

Salient provisions of FEMA

It provides for –

- Regulation of transactions between residents and non-residents

- Investments in India by non-residents and overseas investments by Indian residents
- Freely permissible transactions on current account subject to reasonable restrictions that may be imposed
- RBI control over capital account transactions
- Requirement for realisation of export proceeds and repatriation to India
- Dealing in foreign exchange through 'Authorised Persons' like Authorised Dealer/Money Changer/Off-shore banking unit
- Adjudication and Compounding of Offences
- Investigation of offences by Directorate of Enforcement
- Appeal provisions including Special Director (Appeals) and Appellate Tribunal.



2. PREAMBLE, EXTENT, APPLICATION AND COMMENCEMENT OF FEMA, 1999

(A) Preamble: This Act aims to consolidate and amend the law relating to foreign exchange with the objective of —

- (i) facilitating external trade and payments and
- (ii) for promoting the orderly development and maintenance of foreign exchange market in India.

(B) Extent and Application [Sections 1]:

FEMA, 1999 extends to the whole of India. In addition, it shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.

Accordingly, FEMA does not apply to citizens of India who are outside India unless they are resident of India. The scope of the Act has been further extended to include branches, offices and agencies outside India. The scope is thus wide enough because the emphasis is on the words "Owned or Controlled". Even contravention of the FEMA committed outside India by a person to whom this Act applies will also be covered by FEMA.

(C) Commencement: The Act, 1999 came into force with effect from 1st June, 2000 vide notification G.S.R. 371(E), dated 1.5.2000.



3. DEFINITIONS [SECTION 2]

In this Act, unless the context otherwise requires:

- (a) "Adjudicating Authority" means an officer authorised under sub-section (1) of section 16;

- (b) “*Appellate Tribunal*” means the Appellate Tribunal referred to in section 18;
- (c) “*Authorised person*” means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities;
- (cc) “*Authorised Officer*” means an officer of the Directorate of Enforcement authorised by the Central Government under section 37A;
- (d) “*Bench*” means a Bench of the Appellate Tribunal;
- (e) “*Capital Account Transaction*” means a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India, and includes transactions referred to in sub-section (3) of Section 6;
- (f) “*Chairperson*” means the Chairperson of the Appellate Tribunal;
- (g) “*Chartered Accountant*” shall have the meaning assigned to it in clause (b) of sub-section (1) of Section 2 of the Chartered Accountants Act, 1949;
- (gg) “*Competent Authority*” means the Authority appointed by the Central Government under sub-section (2) of section 37A;
- (h) “*Currency*” includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank
- (i) “*Currency Notes*” means and includes cash in the form of coins and bank notes;
- (j) “*Current Account Transaction*” means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,
 - (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business.
 - (ii) payments due as interest on loans and as net income from investments.
 - (iii) remittances for living expenses of parents, spouse and children residing abroad, and
 - (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children;
- (k) “*Director of Enforcement*” means the Director of Enforcement appointed under section 36(1);
- (l) “*Export*”, with its grammatical variations and cognate expressions means;
 - (i) the taking out of India to a place outside India any goods.
 - (ii) provision of services from India to any person outside India;
- (m) “*Foreign Currency*” means any currency other than Indian currency;

- (n) “*Foreign Exchange*” means foreign currency and includes:
- (i) deposits, credits and balances payable in any foreign currency,
 - (ii) drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
 - (iii) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;
- (o) “*Foreign Security*” means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;
- (p) “*Import*”, with its grammatical variations and cognate expressions, means bringing into India any goods or services;
- (q) “*Indian Currency*” means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934;
- (r) “*Legal Practitioner*” shall have the meaning assigned to it in clause (i) of sub-section (1) of section 2 of the Advocates Act, 1961;
- (s) “*Member*” means a Member of the Appellate Tribunal and includes the Chairperson thereof;
- (t) “*Notify*” means to notify in the Official Gazette and the expression “notification” shall be construed accordingly;
- (u) “*Person*” includes:
- (i) an individual,
 - (ii) a Hindu undivided family,
 - (iii) a company,
 - (iv) a firm,
 - (v) an association of persons or a body of individuals, whether incorporated or not,
 - (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and;
 - (vii) any agency, office or branch owned or controlled by such person;
- (v) “*Person resident in India*” means:
- (i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include—
 - (A) a person who has gone out of India or who stays outside India, in either case—
 - (a) for or on taking up employment outside India, or

- (b) for carrying on outside India a business or vocation outside India, or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
- (B) a person who has come to or stays in India, in either case, otherwise than:
 - (a) for or on taking up employment in India, or
 - (b) for carrying on in India a business or vocation in India, or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (ii) any person or body corporate registered or incorporated in India,
- (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
- (iv) an office, branch or agency outside India owned or controlled by a person resident in India;
- (w) "*Person Resident Outside India*" means a person who is not resident in India;
- (x) "*Prescribed*" means prescribed by rules made under this Act;
- (y) "*Repatriate to India*" means bringing into India the realised foreign exchange and
 - (i) the selling of such foreign exchange to an authorised person in India in exchange for rupees, or
 - (ii) the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank. It includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression "*repatriation*" shall be construed accordingly;
- (z) "*Reserve Bank*" means the Reserve Bank of India constituted under section 3(1) of the Reserve Bank of India Act, 1934;
- (za) "*Security*" means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944, savings certificates to which the Government Saving Certificates Act, 1959 applies, deposit receipts in respect of deposit of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;
- (zb) "*Service*" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical

or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

- (zc) “*Special Director (Appeals)*” means an officer appointed under section 17;
- (zd) “*Specify*” means to specify by regulations made under this Act and the expression “specified” shall be construed accordingly;
- (ze) “*Transfer*” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

4. IMPORTANT DEFINITIONS

(A) Authorised Person: Earlier there were two separate categories of persons namely authorised dealers and money changers who were licensed to deal in foreign exchange. Under FEMA, 1999 these terms have been clubbed together under the definition of the authorised person, which shall also include off-shore banking unit.

‘Offshore Banking Unit’ means a branch of a bank in India located in the Special Economic Zone and holds an authorisation issued under clause (a) of sub-section (1) of section 23 of the Banking Regulation Act, 1949. [As per the Foreign Exchange Management (Offshore Banking Unit) Regulations, 2002].

(B) Capital and Current Account Transactions: The definitions of “Capital Account Transactions” and its counterpart “Current Account Transactions” are contained in clauses (e) and (j) of Section 2. The regulations under FEMA regulate a transaction based on whether the transaction is “Capital Account Transaction” or a “Current Account Transaction”.

Capital Account Transactions means transaction which alters the assets or liabilities including contingent liabilities outside India of persons resident in India or assets or liabilities in India of persons resident outside India would be a capital account transaction. Capital Accounts Transaction in India can be carried out only to the extent permitted because Indian Rupee is not yet fully convertible. Capital and current account transactions are intended to be mutually exclusive. Also, the concept of capital account transaction means differently for residents and non-residents. A transaction which alters the asset or liabilities in India of non-residents fall under the category of capital account. However, as far as residents are concerned transactions which alter the contingent liabilities outside India are also capital transactions. The Reserve Bank of India may by regulations place restrictions on various specified transactions for transactions deemed to be considered as capital in nature. In simple terms, cross border transactions pertaining to investments, loans, immovable property, transfer of assets across borders are Capital Account Transactions.

Current account transaction means a transaction other than a capital account transaction. In other words the current account transactions are the counterpart of capital account transactions and those

transactions that are capital account in nature are not current account transactions and vice-versa. All transactions undertaken by a resident that do not alter his / her assets or liabilities, including contingent liabilities, outside India are current account transactions. In simple terms, cross border transactions pertaining to business, personal transactions such as travel, education, maintenance of family members, are Current Account Transactions.

The meaning of these terms is different from the meaning of terms such as “capital expenditure”, “capital receipt” or “capital assets” in accounts, company law or income-tax act. These are explained below.

Examples:

(1) An Indian resident imports machinery from a vendor in UK for installing in his factory. As per accounts and income-tax law, machinery is a “capital expenditure”. However under FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor owes anything in the other country. Hence it is a Current Account Transaction.

(2) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. As per accounts and income-tax law, for the credit period of 3 months, there is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(j)(i)], “short-term banking and credit facilities in the ordinary course of business” are considered as a Current Account Transaction. Hence import of machinery on credit terms is Current Account Transaction.

What if the credit period is 12 months? Under Master Directions for imports, payment has to be made within 6 months. If the credit period is in excess of 6 months, then it is a loan. There are separate rules for loan. If the transactions falls within the loan rules, then it is permitted. Short term loan by and large means 6 months. For exports, the period for realisation of proceeds, is 9 months.

(3) An Indian resident transfers US\$ 1,000 to his NRI brother in New York as “gift”. The funds are sent from resident’s Indian bank account to the NRI brother’s bank account in New York. Under accounts and income-tax law, gift is a “capital receipt”. However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transactions is over. Hence it is a Current Account Transaction.

If gift is a current account transaction, why is there a restriction under Current Account regulations? It is because while there is no restriction on Current Account transactions, some reasonable restrictions can be imposed. Otherwise people may transfer funds abroad under the garb of current account transactions.

If however the resident gives him a gift in India in Indian currency, for the NRI it is funds lying in India (alteration of Indian asset). For Indian resident, there is no asset or a liability. As this transaction creates an Indian asset for the NRI, it is a Capital Account transaction. (Under separate rules, giving a gift in India to an NRI is permitted subject to certain rules.)

In a similar manner, if an NRI gives a gift to an Indian resident by remitting funds in India, there is no restriction. However if the NRI gives the funds abroad, the resident cannot keep it abroad. He has to bring it to India.

(C) 'Person' and 'Person resident in India':

(1) The definition of "person" is similar to the definition contained in the Income-tax Act, 1961. The term '**person**' includes entities such as companies, firms, individuals, HUF, Association of Persons (AOP), artificial juridical persons agencies, offices and branches. Agencies, offices and branches do not have independent status separate from its owner. Yet these have been considered as persons. The reasons are discussed later.

(2) As far as the definition of the term '**person resident in India**' is concerned, it defines the status for individuals, entities incorporated or registered in India, and agencies, offices and branches. A "person resident outside India" (i.e. a non-resident) means a person who is - not a resident.

Individuals:

To be considered as "resident", the person should have resided in India in the preceding financial year for more than 182 days. Citizenship is not the criteria for determining whether or not a person is resident in India.

There are 3 limbs in the definition. The first limb prescribes the number of days stay. Then there are two limbs which are exceptions to the first limb.

First limb – It states that a person who is in India for more than 182 days in the "preceding year" will be an Indian resident. Thus to start with, one has to consider the period of stay in the preceding year. If for **example** a person is in India for more than 182 days in FY 2018-19, from 1st April 2019, the person will be an Indian resident. For FY 2018-19, one will have to start with FY 2017-18.

Then there are two exceptions provided in clauses (A) and (B). Clause (A) is for persons going out of India. Clause (B) is for persons coming into India. Exception means that even if a person is an Indian resident based on the test provided in first limb, the person will be a "non-resident" if he falls within limb (A) or limb (B).

Clause (A) – second limb – It states that if a person leaves India in any of the three situations, he will not be an Indian resident. Thus, he will be a non-resident. The three situations are - where a person leaves India for:

- (i) taking up employment outside India.
- (ii) doing any business outside India.
- (iii) staying in circumstances which indicate his intention to stay outside India for an uncertain period.

Thus, in the **example** given for the first limb above, if a person leaves India on 1st November 2019, he will be a non-resident from 2nd November 2019 – even though his number of days in India was

more than 182 days in FY 2018-19. Similarly, if a person goes and stays out of India for doing business, he will be a non-resident from that date. For FY 2019-20, the person will be an Indian resident till 1st November 2019. He will then become a non-resident. From 1st April 2020, the person will continue to be a non-resident as he stays out of India for employment.

In case of clause (iii), an **example** can be of a person who has a green card of USA. The green card entitles a person to stay in USA and eventually become a US citizen. If a person goes abroad and starts staying in USA, he will be a non-resident from that date as his stay abroad indicate that he is going to stay there for an uncertain period.

Clause (B) – third limb – This is a complex clause as first limb read with third limb has two exceptions. Limb one uses the phrase “but does not include”. Third limb uses the phrase “otherwise than”. Use of two exceptions make it complex reading.

It states that if a person has come to India for any reason other than for - employment, business or circumstances which indicate his intention to stay for uncertain period – he will be a non-resident. This will be so even if the person has stayed in India for more than 182 days in the preceding year.

For **example**, if a person comes to India on 1st June 2019 for visiting his parents. However, his parents fall sick and he stays till 31st March 2020. Thereafter he continues to stay in India. It is however certain that he will leave India in next 6 months when his parents will recover. His stay in India is neither for employment, nor for business, nor for circumstances which show that he will stay in India for uncertain period. In such a case, even if he is India for more than 182 days in FY 2019-20, he will continue to be a non-resident from 1st April 2020 also. In FY 2019-20, he is of course a non-resident as he was not in India (less than 183 days) in FY 2018-19.

If a person comes in India on 1st June 2019 for employment, business or circumstances which indicate his intention to stay in India for an uncertain period, he will be a resident from 1st June 2019.

Residential status is not for a year. It is from a particular date that a person will be a resident or a non-resident. This is different from income-tax law. Under income-tax law, a person has to pay tax. Even if his status is known at the end of the year, it will only affect his tax. It will not affect his transactions. FEMA is a regulatory law. One has to know the person’s status at the time of undertaking a transaction. If for example, a person comes to India for employment, and if his status can be known only when the year is completed, how will he and people do transactions with each other? If he is considered as a non-resident till the year is over, then people will not be able to do transactions with him. This is the reason why the residential status is not for a year but from particular date.

It is understood that this condition applies only to individuals. It will not apply to HUF, AOP or artificial juridical person as they cannot get employed, cannot go out of India or come to India. Hence, they do not come within the ambit of this portion of the definition. These entities like HUF and AOP are not required to be registered or incorporated like corporate entities nor the definition can be far stretched to cover by applying the criteria of ‘owned or controlled’. Hence legally the definition for

HUF, AOP, BOI fail. Practically if the HUF, AOP etc. are in India, they will be considered as Indian residents.

Person or Body corporate:

Any person or body corporate registered or incorporated in India, will be considered as Indian resident. This definition again does not apply to AOP, BOI etc.

Office, branch or agency:

Any agency, branch or agency outside India but owned or controlled by Indian resident will be considered as resident in India. Thus, one cannot set up a branch outside and escape FEMA provisions.

Any agency, branch or agency in India but owned or controlled by a non-resident will be considered as resident in India. This is relevant as Indian residents can deal with such branch in India without considering FEMA. If such branch is considered as non-resident, then it will be difficult to undertake several transactions.

Examples

(1) Mr. A had resided in India during the financial year 2015-2016 for less than 182 days. He had come to India again on April 1, 2016 for employment. What would be his residential status during the financial year 2016-2017?

Answer: Mr. A had come to India for taking up employment. During the financial year 2015-2016, he was in India for less than 182 days. Since, he has not fulfilled the condition of staying in India for more than 182 days, Mr. A will not be considered as a residential person for the financial year 2016-2017. Here, as he again come to India on 1st April, 2016, so he may primarily cannot be considered as person resident in India from 1st April 2016. However, as he has come for employment, he will be considered as Indian resident from 1st April 2016.

(2) Mr. X had resided in India during the financial year 2015-2016 for less than 182 days. He had come to India on April 1, 2016 for business. He intends to leave the business on April 30, 2017 and leave India on June 30, 2017. What would be his residential status during the financial year 2016-2017 and during 2017-2018 up to the date of his departure?

Answer: As explained in the above example, Mr. X will be considered 'as person resident in India' from 1st April 2016. As regards, financial year 2017-2018, Mr. X would continue to be an Indian resident from 1st April 2017.

If he leaves India for the purpose of taking up employment or for business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure. It may be noted that even if Mr. X is a foreign citizen, if he has not left India for any these purposes, he would be considered, 'person resident in India' during the financial year 2017-2018. Thus, it will depend on the purpose of leaving India which will decide his status from 1st July 2017.

(3) Mr. Z had resided in India during the financial year 2015-2016. He left India on 1st August, 2016 for United States for pursuing higher studies for 3 years. What would be his residential status during financial year 2016-2017 and during 2017-2018?

Answer: Mr. Z had resided in India during financial year 2015-2016 for more than 182 days. After that he has gone to USA for higher studies. In other words, he has not gone out of, or stayed outside India for or on taking up employment, or for carrying a business or any other purpose, in not circumstances as would indicate his intention to stay outside India for an uncertain period. Accordingly, he would be 'person resident in India' during the financial year 2016-2017. RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

For the financial year 2017-2018, he would not have been in India in the preceding financial year (2016-2017) for period exceeding 182 days. Accordingly, he would not be 'person resident in India' during the financial year 2017-2018.

(4) Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its head quarter in Mumbai and has a branch in Singapore. Headquarter at Mumbai controls the branch of robotic unit. What would be the residential status of robotic unit in Mumbai and that of the Singapore branch?

Answer: Toy Ltd. being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi). Accordingly, robotic unit in Mumbai, being a branch of a company, would be a 'person'.

Section 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'.

However, robotic unit in Mumbai, though not 'owned' controls Singapore branch, which is a person resident in India. Hence *prima facie*, it may be possible to hold a view that the Singapore branch is 'person resident in India'.

(5) Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated in 'base', which is normally the city where the airways are headquartered. However, for security considerations, she was based on Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

Answer: Miss Alia stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. She is however employed in UK. She has not come to India for employment, business or circumstances which indicate her intention to stay for uncertain period. Under section 2(v)(B), such

persons are not considered as Indian residents even if their stay exceeds 182 days in the preceding year. Thus, while Miss Alia may have stayed in India for more than 182 days, she cannot be considered to be an Indian resident.

If, however, she has been employed in Mumbai branch of British Airways, then she will be considered as Indian resident.



5. REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE

Dealing in foreign exchange, etc. [Section 3]

Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall-

- (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
- (b) make any payment to or for the credit of any person resident outside India in any manner;
- (c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation— For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

- (d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.— For the purpose of this clause, “financial transaction” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

This section imposes blanket restrictions on the specified transactions. This section applies to residents and non-residents. Consider following examples:

- (i) **Example pertaining to clause (a)** -Dealing in foreign exchange – A non-resident comes to India and would like to sell US\$ 1,000 to his friend who is resident in India. The friend offers him a rate better than the banks. This cannot be done as it would amount to dealing in foreign exchange.
- (ii) **Example pertaining to clause (b)** – NRI brother has an insurance policy in India. He requests his Indian brother to pay insurance premium. This will amount to payment for the credit of non-resident. This is not permitted.

(iii) **Example pertaining to clause (c)** – A foreign tourist comes to India and he takes food at a restaurant. He would like to pay US\$ 20 in cash to the restaurant. The restaurant cannot accept cash as it will be a receipt otherwise than through Authorised Person. The restaurant will have to take a money changers license to accept foreign currency.

(iv) **Example pertaining to clause (d)** – Transactions covered by this sub-section are known as Hawala transactions. An Indian resident gives Rs. 70,000 in cash to an Indian dealer. For this transaction, the brother in Dubai will get US\$ 1,000 from a Dubai dealer. The two dealers may settle the transactions later. However, for the two brothers this transaction is not permitted.

Holding of foreign exchange [Section 4]

Except as provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

This section prevents Indian residents to acquire, hold, own, possess or transfer any foreign exchange, foreign security or immovable property abroad. Then through separate notifications, acquisition of these assets has been permitted subject to certain conditions and compliance rules.

Example, if an Indian resident receives bank balance of US\$ 10,000 from his NRI uncle in London, the Indian resident cannot hold on to the foreign funds. He is supposed to bring back the funds as provided in section 8.



6. CURRENT ACCOUNT TRANSACTIONS [SECTION 5]

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction. Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as prescribed under *FEM (Current Account Transactions) Rules, 2000*.

The section permits receipts and payments freely on current account, though the Central Government may impose reasonable restrictions. On further analysis of the Section 5 two aspects have to be considered:

1. the section states that any person may sell or draw foreign exchange to or from an authorised person,
2. They may do so if such sale or drawal is a current account transaction. However, the Central Government may impose reasonable restrictions.

This implies that current account transactions are freely permitted except where Central Government imposes restrictions.

As per Current Account regulations, drawal of foreign exchange for certain current account transactions is prohibited, a few need permission of Central Government. of India authority and some other transactions would require RBI permission if they exceed a certain ceiling. The three categories are:

I. SCHEDULE I

¹Transactions for which drawal of foreign exchange is prohibited:

- (i) Remittance out of lottery winnings.
- (ii) Remittance of income from racing/riding, etc., or any other hobby.
- (iii) Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
- (iv) Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
- (v) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
- (vi) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
- (vii) Payment related to “Call Back Services” of telephones.
- (viii) Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

II. SCHEDULE II

²Transactions, which require prior approval of the Government of India for drawal of foreign exchange:

Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
Cultural Tours	Ministry of Human Resources Development (Department of Education and Culture)
Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US\$ 10,000) by a State Government and its Public Sector Undertakings.	Ministry of Finance, Department of Economic Affairs
Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport (Chartering Wing)

¹ Schedule I (Transactions which are prohibited)- Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time)

² Schedule II (Transactions which require prior approval of the Central Government)- Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time)

Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e., other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport (Chartering Wing)
Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
Remittance of hiring charges of transponders by (a) TV Channels (b) Internet service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology.
Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US \$ 100,000	Ministry of Human Resource Development (Department of Youth Affairs and Sports)
Remittance for membership of P & I Club	Ministry of Finance (Insurance Division)

³Transactions which require RBI's prior approval for drawal of foreign exchange:

SCHEDULE III

1. **Facilities for individuals**—Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.
 - (i) Private visits to any country (except Nepal and Bhutan)
 - (ii) Gift or donation.
 - (iii) Going abroad for employment
 - (iv) Emigration
 - (v) Maintenance of close relatives abroad

³ Schedule III- Notification no G.S.R. 426(E) dated 26th May 2015

- (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies abroad
- (ix) Any other current account transaction

However, for the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (here in after referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Further, that for a person who is resident but not permanently resident in India and-

- (a) is a citizen of a foreign State other than Pakistan; or
- (b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

Further, a person other than an individual may also avail of foreign exchange facility, *mutatis mutandis*, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

2. Facilities for persons other than individual—The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

- (i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-
 - a. creation of Chairs in reputed educational institutes,

- b. contribution to funds (not being an investment fund) promoted by educational institutes; and
 - c. contribution to a technical institution or body or association in the field of activity of the donor Company.
- (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
 - (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

Explanation—For the purposes of this sub-paragraph, the expression “infrastructure” shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated the May 3, 2000.

- (iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.
3. **Procedure**—The procedure for drawal or remit of any foreign exchange under this schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

If the transaction is not listed in any of the above three schedules, it can be freely undertaken.

Exemption for remittance from RFC Account – If any remittance has to be made for the transactions listed in Schedule II and Schedule III above from RFC account, then no approval is required.

Exemption for remittance from EEFC Account – If any remittance has to be made for the transactions listed in Schedule II and Schedule III above from EEFC account, then also no approval is required. However, if payment has to be made for the following transactions, approval is required even if payment is from EEFC account:

- Remittance for membership of P & I Club.
- Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five per cent of the inward remittance whichever is more. Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

Exemption for payment by International Credit Card while on a visit abroad – If a person is on a visit abroad, he can incur expenditure stated in Schedule III if he incurs it through International credit card.

Note: Liberalised Remittance Scheme (LRS): Under the Liberalised Remittance Scheme (LRS), all resident individuals, including minors, are allowed to freely remit up to USD 2,50,000 per financial year (April – March) for any permissible current or capital account transaction or a combination of both. This is inclusive of foreign exchange facility for the purposes mentioned in Para 1 of Schedule III of Foreign Exchange Management (CAT) Amendment Rules 2015, dated May 26, 2015.

In case of remitter being a minor, the LRS declaration form must be countersigned by the minor's natural guardian. The Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

IMPORT OF GOODS AND SERVICES

Import of Goods and Services into India is being allowed in terms of Section 5 of the Foreign Exchange Management Act 1999, read with Notification No. G.S.R. 381(E) dated May 3, 2000 viz. Foreign Exchange Management (Current Account Transaction) Rules, 2000.

As per the section I of the Master Direction 17, Import trade is regulated by the Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce & Industry, Department of Commerce, Government of India. Authorised Dealer Category – I banks should ensure that the imports into India are in conformity with the Foreign Trade Policy in force and Foreign Exchange Management (Current Account Transactions) Rules, 2000 and the Directions issued by Reserve Bank under Foreign Exchange Management Act, 1999 from time to time.

General Guidelines for Imports

- (1) **General Guidelines:** Rules and regulations to be followed by the Authorised Dealer (AD) from the foreign exchange angle while undertaking import payment transactions on behalf of their clients are given in this para of the Section II of the Master direction. Where specific regulations do not exist, AD may be governed by normal trade practices and it may particularly adhere to "Know Your Customer" (KYC) guidelines (issued by Reserve Bank) in all their dealings.
- (2) **Remittances for Import Payments:** AD may allow remittance for making payments for imports into India, after ensuring that all the requisite details are made available by the importer and the remittance is for bona fide trade transactions as per applicable laws in force.
- (3) **Obligation of Purchaser of Foreign Exchange:** Following are the obligation of the purchaser to be complied with:
 - (i) **Utilization of acquired Foreign Exchange for the said purpose:** In terms of Section 10(6) of the Foreign Exchange Management Act, 1999 (FEMA), any person acquiring foreign exchange is permitted to use it either for the purpose mentioned in the declaration made by him to an Authorised or for any other purpose for which acquisition of foreign exchange is permissible under the said Act or Rules or Regulations framed there under.
 - (ii) **Evidence of import:** Where foreign exchange acquired has been utilised for import of goods into India, the AD should ensure that the importer furnishes evidence of import viz., as in IDPMS, Postal Appraisal Form or Customs Assessment Certificate, etc., and satisfy himself

that goods equivalent to the value of remittance have been imported. AD should ensure that all import remittances outstanding on the notified date of IDPMS are uploaded in IDPMS (Import Data Processing and Monitoring System).

(iii) **Mode of payment:** A person resident in India may make payment for import of goods in foreign exchange through-

- an international card held by him/in rupees from international credit card/ debit card through the credit/debit card servicing bank in India against the charge slip signed by the importer, or
- as prescribed by Reserve Bank from time to time,

provided that the transaction is in conformity with the extant provisions and the import is in conformity with the Foreign Trade Policy in force.

(iv) **Other mode:** Any person resident in India may also make payment as under :

- (a) **In rupees** towards meeting expenses on account of boarding, lodging and services related thereto or travel to and from and within India of a person resident outside India who is on a visit to India;
- (b) **By means of a crossed cheque or a draft** as consideration for purchase of gold or silver in any form imported by such person in accordance with the terms and conditions imposed under any order issued by the Central Government under the Foreign Trade (Development and Regulations) Act, 1992 or under any other law, rules or regulations for the time being in force;
- (c) **A company or resident in India may make payment in rupees** to its non-whole time director who is resident outside India and is on a visit to India for the company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance with the provisions contained in the company's Memorandum of Association or Articles of Association or in any agreement entered into it or in any resolution passed by the company in general meeting or by its Board of Directors, provided the requirement of any law, rules, regulations, directions applicable for making such payments are duly complied with.

(4) **Time Limit for Settlement of Import Payments:**

(i) **Time limit for Normal Imports:**

- (a) In terms of the extant regulations, remittances against imports should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc.
- (b) AD may permit settlement of import dues delayed due to disputes, financial difficulties, etc. However, interest if any, on such delayed payments, usance bills (a bill of exchange which allows the drawee to have period of credit or

term) or overdue interest is payable only for a period of up to three years from the date of shipment at the rate prescribed for trade credit from time to time.

- (ii) **Time Limit for Deferred Payment Arrangements:** Deferred payment arrangements (including suppliers' and buyers' credit) upto five years, are treated as trade credits for which the procedural guidelines as laid down in the Master Circular for External Commercial Borrowings and Trade Credits may be followed.
- (5) **Extension of Time:**
- (i) **limit of extension:** AD can consider granting extension of time for settlement of import dues up to a period of six months at a time (maximum up to the period of three years) irrespective of the invoice value for delays on account of disputes about quantity or quality or non-fulfilment of terms of contract; financial difficulties and cases where importer has filed suit against the seller. In cases where sector specific guidelines have been issued by Reserve Bank of India for extension of time (i.e. rough, cut and polished diamonds), the same will be applicable.
 - (ii) **Circumstances:** While granting extension of time, AD must ensure that:
 - a. The import transactions covered by the invoices are not under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies;
 - b. While considering extension beyond one year from the date of remittance, the total outstanding of the importer does not exceed USD one million or 10 per cent of the average import remittances during the preceding two financial years, whichever is lower; and
 - c. Where extension of time has been granted by the AD, the date up to which extension has been granted may be indicated in the 'Remarks' column.
 - (iii) **In exceptional cases:** Cases not covered by the above instructions / beyond the above limits, may be referred to the concerned Regional Office of Reserve Bank of India.
 - (iv) **Noting of the extension:** The above extension period shall be reported in IDPMS as per message "Bill of Entry Extension" and the date up to which extension is granted will be indicated in "Extension Date" column.
- (6) **Import of Foreign Exchange / Indian Rupees:**
- (i) Except as otherwise provided in the Regulations, no person shall, without the general or special permission of the Reserve Bank, import or bring into India, any foreign currency. Import of foreign currency, including cheques, is governed by Section 6(3)(g) of the Foreign Exchange Management Act, 1999, and the Foreign Exchange Management (Export and Import of Currency) Regulations 2000.

- (ii) Reserve Bank may allow a person to bring into India currency notes of Government of India and / or of Reserve Bank subject to such terms and conditions as the Reserve Bank may stipulate.

(7) Import of Foreign Exchange into India: A person may–

- (i) **Send into India**, without limit, foreign exchange in any form (other than currency notes, bank notes and travellers cheques);
- (ii) **Bring into India** from any place outside India, without limit, foreign exchange (other than unissued notes), subject to the condition that such person makes, on arrival in India, a declaration to the Custom Authorities at the Airport in the Currency Declaration Form (CDF) annexed to these Regulations;

Provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or travellers cheques brought in by such person at any one time does not exceed USD 10,000 (US Dollars ten thousand) or its equivalent and/or the aggregate value of foreign currency notes (cash portion) alone brought in by such person at any one time does not exceed USD 5,000 (US Dollars five thousand) or its equivalent.

(8) Import of Indian Currency and Currency Notes

- (i) Any person resident in India who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (**other than from Nepal and Bhutan**), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25,000 (Rupees twenty five thousand only).
- (ii) **A person may bring into India from Nepal or Bhutan**, currency notes of Government of India and Reserve Bank of India for any amount in denominations up to Rs.100/-.

(9) Issue of Guarantees by an Authorised Dealer:

- (i) An authorised dealer may give a guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owned to a person resident outside India, as an importer, in respect of import on deferred payment terms in accordance with the approval by the Reserve Bank of India for import on such terms.
- (ii) An authorised dealer may give guarantee, Letter of Undertaking or Letter of Comfort in respect of any debt, obligation or other liability incurred by a person resident in India and owned to a person resident outside India (being an overseas supplier of goods, bank or a financial institution), for import of goods, as permitted under the Foreign Trade Policy announced by Government of India from time to time and subject to such terms and conditions as may be specified by Reserve Bank of India from time to time.
- (iii) An authorised dealer may, **in the ordinary course of his business**, give a guarantee in favour of a non-resident service provider, on behalf of a resident customer who is a

service importer, subject to such terms and conditions as stipulated by Reserve Bank of India from time to time:

Limit of providing guarantee:

Service importer	Amount of guarantee
Where a service importer is other than a Public Sector Company or a Department / Undertaking of the Government of India / State Government:	no guarantee for an amount exceeding USD 500,000 or its equivalent shall be issued
Where the service importer is a Public Sector Company or a Department / Undertaking of the Government of India / State Government	no guarantee for an amount exceeding USD 100,000 or its equivalent shall be issued without the prior approval of the Ministry of Finance, Government of India.

- (iv) An authorised dealer may, subject to the directions issued by the Reserve Bank of India in this behalf, permit a person resident in India to **issue corporate guarantee in favour of an overseas lessor** for financing import through operating lease effected in conformity with the Foreign Trade Policy in force and under the provisions of the Foreign exchange Management (Current Account Transactions) Rules, 2000, and the Directions issued by Reserve Bank of India under Foreign Exchange Management Act, 1999 from time to time.



7. CAPITAL ACCOUNT TRANSACTIONS [SECTION 6]

- (1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.
- (2) The Reserve Bank may, in consultation with the Central Government, specify:
 - (a) any class or classes of capital account transactions, which are permissible;
 - (b) the limit up to which foreign exchange shall be admissible for such transactions;

Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.
- (3) Without prejudicial to the generality of the provision of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following:
 - (a) transfer or issue of any foreign security by a person resident in India;
 - (b) transfer or issue of any security by a person resident outside India;

- (c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
 - (d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;
 - (e) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;
 - (f) deposits between persons resident in India and persons resident outside India;
 - (g) export, import or holding of currency or currency notes;
 - (h) transfer of immovable property outside India, other than a lease not exceeding five years, by person a resident in India;
 - (i) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;
 - (j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred:
 - (i) by a person resident in India and owed to a person resident outside India; or
 - (ii) by a person resident outside India.
- (4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

The RBI vide A.P. (DIR Series) Circular No. 90 dated 9th January, 2014 has issued a clarification on section 6(4) of the Act. This circular clarifies that section 6(4) of the Act covers the following transactions:

- (i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
- (ii) Income earned through employment or business or vocation outside India taken up or commenced which such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
- (iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.
- (iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for

making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.

- (5) A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by a such person when he was resident in India or inherited from a person who was resident in India.
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

A capital account transaction as said earlier is a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or persons resident outside India, and includes transactions referred to in sub-section (3). The section gives a liberty by providing that any person may sell or draw foreign exchange to or from an authorised person for capital account transactions. However, the liberty to do so is subject to the provisions of sub-section (2), which states that the Reserve Bank may in consultation with the Central Government specify class or classes of capital account transactions, which are permissible, and the limit upto, which the foreign exchange shall be admissible for such transactions.

Capital account transaction is basically split into the following categories:

- (I) transaction, which are permissible in respect of persons resident in India and outside India.
- (II) transaction on which restrictions cannot be imposed; and
- (III) transactions, which are prohibited.

I. Permissible Transactions

Under Sub-section (2) of Section 6, the RBI has issued the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The Regulations specify the list of transaction, which are permissible in respect of persons resident in India in Schedule-I and the classes of capital account transactions of persons resident outside India in Schedule-II.

Further, subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules; provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

SCHEDULE I

The list of permissible classes of transactions made by **persons resident in India** is:

- (a) Investment by a person resident in India in foreign securities.
- (b) Foreign currency loans raised in India and abroad by a person resident in India.
- (c) Transfer of immovable property outside India by a person resident in India.
- (d) Guarantees issued by a person resident in India in favour of a person resident outside India.
- (e) Export, import and holding of currency/currency notes.
- (f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- (i) Loans and overdrafts by a person resident in India to a person resident outside India.
- (j) Remittance outside India of capital assets of a person resident in India.
- ⁴(k) Undertake derivative contract”

SCHEDULE II

The list of permissible classes of transactions made by **persons resident outside India** is:

- (a) Investment in India by a person resident outside India, that is to say,
 - (i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
 - (ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of a person in India.
- (b) Acquisition and transfer of immovable property in India by a person resident outside India.
- (c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (d) Import and export of currency/currency notes into/from India by a person resident outside India.
- (e) Deposits between a person resident in India and a person resident outside India.

⁴ Reserve Bank of India amended the FEM (Permissible Capital Account Transactions) Regulations, 2000 through the enforcement of the Foreign Exchange Management (Permissible Capital Account Transactions)(Amendment) Regulations, 2019 w.e.f 26-2-2019. and replaced the point no. (k).

- (f) Foreign currency accounts in India of a person resident outside India.
- (g) Remittance outside India of capital assets in India of a person resident outside India.
- ⁵(h) Undertake derivative contracts

II. Transactions with no restriction

They are:

- (1) For amortisation of loan and
- (2) For depreciation of direct investments in ordinary course of business.

Also, restrictions cannot be imposed when drawal is of the purpose of repayments of loan instalments.

III. Prohibited Transactions

On certain transactions, the Reserve Bank of India imposes prohibition.

- (a) no person shall undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction,

⁶provided that-

- (i) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank from time to time for a capital account transaction specified in Schedule I.

Explanation: Drawal of foreign exchange as per item number 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May 2000 as amended from time to time, shall be subsumed within the limit under proviso (a) above.

- (ii) Where the drawal of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds USD 250,000 per financial year, or as decided by Reserve Bank from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal.

⁵ Inserted by Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2019, w.e.f. 26-2-2019.

⁶The Foreign Exchange Management (Permissible Capital Account Transactions) (Third Amendment) Regulations, 2015 vide Notification No. FEMA. 341/2015-RB dated May 26, 2015 substituted the existing proviso contained in Regulation 4 sub-regulation (a) of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 with the above provisos in the principal regulations.

Provided further that no part of the foreign exchange of USD 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

(b) The person resident outside India is prohibited from making investments in India in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage:

(i) In the business of chit fund; ⁷[Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non-resident Indians shall be eligible to subscribe, through banking channel and on non-repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time]

(ii) As Nidhi company;

(iii) In agricultural or plantation activities;

(iv) In real estate business, or construction of farm houses or

Explanation: In "real estate business" the term shall not include shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.; or

(v) In trading in Transferable Development Rights (TDRs).

⁸[(c) No person resident in India shall undertake any capital account transaction which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs, with any person who is, a citizen of or a resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise, in Democratic People's Republic of Korea, until further orders, unless there is specific approval from the Central Government to carry on any transaction.

(d) The existing investment transactions, with any person who is, a citizen of or resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise in Democratic People's Republic of Korea, or any existing representative office or other assets possessed in Democratic People's Republic of Korea, by a person resident in India, which is not

⁷ Vide Notification No. FEMA. 337/2015-RB dated 2nd March, 2015, the Reserve Bank of India, in consultation with the Central Government through the Foreign Exchange Management (Permissible Capital Account Transactions) (Second Amendment) Regulations, 2015 added an explanation with respect to the business of chit fund.

⁸ Vide Foreign Exchange Management (Permissible Capital Account Transaction) (First Amendment) Regulations, 2019 w.e.f 7th March, 2019

permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs shall be closed/liquidated/disposed/settled within a period of 180 days from the date of issue of this Notification, unless there is specific approval from the Central Government to continue beyond that period.”]

Repatriation of sale proceeds

A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely :

- (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
- (ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property; and
- (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

In the event of failure in repayment of external commercial borrowing availed by a person resident in India under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (Notification No. FEMA 3/2000-RB, dated 3-5-2000) a bank which is an authorised dealer may permit the overseas lender or the security trustee (in whose favour the charge on immovable property has been created to secure the ECB) to sell the immovable property on which the said loan has been secured only to a (by the) person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of the said loan and not any other loan.

FRAMEWORK FOR RAISING LOANS THROUGH EXTERNAL COMMERCIAL BORROWINGS

Transactions on account of External Commercial Borrowings (ECB) are governed by section 6(3)(d) of FEMA. ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a stand-alone basis. The framework for raising loans through ECB comprises the following three tracks:

Track I - Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.⁹ Manufacturing sector companies may raise foreign currency denominated ECBs with minimum average maturity period of 1 year.

Track II - Long term foreign currency denominated ECB with minimum average maturity of 10 years.

Track III - Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years. Manufacturing sector companies may raise INR denominated ECBs with minimum average maturity period of 1 year.¹⁰

The term 'All-in-Cost' includes rate of interest, other fees, expenses, charges, guarantee fees whether paid in foreign currency or Indian Rupees (INR) but will not include commitment fees, pre-payment fees / charges, withholding tax payable in INR.

Forms of ECB: The ECB Framework enables permitted resident entities to borrow from recognized non-resident entities in the following forms:

- i. Loans including bank loans;
- ii. Securitized instruments (e.g. floating rate notes and fixed rate bonds, nonconvertible, optionally convertible or partially convertible preference shares / debentures);
- iii. Buyers' credit;
- iv. Suppliers' credit;
- v. Foreign Currency Convertible Bonds (FCCBs);
- vi. Financial Lease; and
- vii. Foreign Currency Exchangeable Bonds (FCEBs).

However, ECB framework is not applicable in respect of the investment in Nonconvertible Debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).

Available routes for raising ECB: Under the ECB framework, ECBs can be raised either under the automatic route or under the approval route. For the automatic route, the cases are examined by the Authorised Dealer Category-I (AD Category-I) banks. Under the approval route, the prospective borrowers are required to send their requests to the RBI through their ADs for examination. While the regulatory provisions are mostly similar, there are some differences in the form of amount of borrowing, eligibility of borrowers, permissible end-uses, etc. under the two routes. While the first six forms of borrowing, mentioned above under points i to vi, can be raised both under the automatic and approval routes, FCEBs can be issued only under the approval route.

Eligible Borrowers: The list of entities eligible to raise ECB under the three tracks is set out in the following list.

⁹ Inserted vide A. P. (DIR Series) Circular No. 9 dated September 19, 2018

¹⁰ Inserted vide A. P. (DIR Series) Circular No. 9 dated September 19, 2018

Track I

- i. Companies in manufacturing and software development sectors.
- ii. Shipping and airlines companies.
- iii. Small Industries Development Bank of India (SIDBI).
- iv. Units in Special Economic Zones (SEZs).
- v. Export Import Bank of India (Exim Bank) (only under the approval route).
- vi. Companies in infrastructure sector, Non-Banking Financial Companies - Infrastructure Finance Companies (NBFCIFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs). Also, Housing Finance Companies, regulated by the National Housing Bank, Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908.

Track II

- i. All entities listed under Track I.
- ii. Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (INVTs) coming under the regulatory framework of the Securities and Exchange Board of India (SEBI).

Track III

- i. All entities listed under Track II.
- ii. All Non-Banking Financial Companies (NBFCs) coming under the regulatory purview of the Reserve Bank.
- iii. NBFCs-Micro Finance Institutions (NBFCsMFIs), Not for Profit companies registered under the Companies Act, 1956/2013, Societies, trusts and cooperatives (registered under the Societies Registration Act, 1860, Indian Trust Act, 1882 and State-level Cooperative Acts/Multilevel Cooperative Act/State-level mutually aided Cooperative Acts respectively), Non-Government Organisations (NGOs) which are engaged in micro finance activities
- iv. Companies engaged in miscellaneous services viz. research and development (R&D), training (other than educational institutes), companies supporting infrastructure, companies providing logistics services. Also, companies engaged in maintenance, repair and overhaul and freight forwarding.

Developers of Special Economic Zones (SEZs)/ National Manufacturing and Investment Zone.

Notes: Entities engaged in micro-finance activities to be eligible to raise ECB: (i) should have a satisfactory borrowing relationship for at least three years with an AD Category I bank in India, and (ii) should have a certificate of due diligence on 'fit and proper' status from the AD Category I bank.

Recognised lender: The list of recognized lenders / investors for the three tracks will be as follows:

Track I	Track II	Track III
i. International banks. ii. International capital markets. iii. Multilateral financial institutions (such as, IFC, ADB, etc.) / regional financial institutions and Government owned (either wholly or partially) financial institutions. iv. Export credit agencies. v. Suppliers of equipment. vi. Foreign equity holders. vii. Overseas long term investors such as: <ul style="list-style-type: none"> a. Prudentially regulated financial entities; b. Pension funds; c. Insurance companies; d. Sovereign Wealth Funds; e. Financial institutions located in International Financial Services Centres in India viii. Overseas branches / subsidiaries of Indian banks	All entities listed under Track I but for overseas branches / subsidiaries of Indian banks.	All entities listed under Track I but for overseas branches / subsidiaries of Indian banks. In case of NBFCs-MFIs, other eligible MFIs, not for profit companies and NGOs, ECB can also be availed from overseas organisations and individuals.
<p>Notes:</p> <ol style="list-style-type: none"> 1. Overseas branches / subsidiaries of Indian banks can be lenders only under Track I. Further, their participation under this track is subject to the prudential norms issued by the Department of Banking Regulation, RBI. 2. Overseas Organizations proposing to lend ECB would have to furnish to the authorised dealer bank of the borrower a certificate of due diligence from an overseas bank, which, in turn, is subject to regulation of host-country regulators and such host country adheres to the Financial Action Task Force (FATF) guidelines on anti-money laundering (AML)/ combating the financing of terrorism (CFT). The certificate of due diligence should comprise the following: <ol style="list-style-type: none"> (i) that the lender maintains an account with the bank at least for a period of two years, (ii) that the lending entity is organised as per the local laws and held in good esteem by the business/local community, and (iii) that there is no criminal action pending against it. (iv) Individual lender has to obtain a certificate of due diligence from an overseas bank indicating that the lender maintains an account with the bank for at least 		

a period of two years. Other evidence /documents such as audited statement of account and income tax return, which the overseas lender may furnish, need to be certified and forwarded by the overseas bank. Individual lenders from countries which do not adhere to FATF guidelines on AML / CFT are not eligible to extend ECB.

Individual Limits: The individual limits refer to the amount of ECB which can be raised in a financial year under the automatic route.

- i. The individual limits of ECB that can be raised by eligible entities **under the automatic route** per financial year for all the three tracks are set out as under:
 - a. Up to USD 750 million or equivalent for the companies in infrastructure and manufacturing sectors, Non-Banking Financial Companies -Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies;
 - b. Up to USD 200 million or equivalent for companies in software development sector;
 - c. Up to USD 100 million or equivalent for entities engaged in micro finance activities; and
 - d. Up to USD 500 million or equivalent for remaining entities.
- ii. ECB proposals beyond aforesaid limits will come **under the approval route**. For computation of individual limits under Track III, exchange rate prevailing on the date of agreement should be taken into account.
- iii. In case the ECB is raised from direct equity holder, aforesaid individual ECB limits will also subject to ECB liability: equity ratio requirement. The ECB liability of the borrower (including all outstanding ECBs and the proposed one) towards the foreign equity holder should not be more than seven times of the equity contributed by the latter. This ratio will not be applicable if total of all ECBs raised by an entity is up to USD 5 million or equivalent.

For the purpose of ECB liability: equity ratio, the paid-up capital, free reserves (including the share premium received in foreign currency) as per the latest audited balance sheet can be reckoned for calculating the 'equity' of the foreign equity holder. Where there are more than one foreign equity holders in the borrowing company, the portion of the share premium in foreign currency brought in by the lender(s) concerned shall only be considered for calculating the ratio.

Procedure of raising ECB: For approval route cases, the borrowers may approach the RBI with an application in prescribed format Form ECB for examination through their AD Category I bank. Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals. ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) would be placed before the Empowered Committee set up by the Reserve Bank. The Empowered Committee will have external as well as internal members

and the Reserve Bank will take a final decision in the cases taking into account recommendation of the Empowered Committee. Entities desirous to raise ECB under the automatic route may approach an AD Category I bank with their proposal along with duly filled in Form 83. Formats of Form ECB and Form 83 are available at Annex I and II respectively of Part V of the Master Directions – Reporting under Foreign Exchange Management Act, 1999.

Routing of funds raised abroad to India: It may be noted that:

- (i) Indian companies or their ADs are not allowed to issue any direct or indirect guarantee or create any contingent liability or offer any security in any form for such borrowings by their overseas holding / associate / subsidiary / group companies except for the purposes explicitly permitted in the relevant Regulations.
- (ii) Further, funds raised abroad by overseas holding / associate / subsidiary / group companies of Indian companies with support of the Indian companies or their ADs as mentioned at (i) above cannot be used in India unless it conforms to the general or specific permission granted under the relevant Regulations.
- (iii) Indian companies or their ADs using or establishing structures which contravene the above shall render themselves liable for penal action as prescribed under FEMA.

Borrowing and Lending in Foreign currency by persons other than authorised dealer

Borrowing in foreign currency by persons other than an authorised dealer: The circumstances and the conditions regarding borrowing in foreign currency by persons other than an authorised dealer are mentioned below:

- i. **For execution of projects outside India and for exports on deferred payment terms:** A person resident in India may borrow, whether by way of loan or overdraft or any other credit facility, from a bank situated outside India, for execution outside India of a turnkey project or civil construction contract or in connection with exports on deferred payment terms, provided the terms and conditions stipulated by the authority which has granted the approval to the project or contract or export is in accordance with the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000.
- ii. **For imports:** An importer in India may, for import of goods into India, avail of foreign currency credit for a period not exceeding six months extended by the overseas supplier of goods, provided the import is in compliance with the Export Import Policy of the Government of India in force.
- iii. **Borrowing by resident individual:** An individual resident in India may borrow a sum not exceeding US\$ 250,000/- or its equivalent from his close relative outside India, subject to the conditions that:
 - a. the minimum maturity period of the loan is one year;
 - b. the loan is free of interest; and

- c. the amount of loan is received by inward remittance in free foreign exchange through normal banking channels or by debit to the NRE/FCNR account of the non-resident lender.

Lending in foreign currency by persons other than an authorised dealer: The circumstances and the conditions regarding lending in foreign currency by persons other than an authorised dealer are mentioned below:

- (i) **Lending to WOS / JV:** An Indian entity may lend to its wholly owned subsidiary or joint venture abroad constituted in accordance with the provisions of Foreign Exchange Management (Transfer or issue of foreign security) Regulations, 2000.
- (ii) **Lending by Select Institutions:** Export Import Bank of India, Industrial Development Bank of India, Industrial Finance Corporation of India, Industrial Credit and Investment Corporation of India Limited, Small Industries Development Bank of India Limited or any other institution in India may extend loans to their constituents in India out of the foreign currency borrowings raised by these institutions with the approval of the Central Government for the purpose of onward lending.
- (iii) **Lending by Indian companies to their employees:** Indian companies in India may grant loans to the employees of their branches outside India for personal purposes provided that the loan shall be granted for personal purposes in accordance with the lender's Staff Welfare Scheme/Loan Rules and other terms and conditions as applicable to its staff resident in India and abroad.

OVERSEAS DIRECT INVESTMENTS BY RESIDENT INDIVIDUALS

Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues for promoting global business by Indian entrepreneurs. Joint Ventures are perceived as a medium of economic and business co-operation between India and other countries.

In keeping with the spirit of liberalisation, which has become the hallmark of economic policy in general, and Foreign Exchange regulations in particular, the Reserve Bank has been progressively relaxing the rules and simplifying the procedures both for current account as well as capital account transactions.

Relevant statutory provision: Section 6 of the Foreign Exchange Management Act, 1999 provides powers to the Reserve Bank to specify, in consultation with the Government of India the classes of permissible capital account transactions and limits up to which foreign exchange is admissible for such transactions. Section 6(3) of the aforesaid Act provides powers to the Reserve Bank to prohibit, restrict or regulate various transactions referred to in the sub-clauses of that sub-section, by making Regulations.

In exercise of the above powers conferred under the Act, the Reserve issued *Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004* vide Notification No. FEMA.120/RB-2004 dated July 7, 2004. The Notification seeks to regulate acquisition and transfer

of a foreign security by a person resident in India i.e. investment (or financial commitment) by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

Relevant definitions: "Direct investment outside India" means investments, either under the Automatic Route or the Approval Route, by way of:

- (i) contribution to the capital or subscription to the Memorandum of a foreign entity, or
- (ii) purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS).

However, it does not include¹¹ Portfolio investment.

A resident individual may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. However, the limit of overseas direct investment by the resident individual is prescribed by RBI.

"Financial Commitment" means the amount of direct investment by way of contribution to equity, loan and 100 per cent of the amount of guarantees and 50 per cent of the performance guarantees issued by an Indian Party to or on behalf of its overseas Joint Venture Company or Wholly Owned Subsidiary.

'Joint Venture' means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian Party makes a direct investment.

"Wholly Owned Subsidiary (WOS)" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by the Indian Party.

"Indian Party" means a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932, or a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008, making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank. When more than one such company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian Party".

"Host country" means the country in which the foreign entity receiving the direct investment from an Indian Party is registered or incorporated.

¹¹ **Portfolio investments** are **investments** in the form of a group (**portfolio**) of assets, including transactions in equity, securities, such as common stock, and debt securities, such as banknotes, bonds, and debentures

Mode of direct investment outside India:

(1) **Automatic route for direct investment or financial commitment outside India:** As per the Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004, an Indian Party has been permitted to make investment/ undertake financial commitment in overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank.

With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

Limit permissible: The total financial commitment of the Indian Party in all the Joint Ventures/ Wholly Owned Subsidiaries shall comprise of the following:

- a. 100% of the amount of equity shares and/ or Compulsorily Convertible Preference Shares (CCPS);
- b. 100% of the amount of other preference shares;
- c. 100% of the amount of loan;
- d. 100% of the amount of guarantee (other than performance guarantee) issued by the Indian Party;
- e. 100% of the amount of bank guarantee issued by a resident bank on behalf of JV or WOS of the Indian Party provided the bank guarantee is backed by a counter guarantee / collateral by the Indian Party.
- f. 50% of the amount of performance guarantee issued by the Indian Party provided that if the outflow on account of invocation of performance guarantee results in the breach of the limit of the financial commitment in force, prior permission of the Reserve Bank is to be obtained before executing remittance beyond the limit prescribed for the financial commitment.

Requirements for investments/ financial commitments: The criteria for overseas direct investment under the Automatic Route is as under:

- i. The Indian Party can invest up to the prescribed limit of its net worth (as per the last audited Balance Sheet) in JV / WOS for any bonafide activity permitted as per the law of the host country. The prescribed limit vis-a-vis the net worth will not be applicable where the investment is made out of balances held in the EEFC account of the Indian party or out of funds raised through ADRs/GDRs;
- ii. The Indian Party is not on the Reserve Bank's exporters' caution list / list of defaulters to the banking system published/ circulated by the Credit Information Bureau of India Ltd. (CIBIL) /RBI or any other credit information company as approved by the Reserve Bank or under

investigation by the Directorate of Enforcement or any investigative agency or regulatory authority; and

- iii. The Indian Party routes all the transactions relating to the investment in a JV/WOS through only one branch of an authorised dealer to be designated by the Indian Party.

Process: The Indian Party should approach an Authorized Dealer with an application in Form ODI and the prescribed enclosures / documents for effecting the remittances towards such investments.

Investments (or financial commitment) in JV/WOS abroad by Indian Parties through the medium of a Special Purpose Vehicle (SPV) are also permitted under the Automatic Route if the Indian Party is not appearing in the Reserve Bank's caution list or is under investigation by the Directorate of Enforcement or included in the list of defaulters to the banking system circulated by the Reserve Bank/any other Credit Information company as approved by the Reserve Bank.

(2) Approval route for direct investment or financial commitment outside India

- (i) Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad.
- (ii) Reserve Bank would, inter alia, take into account the following factors while considering such applications:
 - a) Prima facie viability of the JV / WOS outside India;
 - b) Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);
 - c) Financial position and business track record of the Indian Party and the foreign entity; and
 - d) Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

Therefore, under the approval route (proposals not covered by the conditions under the automatic route) prior approval of the Reserve Bank would be required. For which a specific application in Form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.

Overseas Direct Investments by resident individuals: With effect from August 05, 2013, a resident individual (single or in association with another resident individual or with an 'Indian Party' as defined in the Notification) satisfying the criteria as per Schedule V of the Notification, may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. The limit of overseas direct investment by the resident individual shall be within the overall limit prescribed by the Reserve Bank of India under the provisions of Liberalised Remittance Scheme, as prescribed by the Reserve Bank from time to time.

Prohibitions on direct investment in abroad by an Indian party:

- (a) Indian Parties are prohibited from making investment (or financial commitment) in foreign entity engaged in real estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without the prior approval of the Reserve Bank.
- (b) An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank.

General Permission: General permission has been granted to persons residents in India for purchase / acquisition of securities in the following manner:

- (a) out of the funds held in RFC account;
- (b) as bonus shares on existing holding of foreign currency shares; and
- (c) when not permanently resident in India, out of their foreign currency resources outside India.

General permission is also available to sell the shares so purchased or acquired.

Thus a capital account transaction is permitted only if it is specifically permitted under the regulations. If the transaction is not stated, a prior approval is required.

CAPITAL TRANSACTIONS RELATED TO IMMOVABLE PROPERTY

[I] FOREIGN EXCHANGE MANAGEMENT (ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA) REGULATIONS, 2018

As per the Notification dated 26th of March, 2018, the Reserve Bank of India makes the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 with the enforcement from the date of their publication in the Official Gazette i.e., 26th of March, 2018.

1. **Relevant Definitions:-** In these Regulations, unless the context otherwise requires -
 - '**Non-Resident Indian (NRI)**' means a person resident outside India who is a citizen of India;
 - '**Overseas Citizen of India (OCI)**' means a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955;
 - '**Repatriation outside India**' means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through banking channels or crediting

it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency;

2. Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India:-

An NRI or an OCI may-

- (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Provided further that no payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

- (b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;
- (c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;
- (d) transfer any immovable property in India to a person resident in India;
- (e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

3. Acquisition of Immovable Property for carrying on a permitted activity:-

A person resident outside India who has established in India in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016, as amended from time to time, a branch, office or other place of business for carrying on in India any activity, excluding a liaison office, may -

- (a) acquire any immovable property in India, which is necessary for or incidental to carrying on such activity;

Provided that

- (i) all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and

- (ii) the person files with the Reserve Bank a declaration in the form IPI as prescribed by Reserve Bank from time to time, not later than ninety days from the date of such acquisition.
- (b) transfer by way of mortgage to an authorised dealer as a security for any borrowing, the immovable property acquired in pursuance of clause (a).

Provided no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, other than on lease not exceeding five years, without prior approval of the Reserve Bank.

4. Purchase/ sale of Immovable Property by Foreign Embassies/ Diplomats/ Consulate Generals:-

A Foreign Embassy/ Diplomat/ Consulate General may purchase/ sell immovable property in India other than agricultural land/ plantation property/ farm house provided (i) clearance from Government of India, Ministry of External Affairs is obtained for such purchase/ sale, and (ii) the consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channels.

5. Joint acquisition by the spouse of an NRI or an OCI:-

A person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse.

Provided that

- (i) The consideration for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank;
- (ii) No payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;
- (iii) Provided that the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property;
- (iv) Provided further that the non-resident spouse is not otherwise prohibited from such acquisition.

6. Acquisition by a Long-Term Visa holder:-

A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment subject to the following conditions:

- (a) the property should not be located in and around restricted/ protected areas so notified by the Central Government and cantonment areas;
- (b) the person submits a declaration to the Revenue Authority of the district where the property is located, specifying the source of funds and that he/ she is residing in India on LTV;
- (c) the registration documents of the property should mention the nationality and the fact that such person is on LTV;
- (d) the property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities;
- (e) a copy of the documents of the purchased property shall be submitted to the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division);
- (f) such person shall be eligible to sell the property only after acquiring Indian citizenship. However, transfer of the property before acquiring Indian citizenship shall require prior approval of DCP/FRO/FRRO concerned.

7. Repatriation of sale proceeds:-

- (a) A person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section;
- (b) In the event of sale of immovable property other than agricultural land/ farm house/ plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:
 - (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of his acquisition or the provisions of these Regulations;
 - (ii) the amount for acquisition of the immovable property was paid in foreign

exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External account;

- (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.
- (c) In the event of failure in repayment of external commercial borrowing availed by a person resident in India under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as amended from time to time, a bank which is an authorised dealer may permit the overseas lender or the security trustee (in whose favour the charge on immovable property has been created to secure the ECB) to sell the immovable property on which the said loan has been secured only to a (by the) person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of the said loan and not any other loan.

8. Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries:-

No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.

Provided this prohibition shall not apply to an OCI.

Explanation: For the purpose of this regulation the term "citizen" shall include natural persons and legal entities.

9. Prohibition on transfer of immovable property in India:-

Save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India:-

Provided that

- (i) The Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.
- (ii) A bank which is an authorised dealer may, subject to the directions issued by the Reserve Bank in this behalf, permit a person resident in India or on behalf of such person to create charge on his immovable property in India in favour an overseas lender or security trustee, to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as amended from time to time.
- (iii) An Authorized Dealer in India being the Indian correspondent of an overseas lender may, subject to the directions issued by the Reserve Bank in this regard, create a

mortgage on an immovable property in India owned by an NRI or an OCI, being a director of a company outside India, for a loan to be availed by the company from the said overseas lender.

Provided

- (a) the funds shall be used by the borrowing company only for its core business purposes overseas;
 - (b) in case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit the sale proceeds to the overseas lender.
- (iv) A person resident outside India who has acquired any immovable property in India in accordance with foreign exchange laws in force at the time of such acquisition or with the general or specific permission of the Reserve Bank may transfer such property to a person resident in India provided the transaction takes place through banking channels in India and provided that the resident is not otherwise prohibited from such acquisition.
- 10. Miscellaneous:-** Any transaction involving acquisition or transfer of immovable property under these regulations shall be undertaken:
- (a) through banking channels in India;
 - (b) subject to payment of applicable taxes and other duties/ levies in India.
- 11. Saving:-** Any existing holding of immovable property in India by a person resident outside India made in accordance with the policy in existence at the time of such acquisition would not require any modifications to conform to these regulations.

(II) ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OUTSIDE INDIA

Restriction on acquisition or transfer of immovable property outside India.

No person resident in India shall acquire or transfer any immovable property situated outside India without general or special permission of the Reserve Bank.

Nothing contained in the above said regulations shall apply to the property —

- (a) held by a person resident in India who is a national of a foreign State;
- (b) acquired by a person resident in India on or before 8th July, 1947 and continued to be held by him with the permission of the Reserve Bank.

Acquisition and Transfer of Immovable Property outside India:-

- (1) A person resident in India may acquire immovable property outside India, -

- (a) by way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the Act, or referred to in clause (b) of regulation 4 (acquired by a person resident in India on or before 8th July 1947 and continued to be held by him with the permission of the Reserve Bank.)
 - (b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2015;
 - (c) jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;
- (2) A person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
- (3) A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

Explanation—For the purposes of these regulations, 'relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

¹²Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries.

No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau or Hong Kong without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.



8. EXPORT OF GOODS AND SERVICES [SECTION 7]

- (1) Every exporter of goods shall-
- (a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having

¹² Vide Notification No. FEMA. 335/2015-RB, dated 4th Feb, 2015, the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) (Amendment) Regulations, 2015, made the above amendment in the existing regulation 7 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 according to which the citizens of certain countries have been prohibited on acquisition or transfer of immovable property in India.

regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;

- (b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by such exporter.
- (2) The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.
- (3) Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

Regulations:

1. Short title and commencement:

- (i) These Regulations may be called the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015.
- (ii) They shall come into force from the date of their publication in the Official Gazette.

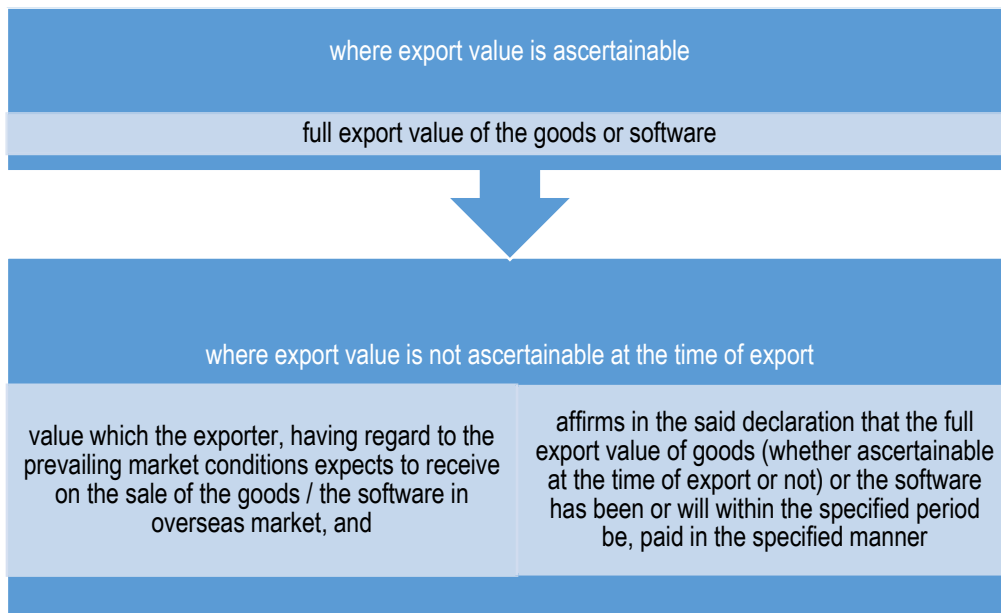
2. Definitions:- Some definitions:

In these Regulations, unless the context requires otherwise, -

- (i) **'export'** includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media;
- (ii) **'export value'** in relation to export by way of lease or hire-purchase or under any other similar arrangement, includes the charges, by whatever name called, payable in respect of such lease or hire-purchase or any other similar arrangement;
- (iii) **'form'** means form annexed to these Regulations;
- (iv) **'software'** means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium;
- (v) **'specified authority'** means the person or the authority to whom the declaration as specified in Regulation 3 is to be furnished;

3. Declaration of exports:

In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –



In respect of export of services to which none of the Forms specified in these Regulations apply: the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due / accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

4. Exemptions:

Notwithstanding anything contained in Regulation 3, export of goods / software may be made without furnishing the declaration in the following cases, namely:

- (a) trade samples of goods and publicity material supplied free of payment;
- (b) personal effects of travellers, whether accompanied or unaccompanied;

- (c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;
- (d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value
- (e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;
- (f) goods imported free of cost on re-export basis;
- (g) the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:
 - (1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;
 - (2) goods imported from foreign suppliers/collaborators on loan basis;
 - (3) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.
- (ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs
- (h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.
- (i) goods sent outside India for testing subject to re-import into India;
- (j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.
- (k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

5. Indication of importer-exporter code number:

The importer-exporter code number allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and in

all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

6. Authority to whom declaration is to be furnished and the manner of dealing with the declaration:

Declaration in Form EDF	<p>(i) It shall be submitted in duplicate to the Commissioner of Customs.</p> <p>(ii) After verification and authentication of the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank, and</p> <p>(iii) hand over the duplicate form to the exporter for being submitted to the authorised dealer.</p>
Declaration in Form SOFTEX	<p>(i) It shall be, in respect of export of computer software and audio/video/television software, submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.</p> <p>(ii) After certifying all three copies of the SOFTEX form, the designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter.</p> <p>(iii) The triplicate shall be retained by the designated official for record.</p>

Duplicate Declaration Forms to be retained with Authorised Dealers : On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX shall be retained by the Authorised Dealers.

7. Evidence in support of declaration:-

The Commissioner of Customs or the postal authority or the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance with Section 7 of the Act and these regulations, require such evidence in support of the declaration as may establish that –

- (a) the exporter is a person resident in India and has a place of business in India;

- (b) the destination stated on the declaration is the final place of the destination of the goods exported;
- (c) the value stated in the declaration represents –
 - (i) the full export value of the goods or software; or
 - (ii) where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market.

Explanation—For the purpose of this regulation, 'final place of destination' means a place in a country in which the goods are ultimately imported and cleared through Customs of that country.

8. Manner of payment of export value of goods:

Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 as amended from time to time.

Explanation—For the purpose of this regulation, re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made under Regulation 3, shall be deemed to be realisation of full export value of such goods.

9. Period within which export value of goods/software/ services to be realised:-

- (1) The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided
 - (a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;
 - (b) further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.
- (2) (a) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs),

Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

- (b) The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

- (c) On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.'

Explanation—For the purpose of this regulation, the “date of export” in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

10. Submission of export documents:

The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form:

Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorised dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

11. Transfer of documents:

Without prejudice to Regulation 3, an authorised dealer may accept, for negotiation or collection, shipping documents including invoice and bill of exchange covering exports, from his constituent (not being a person who has signed the declaration in terms of Regulation 3):

Provided that before accepting such documents for negotiation or collection, the authorised dealer shall –

- (a) where the value declared in the declaration does not differ from the value shown in the documents being negotiated or sent for collection, or
- (b) where the value declared in the declaration is less than the value shown in the documents being negotiated or sent for collection, require the constituent concerned also to sign such declaration and thereupon such constituent shall be bound to comply

with such requisition and such constituent signing the declaration shall be considered to be the exporter for the purposes of these Regulations to the extent of the full value shown in the documents being negotiated or sent for collection and shall be governed by these Regulations accordingly.

12. Payment for the Export:

In respect of export of any goods or software for which a declaration is required to be furnished under Regulation 3, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing –

- (i) that the payment for the goods or software is made otherwise than in the specified manner; or
- (ii) that the payment is delayed beyond the period specified under these Regulations; or
- (iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer;

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

- (iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

13. Certain Exports requiring prior approval

Exports under trade agreement/rupee credit etc.

- (i) Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Govt. of a foreign state shall be governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.
- (ii) An export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, shall be governed by the terms and conditions advised by the Reserve Bank to the authorised dealers from time to time.

14. Delay in Receipt of Payment:

Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

- (a) the payment therefor if the goods or software has been sold and
- (b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf;

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

15. Advance payment against exports:

- (1) Where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –
 - (i) the shipment of goods is made within one year from the date of receipt of advance payment;
 - (ii) the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
 - (iii) the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

- (2) Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

16. Issue of directions by Reserve Bank in certain cases:

- (1) Without prejudice to the provisions of Regulation 3 in relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or, as the case may be, the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or special order, direct from time to time that in respect of export of goods or software to any destination or any class of export transactions or any class of goods or software or class of exporters, the exporter shall, prior to the export, comply with the conditions as may be specified in the order, namely ;
 - (a) that the payment of the goods or software is covered by an irrevocable letter of credit or by such other arrangement or document as may be indicated in the order;
 - (b) that any declaration to be furnished to the specified authority shall be submitted to the authorised dealer for its prior approval, which may, having regard to the circumstances, be given or withheld or may be given subject to such conditions as may be specified by the Reserve Bank by directions issued from time to time.
 - (c) that a copy of the declaration to be furnished to the specified authority shall be submitted to such authority or organisation as may be indicated in the order for certifying that the value of goods or software specified in the declaration represents the proper value thereof.
- (2) No direction under sub-regulation (1) shall be given by the Reserve Bank and no approval under clause (b) of that sub-regulation shall be withheld by the Authorised Dealer, unless the exporter has been given a reasonable opportunity to make a representation in the matter.

17. Project exports:

- (1) Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.
- (2) In case a guarantee is required to be given prior to post award approval, the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements. Explanation:

For the purpose of this Regulation, 'approving authority' means the EXIM Bank of India or the authorised dealer



9. REALISATION AND REPATRIATION OF FOREIGN EXCHANGE [SECTION 8]

Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified under the *FEM (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000* by the Reserve Bank.

Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2000

1. **Duty of persons to realise foreign exchange due:** A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain taking any action, which has the effect of securing:
 - (a) that the receipt by him of the whole or part of that foreign exchange is delayed; or
 - (b) that the foreign exchange ceases in whole or in part to be receivable by him.
2. **Manner of Repatriation:**
 - (1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and—
 - (a) sell it to an authorised person in India in exchange for rupees; or
 - (b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
 - (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.
 - (2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.
3. **Period for surrender of realised foreign exchange:** A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of

sub-regulation (1) of regulation 4 [Regulation 4 deals with manner of repatriation as discussed in above point], within the period specified below:-

1. foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
2. in all other cases within a period of ninety days from the date of its receipt.

4. Period for surrender in certain cases:

1. Any person not being an individual resident in India who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.
2. Notwithstanding anything contained in sub-regulation (1), where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person -
 - (a) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and
 - (b) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

5. **Period for surrender of received/ realised/ unspent/ unused foreign exchange by Resident individuals:** A Person being an individual resident in India shall surrender the received/realised/unspent/ unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

6. Exemption

Nothing in these regulations shall apply to foreign exchange in the form of currency of Nepal or Bhutan.

Exemption from realisation and repatriation in certain cases [Section 9]

The provisions of sections 4 and 8 shall not apply to the following, namely:

- (a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify under the *FEM (Possession and Retention of Foreign Currency) Regulations, 2015* ;
- (b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify under the *FEM (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000*.
- (c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing there on which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank ;
- (d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;
- (e) foreign exchange acquired from employment, business, trade, vocation, service, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify in the *FEM (Possession and Retention of Foreign Currency) Regulations, 2015*.; and
- (f) such other receipts in foreign exchange as the Reserve Bank may specify.

For the purposes of clauses (a) and (e) of Section 9 of the Act, the Reserve Bank specified the following limits for possession or retention of foreign currency or foreign coins, namely:

¹³Limits for possession and retention of foreign currency or foreign coins:-

- (i) possession without limit of foreign currency and coins by an authorised person within the scope of his authority;
- (ii) possession without limit of foreign coins by any person;
- (iii) retention by a person resident in India of foreign currency notes, bank notes and foreign currency traveller's cheques not exceeding USD 2,000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques:
 - (a) was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or

¹³ Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 notified vide Notification No. *FEMA. 11(R)/2015-RB dated December 29, 2015*, c.f. G.S.R. No.1006 (E) dated December 29, 2015, which supersedes the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000, dated 4th February, 2016.

- (b) was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or
- (c) was acquired by him by way of honorarium or gift while on a visit to any place outside India; or
- (d) represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

However, a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and traveller's cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.

Explanation: "Not permanently resident" means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.



10. AUTHORISED PERSON [SECTION 10]

- (1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit. [Sub-section (1)].
- (2) An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein [Sub-section (2)].
- (3) An authorisation granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that:
 - (a) it is in public interest so to do; or
 - (b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction order made thereunder;

Provided that no such authorisation shall be revoked on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter.

- (4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised

person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

- (5) An authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonable satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason the believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank.
- (6) Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provision of the Act for the purpose of this section.

Reserve Bank's powers to issue directions to authorised person [Section 11]

- (1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.
- (2) The Reserve Bank may, for the purpose of ensuring the compliance with the provisions of this Act or of any rule, regulation, notification direction or order made thereunder, direct any authorised person to furnish such information, in such manner, as it deems fit.
- (3) Where any authorised person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being head, impose on the authorised person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

Power of Reserve Bank to inspect authorised person [Section 12]

- (1) The Reserve Bank may, at any time, cause an inspection to be made by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, of the

business of any authorised person as may appear to it to be necessary or expedient for the purpose of:

- (a) verifying the correctness of any statement, information or particulars furnished to the Reserve Bank;
 - (b) obtaining any information or particulars which such authorised person has failed to furnish on being called upon to do so;
 - (c) securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made thereunder.
- (2) It shall be the duty of every authorised person, and where such person is a company or a firm, every director, partner or other officer of such company or firm, as the case may be, to produce to any officer making an inspection under sub-section (1), such books, accounts and other documents in his custody or power and to furnish any statement or information relating to the affairs of such person, company or firm as the said officer may require within such time and in such manner as the said officer may direct.



11. CONTRAVENTIONS AND PENALTIES IN BRIEF

Section No.	Contravention	Quantum of Penalty
Section 11	Authorised person contravenes any direction by RBI or failure to file any return as directed by RBI	<ul style="list-style-type: none"> ➤ Upto ₹ 10,000. ➤ If continuing offence additional penalty upto ₹ 2,000 per day.
Section 13	Of any provision of the Act, or any rule, regulation, notification, direction or order or of any condition subject to which an authorisation issued	<ul style="list-style-type: none"> ➤ Upto three times, the sum involved, if it is quantifiable. ➤ If not quantifiable upto ₹ 2 lacs. ➤ If continuing, further penalty upto ₹ 5,000 per day after first day.
Section 13(1A) and 13(1C)	Acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A	<ul style="list-style-type: none"> ➤ Upto three times, the sum involved. ➤ confiscation of the value equivalent of foreign assets involved in contravention, situated in India. ➤ Imprisonment upto 5 years with a fine if the amount of contravention exceeds the threshold prescribed under the proviso to sub-section (1) of section 37A.

Section 14	Failure to pay penalty as above – where demand is of an amount exceeding ₹ 1 crore. – in any other case	Civil imprisonment. ➤ Upto 3 years ➤ Upto 6 months.
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Penalties [Section 13]

- (1) If any person contravenes any provisions of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day which the contravention continues.
- (1A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.
- (1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.
- (1C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.
- (1D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).
- (2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the person committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with directions made in this behalf.

Explanation: For the purposes of this sub-section, “property” in respect of which contravention has taken place, shall include:

- (a) deposits in a bank, where the said property is converted into such deposits;
- (b) Indian currency, where the said property is converted into that currency; and
- (c) any other property, which has resulted out of the conversion of that property.

Enforcement of the orders of Adjudicating Authority [Section 14]

- (1) Subject to the provisions of sub-section (2) of section 19, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section.
- (2) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied:
 - (a) that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred concealed, or removed any part of his property, or
 - (b) that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to do so.
- (3) Notwithstanding anything contained in sub-section (1), a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating Authority is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.
- (4) Where appearance is not made pursuant to a notice issued and served under sub-section (1), the Adjudicating Authority may issue a warrant for the arrest of the defaulter.
- (5) A warrant of arrest issued by the Adjudicating Authority under sub-section (3) or sub-section (4) may also be executed by any other adjudicating authority within whose jurisdiction the defaulter may for the time being be found.
- (6) Every person arrested in pursuance of a warrant of arrest under this section shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey);

Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him.

Explanation: For the purposes of this sub-section, where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter.

- (7) When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority under this Section, the Adjudicating Authority shall give the defaulter an opportunity showing cause when he should not be committed to the civil prison.
- (8) Pending the conclusion of the inquiry, the adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required.
- (9) Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or lease him on his furnishing security to the satisfaction of the adjudicating authority for his appearance at the expiration of the specified period if the arrears are not satisfied.

- (10) When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release.
- (11) Every person detained in the civil prison in execution of the certificate may be so detained:
 - (a) where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and
 - (b) in any other case, up to six months:

Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison.

- (12) A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison.
- (13) A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973.

Power to recover arrears of penalty [Section 14A]

- (1) Save as otherwise provided in this Act, the Adjudicating Authority may, by order in writing, authorise an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.
- (2) The officer referred to in sub-section (1) shall exercise all the like powers which are conferred on the income-tax authority in relation to recovery of tax under the Income-tax Act, 1961 and the procedure laid down under the Second Schedule to the said Act shall mutatis mutandis apply in relation to recovery of arrears of penalty under this Act.



12. COMPOUNDING OF OFFENCES

Compounding Authority: Persons authorized by Central Government under section 15 (classes of officers of the Enforcement Directorate and classes of officers of the RBI) can act as Compounding Authority.

According to section 15:

- (1) Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed in *the Foreign Exchange (Compounding Proceedings) Rules, 2000*.
- (2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.



13. ADJUDICATION AND APPEAL

Time limits

Section No.	Obligation	Time Limit
Section 14	Full penalty to be paid	Within 90 days from the date on which notice for payment of penalty is served.
Section 15	Compounding of Contravention under section 13	Within 180 days of receipt of application by Directorate of

		Enforcement or RBI.
Section 16	Complaint under section 16(1) to be dealt by Adjudicated Authority	Dispose of the complaint within 1 year of receipt of complaint.
Section 17	Appeal to Special Director (Appeals)	Appeal shall be filed within 45 days from receipt of order.
Section 19	Appeal to Appellate Tribunal	Appeal shall be filed within 45 days from receipt of order.
Section 19(5)	Appeal to be dealt with by Appellate Tribunal	Try to dispose off the appeal within 180 days from receipt of appeal.
Section 35	Appeal to High Court	Appeal to be filed within 60 days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising.

Appointment of Adjudicating Authority [Section 16]

For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed under *the FEM (Adjudication Proceedings and Appeal) Rules, 2000*, after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. [Section 16 (1)]

Adjudicating Authority shall hold an enquiry under section 16 (1) only upon a complaint in writing made by any officer authorized by a general or special order by the Central Government. [Section 16 (3)].

The said person may appear either in person or take the assistance of a legal practitioner / a chartered accountant for presenting his case before the Adjudicating Authority. [Section 16(4)]

Every Adjudicating Authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under section 28(2). [Section 16(5)]

Every Adjudicating Authority shall deal with the complaint as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint:

Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period. .[Section 16(6)]

Appeal to Special Director (Appeals) [Section 17]

- (1) The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.
- (2) Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal of the Special Director (Appeals).
- (3) Every appeal under sub-section (1) shall be filed within 45 days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed in *FEM (Adjudication Proceedings and Appeal) Rules, 2000*:

Provided that the Special Director (Appeals) may entertain an appeal after the expiry of the said period of 45 days, if he is satisfied that there was sufficient cause for not filing it within that period.

- (4) On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.
- (5) The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority.
- (6) The Special Director (Appeals) shall have the same powers of a civil court which are conferred on the Appellate Tribunal under section 28(2) and-
 - (a) all proceedings before him shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code;
 - (b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973.

Appellate Tribunal [Section 18]

The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

Appeal to Appellate Tribunal [Section 19]

(1) Save as provided in sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in sub-section (1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal:

Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed in the *FEM (Adjudication Proceedings and Appeal) Rules, 2000*:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal: Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing off the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority under section 16 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

Right of appellant to take assistance of legal practitioner or chartered accountant and of Government, to appoint presenting officers [Section 32]

(1) A person preferring an appeal to the Appellate Tribunal or the Special Director (Appeals) under this Act may either appear in person or take the assistance of a legal practitioner or a chartered accountant of his choice to present his case before the Appellate Tribunal or the Special Director

(Appeals), as the case may be.

(2) The Central Government may authorise one or more legal practitioners or chartered accountants or any of its officers to act as presenting officers and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal or the Special Director (Appeals), as the case may be.

Civil court not to have jurisdiction [Section 34]

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Appeal to High Court [Section 35]

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Explanation: In this section "High Court" means:

- (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
- (b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.



14. DIRECTORATE OF ENFORCEMENT

Directorate of Enforcement [Section 36]

- (1) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.
- (2) Without prejudice to provisions of sub-section (1), the Central Government may authorise the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.
- (3) Subject to such conditions and limitations as the Central Government may impose, an officer

of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

Power of search and seizure [Section 37]

- (1) The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.
- (2) Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.
- (3) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 and shall exercise such powers, subject to such limitations laid down under that Act.

Special provisions relating to assets held outside India in contravention of section 4 [Section 37A]

- (1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property:

Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

- (2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.
- (3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

Explanation.—While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

- (4) The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1):

Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-section (1).

- (5) Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal.
- (6) Nothing contained in section 15 shall apply to this section.

Empowering other officers [Section 38]

- (1) The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of customs or any central excise officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be stated in the order.
- (2) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on the income-tax authorities under the Income-tax Act, 1961, subject to such conditions and limitations as the Central Government may impose.

15. MISCELLANEOUS

Presumption as to documents in certain cases [Section 39]

Where any document:

- (i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or
- (ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any contravention under this Act alleged to have been committed by any person,

and such document is tendered in any proceeding under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court or the Adjudicating Authority, as the case may be, shall:

- (a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have

- been so executed or attested;
- (b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;
 - (c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document.

Suspension of operation of this Act [Section 40]

- (1) If the Central Government is satisfied that circumstances have arisen rendering it necessary that any permission granted or restriction imposed by this Act should cease to be granted or imposed, or if it considers necessary or expending so to do in public interest, the Central Government may, by notification, suspend or relax to such extent either indefinitely or for such period as may be notified, the operation of all or any of the provisions of this Act.
- (2) Where the operation of any provision of this Act has under sub-section (1) been suspended or relaxed indefinitely, such suspension or relaxation may, at any time while this Act remains in force, be removed by the Central Government by notification.
- (3) Every notification issued under this section shall be laid, as soon as may be after it issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be issued, the notification shall there after have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

Power of Central Government to give directions [Section 41]

For the purposes of this Act, the Central Government may, from time to time, give to the Reserve bank such general or special directions as it thinks fit, and the Reserve bank shall, in the discharge of its functions under this Act, comply with any such directions.

Contravention by companies [Section 42]

- (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly [Sub-section (1)].

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

- (2) Notwithstanding anything contained in sub-section (1), where contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purpose of this Section—

- (i) “Company” means any body corporate and includes a firm or other association of individuals; and
- (ii) “Director” in relation to a firm, means a partner in the firm.

Death or insolvency in certain cases [Section 43]

Any right, obligation, liability, proceedings or appeal arising in relation to the provision of section 13 shall not abate by reason of death or insolvency of the person liable under that section and upon such death or insolvency such rights and obligations shall devolve on the legal representative of such person or the official receiver or the official assignee, as the case may be:

Provided that a legal representative of the deceased shall be liable only to the extent of the inheritance or estate of the deceased.

Bar Legal proceedings [Section 44]

No suit, prosecution or other legal proceeding shall lie against the Central Government or the Reserve Bank or any officer of that Government or of the Reserve Bank or other person exercising any power or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule, regulation, notification, direction or order made thereunder.

Repeal and saving [Section 49]

- (1) The Foreign Exchange Regulation Act, 1973 is hereby repealed and the Appellate Board constituted under sub-section (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.
- (2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such

immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

- (3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.
- (4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.
- (5) Notwithstanding such repeal:
 - (a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.
 - (b) any appeal preferred to the Appellate Board under sub-section (2) of section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act.
 - (c) every appeal from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

- (6) Save as otherwise provided in sub-section (3), the mention of particular matters in sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general applications of Section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.

Students may note that though they are not expected to know the details of all the Rules/Regulations/Clarifications/Notifications issued by various authorities from time to time. However, they should familiarise with such Notifications and other significant rules/regulations having a bearing on such provisions of the Act and which are covered as part of the Study Material and Revision Test Papers published from time to time.

ANNEXURE

FOREIGN EXCHANGE MANAGEMENT (CURRENT ACCOUNT TRANSACTIONS) RULES, 2000

GSR 381(E), dated 3-5-2000 - In exercise of the powers conferred by section 5 and sub-section (1) and clause (a) of sub-section (2) of section 46 of the Foreign Exchange Management Act, 1999, and in consultation with the Reserve Bank, the Central Government having considered it necessary in the public interest, makes the following rules, namely:—

1. Short title and commencement.

- (1) These rules may be called the Foreign Exchange Management (Current Account Transactions) Rules, 2000.
- (2) They shall come into effect on the 1st day of June, 2000.

2. Definitions

In these rules, unless the context otherwise requires,—

- (a) "Act" means the Foreign Exchange Management Act, 1999 (42 of 1999);
- (b) "Drawal" means drawal of foreign exchange from an authorised person and includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM Card or any other thing by whatever name called which has the effect of creating foreign exchange liability;
- (c) "Schedule" means a schedule appended to these rules;
- (d) the words and expressions not defined in these rules but defined in the Act shall have the same meanings respectively assigned to them in the Act.

3. Prohibition on drawal of Foreign Exchange.

Drawal of foreign exchange by any person for the following purpose is prohibited, namely:

- (a) a transaction specified in the Schedule I; or
- (b) a travel to Nepal and/or Bhutan; or
- (c) a transaction with a person resident in Nepal or Bhutan:

Provided that the prohibition in clause (c) may be exempted by RBI subject to such terms and conditions as it may consider necessary to stipulate by special or general order.

4. Prior approval of Government of India.

No person shall draw foreign exchange for a transaction included in the Schedule II without prior approval of the Government of India:

Provided that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

5. Prior approval of Reserve Bank.

Every drawal of foreign exchange for transactions included in Schedule III shall be governed as provided therein:

Provided that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

- 6.** (1) Nothing contained in rule 4 or rule 5 shall apply to drawal made out of funds held in Exchange Earners' Foreign Currency (EEFC) account of the remitter.
- (2) Notwithstanding anything contained in sub-rule (1), restrictions imposed under rule 4 or rule 5 shall continue to apply where the drawal of foreign exchange from the Exchange Earners' Foreign Currency (EEFC) account is for the purpose specified in items 10 and 11 of Schedule II, or items 3, 4, 11, 16 and 17 of Schedule III as the case may be.

7. Use of International Credit Card while outside India.

Nothing contained in rule 5 shall apply to the use of International Credit Card for making payment by a person towards meeting expenses while such person is on a visit outside India.

SCHEDULE I

Transactions which are prohibited

(See Rule 3)

1. Remittance out of lottery winnings.
2. Remittance of income from racing/riding, etc., or any other hobby.
3. Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
4. Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
5. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.

6. Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
7. Payment related to "Call Back Services" of telephones.
8. Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

SCHEDULE II

Transactions which require prior approval of the Central Government

(See Rule 4)

	Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
1	Cultural Tours	Ministry of Human Resources Development (Department of Education and Culture)
2	Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US\$ 10,000) by a State Government and its Public Sector Undertakings.	Ministry of Finance, Department of Economic Affairs
3	Remittance of freight of vessel chartered by a PSU	Ministry of Finance, Department of Economic Affairs
4	Payment of import [through ocean transport] by a Govt. Department or a PSU on c.i.f. basis	Ministry of Surface Transport (Chartering Wing) (i.e., other than f.o.b. and f.a.s. basis)
5	Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
6	Remittance of hiring charges of transponders by	
	(a) TV Channels	Ministry of Information and Broadcasting
	(b) Internet service providers	Ministry of Communication and Information Technology
7	Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
8	[***]	[***]

9	Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US \$ 100,000	Ministry of Human Resource Development (Department of Youth Affairs and Sports)
10	[***]	
11	Remittance for membership of P & I Club	Ministry of Finance (Insurance Division)

SCHEDULE III

(See rule 5)

Facilities for individuals

1. Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India:

- (i) Private visits to any country (except Nepal and Bhutan).
- (ii) Gift or donation.
- (iii) Going abroad for employment.
- (iv) Emigration.
- (v) Maintenance of close relatives abroad.
- (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up.
- (vii) Expenses in connection with medical treatment abroad.
- (viii) Studies abroad.
- (ix) Any other current account transaction:

Provided that for the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (hereinafter referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Provided further that if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be

reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Provided also that for a person who is resident but not permanently resident in India and—

- (a) is a citizen of a foreign State other than Pakistan; or
- (b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

Provided also that a person other than an individual may also avail of foreign exchange facility, mutatis mutandis, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned hereinabove.

Facilities for persons other than individual

2. The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:

- (i) Donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for—
 - (a) creation of Chairs in reputed educational institutes,
 - (b) contribution to funds (not being an investment fund) promoted by educational institutes; and
 - (c) contribution to a technical institution or body or association in the field of activity of the donor Company.
- (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five per cent of the inward remittance whichever is more.
- (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

Explanation: For the purposes of this sub-paragraph, the expression "infrastructure" shall mean as defined in Explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated the May 3, 2000.

- (iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

Procedure

- 3. The procedure for drawal or remit of any foreign exchange under this Schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

FED Master Direction No. 7/2015-16- Liberalised Remittance Scheme (LRS) dated January 1, 2016

1. The captioned Scheme was introduced on February 4, 2004, vide A.P. (DIR Series) Circular No. 64 dated February 4, 2004 read with GoI Notification G.S.R. No.207(E) dated March 23, 2004, as a liberalization measure to facilitate resident individuals to remit funds abroad for permitted current or capital account transactions or combination of both. These Regulations are amended from time to time to incorporate the changes in the regulatory framework and published through amendment notifications.
2. Within the contours of the Regulations, Reserve Bank of India also issues directions to Authorised Persons under Section 11 of the Foreign Exchange Management Act (FEMA), 1999. These directions lay down the modalities as to how the foreign exchange business has to be conducted by the Authorised Persons with their customers/constituents with a view to implementing the regulations framed.
3. This Master Direction consolidates the existing instructions on the "**Liberalised Remittance Scheme**" at one place. Reporting instructions can be found in Master Direction on reporting ([Master Direction No. 18 dated January 1, 2016](#))
4. It may be noted that, whenever necessary, Reserve Bank shall issue directions to Authorised Persons through A.P. (DIR Series) Circulars in regard to any change in the Regulations or the manner in which relative transactions are to be conducted by the Authorised Persons with their customers/ constituents. The Master Direction issued herewith shall be amended suitably simultaneously.

Master Direction - Liberalised Remittance Scheme (LRS)

A. Liberalised Remittance Scheme (LRS) of USD 2,50,000 for resident individuals

1. Under the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 2,50,000 per Financial Year (April March) for any permitted current or capital account transaction or a combination of both. The Scheme is not available to corporates, partnership firms, HUF, Trusts, etc.
2. The LRS limit has been revised in stages consistent with prevailing macro and micro economic conditions. During the period from February 4, 2004 till date, the LRS limit has been revised as under:

(Amount in USD¹⁴)

Date	Feb 4, 2004	Dec 20, 2006	May 8, 2007	Sep 26, 2007	Aug 14, 2013	Jun 3, 2014	May 26, 2015
LRS limit (USD)	25,000	50,000	1,00,000	2,00,000	75,000	1,25,000	2,50,000

3. The Scheme is available to all resident individuals including minors. In case of remitter being a minor, ¹⁵ the Form A2 must be countersigned by the minor's natural guardian.
4. Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions. However, clubbing is not permitted by other family members for capital account transactions such as opening a bank account/investment/purchase of property, if they are not the co-owners/co-partners of the overseas bank account/ investment/property. Further, a resident cannot gift to another resident, in foreign currency, for the credit of the latter's foreign currency account held abroad under LRS.
5. All other transactions which are otherwise not permissible under FEMA and those in the nature of remittance for margins or margin calls to overseas exchanges/ overseas counterparty are not allowed under the Scheme.
6. The permissible capital account transactions by an individual under LRS are:
 - (i) opening of foreign currency account abroad with a bank;
 - (ii) purchase of property abroad;

¹⁴ Omitted

¹⁵ Inserted vide [AP \(Dir Series\) circular 50 dated February 11, 2016](#). Prior to insertion this read as "the LRS declaration form."

- (iii) making investments abroad- acquisition and holding shares of both listed and unlisted overseas company or debt instruments; ¹⁶acquisition of qualification shares of an overseas company for holding the post of Director; acquisition of shares of a foreign company towards professional services rendered or in lieu of Director's remuneration; investment in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes;
 - (iv) setting up Wholly Owned Subsidiaries and Joint Ventures (with effect from August 05, 2013) outside India for bonafide business subject to the terms & conditions stipulated in [Notification No FEMA.263/ RB-2013 dated March 5, 2013](#);
 - (v) extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 1956.
7. The limit of USD 2,50,000 per Financial Year (FY) under the Scheme also includes/subsumes remittances for current account transactions (viz. private visit; gift/donation; going abroad on employment; emigration; maintenance of close relatives abroad; business trip; medical treatment abroad; studies abroad) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015. Release of foreign exchange exceeding USD 2,50,000, requires prior permission from the Reserve Bank of India.

a. Private visits

For private visits abroad, other than to Nepal and Bhutan, any resident individual can obtain foreign exchange up to an aggregate amount of USD 2,50,000, from an Authorised Dealer or FFMC, in any one financial year, irrespective of the number of visits undertaken during the year.

Further, all tour related expenses including cost of rail/road/water transportation; cost of Euro Rail; passes/tickets, etc. outside India; and overseas hotel/lodging expenses shall be subsumed under the LRS limit. The tour operator can collect this amount either in Indian rupees or in foreign currency from the resident traveller.

b. Gift/donation

Any resident individual may remit up-to USD 2,50,000 in one FY as gift to a person residing outside India or as donation to an organization outside India.

c. Going abroad on employment

A person going abroad for employment can draw foreign exchange up to USD 2,50,000 per FY from any Authorised Dealer in India.

¹⁶ Modified with effect from March 28, 2012. [Notification No. 277/2013-RB dated May 08, 2013](#).

d. Emigration

A person wanting to emigrate can draw foreign exchange from AD Category I bank and AD Category II up to the amount prescribed by the country of emigration or USD 250,000. Remittance of any amount of foreign exchange outside India in excess of this limit may be allowed only towards meeting incidental expenses in the country of immigration and not for earning points or credits to become eligible for immigration by way of overseas investments in government bonds; land; commercial enterprise; etc.

e. Maintenance of close relatives abroad

A resident individual can remit up-to USD 2,50,000 per FY towards maintenance of close relatives [‘relative’ as defined in Section 6 of the Indian Companies Act, 1956] abroad.

f. Business trip

Visits by individuals in connection with attending of an international conference, seminar, specialised training, apprentice training, etc., are treated as business visits. For business trips to foreign countries, resident individuals can avail of foreign exchange up to USD 2,50,000 in a FY irrespective of the number of visits undertaken during the year.

However, if an employee is being deputed by an entity for any of the above and the expenses are borne by the latter, such expenses shall be treated as residual current account transactions outside LRS and may be permitted by the AD without any limit, subject to verifying the bonafides of the transaction.

g. Medical treatment abroad

Authorised Dealers may release foreign exchange up to an amount of USD 2,50,000 or its equivalent per FY without insisting on any estimate from a hospital/doctor. For amount exceeding the above limit, Authorised Dealers may release foreign exchange under general permission based on the estimate from the doctor in India or hospital/doctor abroad. A person who has fallen sick after proceeding abroad may also be released foreign exchange by an Authorised Dealer (without seeking prior approval of the Reserve Bank of India) for medical treatment outside India.

In addition to the above, an amount up to USD 250,000 per financial year is allowed to a person for accompanying as attendant to a patient going abroad for medical treatment/check-up.

h. Facilities available to students for pursuing their studies abroad.

AD Category I banks and AD Category II, may release foreign exchange up to USD 2,50,000 or its equivalent to resident individuals for studies abroad without insisting on any estimate from the foreign University. However, AD Category I bank and AD Category II may allow remittances (without seeking prior approval of the Reserve Bank of India) exceeding USD 2,50,000 based on the estimate received from the institution abroad.

8. Remittances under the Scheme can be used for purchasing objects of art subject to the provisions of other applicable laws such as the extant Foreign Trade Policy of the Government of India.
9. The Scheme can be used for outward remittance in the form of a DD either in the resident individual's own name or in the name of beneficiary with whom he intends putting through the permissible transactions at the time of private visit abroad, against self-declaration of the remitter in the format prescribed.
10. Individuals can also open, maintain and hold foreign currency accounts with a bank outside India for making remittances under the Scheme without prior approval of the Reserve Bank. The foreign currency accounts may be used for putting through all transactions connected with or arising from remittances eligible under this Scheme.
11. Banks should not extend any kind of credit facilities to resident individuals to facilitate capital account remittances under the Scheme.
12. The Scheme is not available for remittances for any purpose specifically prohibited under Schedule I or any item restricted under Schedule II of Foreign Exchange Management (Current Account Transaction) Rules, 2000, dated May 3, 2000, as amended from time to time.
13. The Scheme is not available for capital account remittances to countries identified by Financial Action Task Force (FATF) as non-co-operative countries and territories as available on FATF website www.fatf-gafi.org or as notified by the Reserve Bank. Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks is also not permitted.
14. Documentation by the remitter

The individual will have to designate a branch of an AD through which all the remittances under the Scheme will be made. The resident individual seeking to make the remittance should furnish ¹⁷ Form A2 as at Annex for purchase of foreign exchange under LRS.

¹⁷ Inserted vide [AP \(Dir Series\) Circular 50 dated February 11, 2016](#). Prior to insertion it read as "Form A-2 as at Annex-1 and

15. It is mandatory to have PAN card to make remittances under the Scheme for capital account transactions. However, PAN card need not be insisted upon for remittances made towards permissible current account transactions up to USD 25,000.
16. Investor, who has remitted funds under LRS can retain, reinvest the income earned on the investments. At present, the resident individual is not required to repatriate the funds or income generated out of investments made under the Scheme. However, a resident individual who has made overseas direct investment in the equity shares; compulsorily convertible preference shares of a JV/WoS outside India¹⁸, within the LRS limit, shall have to comply with the terms and conditions prescribed by the overseas investment guidelines under [Notification No. FEMA 263/RB-2013 dated March 5, 2013](#).
17. Facility to grant loan in rupees to NRI/ PIO close relative under the Scheme
Resident individual is permitted to lend to a Non-resident Indian (NRI)/ Person of Indian Origin (PIO) close relative ['relative' as defined in Section 6 of the Indian Companies Act, 1956] by way of crossed cheque/ electronic transfer subject to the following conditions:
 - (i) the loan is free of interest and the minimum maturity of the loan is one year;
 - (ii) the loan amount should be within the overall limit under the Liberalised Remittance Scheme of USD 2,50,000 per financial year available for a resident individual. It would be the responsibility of the resident individual to ensure that the amount of loan granted by him is within the LRS limit and all the remittances made by the resident individual during a given financial year including the loan together have not exceeded the limit prescribed under LRS;
 - (iii) the loan shall be utilized for meeting the borrower's personal requirements or for his own business purposes in India.
 - (iv) the loan shall not be utilized, either singly or in association with other person for any of the activities in which investment by persons resident outside India is prohibited, namely:
 - (a) The business of chit fund, or
 - (b) Nidhi Company, or
 - (c) Agricultural or plantation activities or in real estate business, or construction of farm houses, or
 - (d) Trading in Transferable Development Rights (TDRs).

Application-cum-Declaration for purchase of foreign exchange under LRS as per Annex-2"

¹⁸ Deleted the word 'or ESOPs' in terms of [AP \(DIR Series\) Circular No. 97 dated March 28, 2012](#) and [Notification No. 277/2013-RB dated May 08, 2013](#).

Explanation: For the purpose of item (c) above, real estate business shall not include development of townships, construction of residential/ commercial premises, roads or bridges.

- (v) the loan amount should be credited to the NRO a/c of the NRI / PIO. Credit of such loan amount may be treated as an eligible credit to NRO a/c;
 - (vi) the loan amount shall not be remitted outside India; and
 - (vii) repayment of loan shall be made by way of inward remittances through normal banking channels or by debit to the Non-resident Ordinary (NRO) / Non-resident External (NRE) / Foreign Currency Non-resident (FCNR) account of the borrower or out of the sale proceeds of the shares or securities or immovable property against which such loan was granted.
18. A resident individual can make a rupee gift to a NRI/PIO who is a relative of the resident individual ['relative' as defined in Section 6 of the Companies Act, 1956] by way of crossed cheque /electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) a/c of the NRI / PIO and credit of such gift amount may be treated as an eligible credit to NRO a/c. The gift amount would be within the overall limit of USD 250,000 per FY as permitted under the LRS for a resident individual. It would be the responsibility of the resident donor to ensure that the gift amount is within the LRS limit and all the remittances made by the donor during the financial year including the gift amount have not exceeded the limit prescribed under the LRS.

B. Operational instructions to Authorised Persons

1. Authorized Persons may carefully study the provisions of the Act / Regulations / Notifications issued under Foreign Exchange Management Act, 1999.
2. The Reserve Bank will not, generally, prescribe the documents which should be verified by the Authorised Persons while releasing foreign exchange for current account transactions. In this connection, attention of authorized persons is drawn to sub-section (5) of Section 10 of the FEMA, 1999 which provides that an authorised person shall require any person desiring to transact in foreign exchange to make such a declaration and to give such information as will reasonably satisfy him that the transaction will not involve and is not designed for the purpose of any contravention or evasion of the provisions of the FEMA or any rule, regulation, notification, direction or order issued there under.
3. With a view to maintaining uniform practices, Authorized Dealers may consider requirements or documents to be obtained by their branches to ensure compliance with provisions of sub-section (5) of section 10 of the Act.
4. Authorised Dealers are also required to keep on record any information / documentation, on the basis of which the transaction was undertaken for verification by the Reserve Bank. In

case the applicant refuses to comply with any such requirement or makes unsatisfactory compliance therewith, the Authorised Dealer shall refuse, in writing, to undertake the transaction and shall, if he has reasons to believe that any contravention / evasion is contemplated by the person, report the matter to the Reserve Bank.

5. Reserve Bank of India will not issue any instructions under the FEMA, regarding the procedure to be followed in respect of deduction of tax at source while allowing remittances to the non-residents. It shall be mandatory on the part of Authorised Dealers to comply with the requirement of the tax laws, as applicable.
6. While allowing the facility to resident individuals, Authorised Dealers are required to ensure that "Know Your Customer" guidelines have been implemented in respect of bank accounts. They should also comply with the Anti-Money
7. Laundering Rules in force while allowing the facility.
8. The applicants should have maintained the bank account with the bank for a minimum period of one year prior to the remittances for capital account transactions. If the applicant seeking to make the remittances is a new customer of the bank, Authorised Dealers should carry out due diligence on the opening, operation and maintenance of the account. Further, the Authorised Dealers should obtain bank statement for the previous year from the applicant to satisfy themselves regarding the source of funds. If such a bank statement is not available, copies of the latest Income Tax Assessment Order or Return filed by the applicant may be obtained.
9. The Authorised Dealer should ensure that the payment is received out of funds belonging to the person seeking to make the remittances, by a cheque drawn on the applicant's bank account or by debit to his account or by Demand Draft / Pay Order. Authorised Dealer may also accept the payment through credit /debit/prepaid card of the card holder.
10. The Authorised Dealer should certify that the remittance is not being made directly or indirectly by /or to ineligible entities and that the remittances are made in accordance with the instructions contained herein.
11. AD bank should not extend any kind of credit facilities to resident individuals to facilitate remittances for capital account transactions under the Scheme.
12. Authorised Dealer may keep a record of the countries identified by FATF as nonco-operative countries and territories and accordingly update the list from time to time for necessary action by their branches handling the transactions under the Liberalised Remittance Scheme. For this purpose, they may access the website www.fatf-gafi.org to obtain the latest list of nonco-operative countries notified by FATF.
13. The remittances made under this Scheme will be reported in the R-Return in the normal course. The Authorised Dealers may also prepare and keep on record dummy Form A2, in respect of remittances less than USD 25,000. In addition, AD banks would also furnish

information on the number of applicants and total amount remitted under the Scheme, on a monthly basis, to the Reserve Bank of India, through the Online Return Filing System (ORFS).

14. A number of foreign banks operating in India as well as Indian banks have been soliciting (through advertisements) foreign currency deposits (from residents under LRS) [on behalf of overseas mutual funds] or for placing at their overseas branches. These advertisements may not always contain appropriate disclosures to guide potential depositors giving rise to concerns from the point of view of protecting the interest of the resident individuals. Further, marketing in India of schemes soliciting foreign currency deposits by foreign entities, not having operational presence in India, also raises supervisory concerns. Therefore, all banks, both Indian and foreign, including those not having an operational presence in India, should seek prior approval from RBI for the schemes being marketed by them in India to residents either for soliciting foreign currency deposits for their foreign/overseas branches or for acting as agents for overseas mutual funds or any other foreign financial services company. The applications in this regard may be addressed to the Chief General Manager-in-Charge, Department of Banking Regulations, Reserve Bank of India, Central Office, 12th Floor, Fort, Mumbai -400001.

(To be completed by the applicant)

(For payments other than imports and remittances covering intermediary trade)

AD Code No. _____

Form No. _____

(To be filled in by the Authorised Dealer)

**Application for
Remittance Abroad**

Currency _____ Amount _____ Equivalent to Rs. _____

(To be completed by the Authorised Dealer)

¹⁹Annex FORM A2

I/We _____

(Name of applicant remitter)

PAN No. _____ (For remittances exceeding USD 25,000 and for all capital account transactions)

¹⁹ Inserted vide [AP \(Dir\) series Circular 50 dated February 11, 2016](#). Prior to insertion it read as Annex 1, which has since been replaced with effect from the same date.

Address _____ authorize

(Name of AD branch)

To debit my Savings Bank/ Current/ RFC/ EEFC A/c. No. _____ together with their charges and

- *a) Issue a draft : Beneficiary's Name _____
 Address _____
- *b) Effect the foreign exchange remittance directly _____
 1) Beneficiary's Name _____
 2) Name and address of the bank _____
 3) Account No. _____
- *c) Issue travelers cheques for _____
- d) Issue foreign currency notes for _____
 Amount (specify currency) _____

* (Strike out whichever is not applicable) for the purpose/s indicated below

Sr. No.	Whether under LRS (Yes/No)	Purpose Code	Description
		As per the Annex	

(Remitter should put a tick (✓) against an appropriate purpose code. In case of doubt/ difficulty, the AD bank should be consulted).

Declaration

(Under FEMA 1999)

1. # I,(Name), hereby declare that the total amount of foreign exchange purchased from or remitted through, all sources in India during the financial year including this application is within the overall limit of the Liberalised Remittance Scheme prescribed by the Reserve Bank of India and certify that the source of funds for making the said remittance belongs to me and the foreign exchange will not be used for prohibited purposes.

Details of the remittances made/transactions effected under the Liberalised Remittance Scheme in the current financial year (April- March)

<i>Sl. No</i>	<i>Date</i>	<i>Amount</i>	<i>Name and address of AD branch/FFMC through which the transaction has been effected</i>

The total amount of foreign exchange purchased from or remitted through, all sources in India during this calendar year including this application is within USD _____ (USD _____) the annual limit prescribed by Reserve Bank of India for the said purpose.

2. # Foreign exchange purchased from you is for the purpose indicated above.

(Strike out whichever is not applicable)

Signature of the applicant

(Name)

Date:

Certificate by the Authorised Dealer

This is to certify that the remittance is not being made by/ to ineligible entities and that the remittance is in conformity with the instructions issued by the Reserve Bank from time to time under the Scheme.

Name and designation of the authorised official:

Stamp and seal

Signature:

Date:

Place:

Purpose Codes for Reporting under FETERS**A. Payment Purposes** (for use in BOP file)

Gr. No.	Purpose Group Name	Purpose Code	Description
00	Capital Account	S0017	Acquisition of non-produced non-financial assets (Purchase of intangible assets like patents, copyrights, trademarks etc., land acquired by government, use of natural resources) – Government
		S0019	Acquisition of non-produced non-financial assets (Purchase of intangible assets like patents, copyrights, trademarks etc., use of natural resources) – Non-Government
		S0026	Capital transfers (Guarantees payments, Investment Grand given by the government/international organisation, exceptionally large Non-life insurance claims) – Government
		S0027	Capital transfers (Guarantees payments, Investment Grand given by the Non-government, exceptionally large Non-life insurance claims) – Non-Government
		S0099	Other capital payments not included elsewhere
	Foreign Direct Investments	S0003	Indian Direct investment abroad (in branches & wholly owned subsidiaries) in equity Shares
		S0004	Indian Direct investment abroad (in subsidiaries and associates) in debt instruments
		S0005	Indian investment abroad – in real estate
		S0006	Repatriation of Foreign Direct Investment made by overseas Investors in India – in equity shares
		S0007	Repatriation of Foreign Direct Investment in made by overseas Investors India – in debt instruments
		S0008	Repatriation of Foreign Direct Investment made by overseas Investors in India – in real estate
	Foreign Portfolio Investments	S0001	Indian Portfolio investment abroad – in equity shares
		S0002	Indian Portfolio investment abroad – in debt instruments
		S0009	Repatriation of Foreign Portfolio Investment made by overseas Investors in India – in equity shares
		S0010	Repatriation of Foreign Portfolio Investment made by overseas Investors in India – in debt instruments

	External Commercial Borrowings	S0011	Loans extended to Non-Residents	
		S0012	Repayment of long & medium term loans with original maturity above one year received from Non-Residents	
	Short term Loans	S0013	Repayment of short term loans with original maturity up to one year received from Non-Residents	
	Banking Capital	S0014	Repatriation of Non-Resident Deposits (FCNR(B)/NR(E)RA etc)	
		S0015	Repayment of loans & overdrafts taken by ADs on their own account.	
		S0016	Sale of a foreign currency against another foreign currency	
	Financial Derivatives and Others	S0020	Payments made on account of margin payments, premium payment and settlement amount etc. under Financial derivative transactions.	
		S0021	Payments made on account of sale of share under Employee stock option	
		S0022	Investment in Indian Depositories Receipts (IDRs)	
		S0023	Opening of foreign currency account abroad with a bank	
	External Assistance	S0024	External Assistance extended by India. e.g. Loans and advances extended by India to Foreign governments under various agreements	
		S0025	Repayments made on account of External Assistance received by India.	
	01	Imports	S0101	Advance payment against imports made to countries other than Nepal and Bhutan
			S0102	Payment towards imports- settlement of invoice other than Nepal and Bhutan
S0103			Imports by diplomatic missions other than Nepal and Bhutan	
S0104			Intermediary trade/transit trade, i.e., third country export passing through India	
S0108			Goods acquired under merchanting / Payment against import leg of merchanting trade*	
S0109			Payments made for Imports from Nepal and Bhutan, if any	
02	Transport	S0201	Payments for surplus freight/passenger fare by foreign shipping companies operating in India	

		S0202	Payment for operating expenses of Indian shipping companies operating abroad
		S0203	Freight on imports – Shipping companies
		S0204	Freight on exports – Shipping companies
		S0205	Operational leasing/Rental of Vessels (with crew) – Shipping companies
		S0206	Booking of passages abroad – Shipping companies
		S0207	Payments for surplus freight/passenger fare by foreign Airlines companies operating in India
		S0208	Operating expenses of Indian Airlines companies operating abroad
		S0209	Freight on imports – Airlines companies
		S0210	Freight on exports – Airlines companies
		S0211	Operational leasing / Rental of Vessels (with crew) – Airline companies
		S0212	Booking of passages abroad – Airlines companies
		S0214	Payments on account of stevedoring, demurrage, port handling charges etc. (Shipping companies)
		S0215	Payments on account of stevedoring, demurrage, port handling charges, etc. (Airlines companies)
		S0216	Payments for Passenger - Shipping companies
		S0217	Other payments by Shipping companies
		S0218	Payments for Passenger - Airlines companies
		S0219	Other Payments by Airlines companies
		S0220	Payments on account of freight under other modes of transport (Internal Waterways, Roadways, Railways, Pipeline transports and others)
		S0221	Payments on account of passenger fare under other modes of transport (Internal Waterways, Roadways, Railways, Pipeline transports and others)
		S0222	Postal & Courier services by Air
		S0223	Postal & Courier services by Sea
		S0224	Postal & Courier services by others
03	Travel	S0301	Business travel.
		S0303	Travel for pilgrimage
		S0304	Travel for medical treatment

		S0305	Travel for education (including fees, hostel expenses etc.)
		S0306	Other travel (including holiday trips and payments for settling international credit cards transactions)
05	Construction Services	S0501	Construction of projects abroad by Indian companies including import of goods at project site abroad
		S0502	Cost of construction etc. of projects executed by foreign companies in India.
06	Insurance and Pension Services	S0601	Life Insurance premium except term insurance
		S0602	Freight insurance – relating to import & export of goods
		S0603	Other general insurance premium including reinsurance premium; and term life insurance premium
		S0605	Auxiliary services including commission on insurance
		S0607	Insurance claim Settlement of non-life insurance; and life insurance (only term insurance)
		S0608	Life Insurance Claim Settlements
		S0609	Standardised guarantee services
		S0610	Premium for pension funds
		S0611	Periodic pension entitlements e.g. monthly quarterly or yearly payments of pension amounts by Indian Pension Fund Companies.
		S0612	Invoking of standardised guarantees
07	Financial Services	S0701	Financial intermediation, except investment banking - Bank charges, collection charges, LC charges etc.
		S0702	Investment banking – brokerage, under writing commission etc.
		S0703	Auxiliary services – charges on operation & regulatory fees, custodial services, depository services etc.
08	Telecommunication, Computer & Information Services	S0801	Hardware consultancy/implementation
		S0802	Software consultancy / implementation
		S0803	Data base, data processing charges
		S0804	Repair and maintenance of computer and software
		S0805	News agency services
		S0806	Other information services- Subscription to newspapers, periodicals
		S0807	Off-site software imports

		S0808	Telecommunication services including electronic mail services and voice mail services
		S0809	Satellite services including space shuttle and rockets etc.
09	Charges for the use of intellectual property (not included elsewhere)	S0901	Franchises services
		S0902	Payment for use, through licensing arrangements, of produced originals or prototypes (such as manuscripts and films), patents, copyrights, trademarks and industrial processes etc.
10	Other Business Services	S1002	Trade related services – commission on exports / imports
		S1003	Operational leasing services (other than financial leasing) without operating crew, including charter hire-Airlines companies
		S1004	Legal services
		S1005	Accounting, auditing, book-keeping services
		S1006	Business and management consultancy and public relations services
		S1007	Advertising, trade fair service
		S1008	Research & Development services
		S1009	Architectural services
		S1010	Agricultural services like protection against insects & disease, increasing of harvest yields, forestry services.
		S1011	Payments for maintenance of offices abroad
		S1013	Environmental Services
		S1014	Engineering Services
		1015	Tax consulting services
		S1016	Market research and public opinion polling service
		S1017	Publishing and printing services
		S1018	Mining services like on-site processing services analysis of ores etc.
		S1020	Commission agent services
		S1021	Wholesale and retailing trade services.
		S1022	Operational leasing services (other than financial leasing) without operating crew, including charter hire-Shipping companies

		S1023	Other Technical Services including scientific/space services.
		S1099	Other services not included elsewhere
11	Personal, Cultural & Recreational services	S1101	Audio-visual and related services like Motion picture and video tape production, distribution and projection services.
		S1103	Radio and television production, distribution and transmission services
		S1104	Entertainment services
		S1105	Museums, library and archival services
		S1106	Recreation and sporting activities services
		S1107	Education (e.g. fees for correspondence courses abroad)
		S1108	Health Service (payment towards services received from hospitals, doctors, nurses, paramedical and similar services etc. rendered remotely or on-site)
		S1109	Other Personal, Cultural & Recreational services
12	Govt. not included elsewhere	S1201	Maintenance of Indian embassies abroad
		S1202	Remittances by foreign embassies in India
13	Secondary Income	S1301	Remittance for family maintenance and savings
		S1302	Remittance towards personal gifts and donations
		S1303	Remittance towards donations to religious and charitable institutions abroad
		S1304	Remittance towards grants and donations to other governments and charitable institutions established by the governments.
		S1305	Contributions/donations by the Government to international institutions
		S1306	Remittance towards payment / refund of taxes.
		S1307	Outflows on account of migrant transfers including personal effects
14	Primary Income	S1401	Compensation of employees
		S1402	Remittance towards interest on Non-Resident deposits (FCNR(B)/NR(E)RA, etc.)
		S1403	Remittance towards interest on loans from Non-Residents (ST/MT/LT loans) e.g. External Commercial Borrowings, Trade Credits, etc.

		S1405	Remittance towards interest payment by ADs on their own account (to VOSTRO a/c holders or the OD on NOSTRO a/c.)
		S1408	Remittance of profit by FDI enterprises in India (by branches of foreign companies including bank branches)
		S1409	Remittance of dividends by FDI enterprises in India (other than branches) on equity and investment fund shares
		S1410	Payment of interest by FDI enterprises in India to their Parent company abroad.
		S1411	Remittance of interest income on account of Portfolio Investment in India
		S1412	Remittance of dividends on account of Portfolio Investment in India on equity and investment fund shares
15	Others	S1501	Refunds / rebates / reduction in invoice value on account of exports
		S1502	Reversal of wrong entries, refunds of amount remitted for non-exports
		S1503	Payments by residents for international bidding
		S1504	Notional sales when export bills negotiated/ purchased/ discounted are dishonored/ crystallised/ cancelled and reversed from suspense account
		S1505	Deemed Imports (exports between SEZ, EPZs and Domestic tariff areas)
16	Maintenance and repair services (not included elsewhere)	S1601	Payments on account of maintenance and repair services rendered for Vessels, ships, boats, warships, etc.
		S1602	Payments on account of maintenance and repair services rendered for aircrafts, space shuttles, rockets, military aircrafts, helicopters, etc.
17	Manufacturing services (goods for processing)	S1701	Payments for processing of goods

RBI/2013-14/440**A.P. (DIR Series) Circular No. 90****January 9, 2014****Provisions under section 6 (4) of Foreign Exchange Management Act, 1999 - Clarifications**

Attention of Authorized Dealers is invited to Section 6 (4) of FEMA, 1999 in terms of which a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

1. We have been receiving representations with regards to nature of transactions covered under Section 6(4) of FEMA, 1999. In this regard it is clarified that Section 6(4) of FEMA, 1999 covers the following transactions:
 - (i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
 - (ii) Income earned through employment or business or vocation outside India taken up or commenced while such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
 - (iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.
 - (iv) A person resident in India may freely utilise all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/ or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transaction is not in contravention to extant FEMA provisions.
2. Authorised Dealer Category – I banks may bring the contents of this circular to the notice of their constituents and customers concerned.
3. The directions contained in this circular have been issued under Section 10(4) and Section 11(1) of the FEMA, 1999 (42 of 1999) and are without prejudice to permissions/approvals, if any, required under any other law.

FOREIGN EXCHANGE MANAGEMENT (PERMISSIBLE CAPITAL ACCOUNT TRANSACTIONS) REGULATIONS, 2000

FEMA 1/2000-RB, dated 3-5-2000 [GSR 384(E), dated 3-5-2000] - In exercise of the powers conferred by sub-section (2) of section 6, sub-section (2) of section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), the Reserve Bank of India makes, in consultation with the Central Government, following regulations relating to capital account transactions namely:—

1. Short title and commencement.
 - (i) These Regulations may be called the "Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000".
 - (ii) They shall come into force on the 1st day of June, 2000.
2. In these Regulations, unless the context requires otherwise,—
 - (a) 'Act' means, the Foreign Exchange Management Act, 1999 (42 of 1999);
 - (b) 'Drawal' means drawal of foreign exchange from an authorised person and includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM card or any other thing by whatever name called which has the effect of creating foreign exchange liability;
 - (c) 'Schedule' means a schedule to these Regulations;
 - (d) 'Transferable Development Rights' means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole;
 - (e) The words and expressions used but not defined in these Regulations shall have the same meanings respectively assigned to them in the Act.
3. (1) Capital account transactions of a person may be classified under the following heads, namely:—
 - (A) transactions, specified in Schedule I, of a person resident in India;
 - (B) transactions, specified in Schedule II, of a person resident outside India.(2) Subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules:

Provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

4. Save as otherwise provided in the Act, rules or regulations made thereunder,
- (a) no person shall undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction:

Provided that—

- (a) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank from time to time for a capital account transaction specified in Schedule I.

Explanation: Drawal of foreign exchange as per item number 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May, 2000 as amended from time to time, shall be subsumed within the limit under proviso (a) above.

- (b) where the drawal of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds USD 250,000 per financial year, or as decided by Reserve Bank from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal:

Provided further that no part of the foreign exchange of USD 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

- (b) no person resident outside India shall make investment in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage—
- (i) in the business of chit fund, or
- (ii) as Nidhi Company, or
- (iii) in agricultural or plantation activities, or
- (iv) in real estate business, or construction of farm houses, or
- (v) in trading in Transferable Development Rights (TDRs).

Explanation (i) — For the purpose of this regulation, "real estate business" shall not include development of townships, construction of residential/commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.

- (ii) The Registrar of Chits or an officer authorised by the State Government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non-resident Indians shall be eligible to subscribe, through banking channel and on non-repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time.
5. The payment for investment shall be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India in accordance with the regulations made by the Reserve Bank under the Act.
6. Every person selling or drawing foreign exchange to or from an authorised person for a capital account transaction shall furnish to the Reserve Bank, a declaration in the form and within the time specified in the regulations relevant to the transaction.

SCHEDULE I

[See Regulation 3(1)(A)]

Classes of capital account transactions of persons resident in India

- (a) Investment by a person resident in India in foreign securities.
- (b) Foreign currency loans raised in India and abroad by a person resident in India.
- (c) Transfer of immovable property outside India by a person resident in India.
- (d) Guarantees issued by a person resident in India in favour of a person resident outside India.
- (e) Export, import and holding of currency/currency notes.
- (f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- (i) Loans and overdrafts by a person resident in India to a person resident outside India.
- (j) Remittance outside India of capital assets of a person resident in India.
- (k) Undertaking Derivative Contract.

SCHEDULE II

[See Regulation 3(1)(B)]

Classes of capital account transactions of persons resident outside India

- (a) Investment in India by a person resident outside India, that is to say,
 - (i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
 - (ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
- (b) Acquisition and transfer of immovable property in India by a person resident outside India.
- (c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (d) Import and export of currency/currency notes into/from India by a person resident outside India.
- (e) Deposits between a person resident in India and a person resident outside India.
- (f) Foreign currency accounts in India of a person resident outside India.
- (g) Remittance outside India of capital assets in India of a person resident outside India.
- (h) Undertaking Derivative Contract.

FOREIGN EXCHANGE MANAGEMENT (ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA) REGULATIONS, 2018

Vide Notification No. FEMA 21(R)/2018-RB dated March 26, 2018, in exercise of the powers conferred by clause (i) of sub-section (3) of Section 6, sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of [Notification No. FEMA 21/2000-RB dated May 3, 2000](#), as amended from time to time, the Reserve Bank of India makes the following regulations, namely: -

1. Short title and commencement:-

- i) These Regulations may be called the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018.
- ii) They shall come into force from the date of their publication in the Official Gazette.

2. Definitions:-

In these Regulations, unless the context otherwise requires -

- (a) 'Act' means the Foreign Exchange Management Act, 1999 (42 of 1999);
- (b) An 'Authorised Dealer' means a person authorised as an authorised dealer under sub-section (1) of section 10 of the Act;
- (c) 'Non-Resident Indian (NRI)' means a person resident outside India who is a citizen of India;
- (d) 'Overseas Citizen of India (OCI)' means a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955;
- (e) 'Repatriation outside India' means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency;
- (f) The words and expressions used but not defined in these Regulations shall have the same meanings respectively assigned to them in the Act.

3. Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India:-

An NRI or an OCI may

- (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Provided further that no payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

- (b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;
- (c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;
- (d) transfer any immovable property in India to a person resident in India;
- (e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

4. Acquisition of Immovable Property for carrying on a permitted activity:-

A person resident outside India who has established in India in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016, as amended from time to time, a branch, office or other place of business for carrying on in India any activity, excluding a liaison office, may -

- (a) acquire any immovable property in India, which is necessary for or incidental to carrying on such activity;

Provided that

- i. all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and
 - ii. the person files with the Reserve Bank a declaration in the form IPI as prescribed by Reserve Bank from time to time, not later than ninety days from the date of such acquisition.
- (b) transfer by way of mortgage to an authorised dealer as a security for any borrowing, the immovable property acquired in pursuance of clause (a).

Provided no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, other than on lease not exceeding five years, without prior approval of the Reserve Bank.

5. Purchase/ sale of Immovable Property by Foreign Embassies/ Diplomats/ Consulate Generals:-

A Foreign Embassy/ Diplomat/ Consulate General may purchase/ sell immovable property in India other than agricultural land/ plantation property/ farm house provided (i) clearance from Government of India, Ministry of External Affairs is obtained for such purchase/ sale, and (ii) the consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channels.

6. Joint acquisition by the spouse of an NRI or an OCI:-

A person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse.

Provided that

- i. The consideration for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank;
- ii. No payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;
- iii. Provided that the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property;
- iv. Provided further that the non-resident spouse is not otherwise prohibited from such acquisition.

7. Acquisition by a Long-Term Visa holder:-

A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment subject to the following conditions:

- a the property should not be located in and around restricted/ protected areas so notified by the Central Government and cantonment areas;

- b. the person submits a declaration to the Revenue Authority of the district where the property is located, specifying the source of funds and that he/ she is residing in India on LTV;
- c. the registration documents of the property should mention the nationality and the fact that such person is on LTV;
- d. the property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities;
- e. a copy of the documents of the purchased property shall be submitted to the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division);
- f. such person shall be eligible to sell the property only after acquiring Indian citizenship. However, transfer of the property before acquiring Indian citizenship shall require prior approval of DCP/FRO/FRRO concerned.

8. Repatriation of sale proceeds:-

- (a) A person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section;
- (b) In the event of sale of immovable property other than agricultural land/ farm house/ plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:
 - i. the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of his acquisition or the provisions of these Regulations;
 - ii. the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External account;
 - iii. in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.
- (c) In the event of failure in repayment of external commercial borrowing availed by a person resident in India under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as amended from time to time, a bank which is an authorised dealer may permit the overseas lender or the

security trustee (in whose favour the charge on immovable property has been created to secure the ECB) to sell the immovable property on which the said loan has been secured only to a (by the) person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of the said loan and not any other loan.

9. Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries:-

No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.

Provided this prohibition shall not apply to an OCI.

Explanation: For the purpose of this regulation the term "citizen" shall include natural persons and legal entities.

10. Prohibition on transfer of immovable property in India:-

Save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India:-

Provided that

- i. The Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.
- ii. A bank which is an authorised dealer may, subject to the directions issued by the Reserve Bank in this behalf, permit a person resident in India or on behalf of such person to create charge on his immovable property in India in favour an overseas lender or security trustee, to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as amended from time to time.
- iii. An Authorized Dealer in India being the Indian correspondent of an overseas lender may, subject to the directions issued by the Reserve Bank in this regard, create a mortgage on an immovable property in India owned by an NRI or an OCI, being a director of a company outside India, for a loan to be availed by the company from the said overseas lender.

Provided

- a. the funds shall be used by the borrowing company only for its core business purposes overseas;
- b. in case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit the sale proceeds to the overseas lender.

- iv. A person resident outside India who has acquired any immovable property in India in accordance with foreign exchange laws in force at the time of such acquisition or with the general or specific permission of the Reserve Bank may transfer such property to a person resident in India provided the transaction takes place through banking channels in India and provided that the resident is not otherwise prohibited from such acquisition.

11. Miscellaneous:-

Any transaction involving acquisition or transfer of immovable property under these regulations shall be undertaken:

- a. through banking channels in India;
- b. subject to payment of applicable taxes and other duties/ levies in India.

12. Saving:-

Any existing holding of immovable property in India by a person resident outside India made in accordance with the policy in existence at the time of such acquisition would not require any modifications to conform to these regulations.

FOREIGN EXCHANGE MANAGEMENT (ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OUTSIDE INDIA) REGULATIONS, 2015

NOTIFICATION [NO. FEMA 7(R)/2015-RB]/GSR 95(E), DATED 21-1-2016]

In exercise of the powers conferred by clause (h) of sub-section (3) of section 6, sub-section (2) of section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 7/2000-RB dated May 3, 2000, as amended from time to time, the Reserve Bank hereby makes the following regulations relating to acquisition and transfer of immovable property outside India, namely :—

1. (i) These regulations may be called the Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015.
(ii) They shall come into force from the date of their publication in the Official Gazette.
2. In these regulations, unless the context requires otherwise,—
 - (i) 'Act' means the Foreign Exchange Management Act, 1999 (42 of 1999);
 - (ii) The words and expressions used but not defined in these Regulations shall have the same meanings respectively assigned to them in the Act.
3. Save as otherwise provided in the Act or in these regulations, no person resident in India shall acquire or transfer any immovable property situated outside India without general or special permission of the Reserve Bank.
4. Nothing contained in these regulations shall apply to the property—
 - (a) held by a person resident in India who is a national of a foreign state;
 - (b) acquired by a person resident in India on or before 8th July 1947 and continued to be held by him with the permission of the Reserve Bank.
5. (1) A person resident in India may acquire immovable property outside India,—
 - (a) by way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the Act, or referred to in clause (b) of regulation 4;
 - (b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2015;
 - (c) jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;

- (2) A person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
- (3) A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

Explanation:

For the purposes of these regulations, 'relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

FOREIGN EXCHANGE MANAGEMENT (EXPORT OF GOODS & SERVICES) REGULATIONS, 2015

In exercise of the powers conferred by clause (a) of sub-section (1), sub-section (3) of Section 7 and sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in supersession of its Notification No.FEMA.23/2000-RB dated May 3, 2000 as amended from time to time, Reserve Bank of India makes the following Regulations in respect of Export of Goods and Services from India, namely:

1. Short title and commencement:-

- (i) These Regulations may be called the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015.
- (ii) They shall come into force from the date of their publication in the Official Gazette.

2. Definitions:-

In these Regulations, unless the context requires otherwise, -

- (i) 'Act' means the Foreign Exchange Management Act, 1999 (42 of 1999);
- (ii) 'authorised dealer' means a person authorised as an authorised dealer under sub-section (1) of section 10 of the Act, and includes a person carrying on business as a factor and authorised as such under the said section 10;
- (iii) 'EXIM Bank' means the Export-Import Bank of India established under the Export-Import Bank of India Act, 1981 (28 of 1981);
- (iv) 'export' includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media;
- (v) 'export value' in relation to export by way of lease or hire-purchase or under any other similar arrangement, includes the charges, by whatever name called, payable in respect of such lease or hire-purchase or any other similar arrangement;
- (vi) 'form' means form annexed to these Regulations;
- (vii) 'schedule' means schedule appended to these Regulations;
- (viii) 'software' means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium;
- (ix) 'specified authority' means the person or the authority to whom the declaration as specified in Regulation 3 is to be furnished;

- (x) the words and expressions used but not defined in these Regulations shall have the same meanings respectively assigned to them in the Act.

3. Declaration of exports:-

- (1) In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –
 - (i) the full export value of the goods or software; or
 - (ii) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.
- (2) Declarations shall be executed in sets of such number as specified.
- (3) For the removal of doubt, it is clarified that, in respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.
- (4) Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

4. Exemptions:-

Notwithstanding anything contained in Regulation 3, export of goods / software may be made without furnishing the declaration in the following cases, namely:

- (a) trade samples of goods and publicity material supplied free of payment;
- (b) personal effects of travellers, whether accompanied or unaccompanied;
- (c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;

- (d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value
- (e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;
- (f) goods imported free of cost on re-export basis;
- (g) the following goods which are permitted by the Development Commissioner of the Special Economic Zones,
Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely: 1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators; 2) goods imported from foreign suppliers/collaborators on loan basis; 3) goods imported from foreign suppliers/ collaborators free of cost, found surplus after production operations.
- (ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs
- (h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.
- (i) goods sent outside India for testing subject to re-import into India;
- (j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.
- (k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

5. Indication of importer-exporter code number:-

The importer-exporter code number allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 (22 of 1992) shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

6. Authority to whom declaration is to be furnished and the manner of dealing with the declaration :-

A. Declaration in Form EDF

- (i) The declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs.

- (ii) After duly verifying and authenticating the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank and hand over the duplicate form to the exporter for being submitted to the authorised dealer.

B. Declaration in Form SOFTEX

- (i) The declaration in Form SOFTEX in respect of export of computer software and audio/video/ television software shall be submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.
- (ii) After certifying all three copies of the SOFTEX form, the said designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

C. Duplicate Declaration Forms to be retained with Authorised Dealers

On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX shall be retained by the Authorised Dealers.

7. Evidence in support of declaration:-

The Commissioner of Customs or the postal authority or the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance with Section 7 of the Act and these regulations, require such evidence in support of the declaration as may establish that –

- a) the exporter is a person resident in India and has a place of business in India;
- b) the destination stated on the declaration is the final place of the destination of the goods exported;
- c) the value stated in the declaration represents –
 - 1) the full export value of the goods or software; or
 - 2) where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market.

Explanation:

For the purpose of this regulation, 'final place of destination' means a place in a country in which the goods are ultimately imported and cleared through Customs of that country.

8. Manner of payment of export value of goods:-

Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 as amended from time to time.

Explanation:

For the purpose of this regulation, re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made under Regulation 3, shall be deemed to be realisation of full export value of such goods.

9. Period within which export value of goods/software/ services to be realised:-

- (1) The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided
 - (a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;
 - (b) further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.
- (2)
 - (a) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.
 - (b) The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

- (c) On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.'

Explanation:

For the purpose of this regulation, the "date of export" in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

10. Submission of export documents:-

The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form:

Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorized dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

11. Transfer of documents:-

Without prejudice to Regulation 3, an authorised dealer may accept, for negotiation or collection, shipping documents including invoice and bill of exchange covering exports, from his constituent (not being a person who has signed the declaration in terms of Regulation 3):

Provided that before accepting such documents for negotiation or collection, the authorised dealer shall—

- (a) where the value declared in the declaration does not differ from the value shown in the documents being negotiated or sent for collection, or
- (b) where the value declared in the declaration is less than the value shown in the documents being negotiated or sent for collection, require the constituent concerned also to sign such declaration and thereupon such constituent shall be bound to comply with such requisition and such constituent signing the declaration shall be considered to be the exporter for the purposes of these Regulations to the extent of the full value shown in the documents being negotiated or sent for collection and shall be governed by these Regulations accordingly.

12. Payment for the Export:-

In respect of export of any goods or software for which a declaration is required to be furnished under Regulation 3, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or

refrain from doing anything or take or refrain from taking any action which has the effect of securing –

- (i) that the payment for the goods or software is made otherwise than in the specified manner; or
- (ii) that the payment is delayed beyond the period specified under these Regulations; or
- (iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer;

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

- (iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

13. Certain Exports requiring prior approval :- Exports under trade agreement/rupee credit etc.

- (i) Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Govt. of a foreign state shall be governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.
- (ii) An export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, shall be governed by the terms and conditions advised by the Reserve Bank to the authorised dealers from time to time.

14. Delay in Receipt of Payment:-

Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

- (a) the payment therefor if the goods or software has been sold and

- (b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf;

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

15. Advance payment against exports:-

- (1) Where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –
- (i) the shipment of goods is made within one year from the date of receipt of advance payment;
 - (ii) the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
 - (iii) the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

- (2) Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

16. Issue of directions by Reserve Bank in certain cases:-

- (1) Without prejudice to the provisions of Regulation 3 in relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or, as the case may be, the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or special order, direct from time to time that in respect of export of goods or software to any destination or any class of export transactions or any class of goods or software or class of exporters, the exporter shall, prior to the export, comply with the conditions as may be specified in the order, namely ;
- (a) that the payment of the goods or software is covered by an irrevocable letter of credit or by such other arrangement or document as may be indicated in the order;

- (b) that any declaration to be furnished to the specified authority shall be submitted to the authorised dealer for its prior approval, which may, having regard to the circumstances, be given or withheld or may be given subject to such conditions as may be specified by the Reserve Bank by directions issued from time to time.
 - (c) that a copy of the declaration to be furnished to the specified authority shall be submitted to such authority or organisation as may be indicated in the order for certifying that the value of goods or software specified in the declaration represents the proper value thereof.
- (2) No direction under sub-regulation (1) shall be given by the Reserve Bank and no approval under clause (b) of that sub-regulation shall be withheld by the Authorised Dealer, unless the exporter has been given a reasonable opportunity to make a representation in the matter.

17. Project exports:-

- (1) Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.
- (2) In case a guarantee is required to be given prior to post award approval, the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements. Explanation:

For the purpose of this Regulation, 'approving authority' means the EXIM Bank of India or the authorised dealer

Schedule (Refer to Regulation 3)

Form **EDF**: To be completed in duplicate for export from non EDI ports.

Form **SOFTEX**: To be completed in triplicate for declaration of export of software otherwise than in physical form, i.e. magnetic tapes/discs, and paper media.

FOREIGN EXCHANGE MANAGEMENT (REALISATION, REPATRIATION AND SURRENDER OF FOREIGN EXCHANGE) REGULATIONS, 2015

NOTIFICATION NO. FEMA 9(R)/2015-RB [F.NO.1/31/EM-2015]/GSR 1005(E), DATED 29-12-2015

In exercise of the powers conferred by section 8, sub-section (6) of section 10, clause (c) of sub-section (2) of section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 9/ 2000-RB dated May 3, 2000, as amended from time to time the Reserve Bank makes the following regulations relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender, namely—

1. Short title and commencement

- (i) These regulations may be called the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.
- (ii) They shall come into force on from the date of their publication in the Official Gazette

2. Definitions

In these Regulations, unless the context requires otherwise,—

- (i) 'Act' means Foreign Exchange Management Act, 1999 (42 of 1999);
- (ii) 'Authorised Dealer' means a person authorised as an authorised dealer under sub-section (1) of Section 10 of the Act;
- (iii) 'foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange;
- (iv) 'surrender' means the selling of foreign exchange to an authorised person in India in exchange of rupees;
- (v) the words and expressions used but not defined in these regulations shall have the same meanings respectively assigned to them in the Act.

3. Duty of persons to realise foreign exchange due

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing—

- (a) that the receipt by him of the whole or part of that foreign exchange is delayed; or

- (b) that the foreign exchange ceases in whole or in part to be receivable by him.

4. Manner of Repatriation

- (1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and —
- (a) sell it to an authorised person in India in exchange for rupees; or
 - (b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
 - (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.
- (2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

5. Period for surrender of realised foreign exchange

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4, within the period specified below:—

- (1) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
- (2) in all other cases within a period of ninety days from the date of its receipt.

6. Period for surrender in certain cases

- (1) Any person not being an individual resident in India who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.
- (2) Notwithstanding anything contained in sub-regulation (1), where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of

such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person —

- (a) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and
- (b) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

7. Period for surrender of received/ realised/ unspent/ unused foreign exchange by Resident individuals

A person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

8. Exemption

Nothing in these regulations shall apply to foreign exchange in the form of currency of Nepal or Bhutan.

FOREIGN EXCHANGE MANAGEMENT (POSSESSION AND RETENTION OF FOREIGN CURRENCY) REGULATIONS, 2015

NOTIFICATION NO. FEMA 11(R)/2015-RB [F.NO.1/31/EM-2015]/GSR 1006(E), DATED 29-12-2015 [AS CORRECTED BY NOTIFICATION NO. GSR 504(E) (F.NO.1/31/EM-2015), DATED 12-5-2016]

In exercise of the powers conferred by clause (a) and clause (e) of section 9, clause (d) and clause (g) of sub-section (2) of section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 11/2000-RB dated May 3, 2000, as amended from time to time, the Reserve Bank of India makes the following regulations, namely :—

1. Short title & commencement

- (i) These regulations may be called as Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015.
- (ii) They shall come into force from the date of their publication in the Official Gazette.

2. Definitions

In these Regulations, unless the context requires otherwise—

- (i) 'Act' means Foreign Exchange Management Act, 1999 (42 of 1999).
- (ii) 'To possess' or 'to retain' means to possess or to retain in physical form and the words 'possession' or 'retention' shall be construed accordingly.
- (iii) The words and expressions used but not defined in these regulations shall have the same meaning respectively assigned to them in the Act.

3. Limits for possession and retention of foreign currency or foreign coins

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the following limits for possession or retention of foreign currency or foreign coins, namely :—

- (i) Possession without limit of foreign currency and coins by an authorised person within the scope of his authority;
- (ii) Possession without limit of foreign coins by any person;
- (iii) Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US\$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques;
 - (a) was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India;

or

- (b) was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or
- (c) was acquired by him by way of honorarium or gift while on a visit to any place outside India; or
- (d) represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

4. Possession of foreign exchange by a person resident In India but not permanently resident therein

Without prejudice to *clause (iii) of Regulation 3*, a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travellers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.

Explanation: for the purpose of this clause, 'not permanently resident' means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.



THE REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016



LEARNING OUTCOMES

After reading this Chapter, you will be able to understand -

- About Registration of Real Estate Project & Registration of Real Estate Agents.
- Functions and Duties Promoter
- About establishment of Real Estate Regulatory Authority, its Composition, Functions, Powers.
- Know the Offences, Penalties and Adjudication.
- Provisions related to Finance, Accounts, and Audit and Reports.



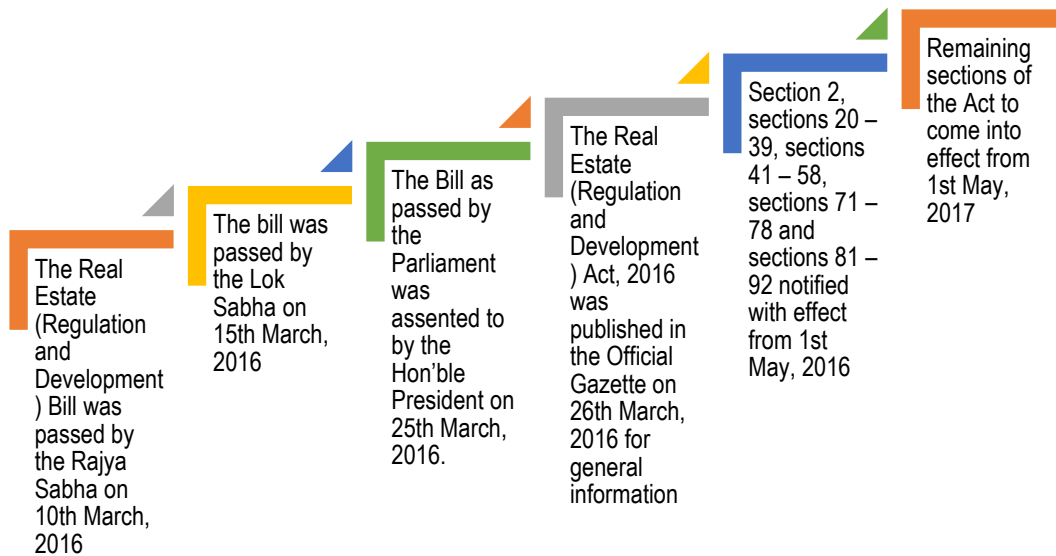
1. INTRODUCTION

The Real Estate (Regulation & Development) Bill, 2016 was passed by Parliament on the 25th day of March, 2016. The Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as RERA/the Act) came into force from May 1, 2016 initially with 59 of its 92 sections notified. All its remaining provisions came into effect from May 1, 2017 providing for mechanism including the appointment of UT/State wise Regulators. The RERA 2016 is an Act of the Parliament of India which seeks to protect home buyers as well as help boost investments in the real estate industry. The key objective of the Act is to ensure accountability of promoters towards allottees and protect their interest by prescribing adequate procedures and penal provisions. Besides, it was also brought in to infuse transparency and financial discipline to ensure fair-play and reduce frauds & delays in the real estate industry and to establish a regulatory oversight fast track dispute resolution mechanism, thus promote good governance in the sector, to create investor confidence. The Central and State Governments are required to notify the Rules under the Act within the statutory period of six months.



The Act empowers the Central & the State Governments to establish within their jurisdiction the Real Estate Regulatory authority (RERA) as the governing authority to exercise the powers conferred on it and to perform the functions assigned to it under the Act. For carrying out the purposes of the Act, the said Authority established under this Act is empowered to make regulations, consistent with the Act & the rules made there under within a period of three months of its establishment.

REAL ESTATE ACT – IMPORTANT DATES AND TIMELINES



RERA AT A GLANCE

This Act consists of 10 Chapters and 92 Sections which are summarised as follows:

1.	Chapter I- Preliminary	Section 1-2
2.	Chapter II- Registration of Real Estate Projects and Agents	Section 3-10
3.	Chapter III- Functions and Duties of Promoter	Section 11-18
4.	Chapter IV- Rights and Duties of Allottees	Section 19
5.	Chapter V- The Real Estate Regulatory Authority	Section 20- 40
6.	Chapter VI- Central Advisory Council	Section 41-42
7.	Chapter VII- The Real Estate Appellate Tribunal	Section 43-58
8.	Chapter VIII- Offences, Penalties and Adjudication	Section 59-72
9.	Chapter IX- Finance, Accounts, Audit and Reports	Section 73-78
10.	Chapter X- Miscellaneous	Section 79-92

The prominent features of the ACT are as follows:

1. RERA applies to real estate projects, promoters, allottees and Real Estate Agents.
2. The Act applies to projects that are ongoing on the date of commencement of the Act and completion certificate has not been issued.
3. Promoters are barred to advertise, market, book, sell any plot, apartment or building without registering the real estate project with RERA.
4. Promoter are required to make an application to the Authority for registration of the real estate project within the prescribed time as per procedure laid down by the Authority.
5. Real estate Regulatory Authorities are required to be set up by the appropriate government in every State/UT. Buyers could approach this body for redressal of their grievances.
6. The Act applies to both residential and commercial properties.
7. Real estate agents dealing in registered projects are required to be registered with respective RERA Authorities.
8. Developers/promoters are barred from selling the project unless the project is registered with the respective RERA Authority.
9. Any change in plan (submitted to RERA authority at the time of registration) by the builder would require approval from 2/3rd of the allottees or buyers in the project.
10. Builders would be liable for any structural defects brought to his notice within 5 years from the date of possession.

11. The carpet area, has been defined by the Act. .
12. 70% of the amount must be kept in a designated account in a scheduled bank exclusive for the current project.
13. In case a buyer has been deceived into purchase through false representation or advertisement, he has an option to exit the project. The developer, in such case, will have to return the money along with interest.
14. Promoters/ real estate agents/ allottees who do not comply with orders of the Authority or Appellate Tribunal face heavy penalty and/or imprisonment..
15. All residential real estate projects where the land is over 500 square metres or the number of apartments proposed to be developed does not exceed eight inclusive of all phases are required to register with Real Estate Regulatory Authority (RERA) before launching a project.
16. Appropriate government (Central and State Govt.), if considers appropriate, may reduce the threshold limit (500 square metres or 8 apartments), if it thinks fit.
17. On-going projects which have not received completion certificate on the date of commencement of the Act will have to seek registration within 3 months.
18. Application for registration must be either approved or rejected within a period of 30 days from the date of application by the RERA Authority.
19. On successful registration, the promoter of the project will be provided with the registration number, a login id and password for the applicants to fill up the essential details on the website of the RERA.
20. Real Estate projects developed in phases would require registration for each phase separately.
21. Exemption from registration:
 - Projects being developed on land less than 500 square metres.
 - Number of units does not exceed 8 (All phases).
 - Obtained completion certificate for the project before commencement of the Act.
 - Renovation/ Repair of the project which does not involve marketing, advertisement and selling or new allotment..
22. Every real estate agent is required to be registered with the Authority to facilitate the sale or purchase on behalf of any person of any plot, apartment or building of the project.
23. Functions of Real Estate Agents
 - Maintain and preserve all the books of accounts, records and documents.
 - Not involve in any unfair trade practice.

- Facilitate possession of all the information and documents as the allottee is entitled to.
 - Discharge any other functions as may be prescribed.
24. Real estate agent is barred to facilitate the sale or purchase of the project which is not registered with the Authority.
 25. Promoter is required to create a webpage on the website of Authority to render all the required details of the proposed project for public viewing.
 26. Promoter is required to mention the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority in all the advertisements or prospectus where details of the projects are given.
 27. Promoters are responsible for all structural defects or any other defects for specified period even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.
 28. Application or booking fee cannot be more than 10% of the cost of the apartment, plot or building, as the case may be.
 29. The allottee shall be entitled to obtain all the information relating the project specifications like sanctioned plans, layout plans, etc.
 30. The allottee shall be entitled to claim refund of amount paid along with the interest, at such rate as may be prescribed and compensation in the manner as provided by the Act from the promoter, in case the promoter fails to comply or is unable to give the possession as per agreement of sale.
 31. The allottee shall be responsible to make the necessary payments on time and proper place.
 32. Every allottee shall take physical possession within two months of the occupancy certificate issued for the said apartment.
 33. The allottee shall be responsible to pay interest for any delay in payment towards any amount to be paid.
 34. The obligations of the allottee and the liability towards interest may be reduced when mutually agreed to between the promoter and such allottee.
 35. The allottee shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.
 36. Real Estate Regulatory Authority consisting of a Chairperson and not less than two whole time members appointed by the appropriate Government, is required to be set up by the appropriate Government within a period of one year from the date of this Act coming into force.

37. The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority or establish more than one Authority in a State or Union territory, as the case may be.
38. The Chairperson shall have powers of general superintendence and directions in the conduct of the affairs of Authority and he shall, in addition to presiding over the meetings of the Authority, exercise and discharge such administrative powers and functions of the Authority as may be prescribed.
39. Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder, against any promoter, allottee or real estate agent, as the case may be.
40. The Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government or the competent authority..
41. The Authority shall register and regulate real estate projects and real estate agents registered under this Act and perform such other functions prescribed by the Act or as may be entrusted by the appropriate Government.
42. The Authority on a complaint or suo motu, may, call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require
43. Authority should dispose of the question / complaints within sixty days from the date of filing the same.
44. Real Estate Regulatory Authority can *suo moto* or on a complaint call for information or conduct investigations.
45. The Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority; summoning and enforcing the attendance of persons and examining them on oath; issuing commissions for the examination of witnesses or documents and any other matter which may be prescribed.
46. The Authority has the Power to issue interim orders and directions and impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under the Act or the rules / regulations made thereunder.
48. The Central Government may, by notification, establish a Council to be known as the Central Advisory Council with the Minister of the Central Government dealing with Housing as the ex officio Chairperson.

49. The functions of the Central Advisory Council shall be to advice and recommend to the Central Government.
50. The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the — (name of the State/Union territory) Real Estate Appellate Tribunal and one or more benches of the Appellate Tribunal, for various jurisdictions, in the State/ Union territory consisting of at least one Judicial Member and one Administrative to Technical Member.
51. The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal.
52. Until the establishment of an Appellate Tribunal, the appropriate Government shall designate, any Appellate Tribunal functioning under any law for the time being in force, to be the Appellate Tribunal.
53. The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal within a period of sixty days.55. The Tribunal shall shall have power to regulate its own procedure and shall not be bound by procedure in the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice. It shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.
54. The Appellate Tribunal shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavits; issuing commissions for the examinations of witnesses or documents; reviewing its decisions; dismissing an application for default or directing it ex parte; and any other matter which may be prescribed.
55. Penalty under RERA: -

On Promoter:

- If any promoter fails to obtain prior registration with the Authority, he shall be liable to a penalty which may extend 10% of the estimated cost of the project as determined by the Authority and on not complying with any such the orders, decisions or directions issued by the Authority or on continuing with the default, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent. of the estimated cost of the real estate project, or with both.
- If any promoter provides false information, or contravenes the provisions of section 4, he shall be liable to penalty which may extend 5% of the estimated cost of project as determined by the Authority.

- If any promoter contravenes any other provisions of this Act or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.
- If any promoter fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to 5% of cost of the project
- If any promoter, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend upto three years or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of the project, or with both.

On Real estate Agents:

- If any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10, he shall be liable to pay a penalty of Rs. 10,000 for every day during which such default continues, which may cumulatively extend up to 5% of the cost of plot, apartment or buildings, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority. If any real estate agent fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to 5% of estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated and as determined by the Authority. If any real estate agent, who fails to comply with, or contravenes any of the orders, decision or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend upto one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated, or with both.

On Allottee:

- If any allottee, fails to comply with, or contravenes any of the orders, decisions or directions of the Authority, he shall be liable to pay penalty for every day during which such default continues, which may cumulatively extend up to 5% of the plot, apartment or building cost, as the case may be, as determined by the Authority. If any allottee, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent of the plot, apartment or building cost, as the case may be, or with both.

On Companies

- Every person who, at the time, the offence was committed in charge of, or was responsible for the company for the conduct of, the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, however, he shall not be liable if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
 - If it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, he shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
56. If any person is punished with imprisonment under this Act, the punishment may, either before or after the institution of the prosecution, be compounded by the court.
 57. For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer.
 58. Any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.
 59. The application for adjudging compensation shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days.
 60. While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person to give evidence or to produce any document.
 61. The Authority shall prepare a budget, maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the appropriate government in consultation with the CAG.
 62. The accounts of the Authority shall be audited by the Comptroller and Auditor-General of India
 63. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority

in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

64. No court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder save on a complaint in writing made by the Authority or by any officer of the Authority duly authorised by it for this purpose.
65. No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.
66. The appropriate Government is empowered to make rules in the prescribed matters for carrying out the provisions of this Act.
67. The Authority is empowered to make regulations, consistent with the Act and rules made thereunder, in the prescribed matters for carrying out the purposes of this Act.
68. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force and shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

SCOPE OF RERA

- The Act covers both residential as well as commercial real estate projects.
- The on-going (under-construction) projects for which for which the completion certificate has not been issued come under the purview of this Act. The Act mandates registration of the projects proposed to be developed on 500 sq. metres of area or with more than eight apartments inclusive of all phases with the regulatory authority.
- If the appropriate Government considers it necessary, it may reduce the threshold below 500 sq mts or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;
- No registration under RERA is required for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.
- In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

- To alter a project plan, structural design and specifications of the plot, apartment or a building, the promoter has to get the consent of minimum two-third allottees (buyers) after the necessary disclosures.
- Promoters shall not advertise, market, book, sell of any plot, apartment or building without registration the real estate project with RERA.
- The registration is valid for a specified period as mentioned by the builder in application form.
- The advertisement or prospectus issued by promoter shall mention website address of the authority wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.
- The allottee shall be responsible to make the necessary payments on time and proper place and shall be liable to pay interest at the prescribed rate for any delay.
- Where the real estate projects is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter/builder shall obtain registration under this Act for each phase separately.
- The real estate agents who intend to sell any plot or flat of a registered project have to register with the respective State Real Estate Regulatory Authority.

BENEFITS OF RERA FOR ALLOTTEES

- The promoter has to rectify any structural defect or any other defect in workmanship, quality or provision of services brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, without further charge, within thirty days,
- The Act also prescribes liabilities on promoters for delay in projects. In case the promoter delays the allottee is entitled to full refund along with interest, in case the allottee wishes to withdraw and compensation with interest, in case he wishes to continue with the project.
- RERA is applicable to all ongoing projects and customers looking at purchasing an ongoing project or a project that is yet to be registered will be ensured better protection under RERA.
- The carpet area, has been defined by the Act to include the area within walls, and the promoter now cannot inflate the carpet area.
- RERA will boost consumer confidence.
- Investment of buyers are safer in RERA as 70 percent of the receipts are required to be deposited by the promoter in the designated account from which he can withdraw only on the basis of completion of the project, which shall be certified by an engineer, architect & a chartered accountant. This has reduced the chances of funds being diverted by the Promoters to other Projects.

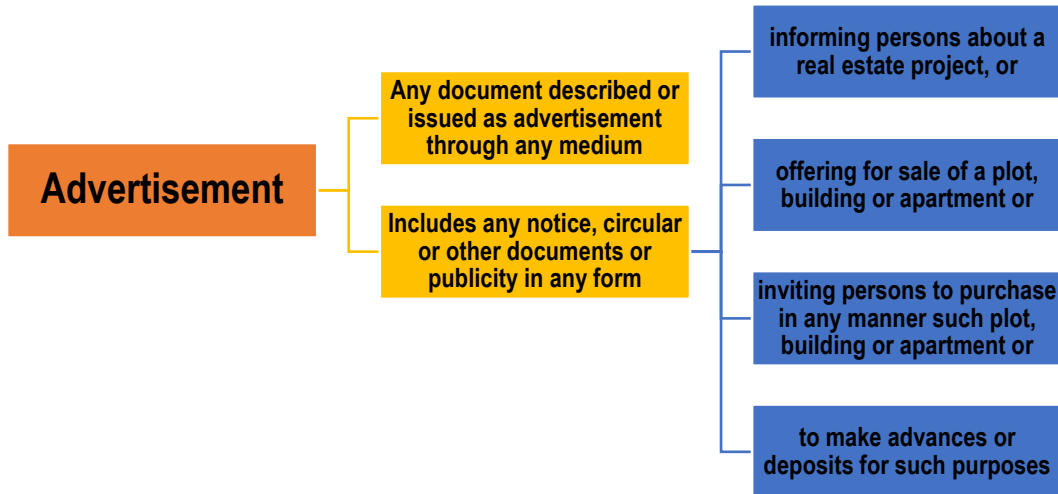
- Promoter has to mandatorily disclose every detail of the project on the website of authority and update them quarterly.
- Promoter shall be penalised for fraudulent/false representations.
- The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.
- The promoter cannot make any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.
- The promoter cannot transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority:
- Transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.
- Both the promoter as well as allottee shall be liable for same rate of interest in case of default.
- In case of any defect in the title of the property, found any time after the possession is given to the allottee, he is entitled to claim compensation and such a claim is not barred by limitation.
- The Authority and the Appellate Tribunal have been established under the Act for grievance redressal.



2. DEFINITIONS

Relevant Definitions are covered under section 2 of the Act which are as follows:

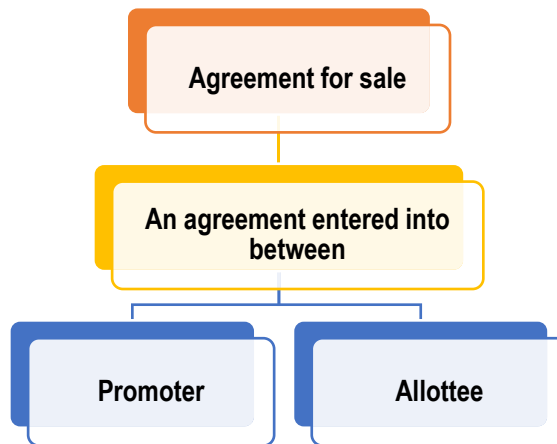
- (a) "**Adjudicating officer**" means the adjudicating officer appointed under sub-section (1) of section 71;
- (b) "**advertisement**" means any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot ,building or apartment or inviting persons to purchase in any manner such plot, building or apartment or to make advances or deposits for such purposes;



Example: Does advertisement include solicitation by emails, whatsapp, social media and SMS? Is issuance of prospectus considered to be a case of ‘advertisement’?

Answer: Any medium adopted in soliciting for sale would be covered under the said definition of Advertisement, including SMS, whatsapp, social media and emails.

- (c) **"agreement for sale"** means an agreement entered into between the promoter and the allottee;



- (d) **"allottee"** in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

Allottee
(in relation to real estate project)

the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter,

includes the person who subsequently acquires the said allotment through sale, transfer or otherwise

does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

Example: Does the term 'allottee' include persons who have acquired the property through secondary sales?

Answer: Yes, As per section 2(d), an allottee includes a person who acquires the said 'apartment / plot' through transfer or sale, but does not include a person to whom such plot, apartment is given on rent.

- (e) **"apartment"** whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;
- (f) **"Appellate Tribunal"** means the Real Estate Appellate Tribunal established under section 43;
- (g) **"Appropriate Government"** means in respect of matters relating to,—

- the Union territory without Legislature, the Central Government;
- the Union territory of Puducherry, the Union territory Government;
- the Union territory of Delhi, the Central Ministry of Urban Development;
- the State, the State Government.

- (h) **"architect"** means a person registered as an architect under the provisions of the Architects Act, 1972;
- (i) **"Authority"** means the Real Estate Regulatory Authority established under sub-section (1) of section 20;
- (j) **"Building"** includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes;
- (k) **"carpet area"** means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

Explanation.— For the purpose of this clause, the expression "exclusive balcony or verandah area" means the area of the balcony or verandah, as the case may be, which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee; and "exclusive open terrace area" means the area of open terrace which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee;

- (l) **"Chairperson"** means the Chairperson of the Real Estate Regulatory Authority appointed under section 21;
- (m) **"commencement certificate"** means the commencement certificate or the building permit or the construction permit, by whatever name called issued by the competent authority to allow or permit the promoter to begin development works on an immovable property, as per the sanctioned plan;
- (n) **"common areas"** mean—
 - (i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;
 - (ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;
 - (iii) the common basements, terraces, parks, play areas, open parking areas and common storage spaces;
 - (iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;
 - (v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;

- (vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;
- (vii) all community and commercial facilities as provided in the real estate project;
- (viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

Example 1: Is 'open parking areas' a part of 'common areas'?

Answer: Section 2(n) defines 'common areas' to include 'open parking areas'.

Example 2: Is 'community and commercial facilities' which are provided in a real estate project are part of 'common areas'?

Answer: Section 2(n) defines 'common areas' to include 'community and commercial facilities', thus they are an integral part of the project, and are required to be handed over by the promoter to the Association of Allottees.

- (o) **"company"** means a company incorporated and registered under the Companies Act, 2013 and includes,—
 - (i) a corporation established by or under any Central Act or State Act;
 - (ii) a development authority or any public authority established by the Government in this behalf under any law for the time being in force;
- (p) **"competent authority"** means the local authority or any authority created or established under any law for the time being in force by the appropriate Government which exercises authority over land under its jurisdiction, and has powers to give permission for development of such immovable property;
- (q) **"completion certificate"** means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;
- (r) **"day"** means the working day, in the concerned State or Union territory, as the case may be, notified by the appropriate Government from time to time;
- (s) **"development"** with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes re-development;
- (t) **"development works"** means the external development works and internal development works on immovable property;
- (u) **"engineer"** means a person who possesses a bachelor's degree or equivalent from an institution recognised by the All India Council of Technical Education or any University or any institution recognised under a law or is registered as an engineer under any law for the time being in force;

- (v) **"estimated cost of real estate project"** means the total cost involved in developing the real estate project and includes the land cost, taxes, cess, development and other charges;
- (w) **"external development works"** includes roads and road systems landscaping, water supply, sewerage and drainage systems, electricity supply transformer, sub-station, solid waste management and disposal or any other work which may have to be executed in the periphery of, or outside, a project for its benefit, as may be provided under the local laws;
- (x) **"family"** includes husband, wife, minor son and unmarried daughter wholly dependent on a person;
- (y) **"garage"** means a place within a project having a roof and walls on three sides for parking any vehicle, but does not include an unenclosed or uncovered parking space such as open parking areas;
- (z) **"immovable property"** includes land, buildings, rights of ways, lights or any other benefit arising out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, standing crops or grass;

Immovable Property

includes land, buildings, rights of ways, lights or any other benefit arising out of land and things attached to the earth or permanently fastened to anything which is attached to the earth

but not standing timber, standing crops or grass

- (za) **"interest"** means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation.—For the purpose of this clause—
 - (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
 - (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;
- (zb) **"internal development works"** means roads, footpaths, water supply, sewers, drains, parks, tree planting, street lighting, provision for community buildings and for treatment and disposal of sewage and sullage water, solid waste management and disposal, water conservation, energy management, fire protection and fire safety requirements, social infrastructure such as education health and other public amenities or any other work in a project for its benefit, as per sanctioned plans;
- (zc) **"local authority"** means the Municipal Corporation or Municipality or Panchayats or any other Local Body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction;

- (zd) **"Member"** means the member of the Real Estate Regulatory Authority appointed under section 21 and includes the Chairperson;
- (ze) **"notification"** means a notification published in the Official Gazette and the expression "notify" shall be construed accordingly;
- (zf) **"Occupancy certificate"** means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic Infrastructure such as water, sanitation and electricity;

Example: What is the difference between the term 'completion certificate' and 'occupancy certificate'?

Answer: Section 2(zf) and section 2(q) respectively, define 'occupancy certificate' and 'completion certificate'. Occupancy certificate relates to permitting the occupation of the apartment/building, which has provision for civic infrastructure such as water, sanitation and electricity and is habitable. Completion certificate relates to the completion of the entire project certifying that the project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority.

- (zg) **"Person"** includes,—

an individual;	
a Hindu undivided family;	
a company;	
a firm under the Indian Partnership Act, 1932 or the Limited Liability Partnership Act, 2008, as the case may be;	
a competent authority;	
an association of persons or a body of individuals whether incorporated or not;	
a co-operative society registered under any law relating to co-operative societies;	
any such other entity as the appropriate Government may, by notification, specify in this behalf;	

- (zh) **"planning area"** means a planning area or a development area or a local planning area or a regional development plan area, by whatever name called, or any other area specified as such by the appropriate Government or any competent authority and includes any area designated by the appropriate Government or the competent authority to be a planning area for future planned development, under the law relating to Town and Country Planning for the time being in force and as revised from time to time;
- (zi) **"prescribed"** means prescribed by rules made under this Act;
- (zj) **"project"** means the real estate project as defined in clause (zn);
- (zk) **"promoter"** means,—
- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
 - (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
 - (iii) any development authority or any other public body in respect of allottees of—
 - (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government;
 - (b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots;or
 - (iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or
 - (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
 - (vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;

Example: Does the definition of 'promoter' include public bodies such as Development Authorities and Housing Boards?

Answer: The Act covers all bodies (private and public) which develop real estate projects for sale to the general public. Section 2(zk) defines the term 'promoter' which includes both private and public real estate promoters. Thus, both Development Authorities and the Housing Boards, when involved in sale are covered under the Act.

- (zl) **"prospectus"** means any document described or issued as a prospectus or any notice, circular, or other document offering for sale of any real estate project or inviting any person to make advances or deposits for such purposes;
- (zm) **"real estate agent"** means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as a commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called;
- (zn) **"real estate project"** means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;
- (zo) **"regulations"** means the regulations made by the Authority under this Act;
- (zp) **"rule"** means the rules made under this Act by the appropriate Government;
- (zq) **"sanctioned plan"** means the site plan, building plan, service plan, parking and circulation plan, landscape plan, layout plan, zoning plan and such other plan and includes structural designs, if applicable, permissions such as environment permission and such other permissions, which are approved by the competent authority prior to start of a real estate project;
- (zr) words and expressions used herein but not defined in this Act and defined in any law for the time being in force or in the municipal laws or such other relevant laws of the appropriate Government shall have the same meanings respectively assigned to them in those laws.





3. REGISTRATION OF REAL ESTATE PROJECT AND REAL ESTATE AGENTS

PRIOR REGISTRATION OF REAL ESTATE PROJECT WITH REAL ESTATE REGULATORY AUTHORITY (SECTION 3)

This section provides for the prior registration of real estate project with the Real Estate Regulatory Authority.

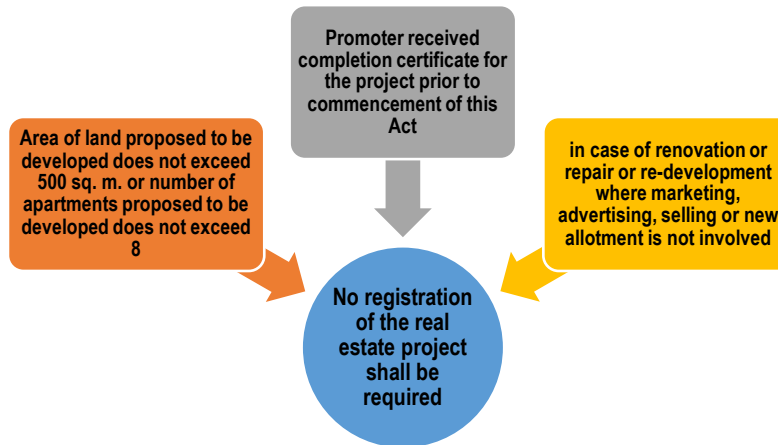
- (1) This section provides that no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any matter any plot, apartment or building, in any real estate project or part of it in any planning area without registering the real estate project with the Real Estate Regulatory Authority established under this Act.

However, the promoter shall make an application to the Authority for registration of the project that is ongoing on the date of commencement of this Act and for which completion certificate has not been issued within a period of three months from the date of commencement of this Act.

If the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority. The provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

- (2) This Section further provides that no registration of the real estate project shall be required
 - (a) where the area of land proposed to be developed does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases;

However, if the appropriate Government if considers it necessary, it may reduce the threshold below 500 square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;
 - (b) where the promoter has received completion certificate for a real estate project prior to commencement of this act;
 - (c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.



Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

Application for registration of real estate projects (Section 4)

This section provides for the application for registration of real estate project by the promoter.

- (1) This section provides that every promoter shall make an application to the Authority for registration of the project in such form, manner, within such time and accompanied by such fee as may be prescribed.
- (2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely:—
 - (a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies competent authority), and the particulars of registration, and the names and photographs of the promoter;
 - (b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;
 - (c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;
 - (d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;

- (e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;
- (f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;
- (g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;
- (h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the appurtenant, if any;
- (i) the number and area of garage for sale in the project;
- (j) the names and addresses of his real estate agents, if any, for the proposed project;
- (k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;
- (l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:—
 - (A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;
 - (B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;
 - (C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;
 - (D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:

The promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project.

The amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in

practice that the withdrawal is in proportion to the percentage of completion of the project.

The promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for that project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

Explanation.— For the purpose of this clause, the term "scheduled bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934.

- (E) that he shall take all the pending approvals on time, from the competent authorities;
 - (F) that he has furnished such other documents as may be prescribed by the rules or regulations made under this Act; and
 - (m) such other information and documents as may be prescribed.
- (3) The Authority shall operationalise a web based online system for submitting applications for registration of projects within a period of one year from the date of its establishment.

GRANT OF REGISTRATION (SECTION 5)

This section provides for the grant of registration.

- (1) This section provides that the Authority shall within a period of thirty days,
- (a) grant registration subject to the provision of the Act and the rules and regulations made thereunder and provide a registration number including a Login Id and password to the applicant for accessing the website of the authority and to create his webpage and to fill therein the details of the proposed project, or
 - (b) reject that application for reasons to be recorded in writing, if such application does not conform to the provisions of the Act or the rules and regulations made thereunder.
- However, no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.
- (2) This section also provides that if the Authority fails to grant the registration or reject the application, as provided within thirty days, the project shall be deemed to have been registered and the Authority shall within seven days of the expiry of the said thirty days, provide a registration number and a Login ID and password to the promoter.

- (3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (c) of Clause (l) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be.

Authority shall within 30 days, grant registration and

• Provide Registration number including a Login ID and password to the applicant for accessing the website of the authority and to create his webpage and to fill therein the details of the proposed project,

Authority shall within 30 days reject the application and

• Provide reasons to be recorded in writing .
• Opportunity of being heard to the applicant before passing such order.

If the Authority, fails to grant the registration or reject the application within 30 days

• Project shall be deemed to have been registered
• Authority shall within 7 days of the expiry of said 30 days, provide Registration number and Login Id and Password to the applicant for accessing the website of the authority and create his webpage.

EXTENSION OF REGISTRATION (SECTION 6)

This section provides for the extension of registration.

This section provides that the registration granted under section 5 may be extended by the Authority on an application made by promoter due to *force majeure*, in such form and on payment of such fee may be prescribed.

However, the Authority may, in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year.

The application for extension of registration shall not be rejected without giving the applicant an opportunity of being heard.

Explanation: The expression “force majeure” shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

REVOCATION OF REGISTRATION (SECTION 7)

This section provides for the revocation of registration.

- (1) This section provides that the Authority may on receipt of a complaint or *suo moto* in this behalf or on the recommendation of the competent authority revoke the registration granted under section 5, after being satisfied that-

the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder;

the promoter violates any of the terms or conditions of the approval given by the competent authority;

the promoter is involved in any kind of unfair practice or irregularities.

Explanation: For the purposes of this clause, the term "**unfair practice means**" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

- (A) the practice of making any statement, whether in writing or by visible representation which,—
 - (i) falsely represents that the services are of a particular standard or grade;
 - (ii) represents that the promoter has approval or affiliation which such promoter does not have;
 - (iii) makes a false or misleading representation concerning the services;
- (B) the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;
- (2) The registration granted to the promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.
- (3) The Authority may, instead of revoking the registration specified above, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.
- (4) The Authority, upon the revocation of the registration,—
 - (a) shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;

- (b) shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8;
- (c) shall direct the bank holding the project bank account, specified under sub-clause (D) of clause (l) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;
- (d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

OBLIGATION OF AUTHORITY CONSEQUENT UPON LAPSE OF OR ON REVOCATION OF REGISTRATION (SECTION 8)

This section provides for the obligation of Authority consequent upon lapse of or on revocation of registration.

This section provides that upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority.

However, no direction, decision or order of the Authority under this section shall take effect until the expiry of the period of appeal provided under the provisions of this Act.

In case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

REGISTRATION OF REAL ESTATE AGENTS (SECTION 9)

This section provides for the registration of real estate agents.

- (1) No real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being the part of the real estate project registered under section 3, being sold by the promoter in any planning area, without obtaining registration. under this section.
- (2) Every real estate agent shall make an application to the Authority for registration in such form, manner, within such time and accompanied by such fee and documents as may be prescribed.
- (3) The Authority shall, within such period, in such manner and upon satisfying itself of the fulfilment of such conditions, as may be prescribed—

- (a) grant a single registration to the real estate agent for the entire State or Union territory, as the case may be;
- (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder:

However, no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

- (4) Whereon the completion of the period specified under sub-section (3), if the applicant does not receive any communication about the deficiencies in his application or the rejection of his application, he shall be deemed to have been registered.
- (5) Every real estate agent who is registered as per the provisions of this Act or the rules and regulations made thereunder, shall be granted a registration number by the Authority, which shall be quoted by the real estate agent in every sale facilitated by him under this Act.
- (6) Every registration shall be valid for such period as may be prescribed, and shall be renewable for a period in such manner and on payment of such fee as may be prescribed.
- (7) Where any real estate agent who has been granted registration under this Act commits breach of any of the conditions thereof or any other terms and conditions specified under this Act or any rules or regulations made thereunder, or where the Authority is satisfied that such registration has been secured by the real estate agent through misrepresentation or fraud, the Authority may, without prejudice to any other provisions under this Act, revoke the registration or suspend the same for such period as it thinks fit.

No such revocation or suspension shall be made by the Authority unless an opportunity of being heard has been given to the real estate agent.

FUNCTIONS OF REAL ESTATE AGENTS (SECTION 10)

- (1) Every real estate agent registered under section 9 shall—
 - (a) not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority;
 - (b) maintain and preserve such books of account, records and documents as may be prescribed;
 - (c) not involve himself in any unfair trade practices, namely:—
 - (i) the practice of making any statement, whether orally or in writing or by visible representation which—
 - (A) falsely represents that the services are of a particular standard or grade;

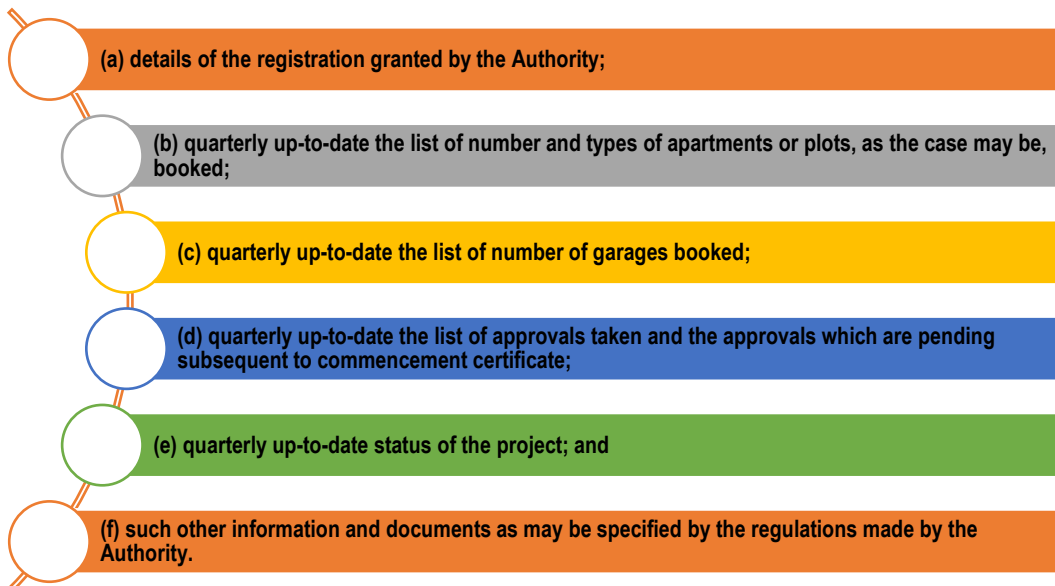
- (B) represents that the promoter or himself has approval or affiliation which such promoter or himself does not have;
- (C) makes a false or misleading representation concerning the services;
- (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.
- (d) facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building, as the case may be;
- (e) discharge such other functions as may be prescribed.



4. FUNCTIONS AND DUTIES OF PROMOTER

FUNCTIONS AND DUTIES OF PROMOTER (SECTION 11)

- (1) The promoter shall, upon receiving his Login Id and password under clause (a) of sub-section (1) or under sub-section (2) of section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including—



- (2) The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

- (3) The promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:—
- (a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;
 - (b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

- (4) The promoter shall—

- (a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

- (b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;
- (c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;
- (d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;
- (e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable: Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;
- (f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the

common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;

- (g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

- (h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;
- (5) The promoter may cancel the allotment only in terms of the agreement for sale.
- Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.
- (6) The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority

OBLIGATIONS OF PROMOTER REGARDING VERACITY OF THE ADVERTISEMENT OR PROSPECTUS (SECTION 12)

This section provides for the obligations of promoter regarding veracity of the advertisement or prospectus.

Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act.

However, if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.

NO DEPOSIT OR ADVANCE TO BE TAKEN BY PROMOTER WITHOUT FIRST ENTERING INTO AGREEMENT FOR SALE (SECTION 13)

- (1) This section provides that no deposit or advance shall be taken by promoter without first entering into agreement for sale. (1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.
- (2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

ADHERENCE TO SANCTIONED PLANS AND PROJECT SPECIFICATIONS BY THE PROMOTER (SECTION 14)

This section provides for adherence to sanctioned plans and project specifications by the promoter

- (1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.
- (2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—
 - (i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person.

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

- (ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

- (3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

OBLIGATIONS OF PROMOTER IN CASE OF TRANSFER OF A REAL ESTATE PROJECT TO A THIRD PARTY (SECTION 15)

This section provides for the obligations of promoter in case of transfer of a real estate project to a third party

- (1) The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority.

However, such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

Explanation.—For the purpose of this sub-section, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

- (2) On the transfer or assignment being permitted by the allottees and the Authority under sub-section (1), the intending promoter shall be required to independently comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

Any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

OBLIGATIONS OF PROMOTER REGARDING INSURANCE OF REAL ESTATE PROJECT (SECTION 16)

This section provides for the obligations of promoter regarding insurance of real estate project:

- (1) The promoter shall obtain all such insurances as may be notified by the appropriate Government, including but not limited to insurance in respect of —
 - (i) title of the land and building as a part of the real estate project; and
 - (ii) construction of the real estate project.
- (2) The promoter shall be liable to pay the premium and charges in respect of the Insurance specified in sub-section (1) and shall pay the same before transferring the insurance to the association of the allottees.
- (3) The insurance as specified under sub-section (1) shall stand transferred to the benefit of the allottee or the association of allottees, as the case may be, at the time of promoter entering into an agreement for sale with the allottee.
- (4) On formation of the association of the allottees, all documents relating to the insurance specified under sub-section (1) shall be handed over to the association of the allottees.

TRANSFER OF TITLE (SECTION 17)

- (1) This section provides for the transfer of Title. (1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws.

In the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

- (2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws.

In the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the completion certificate.

RETURN OF AMOUNT AND COMPENSATION (SECTION 18)

This section provides for the return of amount and compensation.

- (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—
- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
 - (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

However, where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

- (2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.
- (3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.



5. RIGHTS AND DUTIES OF ALLOTTEES

RIGHTS AND DUTIES OF ALLOTTEES (SECTION 19)

This section provides for the Rights and duties of allottees.

- (1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.
- (2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.
- (3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (l) of sub-section (2) of section 4.
- (4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.
- (5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.
- (6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and

- shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.
- (7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).
 - (8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.
 - (9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.
 - (10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.
 - (11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.



6. THE REAL ESTATE REGULATORY AUTHORITY

ESTABLISHMENT AND INCORPORATION OF REAL ESTATE REGULATORY AUTHORITY (SECTION 20)

This section provides for the establishment and incorporation of Real Estate Regulatory Authority.

- (1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under this Act.

The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority.

The appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be.

Until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the purposes under this Act.

After the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated, shall stand transferred to the Regulatory Authority so established and shall be heard from the stage such applications, complaints or cases are transferred.

- (2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

COMPOSITION OF THE AUTHORITY (SECTION 21)

This section provides for the composition of the Authority.

The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government.

QUALIFICATIONS OF CHAIRPERSON AND MEMBERS OF AUTHORITY (SECTION 22)

This section provides for the qualifications of Chairperson and Members of Authority

The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary, in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at-least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration.

A person who is, or has been, in the service of the State Government shall not be appointed as a Chairperson unless such person has held the post of Additional Secretary to the Central Government or any equivalent post in the Central Government or State Government.

A person who is, or has been, in the service of the State Government shall not be appointed as a member unless such person has held the post of Secretary to the State Government or any equivalent post in the State Government or Central Government.

TERM OF OFFICE OF CHAIRPERSON AND MEMBERS (SECTION 23)

This section provides for the term of office of Chairperson and Members

- (1) The Chairperson and Members shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixty five years, whichever is earlier and shall not be eligible for re-appointment.

- (2) Before appointing any person as a Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest as is likely to affect prejudicially his functions as such Member.

SALARY AND ALLOWANCES PAYABLE TO CHAIRPERSON AND MEMBERS (SECTION 24)

This section provides for the salary and allowances payable to Chairperson and Members

- (1) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed and shall not be varied to their disadvantage during their tenure.
- (2) Notwithstanding anything contained in sub-sections (1) and (2) of section 23, the Chairperson or a Member, as the case may be, may,—
 - (a) relinquish his office by giving in writing, to the appropriate Government, notice of not less than three months; or
 - (b) be removed from his office in accordance with the provisions of section 26 of this Act.
- (3) Any vacancy caused to the office of the Chairperson or any other Member shall be filled-up within a period of three months from the date on which such vacancy occurs.

ADMINISTRATIVE POWERS OF CHAIRPERSON (SECTION 25)

This section provides for the administrative powers of Chairperson.

The Chairperson shall have powers of general superintendence and directions in the conduct of the affairs of Authority and he shall, in addition to presiding over the meetings of the Authority, exercise and discharge such administrative powers and functions of the Authority as may be prescribed

REMOVAL OF CHAIRPERSON AND MEMBERS FROM OFFICE IN CERTAIN CIRCUMSTANCES (SECTION 26)

This section provides for the removal of Chairperson and Members from office in certain circumstances.

- (1) The appropriate Government may, in accordance with the procedure notified, remove from office the Chairperson or other Members, if the Chairperson or such other Member, as the case may be,—

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence, involving moral turpitude; or

(c) has become physically or mentally incapable of acting as a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest.

- (2) The Chairperson or Member shall not be removed from his office on the ground specified under clause (d) or clause (e) of sub-section (1) except by an order made by the appropriate Government after an inquiry made by a Judge of the High Court in which such Chairperson or Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

RESTRICTIONS ON CHAIRPERSON OR MEMBERS ON EMPLOYMENT AFTER CESSATION OF OFFICE (SECTION 27)

This section provides for the restrictions on Chairperson or Members on employment after cessation of office.

- (1) The Chairperson or a Member, ceasing to hold office as such, shall not—
- (a) accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office.

However, nothing contained in this clause shall apply to any employment under the appropriate Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or provincial Act or a Government Company, as defined under clause (45) of section 2 of the Companies Act, 2013, which is not a promoter as per the provisions of this Act;
 - (b) act, for or on behalf of any person or organisation in connection with any specific proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the Chairperson or such Member had, before cessation of office, acted for or provided advice to, the Authority;
 - (c) give advice to any person using information which was obtained in his capacity as the Chairperson or a Member and being unavailable to or not being able to be made available to the public;
 - (d) enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he had direct and significant official dealings during his term of office as such.

- (2) The Chairperson and Members shall not communicate or reveal to any person any matter which has been brought under his consideration or known to him while acting as such.

OFFICERS AND OTHER EMPLOYEES OF AUTHORITY (SECTION 28)

This section provides for the officers and other employees of authority.

- (1) The appropriate Government may, in consultation with the Authority appoint such officers and employees as it considers necessary for the efficient discharge of their functions under this Act who would discharge their functions under the general superintendence of the Chairperson.
- (2) The salary and allowances payable to, and the other terms and conditions of service of, the officers and of the employees of the Authority appointed under sub-section (1) shall be such as may be prescribed.

MEETINGS OF AUTHORITY (SECTION 29)

This section provides for the meetings of the Authority.

- (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.
- (2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.
- (3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.
- (4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application: Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

VACANCIES, ETC., NOT TO INVALIDATE PROCEEDING OF AUTHORITY (SECTION 30)

This section provides that the Vacancies, etc., not to invalidate proceeding of Authority

No act or proceeding of the Authority shall be invalid merely by reason of—

- (a) any vacancy in, or any defect in the constitution of, the Authority; or

- (b) any defect in the appointment of a person acting as a Member of the Authority; or
- (c) any irregularity in the procedure of the Authority not affecting the merits of the case.

FILING OF COMPLAINTS WITH THE AUTHORITY OR ADJUDICATION OFFICER (SECTION 31)

This section provides for the filing of complaints with the Authority or adjudication officer

- (1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

- (2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed.

FUNCTIONS OF AUTHORITY FOR PROMOTION OF REAL ESTATE SECTOR (SECTION 32)

This section provides for the Functions of Authority for promotion of real estate sector

The Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government or the competent authority, as the case may be, on,—

- (a) protection of interest of the allottees, promoter and real estate agent;
- (b) creation of a single window system for ensuring time bound project approvals and clearances for timely completion of the project;
- (c) creation of a transparent and robust grievance redressal mechanism against acts of omission and commission of competent authorities and their officials;
- (d) measures to encourage investment in the real estate sector including measures to increase financial assistance to affordable housing segment;
- (e) measures to encourage construction of environmentally sustainable and affordable housing, promoting standardisation and use of appropriate construction materials, fixtures, fittings and construction techniques;
- (f) measures to encourage grading of projects on various parameters of development including grading of promoters;

- (g) measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations;
- (h) measures to facilitate digitization of land records and system towards conclusive property titles with title guarantee;
- (i) to render advice to the appropriate Government in matters relating to the development of real estate sector;
- (j) any other issue that the Authority may think necessary for the promotion of the real estate sector.

ADVOCACY AND AWARENESS MEASURES (SECTION 33)

This section provides for the advocacy and awareness measures.

- (1) The appropriate Government may, while formulating a policy on real estate sector (including review of laws related to real estate sector) or any other matter, make a reference to the Authority for its opinion on possible effect, of such policy or law on real estate sector and on the receipt of such a reference, the Authority shall within a period of sixty days of making such reference, give its opinion to the appropriate Government which may thereafter take further action as it deems fit.
- (2) The opinion given by the Authority under sub-section (1) shall not be binding upon the appropriate Government in formulating such policy or laws.
- (3) The Authority shall take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.

Functions of Authority (Section 34) This section provides that the functions of the Authority shall include—

- (a) to register and regulate real estate projects and real estate agents registered under this Act;
- (b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;
- (c) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;
- (d) to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such

details as may be prescribed, including those whose registration has been rejected or revoked;

- (e) to fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;
- (f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;
- (g) to ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act;
- (h) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of this Act.

POWERS OF AUTHORITY TO CALL FOR INFORMATION, CONDUCT INVESTIGATIONS (SECTION 35)

This section provides for the Powers of Authority to call for information, conduct investigations

- (1) Where the Authority considers it expedient to do so, on a complaint or *suo motu*, relating to this Act or the rules or regulations made thereunder, it may, by order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.
- (2) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under sub-section (1), the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:—
 - (i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;
 - (ii) summoning and enforcing the attendance of persons and examining them on oath;
 - (iii) issuing commissions for the examination of witnesses or documents;
 - (iv) any other matter which may be prescribed.

POWER TO ISSUE INTERIM ORDERS (SECTION 36)

This section provides for the power to issue interim orders.

Where during an inquiry, the Authority is satisfied that an act in contravention of this Act, or the rules and regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority may, by order, restrain any promoter, allottee or real

estate agent from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where the Authority deems it necessary.

POWERS OF AUTHORITY TO ISSUE DIRECTIONS (SECTION 37)

This section provides that the Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

POWERS OF AUTHORITY (SECTION 38)

This section provides for the powers of Authority.

- (1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.
- (2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.
- (3) Where an issue is raised relating to agreement, action, omission, practice or procedure that—
 - (a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or
 - (b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may *suo motu*, make reference in respect of such issue to the Competition Commission of India.

RECTIFICATION OF ORDERS (SECTION 39)

This section provides that the Authority may, at any time within a period of two years from the date of the order made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

However, no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

The Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

RECOVERY OF INTEREST OR PENALTY OR COMPENSATION AND ENFORCEMENT OF ORDER, ETC. (SECTION 40)

This section provides for the recovery of Interest or penalty or compensation and enforcement of order, etc.

- (1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.
- (2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.



7. CENTRAL ADVISORY COUNCIL

ESTABLISHMENT OF CENTRAL ADVISORY COUNCIL (SECTION 41)

This section provides for the establishment of Central Advisory Council

- (1) The Central Government may, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Advisory Council.
- (2) The Minister to the Government of India in charge of the Ministry of the Central Government dealing with Housing shall be the *ex officio* Chairperson of the Central Advisory Council.
- (3) The Central Advisory Council shall consist of representatives of the Ministry of Finance, Ministry of Industry and Commerce, Ministry of Urban Development, Ministry of Consumer Affairs, Ministry of Corporate Affairs, Ministry of Law and Justice, Niti Aayog, National Housing Bank, Housing and Urban Development Corporation, five representatives of State Governments to be selected by rotation, five representatives of the Real Estate Regulatory Authorities to be selected by rotation, and any other Central Government department as notified.
- (4) The Central Advisory Council shall also consist of not more than ten members to represent the interests of real estate industry, consumers, real estate agents, construction labourers, non-governmental organisations and academic and research bodies in the real estate sector.

FUNCTIONS OF CENTRAL ADVISORY COUNCIL (SECTION 42)

This section provides for the functions of Central Advisory Council

- (1) The functions of the Central Advisory Council shall be to advise and recommend the Central Government,—
 - (a) on all matters concerning the implementation of this Act;
 - (b) on major questions of policy;
 - (c) towards protection of consumer interest;
 - (d) to foster the growth and development of the real estate sector;
 - (e) on any other matter as may be assigned to it by the Central Government.
- (2) The Central Government may specify the rules to give effect to the recommendations of the Central Advisory Council on matters as provided under sub-section (1).



8. THE REAL ESTATE APPELLATE TRIBUNAL

ESTABLISHMENT OF REAL ESTATE APPELLATE TRIBUNAL (SECTION 43)

This section provides for the establishment of Real Estate Appellate Tribunal

- (1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the — (name of the State/Union territory) Real Estate Appellate Tribunal.
- (2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.
- (3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.
- (4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal.

However, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal Functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act.

After the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

- (5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter.

Where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

APPLICATION FOR SETTLEMENT OF DISPUTES AND APPEALS TO APPELLATE TRIBUNAL (SECTION 44)

This section provides for the application for settlement of disputes and appeals to Appellate Tribunal

- (1) The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.
- (2) Every appeal made under sub-section (1) shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the appropriate Government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed.

However, the Appellate Tribunal may entertain any appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filling it within that period.

- (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders, including interim orders, as it thinks fit.
- (4) The Appellate Tribunal shall send a copy of every order made by it to the parties and to the Authority or the adjudicating officer, as the case may be.
- (5) The appeal preferred under sub-section (1), shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of sixty days from the date of receipt of appeal.

Where any such appeal could not be disposed of within the said period of sixty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within that period.

- (6) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.

COMPOSITION OF APPELLATE TRIBUNAL (SECTION 45)

This section provides for the composition of Appellate Tribunal.

The Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member, to be appointed by the appropriate Government.

Explanation.—For the purposes of this Chapter,—

- (i) "Judicial Member" means a Member of the Appellate Tribunal appointed as such under clause (b) of sub-section (1) of section 46;
- (ii) "Technical or Administrative Member" means a Member of the Appellate Tribunal appointed as such under clause (c) of sub-section (1) of section 46.

QUALIFICATIONS FOR APPOINTMENT OF CHAIRPERSON AND MEMBERS (SECTION 46)

This section provides for the qualifications for appointment of Chairperson and Members

- (1) A person shall not be qualified for appointment as the Chairperson or a Member of the Appellate Tribunal unless he,—
- (a) in the case of Chairperson, is or has been a Judge of a High Court; and
- (b) in the case of a Judicial Member he has held a judicial office in the territory of India for at least fifteen years or has been a member of the Indian Legal Service and has held the post of Additional Secretary of that service or any equivalent post, or has been an advocate for at least twenty years with experience in dealing with real estate matters; and
- (c) in the case of a Technical or Administrative Member, he is a person who is well-versed in the field of urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, public affairs or administration and possesses experience of at least twenty years in the field or who has held the post in the Central Government, or a State Government equivalent to the post of Additional Secretary to the Government of India or an equivalent post in the Central Government or an equivalent post in the State Government.
- (2) The Chairperson of the Appellate Tribunal shall be appointed by the appropriate Government in consultation with the Chief Justice of High Court or his nominee.

- (3) The judicial Members and Technical or Administrative Members of the Appellate Tribunal shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department handling Housing and the Law Secretary and in such manner as may be prescribed.

TERM OF OFFICE OF CHAIRPERSON AND MEMBERS (SECTION 47)

This section provides for the term of office of Chairperson and Members.

- (1) The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall hold office, as such for a term not exceeding five years from the date on which he enters upon his office, but shall not be eligible for re-appointment.

Provided that in case a person, who is or has been a Judge of a High Court, has been appointed as Chairperson of the Tribunal, he shall not hold office after he has attained the age of sixty-seven years .

No Judicial Member or Technical or Administrative Member shall hold office after he has attained the age of sixty-five years.

- (2) Before appointing any person as Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest, as is likely to affect prejudicially his functions as such member.

SALARY AND ALLOWANCES PAYABLE TO CHAIRPERSON AND MEMBERS (SECTION 48)

This section provides for the salary and allowances payable to Chairperson and Members

- (1) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed and shall not be varied to their disadvantage during their tenure.
- (2) Notwithstanding anything contained in sub-sections (1) and (2) of section 47, the Chairperson or a Member, as the case may be, may:—
 - (a) relinquish his office by giving in writing to the appropriate Government a notice of not less than three months;
 - (b) be removed from his office in accordance with the provisions of section 49.
- (3) A vacancy caused to the office of the Chairperson or any other Member, as the case may be, shall be filled-up within a period of three months from the date on which such vacancy occurs.

REMOVAL OF CHAIRPERSON AND MEMBER FROM OFFICE IN CERTAIN CIRCUMSTANCES (SECTION 49)

This section provides for the removal of Chairperson and Member from office in certain circumstances.

- (1) The appropriate Government may, in consultation with the Chief Justice of the High Court, remove from office of the Chairperson or any judicial Member or Technical or Administrative Member of the Appellate Tribunal, who—
 - (a) has been adjudged as an insolvent; or
 - (b) has been convicted of an offence which, in the opinion of the appropriate Government involves moral turpitude; or
 - (c) has become physically or mentally incapable; or
 - (d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or
 - (e) has so abused his position as to render his continuance in office prejudicial to the public interest.
- (2) The Chairperson or Judicial member or Technical or Administrative Member shall not be removed from his office except by an order made by the appropriate Government after an inquiry made by the Judge of the High Court in which such Chairperson or Judicial member or Technical or Administrative Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.
- (3) The appropriate Government may suspend from the office of the Chairperson or Judicial member or Technical or Administrative Member in respect of whom a reference of conducting an inquiry has been made to the Judge of the High Court under sub-section (2), until the appropriate Government passes an order on receipt of the report of inquiry made by the Judge of the High Court on such reference.
- (4) The appropriate Government may, by rules, regulate the procedure for inquiry referred to in sub-section (2).

RESTRICTIONS ON CHAIRPERSON OR JUDICIAL MEMBER OR TECHNICAL OR ADMINISTRATIVE MEMBER ON EMPLOYMENT AFTER CESSATION OF OFFICE (SECTION 50)

This section provides for the restrictions on Chairperson or Judicial Member or Technical or Administrative Member on employment after cessation of office.

- (1) The Chairperson or Judicial Member or Technical or Administrative Member, ceasing to hold office as such shall not:—

- (a) Accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office.

Nothing contained in this clause shall apply to any employment under the appropriate Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or provincial Act or a Government Company as defined under clause (45) of section 2 of the Companies Act, 2013, which is not a promoter as per the provisions of this Act;

- (b) act, for or on behalf of any person or organisation in connection with any specific proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the Chairperson or Judicial Member or Technical or Administrative Member had, before cessation of office, acted for or provided advice to, the Authority;
 - (c) give advice to any person using information which was obtained in his capacity as the Chairperson or Judicial Member or Technical or Administrative Member and being unavailable to or not being able to be made available to the public;
 - (d) enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he had direct and significant official dealings during his term of office as such.
- (2) The Chairperson or Judicial Member or Technical or Administrative Member shall not communicate or reveal to any person any matter which has been brought under his consideration or known to him while acting as such.

OFFICERS AND OTHER EMPLOYEES OF APPELLATE TRIBUNAL (SECTION 51)

This section provides for the officers and other employees of Appellate Tribunal.

- (1) The appropriate Government shall provide the Appellate Tribunal with such officers and employees as it may deem fit.
- (2) The officers and employees of the Appellate Tribunal shall discharge their functions under the general superintendence of its Chairperson.
- (3) The salary and allowances payable to, and the other terms and conditions of service of, the officers and employees of the Appellate Tribunal shall be such as may be prescribed.

VACANCIES (SECTION 52)

This Section provides that if, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a Member of the Appellate Tribunal, the appropriate Government shall

appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled.

POWERS OF TRIBUNAL (SECTION 53)

This section provides for the powers of the Tribunal.

- (1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice.
- (2) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure.
- (3) The Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.
- (4) The Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:—
 - (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) requiring the discovery and production of documents;
 - (c) receiving evidence on affidavits;
 - (d) issuing commissions for the examinations of witnesses or documents;
 - (e) reviewing its decisions;
 - (f) dismissing an application for default or directing it ex parte; and
 - (g) any other matter which may be prescribed.
- (5) All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 for the purposes of section 196 of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

ADMINISTRATIVE POWERS OF CHAIRPERSON OF APPELLATE TRIBUNAL (SECTION 54)

This section provides that the Chairperson shall have powers of general superintendence and direction in the conduct of the affairs of Appellate Tribunal and he shall, in addition to presiding over the meetings of the Appellate Tribunal exercise and discharge such administrative powers and functions of the Appellate Tribunal as may be prescribed.

Vacancies, etc., not to invalidate proceeding of Appellate Tribunal (Section 55) This section provides that no act or proceeding of the Appellate Tribunal shall be invalid merely by reason of—

- (a) any vacancy in, or any defect in the constitution of, the Appellate Tribunal, or
- (b) any defect in the appointment of a person acting as a Member of the Appellate Tribunal; or
- (c) Any irregularity in the procedure of the Appellate Tribunal not affecting the merits of the case.

RIGHT TO LEGAL REPRESENTATION (SECTION 56)

This section provides that the applicant or appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

Explanation.—For the purposes of this section,—

- (a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

ORDERS PASSED BY APPELLATE TRIBUNAL TO BE EXECUTABLE AS A DECREE (SECTION 57)

This section provides for the orders passed by Appellate Tribunal to be executable as a decree

- (1) Every order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.
- (2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by the court.

APPEAL TO HIGH COURT (SECTION 58)

This section provides for the appeal to High Court.

- (1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908.

The High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation.—The expression "**High Court**" means the High Court of a State or Union territory where the real estate project is situated.

- (2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.



9. OFFENCES, PENALTIES AND ADJUDICATION

PUNISHMENT FOR NON-REGISTRATION UNDER SECTION 3 (SECTION 59)

This section provides for the punishment for non-registration under section 3

- (1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten per cent. of the estimated cost of the real estate project as determined by the Authority.
- (2) If any promoter does not comply with the orders, decisions or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent. of the estimated cost of the real estate project, or with both.

PENALTY FOR CONTRAVENTION OF SECTION 4 (SECTION 60)

This section provides that if any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project, as determined by the Authority.

PENALTY FOR CONTRAVENTION OF OTHER PROVISIONS OF THIS ACT (SECTION 61)

This section provides that if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be

liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.

Penalty for non-registration and contravention under sections 9 and 10 (Section 62) This section provides that if any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10, he shall be liable to a penalty of ten thousand rupees for every day during which such default continues, which may cumulatively extend up to five per cent. of the cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.

Penalty for failure to comply with orders of Authority by promoter (Section 63) This section provides that if any promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of the real estate project as determined by the Authority

Penalty for failure to comply with orders of Appellate Tribunal by promoter (Section 64) This section provides that if any promoter, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to three years or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of the real estate project, or with both.

PENALTY FOR FAILURE TO COMPLY WITH ORDERS OF AUTHORITY BY REAL ESTATE AGENT (SECTION 65)

This section provides that if any real estate agent, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated and as determined by the Authority.

PENALTY FOR FAILURE TO COMPLY WITH ORDERS OF APPELLATE TRIBUNAL BY REAL ESTATE AGENT (SECTION 66)

This section provides that if any real estate agent, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated, or with both.

PENALTY FOR FAILURE TO COMPLY WITH ORDERS OF AUTHORITY BY ALLOTTEE (SECTION 67)

This section provides that if any allottee, who fails to comply with, or contravenes any of the orders, decisions or directions of the Authority he shall be liable to a penalty for the period during which such default continues, which may cumulatively extend up to five per cent. of the plot, apartment or building cost, as the case may be, as determined by the Authority.

PENALTY FOR FAILURE TO COMPLY WITH ORDERS OF APPELLATE TRIBUNAL BY ALLOTTEE (SECTION 68)

This section provides that if any allottee, who fails to comply with, or contravenes any of the orders or directions of the Appellate Tribunal, as the case may be, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the plot, apartment or building cost, as the case may be, or with both.

OFFENCES BY COMPANIES (SECTION 69)

This section provides for the Offences by Companies.

- (1) Where an Offence under this Act has been committed by a company, every person who, at the time, the offence was committed was in charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Nothing contained in this sub-section, shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

- (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purpose of this section,—

- (a) "Company" means any body corporate and includes a firm, or other association of individuals; and
- (b) "Director" in relation to a firm, means a partner in the firm.

COMPOUNDING OF OFFENCES (SECTION 70)

This section provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, if any person is punished with imprisonment under this Act, the punishment may, either before or after the institution of the prosecution, be compounded by the court on such terms and conditions and on payment of such sums as may be prescribed. However, the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded.

POWER TO ADJUDICATE (SECTION 71)

This section provides for the power to adjudicate.

- (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard.

Any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

- (2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application.

Where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

- (3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.

FACTORS TO BE TAKEN INTO ACCOUNT BY THE ADJUDICATING OFFICER (SECTION 72)

This section provides that while adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:—

- (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
- (b) the amount of loss caused as a result of the default;
- (c) the repetitive nature of the default;
- (d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.



10. FINANCE, ACCOUNTS, AUDITS AND REPORTS

GRANTS AND LOANS BY CENTRAL GOVERNMENT (SECTION 73)

This section provides that the Central Government may, after due appropriation made by Parliament in this behalf, make to the Authority grants and loans of such sums of money as that Government may consider necessary.

GRANTS AND LOANS BY STATE GOVERNMENT (SECTION 74)

This section provides that the State Government may, after due appropriation made by State Legislature by law in this behalf, make to the Authority, grants and loans of such sums of money as the State Government may think fit for being utilised for the purposes of this Act.

CONSTITUTION OF FUND (SECTION 75)

This section provides for the constitution of Fund.

- (1) The appropriate Government shall constitute a fund to be called the 'Real Estate Regulatory Fund' and there shall be credited thereto,—
 - (a) all Government grants received by the Authority;
 - (b) the fees received under this Act;
 - (c) the interest accrued on the amounts referred to in clauses (a) to (b).
- (2) The Fund shall be applied for meeting—
 - (a) the salaries and allowances payable to the Chairperson and other Members, the adjudicating officer and the administrative expenses including the salaries and

allowances payable to the officers and other employees of the Authority and the Appellate Tribunal;

- (b) The other expenses of the Authority in connection with the discharge of its functions and for the purposes of this Act.
- (3) The Fund shall be administered by a committee of such Members of the Authority as may be determined by the Chairperson.
- (4) The committee appointed under sub-section (3) shall spend monies out of the Fund for carrying out the objects for which the Fund has been constituted.

CREDITING SUMS REALISED BY WAY OF PENALTIES TO CONSOLIDATED FUND OF INDIA OR STATE ACCOUNT (SECTION 76)

This section provides for crediting sums realised by way of penalties to Consolidated Fund of India or State account.

- (1) All sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in the Union territories, shall be credited to the Consolidated Fund of India.
- (2) All sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in a State, shall be credited to such account as the State Government may specify.

BUDGET, ACCOUNTS AND AUDIT (SECTION 77)

This section provides for the budget, accounts and audit

- (1) The Authority shall prepare a budget, maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the appropriate Government in consultation with the Comptroller and Auditor General of India.
- (2) The accounts of the Authority shall be audited by the Comptroller and Auditor General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority to the Comptroller and Auditor-General of India.
- (3) The Comptroller and Auditor-General and any person appointed by him in connection with the audit of the accounts of the Authority under this Act shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular shall have the right to demand and production of books, accounts, connected vouchers and other documents and papers, and to inspect any of the offices of the Authority.
- (4) The accounts of the Authority, as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to that appropriate Government by the Authority and the appropriate Government shall cause the audit report to be laid, as soon as may be after it is received,

before each House of Parliament or, as the case may be, before the State Legislature or the Union territory Legislature, where it consists of two Houses, or where such legislature consists of one House, before that House.

ANNUAL REPORT (SECTION 78)

This section provides for the Annual Report.

- (1) The Authority shall prepare once in every year, in such form and at such time as may be prescribed by the appropriate Government,—
 - (a) a description of all the activities of the Authority for the previous year;
 - (b) the annual accounts for the previous year; and
 - (c) the programmes of work for the coming year.
- (2) A copy of the report received under sub-section (1) shall be laid, as soon as may be after it is received, before each House of Parliament or, as the case may be, before the State Legislature or the Union Territory Legislature, where it consists of two Houses, or where such legislature consists of one House, before that House.



11. MISCELLANEOUS

BAR OF JURISDICTION (SECTION 79)

This section provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

COGNIZANCE OF OFFENCES (SECTION 80)

This section provides for the cognizance of offences.

- (1) No court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder save on a complaint in writing made by the Authority or by any officer of the Authority duly authorised by it for this purpose.
- (2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

DELEGATION (SECTION 81)

This section provides that the Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be

specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85, as it may deem necessary.

POWER OF APPROPRIATE GOVERNMENT TO SUPERSEDE AUTHORITY (SECTION 82)

This section provides for the Power of appropriate Government to supersede Authority

- (1) If, at any time, the appropriate Government is of the opinion,—
 - (a) that, on account of circumstances beyond the control of the Authority, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
 - (b) that the Authority has persistently defaulted in complying with any direction given by the appropriate Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Authority or the administration of the Authority has suffered; or
 - (c) that circumstances exist which render it necessary in the public interest so to do, the appropriate Government may, by notification, supersede the Authority for such period, not exceeding six months, as may be specified in the notification and appoint a person or persons as the President or the Governor, as the case may be, may direct to exercise powers and discharge functions under this Act.

Before issuing any such notification, the appropriate Government shall give a reasonable opportunity to the Authority to make representations against the proposed supersession and shall consider the representations, if any, of the Authority.
- (2) Upon the publication of a notification under sub-section (1) superseding the Authority,—
 - (a) the Chairperson and other Members shall, as from the date of supersession, vacate their offices as such;
 - (b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Authority shall, until the Authority is reconstituted under sub-section (3), be exercised and discharged by the person or persons referred to in sub-section (1); and
 - (c) all properties owned or controlled by the Authority shall, until the Authority is reconstituted under sub-section (3), vest in the appropriate Government.
- (3) On or before the expiration of the period of supersession specified in the notification issued under sub-section (1), the appropriate Government shall reconstitute the Authority by a fresh appointment of its Chairperson and other members and in such case any person who had

vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment.

- (4) The appropriate Government shall cause a copy of the notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament or, as the case may be, before the State Legislature, or the Union Territory Legislature, as the case may be, where it consists of two Houses, or where such legislature consists of one House, before that House.

POWER OF APPROPRIATE GOVERNMENT TO ISSUE DIRECTIONS TO AUTHORITY AND OBTAIN REPORTS AND RETURNS (SECTION 83)

This section provides for the Power of appropriate Government to issue directions to Authority and obtain reports and returns

- (1) Without prejudice to the foregoing provisions of this Act, the Authority shall, in exercise of its powers and in performance of its functions under this Act, be bound by such directions on questions of policy, as the appropriate Government may give in writing to it from time to time.
The Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.
- (2) If any dispute arises between the appropriate Government and the Authority as to whether a question is or is not a question of policy, the decision of the appropriate Government thereon shall be final.
- (3) The Authority shall furnish to the appropriate Government such returns or other information with respect to its activities as the appropriate Government may, from time to time, require.

POWERS OF APPROPRIATE GOVERNMENT TO MAKE RULES (SECTION 84)

This section provides for the powers of appropriate government to make rules.

- (1) The appropriate Government shall, within a period of six months of the commencement of this Act, by notification, make rules for carrying out the provisions of this Act.
- (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—
 - (a) the form, time and manner of making application and fees payable therewith under sub-section (1) of section 4;
 - (ab) information and documents for application to the Authority for registration under clause (m) of sub-section (2) of section 4;
 - (ac) the form of application and the fees for extension of registration under section 6;

- (b) the form and manner of making application and fee and documents to be accompanied with such application as under sub-section (2) of section 9;
- (c) the period, manner and conditions under which the registration is to be granted under sub-section (3) of section 9;
- (d) the validity of the period of registration and the manner and fee for renewal under sub-section (6) of section 9;
- (e) the maintenance and preservation of books of account, records and documents under clause (b) of section 10;
- (f) the discharge of other functions by the real estate agent under clause (e) of section 10;
- (g) the rate of interest payable under section 12;
- (h) the form and particulars of agreement for sale under sub-section (2) of section 13;
- (i) the rate of interest payable under clause (b) of sub-section (1) of section 18;
- (j) the rate of interest payable under sub-section (4) of section 19; (k) the rate of interest payable under sub-section (7) of section 19;
- (l) the manner of selection of Chairperson and Members of Authority under section 22;
- (m) the salaries and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members of the Authority under sub-section (1) of section 24;
- (n) the administrative powers of the Chairpersons under section 25;
- (o) the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Authority under sub-section (2) of section 28;
- (oa) the form, manner and fees for filing of a complaint under sub-section (2) of section 31;
- (p) the details to be published on the website as under clause (b) and under clause (d) of section 34;
- (q) the additional functions which may be performed by the Authority under clause (iv) of sub-section (2) of section 35;
- (r) the manner of recovery of interest, penalty and compensation under sub-section (1) of section 40;
- (s) the manner of implementation of the order, direction or decisions of the adjudicating officer, the Authority or the Appellate Tribunal under sub-section (2) of section 40;

- (t) recommendations received from the Central Advisory Council under sub-section (2) of section 42;
- (u) the form and manner and fee for filing of appeal under sub-section (2) of section 44;
- (v) the manner of selection of Members of the Tribunal under sub-section (3) of section 46;
- (w) the salaries and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members of the Appellate Tribunal under sub-section (1) of section 48;
- (x) the procedure for inquiry of the charges against the Chairperson or Judicial Member of the Tribunal under sub-section (4) of section 49;
- (y) the salaries and allowances payable to, and the other terms and conditions of service of, the officers and employees of the Appellate Tribunal under sub-section (3) of section 51;
- (z) any other powers of the Tribunal under clause (g) of sub-section (4) of section 53;
- (za) the powers of the Chairperson of the Appellate Tribunal under section 54;
- (zb) the terms and conditions and the payment of such sum for compounding of the offences under section 70;
- (zc) the manner of inquiry under sub-section (1) of section 71;
- (zd) the form to be specified in which the Authority shall prepare a budget, maintain proper accounts and other relevant records and prepare an annual statement of accounts under sub-section (1) of section 77;
- (ze) the form in which and time at which the Authority shall prepare an annual report under sub-section (1) of section 78;
- (zf) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

POWER TO MAKE REGULATIONS (SECTION 85)

This section provides for the power to make regulations.

- (1) The Authority shall, within a period of three months of its establishment, by notification, make regulations, consistent with this Act and the rules made thereunder to carry out the purposes of this Act.
- (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—
 - (a) omitted

- (b) omitted
- (c) such other information and documents required under clause (f) of sub-section (1) of section 11;
- (d) display of sanctioned plans, layout plans along with specifications, approved by the competent authority, for display under clause (a) of sub-section (3) of section 11;
- (e) preparation and maintenance of other details under sub-section (6) of section 11;
- (f) time, places and the procedure in regard to transaction of business at the meetings of the Authority under sub-section (1) of section 29;
- (g) omitted
- (h) standard fees to be levied on the promoter, the allottees or the real estate agent under clause (e) of section 34; (i) any other matter which is required to be, or may be, specified by regulation or in respect of which provision is to be made by regulations.

LAYING OF RULES (SECTION 86)

This section provides for the laying of Rules.

- (1) Every rule made by the Central Government, every regulation made by the Authority under the Union territory of Delhi and the Union territories without Legislature and every notification issued by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or in the notification, as the case may be, or both Houses agree that the rule or regulation or the notification should not be made, the rule or regulation or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.
- (2) Every rule made by a State Government or the Union territory Government, as the case may be, every regulation made by the Authority under the State Government or the Union territory Government of Puducherry, as the case may be, and every notification issued by the State Government or the Union territory Government of Puducherry, as the case may be, under this Act, shall be laid as soon as may be, after it is made, before the State Legislature, or the Union territory Legislature, as the case may be, where it consists of two Houses, or where such legislature consists of one House, before that House.

MEMBERS, ETC., TO BE PUBLIC SERVANTS (SECTION 87)

This section provides that the Chairperson, Members and other officers and employees of the Authority, and the Appellate Tribunal and the adjudicating officer shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

APPLICATION OF OTHER LAWS NOT BARRED (SECTION 88)

This section provides that the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

ACT TO HAVE OVERRIDING EFFECT (SECTION 89)

This section provides that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

PROTECTION OF ACTION TAKEN IN GOOD FAITH (SECTION 90)

This section provides that no suit, prosecution or other legal proceedings shall lie against the appropriate Government or the Authority or any officer of the appropriate Government or any member, officer or other employees of the Authority for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

POWER TO REMOVE DIFFICULTIES (SECTION 91)

This section provides for the power to remove difficulties.

- (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty.

No order shall be made under this section after the expiry of two years from the date of the commencement of this Act.

- (2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

REPEAL (SECTION 92)

This section provides that the Maharashtra Housing (Regulation and Development) Act, 2012 is hereby repealed.